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## DOL clarifies ongoing nature of COVID “Outbreak Period” ERISA deadline moratorium

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In May 2020, the Departments of Labor and Treasury issued guidance placing a moratorium on the ability of employee benefit plan administrators to enforce several deadlines applicable to benefit plans during the COVID “Outbreak Period.” The “Outbreak Period” was defined in that guidance as the period beginning on March 1, 2020, and ending sixty days after the end of the COVID National Emergency. President Biden recently extended the COVID National Emergency indefinitely.

Although the COVID National Emergency period continues, the statutory authority granted to the Departments of Labor and Treasury is limited to delaying deadlines for a period of one year. Given this statutory limit on authority, many employers and plan administrators questioned how the deadline moratorium would apply after February 28, 2021. For example, could deadlines be enforced again for all participants starting March 1, 2021? Would the deadlines again become effective starting sixty days after March 1, 2021? Or does the deadline moratorium apply on an individual-by-individual basis? Given the administrative difficulties caused by the inability to enforce certain deadlines, many employers and plan administrators hoped that the agencies would issue guidance ending the moratorium altogether.

Last week, the Department of Labor finally issued clarifying guidance stating that the Outbreak Period will continue until sixty days after the end of the COVID National Emergency. However, the Department of Labor’s and Treasury’s limit of authority (i.e., the 12-month deadline moratorium) is applied on an individual-by-individual basis. In other words, until the Outbreak Period is over, each deadline will be paused on an individual-by-individual basis until the earlier of (i) the end of the 12-month period starting on the date the original deadline would have occurred or (ii) the end of the Outbreak Period.

The Department of Labor’s clarification will no doubt exacerbate the administrative difficulties presented by the Outbreak Period delays. The chart below highlights the key deadlines subject to the Outbreak Period moratorium and provides a few examples on how the moratorium applies in practice:

Requirement	Disregarded Deadline
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<p>COBRA Employee Notice of Qualifying Event or Disability Determination</p>	<p>The 60-day period for a covered individual to notify the plan administrator of a qualifying event (e.g., death or divorce) or disability determination.</p> <p><b>Example:</b> Employee B gets a divorce on July 1, 2021, and spouse is no longer eligible for coverage as a dependent as of that date. Under normal rules, spouse would need to provide notice of the qualifying event within 60 days of the divorce (i.e., August 29, 2021). Under the Outbreak Period moratorium, the COBRA election notice need not be provided until the earlier to occur of (1) August 29, 2022, or (2) 60 days after the end of the Outbreak Period.*</p>
<p>COBRA Election Notice</p>	<p>The 60-day deadline for participants to elect COBRA (measured from the later of the date the notice is received or loss of coverage).</p> <p><b>Example:</b> Employee C loses coverage due to a qualifying event and receives the COBRA election notice on April 1, 2020. Under normal rules, Employee C would have to elect COBRA coverage by May 30, 2020. Under the Outbreak Period moratorium, the COBRA election notice need not be provided until the earlier to occur of (1) May 30, 2021, or (2) 60 days after the end of the Outbreak Period.*</p> <p><b>Example:</b> Employee D loses coverage due to a qualifying event and receives the COBRA election notice on October 1, 2021. Under normal rules, Employee C would have to elect COBRA coverage by November 29, 2021. The COVID National Emergency is declared over as of March 1, 2022. Employee D must elect COBRA coverage no later than April 29, 2022 (i.e., the end of the Outbreak Period).</p>
<p>COBRA Initial Premium Deadline</p>	<p>The 45-day deadline (measured after the date of the COBRA election) for the initial premium payment.</p> <p><b>Example:</b> Employee E elects COBRA coverage on October 1, 2020, retroactive to her loss of coverage on September 1, 2020. Under normal rules, the initial premium payment would be due on November 14, 2020. Under the Outbreak Period moratorium, Employee will not be required to pay the initial COBRA premium until the earlier to occur of (1) November 14, 2021, or (2) 45 days after the end of the Outbreak Period.*</p>
<p>COBRA Premium Grace Period</p>	<p>The 30-day grace period required for subsequent COBRA premium payments.</p> <p><b>Example:</b> Employee F elected COBRA coverage on November 1, 2020, and premium payments are due on the 1st of each</p>

	<p>month, subject to a 30-day grace period. Employee F ceases premium payments starting on March 1, 2021. Under normal rules, claims incurred in the month of March could be “pending” while awaiting the premium payment, and if payment is not received by the end of the grace period, coverage would be terminated retroactive to March 1, 2021. However, under the Outbreak Period moratorium, Employee F’s coverage cannot be terminated until the earlier to occur of (1) March 30, 2022, or (2) 30 days after the end of the Outbreak Period.* Nevertheless, claims could still be “pending” during the full premium delinquency period, subject to satisfaction of regulatory requirements.</p>
<p>HIPAA Special Enrollment</p>	<p>The 30-day (or 60-day in the case of a loss of CHIP or Medicaid coverage or eligibility for premium assistance) period in which an employee or dependents can enroll in a plan outside of open enrollment.</p> <p><b>Example:</b> Employee G and her children receive health coverage under a plan sponsored by her spouse’s employer. Spouse is laid-off and loses coverage effective April 1, 2021. Employee G’s employer also sponsors a group health plan and requires notice within 30 days of a life event (here, by April 30, 2021) to enroll outside of open enrollment. Under the Outbreak Period moratorium, Employee G has until the earlier to occur of (1) April 30, 2022, or (2) 30 days after the end of the Outbreak Period* to enroll in coverage under her employer’s plan.</p>
<p>Internal Claims and Appeals Deadlines</p>	<p>Deadlines to file internal claims for benefits or appeal adverse benefit determinations.</p> <p><b>Example:</b> A group health plan requires initial claims to be submitted within 365 days. Employee H incurs a claim on April 1, 2020. Under normal rules, the claim must be submitted by April 1, 2021. However, under the Outbreak Period moratorium, the claim must be submitted by the earlier to occur of (1) April 1, 2022, or (2) 365 days after the end of the Outbreak Period.</p> <p><b>Example:</b> Health FSA has an annual runout period under which participants can submit claims from a prior year until March 31st of the following year. Such claims are reimbursable from contribution made in the prior year (i.e., this is not a grace period, but rather, a runout period). Employee I incurs reimbursable claims of \$150 on December 15, 2020, and has sufficient funds to cover those claims as of December 31, 2020. Under normal rules, Employee I would submit those claims for reimbursement until the end of the</p>

