



Employee Benefits News

May 6, 2020

For Whom the Timing Tolls: The COVID-19 Outbreak Period Extends Benefit Plan Deadlines

New employee benefits guidance temporarily extends certain time frames and deadlines for participant actions and relieves some plan administration compliance obligations during the COVID-19 National Emergency (the “COVID-19 Emergency”).¹ The period during which this relief applies—the “**Outbreak Period**”—currently runs from March 1, 2020 until 60 days after the announced end of the COVID-19 Emergency.² Below, we summarize this new guidance and offer some recommended actions.

Extension of Deadlines for Participant Actions

All group health, disability and other employee welfare plans, and all defined benefit and defined contribution plans that are subject to ERISA or the Internal Revenue Code (the “Code”) **must disregard** the “Outbreak Period” for purposes of determining the following time periods when determining if a participant has timely taken action³:

- **HIPAA Special Enrollment Periods**
 - The 30-day special enrollment period in which an otherwise eligible individual may request to enroll in the employer’s group health plan as a result of (i) the employee’s or dependent’s loss of eligibility under another group health plan or insurance, (ii) a person becoming an employee’s dependent by reason of birth, marriage, adoption or placement for adoption, or (iii) any other circumstance for which HIPAA requires a special enrollment period.
 - The 60-day special enrollment period added by the Children’s Health Insurance Program Reauthorization Act of 2009 in which an individual may request to enroll in the employer’s group health plan.
- **COBRA Continuation Health Coverage Election Periods, Premium Deadlines and Notice of Changes**
 - The 60-day period during which a qualified beneficiary may elect COBRA continuation coverage.
 - The date as of which the initial COBRA premium is due (ordinarily not before the 45th day after the initial COBRA election is made).
 - The due date of any subsequent COBRA premium (ordinarily payment is timely if made within the 30 days after the first day of the period for which payment is being made).
 - The date by which an individual must notify the plan of a qualifying event or a determination of disability.
 - The date by which a COBRA election notice must be provided to a qualified beneficiary.

- **Benefit Claims and Appeals**

- The date within which an individual may file a benefit claim under the plan's claims procedure.
- The date within which a claimant may file an appeal of an adverse benefit determination under the plan's claims procedure.

- **External Review Processes Applicable to Group Health Plans**

- The date within which a claimant may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination.
- The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete.

HHS Temporarily Extends Similar Relief to Plans Subject to PHSA. Importantly, the U.S. Department of Health and Human Services ("HHS") agrees with this relief guidance and advises that:

- HHS will exercise enforcement discretion to adopt a temporary policy of measured enforcement to extend similar time frames otherwise applicable to non-federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan, and their participants, beneficiaries and enrollees under applicable provisions of the Public Health Service Act (the "PHSA").
- HHS encourages sponsors of non-federal governmental group health plans to provide similar relief to participants and beneficiaries, and encourages states and health insurance issuers offering coverage in connection with a group health plan to enforce and operate in a manner consistent with the relief. HHS will not consider any state to have failed to substantially enforce the applicable provisions of title XXVII of the PHSA if the state takes such an approach.

Extension of Deadlines for Plan Administration Actions

In General

Delivery of Notice and Disclosures. During the Outbreak Period, employee benefit plans and responsible plan fiduciaries have additional time to provide ERISA Title I required notices and plan disclosures to participants, beneficiaries and others, if the plan and responsible fiduciary act in good faith to furnish the notice, disclosure or document *as soon as administratively practicable under the circumstances*.

- **Good Faith Includes Relaxed Electronic Delivery Requirements.** Good faith efforts to deliver notices, disclosures and documents include a fiduciary's use of electronic alternative means of communicating with participants and beneficiaries who the fiduciary *reasonably believes* have effective access to electronic means of communication, including email, text messages, and continuous-access websites.

Guiding Principles for General ERISA Fiduciary Behavior. Plan sponsors, fiduciaries, and service providers are encouraged to use the following guiding principles when dealing with plan participants who may have problems or difficulties during the COVID-19 Emergency:

- To act reasonably and prudently, and in the interest of the covered workers and their families who rely on the plans for physical and economic well-being.

- To make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments.
- To attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.

The Department of Labor (“DOL”) has stated that its benefits enforcement efforts will emphasize compliance assistance, including grace periods and other relief where appropriate, such as where physical disruption to a plan or service provider’s principal place of business makes compliance with pre-established time frames impossible.

Specific Guidance

Guidance also is provided on the following specific plan administration requirements:

- **Verification Processes for Plan Loans and Distributions.** During the Outbreak Period, the DOL is relaxing compliance enforcement of ERISA plan loan and distribution verification requirements. Specifically, an administrator’s failure to follow the plan’s verification procedures for loans or distributions will be excused for purposes of Title I of ERISA if:
 - The failure is solely attributable to the COVID-19 outbreak;
 - The plan administrator makes a good faith diligent effort under the circumstances to comply with plan procedures; and
 - The plan administrator makes a reasonable attempt to correct any procedural deficiencies (such as assembling missing documentation) as soon as administratively practicable.

Brownstein Comment: The Notice states that this relief does not relax any of the loan or distribution requirements imposed under the Code, such as spousal consent requirements (where applicable). Caution should be exercised as it is not always easy to clearly discern what is an ERISA versus a Code requirement.

