

COVID-19 Update: IRS and DOL Extend COBRA and Other Benefit Plan Deadlines During the Pandemic Outbreak Period

On April 28, 2020, the Employee Benefits Security Administration, the Department of Labor, the Internal Revenue Service, and the Department of the Treasury (the "Agencies") signed a joint notification of relief, which was published in the Federal Register on May 4, 2020 (the "Notice").¹ The Notice provides extension of deadlines with respect to certain medical plan enrollments, election periods under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), COBRA premium payments, COBRA qualifying event notification periods, and certain plan claims, appeals and review periods. The Notice is anticipated to have a significant impact on the administration of health plans. The dramatically liberalized deadlines will provide much appreciated flexibility for participants, but could result in an increase in adverse selection and resulting increase in costs, as well as administrative issues for plan administrators.

The Notice mandates the disregard of the period of March 1, 2020, until 60 days after the end of the COVID-19 National Emergency (which was declared by President Trump through a Proclamation on March 13, 2020, and through subsequent guidance) or such other date announced by the Agencies in a future notification (the "Outbreak Period") when determining certain deadlines or time limited periods.² The Notice also provides that if the National Emergency ends at different times in different part of the country, the Agencies will issue additional guidance.

Special Enrollment Timeframes

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requires a special enrollment period for individuals and dependents who lose eligibility for group health plan or other health insurance coverage in which they were previously enrolled, as well as for those who become a dependent of an employee eligible for such a plan due to marriage, birth, adoption, or placement for adoption. Generally, such enrollment must be requested within 30 days of the occurrence of the event (or 60 days with respect to the special enrollment rights provided under the Children's Health Insurance Program Reauthorization Act of 2009, also known as CHIPRA).

The Notice excludes the Outbreak Period from the 30 or 60 day enrollment period. Therefore, as an example, assuming the National Emergency ends on June 30, 2020, and the Outbreak Period ends on August 29, 2020 (the 60th day after the end of the National Emergency), an individual who was eligible for, but declined participation in, her employer's group health plan and gives birth on March 31, 2020, would be qualified to enroll herself and her child in the group health plan as early as March 31, 2020, and may exercise her enrollment rights until September 28, 2020, (30 days after the end of the Outbreak Period) provided she pays the premiums for any period of coverage.

COBRA Notification Deadlines

COBRA requires employers to notify the plan of certain qualifying events, and for individuals to notify the plan of certain qualifying events, or determinations of disability. Plans are also required to notify qualified beneficiaries of their rights to elect COBRA continuation coverage within certain time frames. The Notice mandates that the Outbreak Period be disregarded when determining the period in which the individual must notify the plan of a qualifying event or the determination of a disability. The Notice also clarifies that the Outbreak Period is to be disregarded when determining the date for providing COBRA election notices to participants.

COBRA Elections

Qualified beneficiaries are generally provided a period of at least 60 days to elect COBRA continuation coverage (with such period beginning not later than the date on which coverage under the plan terminates due to a qualifying event, or, if later, the date of the COBRA election notice). (Note that the deadline for providing COBRA election notices has also been extended, see above.)

¹ 85 FR 26351 (available [here](#)).

² The Employee Retirement Income Security Act and the Internal Revenue Code generally empower the Secretaries of Labor and Treasury, in the case of a Presidentially declared disaster, to prescribe a period of up to one year that may be disregarded in determining the date by which an action is required or permitted to be completed. Therefore, in the absence of legislative change, it is anticipated that the extension will not extend beyond February 29, 2021.

The Notice mandates that the Outbreak Period is disregarded when determining the 60 day COBRA continuation coverage election period. Therefore, as an example, again assuming the National Emergency ends on June 30, 2020, and the Outbreak Period ends on August 29, 2020 (the 60th day after the end of the National Emergency), an individual who was participating in their employer's group health plan, but experiences a qualifying event due to a reduction in hours below the threshold for eligibility in the plan, and who has no other coverage, and who is provided with a COBRA election notice on April 1, 2020, would have until October 28, 2020, (60 days after the end of the Outbreak Period) to elect COBRA coverage.

