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DOL and IRS issue COVID-19 Benefit Plan Rules, COBRA Deadline Extensions and Updated Model COBRA Forms

Employers, insurers and benefit plan vendors are all impacted by new guidance issued by the Department of Labor (DOL) and the Internal Revenue Service (IRS) aimed at mitigating the disruptive effect of COVID-19. The guidance was issued on April 28, 2020. In a related step, the DOL also issued new Model COBRA notices on May 1.

The guidance issued April 28 is:

- **Joint Rule**. The DOL and IRS issued a joint rule providing an extension of certain participant deadlines to enroll in health coverage, elect and pay for COBRA coverage and make and appeal benefit plan claims. Of the three pieces of guidance, the Joint Rule will have the most impact on employers and plan administrators and requires quick action to ensure compliance. Although the new rules do not specifically require notice to participants, employers can ensure their fiduciary duties are met and limit potential claims by giving participants notice of the new extended deadlines. At a minimum, any required notices, such as claim denial notices and COBRA election forms, should state the extended deadlines.
- **EBSA Disaster Relief Notice 2020-1 ("Notice 2020-01")**. The DOL's Employee Benefits Security Administration (EBSA) issued this Notice to give plan administrators impacted by COVID-19 more time to provide notices and to announce that the DOL will not assert a violation of ERISA or of plan document terms for certain delays in compliance or for implementation of the special rules for participant loans from a retirement plan permitted by the CARES Act.
- **COVID-19 FAQs for Participants and Beneficiaries (the "FAQs")**. The EBSA published FAQs to provide general

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information to participants about how to access their rights under health, retirement and benefit plans generally and what to do if they have trouble getting benefits or information about their benefits.

For governmental employers, it is notable that both the Joint Rule and Notice 2020-1 provide that the Department of Health and Human Services ("HHS") has advised that the HHS will exercise its enforcement discretion to afford similar extended timeframes to non-Federal governmental group health plans and related health insurance issuers and encourages such plans to provide the same extended timeframes to participants.

The Joint Rule

The Joint Rule is intended to minimize the risk that individuals lose benefits because they do not comply with normal deadlines that may not be appropriate for this time of massive economic and employment disruption. To that end, the Joint Rule provides additional time for participants and beneficiaries to make important healthcare coverage decisions or to pursue claims under benefit plans. The Joint Rule also provides some relief to employers and plan administrators.

Employers and plan administrators need to be sure every staff member who might be contacted by a participant about benefits is aware of these new rules and need to take the necessary steps to implement the rules. The FAQs direct participants to contact the DOL if they have trouble accessing their benefits or plan information, and that could result in a DOL compliance review or audit of the plan which can be burdensome and costly for employers and administrators.

Extension of Time for Participant Action

The Joint Rule provides that an "Outbreak Period" is ignored in determining the deadline for participants to elect special enrollment in a health plan, elect or pay for COBRA coverage or make or appeal a benefit plan claim. The Outbreak Period is the period from March 1,

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2020 until 60 days after the announced end of the COVID-19 National Emergency. For purposes of the examples below, we assume the end of the COVID-19 National Emergency is announced to be July 31, 2020, and the Outbreak Period therefore ends September 29, 2020.

Group health plans, disability and other welfare plans and employee retirement plans covered by ERISA or the Code must disregard the Outbreak Period for plan participants, beneficiaries, qualified beneficiaries or claimants in determining the following periods and dates:

HIPAA Special Enrollment Rights.

HIPAA allows eligible employees to enroll themselves and/or their eligible dependents in group health coverage within 30 days from the date that (i) the individual ceased to be covered by another group health plan or certain other health coverage or (ii) an individual becomes a dependent of an eligible employee by birth, marriage, adoption or placement for adoption. This does not apply to excepted benefits like dental, vision and other limited scope benefits. Under the Joint Rule, if the 30-day deadline would end or begins in the Outbreak Period, the individual will have additional time to elect special enrollment in a group health plan. The additional time is determined by ignoring the Outbreak Period. If the 30-day deadline period begins before the Outbreak Period but ends during the Outbreak Period, the additional time tacked onto the end of the Outbreak Period equals the days of the election period as of the first day of the Outbreak Period. If the 30-day period begins during the Outbreak Period, the additional time added to the end of the Outbreak Period is 30 days.

