

COVID-19 Plan Administration Relief: The Good, the Bad, and the Ugly

Agency Guidance Provides Both Relief and Frustration

On April 28, 2020, the U.S. Department of Labor (DOL) and U.S. Department of the Treasury (“Treasury”)¹ coordinated the release of the following guidance in response to the COVID-19 National Emergency:²

- [EBSA Disaster Relief Notice 2020-01](#) (the “EBSA Notice”) – The EBSA Notice provides limited relief for certain plan filings, broad relief for the delivery of plan notices and disclosures, and relaxes the rules for electronic delivery.
- [Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID–19 Outbreak Final Rule](#) (the “Final Rule”) – The Final Rule suspends various plan administration deadlines. Most of this relief gives employees/participants more time to enroll when certain events occur, file claims for benefits or appeal denied claims, and elect and pay for COBRA. Group health plans must administer these employee/participant rights but get limited consolation in the form of COBRA election notice relief.
- [COVID-19 FAQs for Participants and Beneficiaries](#) (the “COVID-19 FAQs”) – The COVID-19 FAQs are intended to help employees and participants understand how the EBSA Notice and Final Rule may affect them.

This Alert solely addresses the guidance applicable to group health plans, and it does not cover any guidance for retirement plans (e.g. 401(k) plans, pension plans, etc.). The U.S. Department of Health and Human Services indicated in both the EBSA Notice and Final Rule that it intends to adopt similar relief through the Public Health Services Act (PHSA), which will affect non-federal governmental and church plans.³

The “Outbreak Period”

President Trump declared March 1, 2020 to be the first day of the National Emergency caused by the COVID-19 pandemic. The Final Rule defines the term “Outbreak Period” to mean the period beginning March 1, 2020 and ending 60 days after the announced end of the National Emergency or such other date or dates announced by the DOL and/or Treasury in future guidance. In a footnote, the DOL and Treasury leave open the possibility that the Outbreak Period may end at different times in different parts of the country.

¹ The Employee Benefits Security Administration (EBSA) is an agency within the DOL. The IRS is an agency within Treasury.

² President Trump declared March 1, 2020 as the first day of a National Emergency caused by the COVID-19 pandemic.

³ This will also apply to fully insured group health plans to the extent the EBSA Notice and Final Rule do not already cover them.

In general, the relief provided under the EBSA Notice and Final Rule applies throughout the Outbreak Period. The exception is the limited filing relief for Forms 5500, 990, and M-1 that has a separate end date described in more detail below.

Notes: The Outbreak Period does not end in a given location merely because a state or local government ends a general quarantine or shelter-in-place order. Also, the Final Rule appeared April 28, 2020. For the purposes of several examples, it used April 30, 2020 as the declared end of the National Emergency and treated June 29, 2020 (60 days after April 30th) as the end of the Outbreak Period. The dates used were purely for the examples, and no declared end to the National Emergency has occurred as of this Alert's publication date.

EBSA Notice and Final Rule Relief during the Outbreak Period

ERISA Disclosures and Notices	
Plan Relief	<p>The plan (through its plan administrator or other fiduciary) will be considered to timely provide all Title I ERISA disclosures and notices if the plan provides the material in good faith as soon as it is administratively practical to do so</p> <p>Covered disclosures and notices include the plan document(s), summary plan description (SPD), summary of material modification (SMM), summary of benefits and coverage (SBC), summary annual report, and benefit determinations (including claims and appeals notices)</p> <p>COBRA is addressed separately below</p>
Implications	<p>Administrative practicality is a subjective standard, but an employer should not be subject to penalties if the inability to access or generate information because of a business closure or a backlog of work issues due to COVID-19 prevents a plan from providing material within a required timeframe so long as the plan provides the material as soon as it reasonably can</p> <p>This relief includes providing an amended summary plan description, summary of material modification, and summary of benefits and coverage</p> <p>It can be difficult to enforce plan provisions that have not been communicated to participants (usually just an issue for limitations and denials), so there is still an incentive to provide information as soon as possible</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Notes: ERISA Section 518 limits this relief to one year, so it is required to end February 28, 2021.</p> </div>