	runout period on March 30, 2021. However, under the Outbreak Period moratorium, Employee I can submit the claims for reimbursement by the earlier to occur of (1) March 30, 2022, or (2) 90 days after the end of the Outbreak Period.
External Review Deadlines	<p>Deadlines to request, and to perfect an incomplete request for, external review of certain adverse benefit determinations under non-grandfathered health plans.</p> <p><b>Example:</b> Under the federal external review process (state deadlines vary), participants have four (4) months to submit a request for external review after receiving a notice of an adverse benefit determination. Employee J receives a notice of an adverse benefit determination on September 1, 2020. Employee J may submit a request for external review until the earlier to occur of (1) January 1, 2022, or (2) 4 months after the end of the Outbreak Period.</p>

\*EBSA Notice 2021-01 contains conflicting language as to what happens when the Outbreak Period ends. On the one hand, the language states that the otherwise applicable ERISA deadline will “resume” at the end of the Outbreak Period. However, the examples provided by the DOL imply that individual actions must be taken by the end of the Outbreak Period. Given this ambiguity, the conservative approach would be to restart the applicable ERISA deadlines at the end of the Outbreak Period.

The illustrations above are intended to highlight the basic application of the Outbreak Period deadline moratorium. However, the reality is that with the DOL’s recent guidance requiring individual-by-individual application of the 12-month moratorium, actual administration of these rules will be much more complex. As employers and plan administrators navigate these rules, they should consider the following:

- **Administrative Simplification.** Although the individual application of the moratorium may appear daunting for many administrators, the burden can be alleviated to some degree by adopting simplification methods. The extreme form of simplification is to ignore the individual application 12-month moratorium and pause all applicable deadlines for the duration of the Outbreak Period. Once the Outbreak Period ends, all deadlines for individuals subject to the moratorium can be started from day one. Although this certainly simplifies administration of the moratorium, it comes with a cost because, among other things, it increases the risk of COBRA coverage adverse selection, prolongs the COBRA premium deferment period beyond what is required, and increases experience losses under health FSAs. Employers and plan administrators are encouraged to work closely with benefits counsel to develop strategies to administer the moratorium in an efficient and cost-effective manner while maintaining compliance.
- **COBRA Premium Management.** Perhaps the most challenging aspect of the Outbreak Period moratorium is the application it has to COBRA premiums. Under normal rules, group health plans can “pend” or deny claims during a period of premium delinquency (subject to retroactive

coverage if premiums are paid) and then terminate COBRA coverage completely once a grace period ends (assuming a significant delinquency remains at the end of the grace period). The DOL's recent guidance provides some relief in the sense that we now know that the longest required premium deferment period is 12 months (i.e., the extent of the DOL's and IRS's statutory authority) from the date on which the delinquency first occurred. However, pending claims subject to retroactive reinstatement for such a long period of time presents several problems for administrators. Plus, the reality is that many COBRA-qualified beneficiaries that default on COBRA premiums have done so intentionally with the expectation that coverage will be terminated. Employers and plan administrators should work with their COBRA administrators and benefits counsel to develop methods to mitigate risks associated with COBRA premium deferments.

- **COBRA Subsidies.** As if the Outbreak Period deadline moratorium was not complex enough, as of the date of this alert, draft legislation would provide many COBRA-qualified beneficiaries with an 85% COBRA premium subsidy through September 2021. Certainly, if the legislation is passed with the subsidies, special notices will need to be sent to qualified beneficiaries explaining the availability of the subsidies. Less certain is how COBRA subsidies will interact with the Outbreak Period moratorium. For example, it is not clear how employers will get reimbursed for the subsidy when qualified beneficiaries are able to defer premiums or delay electing COBRA until (potentially) well into 2022.
- **Notices.** As ERISA fiduciaries, plan administrators should consider providing notices to impacted individuals who are approaching the end of their individual deadline moratorium. For example, should the plan send a notice reminding a COBRA-qualified beneficiary that the 12-month deadline moratorium will be ending and the election will be due? Should a completely new election notice be sent, especially if premiums have changed? Should COBRA-qualified beneficiaries be informed that the 12-month moratorium on the 45-day or 30-day premium grace period is ending and the payment will be due? These notice considerations should be taken seriously as a matter of fiduciary responsibility, and employers and plan administrators should consult with ERISA counsel when determining how to proceed.

The COVID National Emergency looks to be with us for a while. Therefore, employers and plan administrators should be prepared to deal with the Outbreak Period moratorium for the foreseeable future.

To learn more about how to navigate these concerns, [register for our webinar](#) "Special Briefing: 2021 Health & Welfare Benefits Update" on March 30th at 1:00 p.m. eastern.

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