Enrollment is generally effective the first of the month after the employee elect's special enrollment, except for special enrollment due to birth or adoption, which is required to be retroactive to the date of birth or adoption. The Joint Rule includes an example related to birth or adoption but isn't clear on the effective date of coverage for special enrollment rights triggered by other events. Presumably, the coverage should be made available as early as it would have been under the plan's terms if the employee had elected coverage within 30 days from the date of the event triggering the special

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enrollment right.

Example. An employee has single coverage under her employer health plan, and the employee's spouse's employment (and therefore group health coverage) ends on April 30, 2020. The employee normally has until May 30, 2020 to enroll her spouse in the group health plan, but now has until October 29, 30 days after September 29, 2020, due to ignoring the Outbreak Period which we've assumed ends September 29, 2020. If the spouse's coverage ended on February 15, 14 days before the Outbreak Period began, and the original special enrollment deadline would have been March 16, the extended deadline to elect special enrollment would be October 15, 16 days after the end of the Outbreak Period.

COBRA Elections and Payment.

- COBRA Elections. COBRA continuation coverage must generally be elected by a qualified beneficiary within 60 days of the date the plan administrator or COBRA vendor gives notice to the qualified beneficiary of the right to elect COBRA coverage following a qualifying event that results in the loss of health coverage. COBRA applies to major medical, dental, vision and certain other types of group health coverage.

  The Joint Notice provides that the Outbreak Period is ignored in determining the deadline, so an election period that begins or ends in the Outbreak Period will be extended giving the qualified beneficiary additional time to elect COBRA. If the qualifying event occurs during the Outbreak Period, the deadline will be 60 days after the end of the Outbreak Period.

- COBRA Premiums. Plans cannot require payment of an initial COBRA premium earlier than 45 days after COBRA is elected. After the initial 45-day premium period, there is a 30-day grace period for payment of the COBRA premium each month. Under the Joint Notice, the Outbreak Period is ignored in determining the deadline for payment of COBRA premiums, which could give participants a great deal of additional time to pay.

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Example. If an employee terminated employment December 1, 2019 and elected COBRA, and the monthly premium is due the first day of each month, premiums due beginning February 1, 2020 and throughout the Outbreak Period have an extended due date. The premium due February 1 would have a 30-day grace period until March 1, 2020, and ignoring the Outbreak Period assumed to end September 29, the February premium would be due September 30, 2020. Premiums for March 1 through September 1 would be due by October 30.
Plans and insurers are not required to pay claims during a period for which COBRA premiums have not been paid, but must advise providers that the individual is covered subject to payment of the premiums and claims must be paid once the premiums have been paid. Most large employers have self-funded plans and should be sure the vendor that processes their plan claims and takes calls from participants and providers asking about the status of a participant's coverage are aware of which individuals are in an election period or payment grace period and answer any questions accordingly. Employers should also be sure that vendors don't pay claims until premiums are paid.

- Employee Notice of a Qualifying Event or of Disability.
Covered employees or qualified beneficiaries must notify the plan administrator within 60 days after certain qualifying events such as divorce or a dependent ceasing to qualify as a dependent, to trigger COBRA rights for the individuals who are no longer eligible to be covered. A qualified beneficiary who is determined to have been or becomes disabled during the first 60 days of COBRA coverage can qualify for an extension of the period of COBRA coverage to up to 29 months provided that the plan administrator is given notice of disability within 60 days of the date of a social security determination of disability and before the end of the original 18 months of COBRA. For purposes of these deadlines, the Outbreak Period is ignored in the same manner as it is ignored for election and payment deadlines described above.

Claims Procedures Deadlines.

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- Deadline for Participant to Make an Initial Claim. Many plans impose a deadline for participants to make a claim for plan benefits, often one or two years after the expense is incurred or the claim arises. Under the Joint Rules, the Outbreak Period is ignored in determining whether a plan's deadline for making a claim has been met.
- Deadline for Appeal of a Denied Claim. Participants have 180 days to appeal a denied health plan claim or a claim under any plan based on a determination of disability, and 60 days to appeal other welfare or retirement plan claims. Under the Joint Rules, the Outbreak Period is ignored in determining whether a plan's deadline for making a claim has been met.
- Interim Claims Procedures Deadlines. The Outbreak Period is also ignored in determining the deadline to request an external review of a health plan claim, or to provide additional information requested of the participant in connection with an external review.

Extension of Time for Employer and Plan Administrator Action.

Somewhat surprisingly, the Joint Rule allows employers and administrators to disregard the Outbreak Period when determining the date by which COBRA election notices must be provided. The employer and plan administrator have a combined period of 44 days to provide qualified beneficiaries with a notice of a COBRA election rights following a qualifying event. Employers must notify the plan administrator of certain COBRA qualifying events, such as an employee's termination of employment, within 30 days of their occurrence, and the plan administrator then has 14 days to provide a COBRA election notice to qualified beneficiaries.

