

Tri-Agencies Clarify Outbreak Period Relief Due to COVID-19

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At the beginning of the pandemic, the federal government suspended certain COBRA and ERISA deadlines due to the COVID-19 National Emergency. These deadlines included the timeframe to elect COBRA coverage, make initial and subsequent COBRA payments, request special enrollment in a group health plan and file certain claims and appeals under ERISA. This initial relief began March 1, 2020, and was to end sixty (60) days after the announced end of the COVID-19 National Emergency or such other date announced by the relevant agencies in a future notification (referred to as the “Outbreak Period”). The Departments of Labor, Treasury and Health and Human Services have now clarified how this prior guidance dovetails with existing deadline extension rules under ERISA and the Internal Revenue Code.

Plan sponsors and administrators have been grappling with how the suspension of deadlines in these earlier notices is impacted by Section 518 of ERISA and Section 7508A(b) of the Internal Revenue Code, which generally provide that, in the case of a Presidentially declared disaster, the Secretaries of Labor and the Treasury may prescribe a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Based on those statutory provisions, many believed that the Outbreak Period would automatically end, and deadlines would be reinstated, on February 28, 2021.

Instead, the Departments of Labor, Treasury, and HHS have adopted an administratively cumbersome work-around by adopting a one-year suspension of deadlines on an individual-by-individual basis. Specifically, EBSA Disaster Relief Notice 2021-01 clarifies that timeframes that are subject to relief under the prior guidance will be disregarded for individuals until the **earlier of** (a) one year from the date they were first eligible for relief, or (b) 60 days after the announced end of the National Emergency (i.e., the end of the Outbreak Period, which is still ongoing).

For example, if an individual would have been required to make a COBRA election by January 1, 2021, the notice delays that election requirement until the earlier of one year from that date (i.e., January 1, 2022) or the end of the Outbreak Period when it is announced. Similarly, if a plan would have been required to furnish a notice or disclosure by March 1, 2021, the responsible plan fiduciary would be required to ensure that the notice or disclosure was furnished on or before March 1, 2022.

However, the DOL notes that plan fiduciaries should make reasonable accommodations to help prevent the loss of, or undue delay in payment of, benefits to affected individuals, and should take steps to minimize the possibility of

individuals losing benefits because of a failure to comply with pre-established time frames. The DOL also reminds plan fiduciaries that where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action would expose a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period. In addition, the DOL notes that prior disclosures made to plan participants during the pandemic regarding the mechanics of the Outbreak Period may need to be revised and reissued if they failed to provide accurate information regarding the time in which participants and beneficiaries were required to act. The DOL also takes the opportunity in the notice to remind group health plan sponsors and administrators to consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including the opportunity to obtain coverage through the Health Insurance Marketplace which, in most states, has a special open enrollment period through May 15, 2021. Additional notices may be required if COBRA relief is enacted as part of the current stimulus package being debated by Congress.

Winston Takeaway: *Due to the individual-by-individual nature of the guidance, we encourage plan sponsors to speak with their benefits and COBRA administration vendors to determine whether there are any administrative constraints with respect to what actions can be taken to comply with this new guidance. Plan sponsors should work with their administrators to implement and communicate these new deadlines. This individualized application of the one-year deadline was not contemplated last year when plans initially communicated these COVID-related extensions. Therefore, it is important to update posted communications about these extensions on benefits websites, COBRA forms, HIPAA special enrollment notices, and other group health plan communications.*

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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