HIPAA Special Enrollment Rights	
Employee/Participant Relief	<p>The deadlines to request enrollment in a group health plan due to marriage, birth or adoption, the loss of other health coverage, or certain Medicaid/CHIP events are suspended⁴</p> <div style="border: 1px solid black; padding: 5px;"> <p>HIPAA-Excepted Benefits: The special enrollment rights are generally limited to medical coverage as most other group health plans (e.g. dental, vision, EAP, health care FSA) usually qualify as HIPAA-excepted benefits.</p> </div>
Implications	<p>A special enrollment window does not begin to run (or run again) until the day after the Outbreak Period ends</p> <p>The suspension of the special enrollment deadlines also applies to events that occurred before March 1, 2020 if the applicable enrollment window extended into March</p> <div style="border: 1px solid black; padding: 5px;"> <p>Example 1: Chris works for Employer A and gets married on May 11, 2020. Employer A's medical plan provides for a 31-day special enrollment window measured from the marriage date. Assume the COVID-19 National Emergency ends May 31, 2020, meaning the Outbreak Period ends on July 30, 2020 (60 days after May 31st). Chris' 31-day special enrollment window starts July 31, 2020 and ends August 30, 2020. Employer A's plan indicates coverage for marriage is effective on the first day of the following month after a timely request for enrollment. If Chris requests enrollment on August 5, 2020, coverage will be effective on September 1, 2020.</p> </div> <div style="border: 1px solid black; padding: 5px;"> <p>Example 2: Jennifer works for Employer A and had a baby on February 20, 2020. Employer A's medical plan provides for a 31-day special enrollment window measured from the birth date. Assume the COVID-19 National Emergency ends May 31, 2020, meaning the Outbreak Period ends on July 30, 2020 (60 days after May 31st). Jennifer's 31-day special enrollment window started February 20, 2020 and was suspended on February 29, 2020 (10 days). It starts again on July 31, 2020 and ends August 20, 2020 (21 days later). If Jennifer requests enrollment on or before August 20, 2020, coverage must be retroactive to February 20, 2020.</p> </div> <p>Remember, the only special enrollment event providing for coverage <i>retroactive</i> to the date of the event is a birth, adoption, or placement for adoption</p> <p>A plan may be able to permit retroactive enrollment for other events, but it will need the approval of any insurance or stop-loss carrier⁵</p>

⁴ HIPAA requires a special enrollment window of at least 30 days (31 days is common) for marriage, birth or adoption, or the loss of other health coverage and at least 60 days for certain Medicaid/CHIP events. Plans may provide for longer periods.

⁵ The employee cannot pay for this period of retroactive coverage for other special enrollment events on a pre-tax basis. The employee must pay after-tax or the employer can provide on a tax-free basis (assuming no discrimination under the Internal Revenue Code).

COBRA	
Plan Relief	The deadlines to provide COBRA election materials to COBRA qualified beneficiaries are suspended
Implications	<p>COBRA administration is usually a standardized process between plan administrators and third-party COBRA administrators, but this does relieve plan administrators from potential penalties caused by disruption to business operations</p> <p>There is little benefit to delay providing COBRA election materials</p>
Participant Relief	<p>The 60-day deadline for an employee or qualifying beneficiary to notify the plan of a divorce or loss of dependent eligibility is suspended</p> <p>The deadline for an employee or qualifying beneficiary to request a disability extension for the COBRA continuation coverage is suspended</p> <p>The 60-day deadline to elect COBRA is suspended</p> <p>The 45-day deadline to pay the initial COBRA premium and the 30-day deadlines for subsequent monthly COBRA premiums are suspended</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Strange but True: The revised model COBRA notices released by the DOL <u>after</u> the EBSA Notice and Final Rule do not mention these additional COBRA rights.</p> </div>
Implications	<p>In short, there are no deadlines to elect or pay for COBRA during the Outbreak Period</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Example: Chris works for Employer A and is enrolled in A's group health plan. A furloughs Chris on May 15, 2020, and he loses eligibility for coverage on May 31st due to the reduction in work hours. The plan provides Chris with a COBRA election notice on June 1, 2020. Assume the COVID-19 National Emergency ends May 31, 2020, meaning the Outbreak Period ends on July 30, 2020 (60 days after May 31st). Chris' 60-day COBRA election period does not begin to run until July 31, 2020, and Chris has until September 28, 2020 to timely elect COBRA retroactive to June 1st.</p> </div> <p>Unless the COBRA is subsidized, other coverage options such as the Public Health Insurance Marketplace will frequently be more attractive than COBRA coverage</p> <p>The Final Rule seems to suggest employers may continue using the "pend and pay" method for maintaining COBRA coverage⁶</p> <ul style="list-style-type: none"> • <u>Pay and chase</u> – The plan pays claims during the coverage period and retroactively cancels coverage if premiums are not paid. Since the Final Rule does not require payment during the Outbreak Period, this can put the plan at significant risk for non-payment. The plan's recourse is to attempt to recover (i.e. "chase") the paid claims from the participant(s). • <u>Pend and pay</u> – The plan pends claims during the coverage period and pays them after the applicable premiums are paid. We believe this approach is more common.

⁶ [Final Rule, Example 3](#), which states that a plan may retroactively pay for benefits during the Outbreak Period.

