

Labor and Treasury Departments Provide Retirement Plan Relief and Extend Notice and Claim Deadlines

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The Employee Benefits Security Administration recently released [Disaster Relief Notice 2020-01](#) (the Notice), which provides employers and retirement plan fiduciaries relief from certain notice and other obligations related to the administration of retirement plans. In addition, as noted in our recent blog post, [Agencies Issue Guidance Extending Certain Employee Benefit Plan Deadlines](#), the Department of Labor (the Department), the Department of the Treasury, and the Internal Revenue Service issued a [final ruling](#) that extends certain timeframes affecting participant and beneficiary rights with respect to claims and appeals under employee benefit plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) and the *Internal Revenue Code* during the COVID-19 national emergency (the Joint Guidance).

- **Extension of Deadlines for Claims and Appeals:** Under ERISA, retirement plans are required to establish and maintain claims procedures, and to provide claimants with a reasonable opportunity to appeal an adverse benefit determination. Under the Joint Guidance, retirement plans must disregard the period from March 1, 2020 until 60 days following the announced end of the COVID-19 national emergency (the “Outbreak Period”) for purposes of determining the period within which claimants may file a benefit claim under the plan’s claims procedure or appeal a denied claim.

The Joint Guidance provides the following illustrative example and assumes that the COVID-19 national emergency ends on April 30, 2020, resulting in the Outbreak Period concluding 60 days later on June 29, 2020:

Individual F received a notice of adverse benefit determination from Individual F’s 401(k) plan on April 15, 2020. The notification advised Individual F that there are 60 days within which to file an appeal. When determining the 60-day period within which Individual F’s appeal must be filed, the Outbreak Period is disregarded. Therefore, Individual F’s last day to submit an appeal is 60 days after June 29, 2020, which is August 28, 2020.

Winston Takeaway: *The Joint Guidance applies to both ERISA-governed claims and appeals deadlines and to plan deadlines established by an employer. Employers should consider revisiting claims and appeal denials made since the Outbreak Period began on March 1, 2020 on the basis of a failure to timely file a claim or appeal, and continue to take into account the Outbreak Period when evaluating claims and appeals.*

- **General ERISA Fiduciary Compliance:** The Notice instructs that plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments, and should attempt to

minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes. In addition, the Department acknowledges that there may be instances when plans and service providers may be unable to achieve full and timely compliance with claims processing and other ERISA requirements. The Notice explains that the Department's enforcement approach will emphasize compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims decisions or disclosures impossible.

Winston Takeaway: *Employers that experience disruptions due to the pandemic, including workforce disruptions and/or limited access to their normal place of business, should consider documenting such disruptions in order to facilitate requests for relief in the event of a subsequent audit or investigation by the Department.*

- **General Relief for Notices and Disclosures:** The Notice announces an extension of deadlines for furnishing required notices and disclosures to plan participants, beneficiaries, and other persons. The Notice provides that an employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document during the Outbreak Period. In order to take advantage of the relief, the plan and responsible fiduciary must act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. For these purposes, "good faith acts" include the use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.

The relief applies to notices or disclosures required under Title I of ERISA over which the Department has interpretive and regulatory authority, excluding notices and disclosures related to claim and appeal procedures, which are governed by the Joint Guidance. Examples of required disclosures governed by the Notice include:

- Summary annual reports;
- Summary of material modifications;
- Summary plan descriptions;
- Participant disclosures for participant-directed retirement plans;
- Periodic pension benefit statements;
- Annual funding notices required to be furnished by defined benefit plans; and
- Qualified default investment alternative notices.

The Notice also contains guidance and relief with respect to specific administrative matters affecting retirement plans, including the following:

- **Delays in Participant Contributions and Loan Repayments:** The Notice recognizes that some employers and service providers may not be able to forward participant deferral contributions and loan repayments within the normal time frame required by law during the Outbreak Period and will not take enforcement action with respect to a temporary delay in forwarding such payments or contributions to a plan, provided that the delay is solely attributable to the COVID-19 outbreak.

Winston Takeaway: *The failure to timely remit participant contributions can result in prohibited transactions and breaches of ERISA fiduciary duties that require correction. The timeframe in which participant contributions are remitted is often the subject of Department audits and can result in costly corrections. Therefore, employers and plan fiduciaries should consider taking a conservative approach when taking advantage of this relief and will want to document the reasons for any delays in remittance and how the delays relate to the COVID-19 outbreak.*

- **Failure to Follow Procedural Requirements for Plan Loans and Distributions:** If a retirement plan fails to follow procedural requirements for plan loans and distributions imposed by the terms of the plan, the Department will not treat it as a failure to comply with the plan terms, provided the following conditions are met: (i) the failure is solely attributable to the COVID-19 outbreak; (ii) the plan administrator makes a good faith, diligent effort under the

circumstances to comply with the plan’s requirements; and (iii) the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable. *Importantly, the Notice relief is limited to verification requirements required under Title I of ERISA that are within the interpretive and regulatory authority of the Department, and would not include requirements under the jurisdiction of the Treasury Department/IRS, such as spousal consent requirements.*

- **Failure to Follow ERISA Requirements for CARES Act Loans:** The CARES Act allows a plan sponsor to increase limits for loans from qualified plans from \$50,000 to \$100,000 and from 50 percent of the employee’s vested benefit to 100 percent of the employee’s vested benefit. The CARES Act also provides that any repayment of a plan loan made to a qualifying COVID-affected individual that is due during the period beginning on March 27, 2020 and ending December 31, 2020 may be delayed for up to one year. The Notice clarifies that the Department will not treat such loans as violating ERISA if the CARES Act and related guidance are followed.
- **Delays in Delivery of Blackout Notices:** The administrator of an individual account retirement plan is generally required to provide 30 days’ advance notice of a period of suspension, limitation, or restriction of more than three consecutive business days on a participant’s ability to direct investments, obtain loans, or obtain other distributions from the plan. The Notice clarifies that existing regulations, which provide an exception to the advance notice requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator, may apply during the Outbreak Period.

The Notice provides some relief to employers and retirement plan fiduciaries, given the unprecedented disruptions caused by the COVID-19 pandemic. However, plan sponsors and plan fiduciaries will need to update administrative processes to ensure compliance with Outbreak Period extensions applicable to retirement plan claims and appeals.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice Group or your Winston relationship attorney for further information.

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Author

[Erin Haldorson Weber](#)

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Erin Haldorson Weber

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