

## New Federal Guidance Extends Many Employee Benefit-Related Deadlines and Provides Additional Relief for Plan Administrators

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Pursuant to authority granted under the CARES Act, the Department of Labor (DOL) and the Internal Revenue Service (IRS) issued joint guidance on April 28, 2020, extending a number of election periods and deadlines prescribed by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code). Additional relief was provided related to retirement plan contributions, distributions, and loans as described in the DOL's Disaster Relief Notice 2020-01.

### **Relief related to certain benefit-related deadlines and dates**

All group health plans, disability and other employee welfare benefit plans, and employee retirement plans subject to ERISA or the Code must disregard the period from March 1, 2020, until 60 days after the announced end of the COVID-19 National Emergency (the National Emergency), or such other date announced by the DOL and IRS in a future notice (the Outbreak Period), in determining the following election periods and deadlines.

1. The 30-day election period (or 60-day period, if applicable) for HIPAA special enrollment.

For example, if an employee needs to add a dependent to the health plan, the deadline for enrolling the dependent is extended. Similarly, if an employee or dependent lose eligibility for a state Medicaid program or

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## New Federal Guidance Extends Many Employee Benefit-Related Deadlines and Provides Additional Relief for Plan Administrators

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CHIP program, the 60-day enrollment deadline is extended.

2. The 60-day election period for COBRA continuation coverage.
3. The due date for making COBRA premium payments (i.e., the initial payment that is due by the 45<sup>th</sup> day following the election of COBRA and the 30-day grace period for making COBRA payments are extended).
4. The 60-day deadline by which individuals must inform a plan administrator of a COBRA qualifying event (e.g., divorce, legal separation, etc.) or a determination of disability for COBRA purposes.
5. The date by which claimants must file a benefit claim under the plan's claim procedures.
6. The date by which claimants must file an appeal of an adverse benefit determination under the plan's claim procedures.
7. The date by which claimants must file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination.
8. The date by which claimants must file information to perfect a request for external review upon a finding that the request was not complete.
9. The date by which a group health plan, plan sponsor, or plan administrator is required to provide the COBRA election notice to a qualified beneficiary (generally 14 days following receipt of notice from the employer of the qualifying event).

Because these extensions will be effective immediately upon publication in the Federal Register which is expected in the next few days, plan administrators are encouraged to carefully review how these extensions impact the administration of their benefit plans, as well as the impact on participants, beneficiaries, COBRA qualified beneficiaries, and claimants. Specifically, plan administrators should inform plan participants of the extended deadlines and modify plan terms and procedures to ensure that enrollments and benefits are not inadvertently denied or terminated.

### Examples

The guidance provides a number of examples that illustrate the extended timeframes. Below are four such examples which assume that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (i.e., the 60<sup>th</sup> day after the end of the National Emergency). To the extent there

## New Federal Guidance Extends Many Employee Benefit-Related Deadlines and Provides Additional Relief for Plan Administrators

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are different Outbreak Period end dates for different parts of the country, the DOL and IRS will issue additional guidance.

### *Example 1 (Electing COBRA).*

Mike works for Acme and participates in Acme's group health plan. Due to the National Emergency, Mike experiences a qualifying event for COBRA purposes due to a reduction of hours and has no other coverage. Mike is provided a COBRA election notice on April 1, 2020. Because the Outbreak Period is disregarded for purposes of determining Mike's COBRA election period, the last day of Mike's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.

### *Example 2 (Special enrollment period).*

Audrey is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020, Audrey gave birth and would like to enroll herself and the child into her employer's plan; however, open enrollment does not begin until November 15. Because the Outbreak Period is disregarded for purposes of determining Audrey's special enrollment period, Audrey and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage.

### *Example 3 (COBRA premium payments).*

Facts. On March 1, 2020, Max was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since Max elected COBRA. Monthly premium payments are due by the first of the month. The plan provides for a 30-day grace period for making premium payments. Max made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, Max has made no premium payments for March, April, May, or June. Does Max lose COBRA coverage, and if so for which month(s)?

Conclusion. In this example, the Outbreak Period is disregarded for purposes of determining whether monthly COBRA premium payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and Max is entitled to COBRA continuation coverage for these months if he timely makes payment. Under COBRA, premium payments are timely if made within 30 days from the date they are first due (i.e., the grace period). In calculating the 30-day grace period, however, the Outbreak Period is disregarded, and payments for March, April, May, and June are all deemed to be timely if made within 30 days after the end of the Outbreak Period. Accordingly,

## New Federal Guidance Extends Many Employee Benefit-Related Deadlines and Provides Additional Relief for Plan Administrators

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premium payments for four months (i.e., March, April, May, and June) are all due by July 29, 2020. Max is eligible to receive coverage under the terms of the plan during this interim period even though some or all of Max's premium payments may not be received until July 29, 2020. Since the due dates for Max's premiums would be postponed and Max's payment for premiums would be retroactive during the initial COBRA election period, Max's insurer or plan may not deny his coverage, and may make retroactive payments for benefits and services received by Max during this time.