Deadline for COBRA Premium Payments

COBRA continuation coverage is permitted to be terminated for failure to pay timely premiums. A premium is generally considered paid timely if it is paid not later than 30 days after the first day of the period for which payment is being made (and plans may not require payment of premiums before 45 days after the initial COBRA election).

The Notice mandates the disregard of the Outbreak Period when determining this 30 day period. The following example illustrates the application of this extension, and assumes the National Emergency ends on June 30, 2020, and the Outbreak Period ends on August 29, 2020 (the 60th day after the end of the National Emergency), and that an individual was receiving COBRA continuation coverage on March 1, 2020, and had been for more than 45 days, under a plan that provided only the statutorily required 30 day payment period. This individual made a timely payment in February, 2020, but as of July 1, had made no payments for March, April, May, or June.

The Outbreak Period would be excluded from the applicable timeframe; therefore, payments for March, April, May, and June made by September 28, 2020, would be timely, and the individual would be eligible to receive coverage for this period, even if payments were not received until September 28. In this case the applicable plan or insurer may not deny coverage, and retroactive payment for benefits and services may be made, for this period of time.

If the employee made a payment equal only to two months of premiums by September 28, 2020, they would be entitled to COBRA continuation coverage for the months of March and April, but the plan would not be obligated to cover benefits or services that occurred after April, 2020.

Claims and Appeals Procedures Deadlines

ERISA and certain Internal Revenue Code covered employee benefit plans and non-grandfathered group or individual health insurance plans are generally required to establish and maintain claims procedures. Additionally, group health plans and disability plans must generally provide claimants at least 180 days (60 days in the case of a pension plan or other welfare plan) following receipt of an adverse benefit determination to appeal such determination.³

The Notice mandates that the Outbreak Period be disregarded when determining the deadline for filing benefit claims or appeals of adverse benefit determinations. Note that this applies to both health plans and retirement plans. The following examples illustrate the application of this extension, and assumes that the National Emergency ends on June 30, 2020, and the Outbreak Period ends on August 29, 2020 (the 60th day after the end of the National Emergency).

In the first example, an individual who is a participant in a group health plan receives covered treatment under the plan on March 1, 2020, but a claim for such treatment is not submitted until April 1, 2021. The plan terms require submission of claims within 365 days of the receipt of treatment. The individual's claim would be considered timely, as the Outbreak Period is disregarded, therefore the last day to submit a claim would be 365 days after August 29, 2020, which is August 29, 2021.

In the second example, an individual received notice of an adverse benefit determination from the disability plan in which he is a participant on January 28, 2020, and the notice provided 180 days in which to file an appeal. The appeals deadline would be January 24, 2021, as the Outbreak Period is disregarded, and so there would be 148 days (180 days less the 32 days which had elapsed from January 28 to March 1) left in which to file the appeal.

In the third example, the individual received a notice of adverse benefit determination from the 401(k) plan in which she participates on April 15, 2020, and the notice stated that she had 60 days in which to file an appeal. The appeals deadline would be October 28, 2020, which is 60 days after the Outbreak Period is assumed to end.

³ Note that an extension of deadlines for the employer provision of required notices is not covered under the Notice, but it is addressed in EBSA Disaster Relief Notice 2020-01.

Procedures Regarding External Review

Non-grandfathered group health plans and health insurance issuers are also subject to certain standards for external reviews. These standards provide timelines and procedures for completion, or 'perfection' of claims which are deemed incomplete. The Outbreak Period will be disregarded when determining both the date by which a claimant may file a request for external review after receipt of an adverse benefit determination or final internal adverse benefit determination, as well as the date which a claimant may file information to perfect a request for external review.

Discussion

Although these changes will be welcomed by plan participants, they do raise some issues and potential liabilities for plan administrators and sponsors. As mentioned above, there is ample opportunity for former health plan participants to delay electing or paying for COBRA until they have determined whether they will have need of the coverage. This could result in adverse selection and resulting negative claims experience. In addition, plan administrators will be required to properly administer these changes retroactively to March 1, 2020.

Plan administrators must also consider how they will communicate these changes to the participants. Revised COBRA notices and descriptions of claims procedures are likely to be required.⁴

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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⁴ It is noted that revised model COBRA notices were released by the Department of Labor on May 1, 2020 (available [here](#)), but these notices do not appear to reflect the Outbreak Period extensions.