Claims and Appeals	
Participant Relief	The deadlines to file a claim for benefits or appeal an adverse benefit determination are suspended
Implications	<p>The time to file a claim for benefits or appeal an adverse benefit determination (a denied claim) cannot expire during the Outbreak Period</p> <p>This also means a participant may still file a claim or appeal previously deemed denied during the Outbreak Period because of the participant's failure to timely file the claim or appeal</p> <p>Plans should review whether any claims or appeals have been denied on or after March 1, 2020 because of the participant's failure to timely file⁷</p> <div style="border: 1px solid black; padding: 5px;"> <p>Health Care FSAs and Run-Out Periods: This relief also means that the run-out period for a health care FSA cannot expire during the Outbreak Period. For example, if a calendar year health care FSA's run-out period to submit claims ends March 31, 2020, the run-out period will remain open and participants will have the entire Outbreak Period to submit valid claims before the unspent balance is forfeit.</p> <p>This relief should also apply to HRAs, although unspent HRA balances for current employees usually carry over to the following year and are not forfeit. This relief does not apply to dependent care FSAs, because they are not ERISA plans.</p> <p>Please note that the relief only provides additional time to <i>submit</i> claims. It does not provide additional time to <i>incur</i> them.</p> </div>
External Review	
Participant Relief	The 4-month period to request external review or correct an external review request is suspended
Implications	The time to request the external review for a denied medical claim based on whether services or treatment are medically necessary or appropriate cannot expire during the Outbreak Period

Notification Requirements

The EBSA Notice and Final Rule do not explicitly require plans to notify affected employees and participants about the additional rights created by the relief. As discussed earlier, the model COBRA notices released by the DOL *after* the EBSA Notice and Final Rule do not mention the additional COBRA rights, and the DOL or Treasury have not released any other updated group health plan model notices. ERISA does require the disclosure of these additional rights via SPDs or SMMs, but it allows up to 210 days from the end of the plan year in which the change(s) took place to do so.⁸

⁷ Most plan administrators will need the assistance of the insurance carrier or third party administrator.

⁸ This may or may not be affected by the relief to provide disclosures and notices during the Outbreak Period depending upon the plan year. The additional rights do not affect SBCs.

Effective plan administration, the EBSA Notice and Final Rule's requirement for plans, plan administrators, and plan sponsors to act in good faith, and general fiduciary responsibilities (please see *Fiduciary Responsibilities* below) will put pressure on plans to communicate the additional rights as soon as it is practical to do so. It may be reasonable for plans to satisfy this requirement by providing the COVID-19 FAQs to employees and participants. The DOL drafted them specifically to explain the additional rights to the public.

Different faces in different places: Remember that the DOL and Treasury left open the possibility that the Outbreak Period may end at different times in different parts of the country. If this actually occurs, some multi-state employers may find themselves subject to different plan administration requirements for participants covered under the same plan(s) at the same time.

Fiduciary Responsibilities

In the EBSA Notice, the DOL reminds plans and plan sponsors of their fiduciary responsibilities to “act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing.” This responsibility includes providing “reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments.” Plans and plan sponsors should act to minimize the risk of benefits loss due to a failure to notify affected employees and participants of their rights or otherwise comply in good faith with both established plan administration requirements and the relief provided by the EBSA Notice and Final Rule.

DOL Relaxes Electronic Delivery Rules

During the Outbreak Period, the DOL authorizes communication with employees and participants via emails, text messages, and/or websites as “good faith” delivery of communication so long as the plan fiduciary “reasonably believes [plan participants and beneficiaries] have effective access to [such] electronic means of communication” and/or “continuous access” to websites. If communication during the Outbreak Period proves successful, the DOL may consider finally updating its existing electronic delivery safe harbor rules written twenty years ago.

DOL Follows IRS' Lead in Providing Limited Filing Relief

The IRS previously issued [IRS Notice 2020-23](#), which automatically delayed the filing date for Forms 5500 and 990 that were due on or after April 1, 2020 through July 14, 2020 until **July 15, 2020**. The DOL incorporated this Form 5500 extension into the EBSA Notice⁹ and further extended this relief to Form M-1. Please see our [Alert](#) for more information about these extended filing deadlines.

The COVID-19 FAQs

The COVID-19 FAQs consist of 23 questions written from the employee/participant perspective and answered by the DOL. The first 12 questions are specific to the additional rights discussed in this Alert for group health plans and indicate:

⁹ The IRS and DOL have joint authority for Form 5500 filings.

- Participants have more time to request special enrollment, elect and pay for COBRA, file claims for benefits and appeals of adverse benefit determinations, and request external review for denied claims;
- Participants should review the applicable SPD(s) and ask questions about their rights;
- Employers are generally free to change their plans during the year; and
- Individuals may have additional coverage options in addition to employer-provided group health plans, such as the Public Health Insurance Marketplace, Medicare, and Medicaid.

Note: The DOL indicates in the FAQs that the loss of a COBRA subsidy from a former employer is a Marketplace special enrollment event. This is consistent with U.S. Department of Health and Human Services (HHS) information on [Healthcare.gov](https://www.healthcare.gov), which contradicts applicable HHS regulations. It appears the federal agencies intend to disregard the HHS regulations and treat the loss of a COBRA subsidy as a Marketplace special enrollment event.

About the Authors



***Jennifer Stanley, J.D.** is a Compliance Consultant in the Employee Health & Benefits Compliance Center of Excellence for Marsh & McLennan Agency.*



***Christopher Beinecke, J.D., LL.M.** is the Employee Health & Benefits National Compliance Leader for Marsh & McLennan Agency.*

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