

Practice Update

U.S. Agencies Issue Additional COVID-19 Relief and Guidance for Employee Benefit Plans

June 2, 2020

On April 28th, the Employee Benefits Security Administration (EBSA) (a division of the US Department of Labor (DOL)) and the Internal Revenue Service (IRS) (a bureau of the Department of the Treasury (Treasury)) jointly issued guidance (IRS and EBSA Joint Guidance) (the “Joint Guidance”) to extend certain timeframes applicable under employee benefits plans (e.g., health, disability, other welfare plans and retirement plans) to minimize the possibility of individuals (e.g., employee benefit plan participants, beneficiaries and claimants) losing critical benefits because of failures to comply with pre-established timeframes that are made difficult during the COVID-19 pandemic and related National Emergency.^[1] As part of this endeavor, the Department of Health and Human Services (HHS) has acknowledged its concurrence with the Joint Guidance and indicated that it will equally relax its enforcement policy to extend similar timeframes to non-Federal governmental group health plans and health insurance issuers offering group health plan coverage.

The Joint Guidance applies to all group health plans, disability and other employee welfare plans, and retirement plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA) or the Internal Revenue Code of 1986, as amended (the Code). The Joint Guidance *suspends* several key

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employee benefit plan deadlines for the period spanning from March 1, 2020, until 60 days after the end of the National Emergency, or such other date (whether earlier or later) as determined by the DOL (the “Outbreak Period”). This means that the Joint Guidance applies retroactively to March 1 and will remain in effect for *at least* 60 days after the end of the National Emergency. The following periods and dates are specifically impacted and thereby suspended until the end of the Outbreak Period, at which point they immediately commence and start to track:

1. The 30-day period (or 60-day period, if applicable) to request special enrollment under the Health Insurance Protection and Accountability Act of 1996, as amended (HIPAA);
[2]
2. The 60-day election period for COBRA continuation coverage;
3. The date for making COBRA premium payments;
[3]
4. The date (which is generally 60 days but subject to the specific facts) for individuals to notify the plan of a qualifying event or determination of disability;
5. The date within which individuals may file a benefit claim under the plan’s claims procedure;
6. The date within which claimants may file an appeal of an adverse benefit determination under the plan’s claims procedure;
7. The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination; and
8. 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 pursuant to applicable appeal rules.

The Joint Guidance does outline a number of examples of how to apply the suspension in the eight circumstances noted above.

Simultaneously with the Joint Guidance, the EBSA also issued Disaster Relief Notice 2020-01 (EBSA Disaster Relief Notice 2020-01) (Notice 2020-01). Notice 2020-01 further relaxes a variety of deadlines dictated by ERISA but couples the relaxation with additional flexibility in meeting those deadlines. Given that “the COVID-19 outbreak may temporarily impede efforts to comply with various [ERISA] requirements and deadlines,” EBSA has adopted extensions and stated that it will exercise its discretion to provide relief. The additional relief provided under Notice 2020-01 includes:

- General Extension of Deadlines for Notices and Disclosures. An employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for failure to timely furnish a notice, disclosure or other document that must be furnished during the Outbreak Period so long as the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. *Good faith acts include use of electronic alternative means of communication including email, text messages and continuous access websites.*
- Verification Procedures for Plan Loans and Distributions. A failure to strictly adhere to plan loan or distribution procedural requirements outline by the terms of the employee benefit plan, will not be penalized by the DOL 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 those requirements; and
 - The plan administrator makes a reasonable attempt to correct any procedural deficiencies

as soon as administratively practicable.

This relief is limited to loan requirements dictated by ERISA (which are within the interpretive and regulatory authority of the DOL) and do not apply to spousal consent, for example, which is Code based and falls within the jurisdiction of the IRS.

- Qualified Plan Loans Under the CARES Act Expansion. With respect to loans from qualified plans, Code Section 72(p)(2) generally provides that the maximum amount a plan can permit as a loan is the lesser of (a) \$50,000 or (b) the greater of \$10,000 or 50 percent of the participant's vested account balance. Under the Coronavirus Aid, Relief and Economic Security Act of 2020 (the CARES Act), if an individual takes a Coronavirus-related loan during the one hundred eighty (180) day period starting on March 27, 2020, the maximum amount that a tax-qualified retirement plan can permit as a loan is increased to the lesser of (a) \$100,000 or (b) the greater of \$10,000 or 100 percent of the participant's vested account balance. Further, the CARES Act also provides that a qualified plan may also delay any loan repayment under the qualified plan for up to one (1) year so long as that loan repayment is otherwise due between March 27, 2020 and December 31, 2020. The DOL acknowledges that loans and loan repayments made in compliance with this relief will not be treated as having violated Title I of ERISA so long as the plan is currently operated (as required under the CARES Act) and retroactively amended (as required under the CARES Act) on or before the last day of the first plan year beginning on or after January 1, 2022.
- Delay in Deposit of Participant Contributions or Loan Repayments. The DOL recognizes that some employers may face challenges in forwarding participant plan contributions and loan repayments taken from pay to retirement plans within the Outbreak Period. In the event such

failure is solely attributable to the COVID-19 outbreak, the DOL will not take enforcement action with respect to such temporary delays *so long as the employers and service providers acted reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.*

- ERISA Fiduciary Grace Periods. The DOL notes that plans and service providers may be unable to comply with “claims processing and other ERISA requirements.” As such, the DOL’s enforcement approach under the Notice 2020-01 will “emphasize compliance assistance and include grace periods and other relief where appropriate.” The Notice includes an applicable example where physical disruption to a plan or service provider’s principal place of business makes compliance with certain processes impossible.
- Form M-1 and Form 5500 Filings Relief. The deadline for Form M-1 filings (for MEWAs) has been extended to July 15, 2020 to align with IRS Form 5500 relief. This means that fiscal year plans with filings due on or after April 1, 2020 but before July 14, 2020 have the benefit of an extended deadline. This relief does not apply to calendar year plans with filings otherwise due July 31, 2020.

Finally, the DOL has also issues a set of FAQs designed to help employee benefit plan participants and beneficiaries, as well as plan sponsors, and employers impacted by the COVID-19 outbreak understand their rights and responsibilities under ERISA. Each piece of guidance above expressly notes that the agencies will continue to monitor the effects of the COVID-19 pandemic and may provide additional relief as deemed warranted or necessary.

We know that employers are working around the clock to address the challenges presented by COVID-19, while managing ongoing benefit plan concerns. If you would like to discuss how the relief above may

impact your plan, please reach out to your Akerman contact.

[1] On March 13, 2020, President Trump issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. The President subsequently made a determination under the Stafford Act, that a national emergency exists nationwide beginning March 1, 2020, as the result of the COVID-19 outbreak (the National Emergency).

[2] HIPAA special enrollment allows individuals who previously declined health coverage to enroll for coverage, regardless of a plan's open enrollment period. Special enrollment rights are generally triggered by life events related to a loss of eligibility and new dependents.

[3] Under the COBRA rules, the first premium payment is subject to a 45-day deadline and each subsequent premium is subject to a 30-day deadline.

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