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May 5, 2020

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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

DOL AND TREASURY ANNOUNCE EXTENSIONS OF BENEFIT PLAN DEADLINES

On April 28, 2020, the Department of Labor and Department of the Treasury (collectively, "agencies") issued guidance that extends certain plan and participant deadlines in light of President Trump's COVID-19 National Emergency declaration. While the guidance applies to all ERISA-covered plans,[1] the most significant impact of the guidance will be on group health plans.

The guidance requires plans to ignore the days that fall within a period of time referred to as the "Outbreak Period" when calculating certain deadlines. In effect, the deadlines are "tolled" during this period. For example, if a 30-day deadline normally applies, the period consisting of the Outbreak Period will not count against that 30-day deadline.

The Outbreak Period is the period beginning on March 1, 2020 and ending 60 days after the end of the National Emergency or such other date announced by the agencies. At this point, it is uncertain as to when the National Emergency declaration will end, and so the end-date of the Outbreak Period is also uncertain. The guidance notes that in the event there are different Outbreak Period end-dates for different parts of the country (i.e., if the National Emergency declaration ends for some, but not all regions of the country), the agencies will issue additional guidance. The agencies also note that in no event will the Outbreak Period last more than one year; that is, the latest the Outbreak Period can end is February 28, 2021.

COBRA Deadlines

The guidance applies to three COBRA deadlines: the COBRA election period, the time frames to pay COBRA premiums, and the time frame for qualified beneficiaries to notify a plan of a qualified event.

The COBRA election period is the 60-day period during which a qualified beneficiary can elect COBRA. The 60-day period is measured from the later of the date coverage is lost due to the qualifying event or the date the qualified beneficiary receives the COBRA election notice. The days within the Outbreak Period will not count against this 60-day time frame. Thus, the guidance will extend the COBRA election period for anyone whose COBRA election period begins within or extends into the Outbreak Period. Effectively, this means that anyone whose election period began on or after January 2, 2020 will be impacted. For example, if someone's election period began on January 2, 2020, day 60 of the election period would fall on March 1, the first day of the Outbreak Period. Because the days within the Outbreak Period do not count towards the 60-day election period, the person will have until the day after the Outbreak Period ends to elect COBRA. Assuming the person timely paid the initial COBRA premium, coverage would have to be retroactive to the

[1] The guidance does not directly apply to non-federal governmental plans. However, the guidance notes that the Department of Health and Human Services ("HHS") has reviewed the guidance and is encouraging plan sponsors of non-federal governmental plans to comply.

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date of the qualifying event. Similarly, anyone whose 60-day election period begins during the Outbreak Period would have 60 days after the end of the Outbreak Period to elect COBRA.

The guidance also applies to COBRA premium due dates. Normally, payment of the initial COBRA premium will be considered timely if made not later than 45 days after electing COBRA, with no grace period, and thereafter, premiums are typically due on the first of the month with a 30-day grace period. The guidance provides that days within the Outbreak Period do not count against these 45-day and 30-day periods. Thus, the guidance will impact anyone whose initial COBRA premium payment would be due within the Outbreak Period or whose 45-day initial premium payment period begins within the Outbreak Period. Effectively, this means that anyone who elected COBRA from January 16 through the duration of the Outbreak Period will be impacted. For example, someone who elected COBRA on January 16 would normally have until March 1 (45 days after electing COBRA) to make the initial premium payment. Per the guidance, that individual now has until one-day after the end of the Outbreak Period to pay the initial COBRA premium. Similarly, an individual who elected COBRA during the Outbreak Period will have until 45 days after the Outbreak Period to make the initial COBRA premium. In each case, if the premium payment is timely made, coverage must be reinstated retroactive to the date of the qualifying event. Similarly, the guidance applies to an individual whose grace period for a monthly premium payment extends into or begins within the Outbreak Period. For example, if a monthly premium was due on February 1, 2020, the grace period would normally end on March 2 (30 days after February 1). However, because the days within the Outbreak Period do not count towards the grace period, the person will have until 2 days after the end of the Outbreak Period to make the February payment. The payments due March 1 (and all other payments that would have been due within the Outbreak Period) will be due 30 days after the end of the Outbreak Period. The guidance provides that a plan may wait until the individual makes the payments before it is required to pay for claims incurred after the due date.