*Example 4 (COBRA premium payments).*

Same facts as Example 3. By July 29, 2020, Max made a payment equal to two months' premiums. Max is only entitled to COBRA for March and April of 2020, the two months for which timely premium payments were made, and Max is not entitled to COBRA for any month after April 2020. Benefits and services provided by the group health plan (e.g., doctors' visits or filled prescriptions) that occurred on or before April 30, 2020 would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.

### **Application of guidance to governmental plans**

Governmental plans are not subject to ERISA, but governmental health plans instead are subject to the Public Health Service Act (PHSA), which incorporates many similar provisions of ERISA and the Code and is enforced by the Department of Health and Human Services (HHS). HHS will exercise enforcement discretion to adopt a temporary policy of relaxed enforcement to extend similar timeframes set forth in this joint agency guidance that are otherwise applicable to non-federal governmental group health plans. HHS encourages plan sponsors of non-federal governmental group health plans to provide relief similar to that specified above to participants and beneficiaries.

### **Relief related to retirement plan loans and distributions**

The DOL extended the following relief as it relates to verification procedures for plan loans and distributions, including the new loan provisions of the CARES Act.

If a retirement plan subject to ERISA fails to follow procedural requirements for plan loans or distributions imposed by the terms of the plan, the DOL will not treat it as a failure if:

- that failure is solely attributable to the COVID-19 outbreak;

## New Federal Guidance Extends Many Employee Benefit-Related Deadlines and Provides Additional Relief for Plan Administrators

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- the plan administrator makes a good-faith, diligent effort under the circumstances to comply with those requirements; and
- the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

This relief is limited to verification requirements required under ERISA, and does not include other requirements (e.g., spousal consent) under the jurisdiction of the IRS. Further, the DOL will not treat any person as having violated the provisions of ERISA solely because: (1) the person made a plan loan to a qualified individual during the loan relief period in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance; or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance.

### **Relief related to timely remittance of participant deferrals and loan payments**

Generally, participant deferrals to a retirement plan or loan repayments must be forwarded to the plan by the employer by the earliest date on which such amounts can reasonably be segregated from the employer's general assets. In most cases, the DOL requires the remittance of participant deferrals and loan payments within just a few days.

Due to the delays caused by the COVID-19 pandemic, the DOL recognizes that some employers and service providers may not be able to forward participant contributions and payments to retirement plans within these timeframes during the Outbreak Period. In such instances, the DOL will not take enforcement action with respect to such temporary delay, *if the delay is solely due to a failure attributable to the COVID-19 pandemic*. Employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.

### **Relief related to Blackout Notices**

In general, the administrator of an individual retirement account plan (e.g., a 401(k) plan) is required to provide 30 days' advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period. The DOL extends relief for plan administrators from this blackout notice requirement.

## New Federal Guidance Extends Many Employee Benefit-Related Deadlines and Provides Additional Relief for Plan Administrators

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### **Relief related to Form 5500 filings and other Tax Code requirements**

In prior guidance, the IRS automatically postponed the due date of many tax payments and filings, including Form 5500 filings. Any such due date or deadline that would ordinarily occur on or between April 1, 2020, and July 14, 2020, is automatically extended to July 15, 2020. This means that any Form 5500 that was due between April 1, 2020, and July 14, 2020, is automatically extended to July 15, 2020. This extension also applies to many other benefit plan administration deadlines under the Code, such as the deadline for loan repayments, timing of indirect rollovers, distribution of excess deferrals, and required minimum distributions (to the extent not waived in 2020 in accordance with the CARES Act). Note: At this time, Form 5500s for calendar year plans are still due on July 31.

### **Guidance related to ERISA fiduciary compliance**

Finally, the DOL reminds plan administrators that the guiding principle for plans must be 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 well-being. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

The DOL 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. As a result, the DOL will emphasize compliance assistance and include grace periods and other relief where appropriate, when the COVID-19 pandemic has physically disrupted a plan or service provider's principal place of business making compliance with ERISA reporting and disclosure deadlines impossible.

Attorneys in Laner Muchin's Employee Benefits Group may assist you with any compliance questions you may have related to your company's employee benefit plans.