- **Implementing Loan Changes Added by the CARES Act.** A plan’s expansion of participant loan rights in accordance with the CARES Act (e.g., increasing the maximum loan amount to the lesser of \$100,000 or 100% of vested account balance without requiring additional collateral or security, and allowing loan repayments due through Dec. 31, 2020, to be suspended for up to one year) will not be treated as violations of Title I of ERISA; provided the plan is timely amended in accordance with the plan amendment provisions included at Section 2202 of the CARES Act (generally, the amendment is adopted on or before the last day of the first plan year beginning on or after Jan. 1, 2022, or such later date prescribed by the U.S. Department of Treasury or its delegate).
- **Timing of Deposits of Participant Contributions and Loan Repayments.** During the Outbreak Period, an employer may deposit participant contributions and participant loan repayments as soon as administratively practicable *under the circumstances*. In determining if the deposit is timely under the circumstances, employers and service providers must act reasonably and prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances. **Brownstein Comment:** Although the DOL has said it will not take enforcement action, there remains the risk of participant claims that an employer did not deposit the contributions quickly enough. If an employer needs to make a deposit later than normal, we recommend creation of a contemporaneous record as to why the delay was needed and the deposit was made as soon as administratively practicable under the circumstances. And certainly do NOT delay depositing participant contributions withheld from paychecks because the employer needs or wants to use these funds for its own business-related purposes. This action at a minimum results in a prohibited transaction (subject to excise taxes

and penalties), constitutes a breach of fiduciary duty and requires a costly correction (contribution plus earnings must be deposited).

Recommended Actions

Related to the extension of the deadlines for participant actions, we recommend the following actions:

- **Notify employees generally** of the impact of the Outbreak Period in determining whether they have acted timely with respect to the participant-related actions described in the guidance. Consider also giving them the link to the DOL and IRS FAQ pages that address questions related to the affect of the COVID-19 Emergency on benefits and the CARES Act provisions.⁴
 - Since it is uncertain how long the Outbreak Period will last, and we are aware that some third-party administrators charge a hefty fee for revisions to a plan’s participant application and election forms, we think it would be acceptable to include this information on an insert or separate sheet that is affixed to the otherwise applicable forms and instructions.
- **Notify specific participants** and beneficiaries who are in the midst of any decision period. We think a plan sponsor and plan administrator could be at some risk of future litigation if efforts are not made to give this notice.
- **Allow “do-overs.”** What is not addressed is whether and what action is required with respect to a participant’s or beneficiary’s decision (or failure to act) that occurred after March 1, 2020, but before the date the individual becomes aware that the Outbreak Period tolls the deadline. We think the best course of action is to give participants and beneficiaries in this situation a “do-over.” We think there is some risk for claims of breach of fiduciary duty for failures to do so. This obviously complicates plan administration and interrupts the routine, standard flows of plan administration procedures that many have worked so hard to implement, but administrators would be well-advised to act consistently with the guiding fiduciary principles pronounced for dealing with participants during the COVID-19 Emergency. *Brownstein Comment:* Given the extension of time during which a participant can act in certain instances, *e.g.*, COBRA, at what point should a plan administrator rely on, and implement, a participant election? We think that, regardless when a participant files a COBRA election even if in the middle of the extended election period, the administrator should implement it upon receipt.
- **Plan Amendments.** We think it appropriate to amend plans to recognize the impact of the deadline extensions, so that plans continue to be administered in accordance with their terms. We think that this amendment could be simply accomplished by a resolution of the governing fiduciary body.
- **Document, document, document.** Be certain to create a contemporaneous record regarding the whys and hows any plan administration function was completed “as soon as practical under the circumstances” if that function was not otherwise completed timely. We recommend this for all delayed actions, not just for delayed deposits of participant contributions as discussed above.
- **Keep Alert.** Since the end of the Outbreak Period is not known at this time, it is important to keep alert for indications of any announcement of the upcoming end of the period, as employers and plan fiduciaries certainly will want to, once again, notify participants about the change in the rules of operation so as to protect them from unintentional errors. It also it important to be up-to-date with the plethora of guidance being issued.

How We Can Help

Please contact one of us or your regular Brownstein attorney for answers to your questions about this new guidance or if we can help you navigate and communicate its application to your employee benefit plans.

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¹ Our apologies to John Donne, Ernest Hemingway, and Metallica. The guidance includes: (i) [press release](#), (ii) [Final Rule](#): Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (the “[Final Rule](#)”), (iii) EBSA Disaster Relief [Notice 2020-1](#) (the “[Notice](#)”), and (iv) [DOL COVID-19 FAQs](#) for Participants and Beneficiaries (the “[FAQs](#)”). The guidance is issued under Section 518 of ERISA, as amended by Section 3607 of the CARES Act.

² The Final Rule indicates that, if the COVID-19 Emergency (as announced in a Proclamation by President Trump on March 13, 2020) has disparate end dates in different areas of the U.S., additional guidance will be issued. The agencies also retain the right to set an end date to the relief that is other than the 60th day following the end of the COVID-19 Emergency.

³ The guidance provides a number of examples demonstrating how the application of the Outbreak Period applies to these different deadlines.

⁴ See, [IRS FAQs](#).