While the Joint Rule allows this notice to be given later – by disregarding the Outbreak Period in calculating the deadline, many employers may choose not to take advantage. Given the significant extension of time participants already have to elect and pay for COBRA coverage, employers and administrators likely will not want to delay providing COBRA notices, and may want to provide them as quickly as possible to limit the length of election and payment periods to the extent possible.

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Notice 2020-01

Notice 2020-01 provides limited relief to employers and plan vendors that are affected by COVID-19 by allowing certain notices to be given late if the employer or vendor acts in good faith and furnishes the notice as soon as administratively practicable under the circumstances. The Notice also provides limited relief related to loans and distributions, the timing of deposit of participant contributions, the timing of blackout notices for retirement plans, and the deadline for Form 5500 and M-1 filings.

Notices to Participants and Beneficiaries

Notice 2020-01 conditionally provides additional time for employers and plan administrators or other fiduciaries to furnish notices or disclosures required under Title I of ERISA to participants and beneficiaries. This does not apply to the provision of COBRA election notices that are unconditionally extended under the Joint Notice nor to notices that are required by the Code rather than ERISA, such as 401(k) plan safe-harbor notices.

Notices, disclosures or other documents which are required to be provided during the Outbreak Period (see the Joint Rule discussion above) may be provided later than the applicable deadline without resulting in an ERISA violation if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure or other document as soon as administratively practicable under the circumstances. "Good faith" includes furnishing the notices or other documents through email, text or continuous website access provided the plan fiduciary reasonably believes the recipient participants or beneficiaries have effective access.

This conditional extension of deadlines applies to Summary Plan Descriptions (SPDs) and Summaries of Material Modifications (SMMs), annual funding notices, annual reports, periodic benefit statements and other required notices or disclosures. The extension applies to DOL enforcement, not enforcement by participants, so employers should strive to ensure fee disclosures and QDIA notices that provide employers with fiduciary relief are not delayed.

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One required notice under ERISA is a "blackout notice", which must be given 30 days in advance of a three day or longer period when a participant's ability to direct investments or take loans or distributions is suspended or restricted. Existing rules provide that if advance notice is impossible due to unforeseen circumstances beyond the reasonable control of the plan administrator and a plan fiduciary documents the determination that these circumstances exist in writing, the advance notice requirement is excused though delivery of the notice is still required. Notice 2020-1 provides that the COVID-19 pandemic is necessarily due to a circumstance beyond the plan administrator's control and therefore waives the written determination requirement for a late blackout notice.

The specific relief for blackout notices is important as recordkeepers have had some challenges in connection with the economic tumult and it is possible that future volatility could cause additional problems.

Plan Loans and Distributions

The CARES Act provided expanded access to plan distributions and loans for qualifying individuals who have been impacted by COVID-19, and amended the tax rules to allow plans to implement the new rules now and adopt amendments in a later plan year to reflect the operation of the plans.

For loans taken between March 27, 2020 and September 23, 2020 the CARES Act increased the amount qualifying individuals can borrow to 100% of the participant's vested account balance or $100,000, whichever is lower (normally 50% of the participant's vested account balance or $50,000, whichever is lower). Additionally, the CARES Act allows plans to permit delayed repayment of loans by qualifying individuals. See our article "Employee Benefit Plan Changes Under CARES Act" for more information on these rules.

A loan taken by a participant from their account in a retirement plan, such as a 401(k) plan, must qualify for an exemption from ERISA's prohibited transaction rules, but the increased loan limits under the CARES Act and the limited availability of CARES Act loans to qualifying individuals would both violate the requirements for the

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prohibited transaction exemption. Fortunately, Notice 2020-01 provides that the DOL will not treat any person as violating Title I of ERISA, including the "adequate security" and "reasonably equivalent basis" requirements for the needed prohibited transaction exemption solely because the plan and participants have taken advantage of the CARES Act loan rules.

Notice 2020-01 also generally provides that if an ERISA retirement plan fails to follow procedural requirements for plan loans or distributions, the DOL will not treat is as a violation provided that:

- 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 the requirements; and
- The plan administrator makes a reasonable attempt to correct procedural issues, such as putting together missing documentation, as soon as administratively practical.

However, this relaxed treatment does not extend to spousal consent requirements or any other requirement that is subject to the IRS's jurisdiction.

Participant Contributions and Loan Repayments

Notice 2020-01 provides relief to employers and service providers who may not be able to promptly forward participant contributions and loan repayments to a retirement plan. Participant contributions and loan repayments are required by the DOL to be remitted to plans very quickly, generally within a couple of days from when such amounts are withheld from participants'' pay. Notice 2020-01 provides that the DOL will not take enforcement action in response to a temporary delay in forwarding participant contributions or loan repayments to a plan if the delay is solely the result of the COVID-19 outbreak. In any event, employers and service providers must act reasonably, prudently and in the interests of the employees and remit such amounts as soon as administratively practicable.

Form 5500 and Form M-1 Filing Relief

Calendar year plans do not have an extension of the July 31 deadline to file the Form 5500 for the 2019 plan year, although as always,

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these plans can file for an extension of time until October 15, 2020 to file. IRS Notice 2020-23 provided a limited extension for Form 5500 filings in connection with the COVID-19 emergency whereby Form 5500 filings otherwise due on or after April 1 and before July 15, 2020, would automatically be due July 15, 2020 instead. In Notice 2020-01, the DOL has adopted this same extension for ERISA Form 5500 requirements and applied this same extension for Form M-1 filings for MEWA arrangements.

General ERISA Fiduciary Compliance Guidance

Finally, the DOL urged plan administrators and fiduciaries to make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments during this period. In other words, the DOL seems more focused on the spirit rather than the letter of the law. In turn, the DOL provided that its enforcement focus will be on compliance assistance and grace periods and other relief measures.

Plan administrators or fiduciaries may want to consult with benefits counsel regarding any "reasonable accommodations" beyond those explicitly addressed in this Notice 2020-01. And, if a plan administrator or other fiduciary makes a reasonable accommodation of the type contemplated by the DOL here, they would be well served to keep a short file memo that explains the actions based upon the DOL's own words.

The FAQs

The FAQs, issued by the DOL, are primarily intended to assist participants and beneficiaries impacted by the COVID-19 pandemic understand their rights regarding employer-provided health, welfare and retirement plan benefits. The FAQs consist of 23 questions and answers which do not break any new legal ground. They provide basic information about plans and certain benefit laws, like HIPAA and COBRA, explain where participants can get access to certain information, e.g., health care coverage options, and posit answers to various scenarios.

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Importantly, the DOL directs participants to contact the DOL's benefit advisers if they cannot locate a contact person at their employers or cannot obtain certain information from their employer. Employers should be ready to answer participant questions and benefit claims promptly, and be sure their vendors are doing so, to avoid participant calls to the DOL that might result in questions or even a DOL investigation of a plan.

One More Thing – New Model COBRA Forms

In addition to the guidance issued on April 28, DOL issued new Model COBRA forms on May 1. While the DOL generally treats use of these Model forms as good faith compliance with COBRA rules, these forms need to be customized for the particular employer and employers should consider how to ensure the forms effectively communicate to participants their COBRA rights. COBRA litigation is increasing, and penalties imposed against employers related to ineffective COBRA forms are not uncommon.

- COBRA forms are required to state the plan administrator (usually the employer) and an address and phone number for the plan administrator, in addition to noting contact information for a COBRA vendor to whom elections and payments should be sent.
- COBRA forms should be provided in alternate languages if necessary for participants' understanding. The DOL Model forms are published in English and Spanish.
- We recommend that the deadline for giving notice of a determination of disability that will extend the COBRA coverage period be stated. That deadline is 60 days after the Social Security Administration makes a determination of a disability and no later than the end of the original 18-month COBRA period. It is curious that this deadline isn't in the Model notices, since it is a statutory deadline.
- While the Model forms must be customized and could be revised to be clear, employers should use the Model forms; at least one employer has been found not to have provided

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compliant notices where the Model forms were not used.

- Employers need to retain clear proof of mailing of COBRA notices, or ensure that their vendor can provide the needed proof in the event of a claim or dispute.

Employers impacted by COVID-19 have much to do without having to understand and implement numerous new benefit plan rules, but that is what is necessary to ensure compliance and avoid potential claims or penalties. This update is designed to assist you in identifying what is most important for you to focus on.

If you have questions about these IRS and DOL requirements or other employee benefits plan matters, please contact Sarah Lowe, Carl Lammers or Alison Stemler with Frost Brown Todd's Employee Benefits & ERISA Practice Group, or Bill Williams or Matt R. Wagner in Frost Brown Todd's Insurance Regulation & Risk Management Practice Group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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