Finally, the guidance extends the time frame for individuals to notify the plan of a qualifying event.[2] For some qualifying events, such as a divorce or a dependent ceasing to be eligible for coverage, COBRA contemplates an individual notifying the plan of the event causing a loss of eligibility. Typically, an individual has 60 days to notify the plan, but the guidance provides that days that fall within the Outbreak Period will not count against the 60-day time frame.

[2] The guidance also extends the time frame for qualified beneficiaries to notify the plan of a determination of disability from the Social Security Administration. Under COBRA rules, when the qualifying event is a termination of employment or reduction in hours, the 18-month maximum COBRA period can be extended by up to 11 months (for a total of 29 months) if a qualified beneficiary is determined by the Social Security Administration to be disabled at any time during the first 60 days of continuation coverage. To qualify for the disability extension, a qualified beneficiary must notify the plan of the disability determination within 60 days from the later of the date coverage is lost due to qualifying event, the date of qualifying event, or the date the Social Security Administration determines person is disabled. Days within the Outbreak Period do not count against this 60-day deadline.

Special Enrollment Periods

The guidance also extends the time frames for individuals to enroll in a medical plan on account of a "special enrollment event."[3] Normally, an individual must be provided at least 30 days to enroll in a plan (or enroll dependents in a plan) for the following special enrollment events: (i) employee gets married, (ii) birth or adoption/placement for adoption of the employee's child, and (iii) the employee or a dependent loses eligibility for coverage under another group health plan. An individual typically has 60 days to enroll when the special enrollment event is a loss of eligibility for Medicaid or CHIP or becoming eligible for a state premium subsidy. The days within the Outbreak Period do not count against the 30- or 60-day time frames. For example, if a child was born on January 31, the employee would normally have 30 days, or until March 1, to enroll the child, with coverage retroactive to the date of birth. Due to the guidance, the employee will have until one day after the Outbreak Period to enroll the child. If the child were born during the Outbreak Period, the employee will have until 30 days after the Outbreak Period to enroll the child.

Claims Procedure Deadlines

Finally, the guidance requires plans to disregard certain claims and appeals deadlines. In this regard, the guidance implicates all plans, including retirement plans.

Though not legally required, many plans impose a deadline for participants and beneficiaries to submit a claim for benefits. For example, a plan might say that any claim incurred during the plan year must be submitted within 90 days after the end of the plan year. The guidance requires the plan to disregard days within the Outbreak Period for purposes of enforcing the deadlines. It would appear that as a result of this guidance, plans with claims submission deadlines that have already passed within the Outbreak Period will be required to, in essence, "re-open" the deadlines. Thus, if a plan with a calendar-year plan year requires claims in 2019 to be submitted within 90 days after the end of the 2019 plan year (i.e., on or before March 30, 2020), the plan will have to extend the claims submission deadline until 30 days after the end of the Outbreak Period. This sort of a claims submission deadline is a typical feature of health care flexible spending accounts, since under flexible spending account rules, unused funds must be forfeited (except that plans may allow up to $500 to roll over to the next plan year). Having a claims submission deadline allows the plan to identify the amount of the forfeiture (or carry over amount).[4]

Plans must also disregard the days within the Outbreak Period when calculating the deadline for a participant or beneficiary to appeal a claim denial. For group health plans, disability plans, and claims under other plans that hinge on the plan determining that an individual is disabled, the time frame to appeal generally is 180 days from the date of receipt of the claim denial. For all other appeals of adverse benefit determinations, the time frame is generally 60 days from receipt of the adverse benefit determination. In addition, group health plans subject to the Affordable Care Act's external review

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[3] Technically, plans that constitute excepted benefits (such as dental-only and vision-only) and so-called retiree-only plans (those that cover fewer than two employees as of the first day of the plan year) are not subject to the special enrollment rules, but many voluntarily comply.

[4] The guidance does not apply to dependent care flexible spending accounts, although as a practical matter, it may be difficult for a flexible spending account claims administrator to apply different claims submission deadlines for a health care flexible spending account versus a dependent care flexible spend account.

requirements (generally, non-grandfathered medical plans) will need to disregard the days within the Outbreak Period as they apply for deadlines associate with requesting and perfecting a request for external review. In general, a participant or beneficiary would have 4 months from receipt of the final appeal denial to request external review.

Conclusion

As illustrated in some of the examples above, the retroactive nature and indefinite duration of the Outbreak Period will create challenges for plan sponsors and plan service providers. Plan sponsors should therefore work with their service providers (e.g., claims administrators, COBRA administrators, recordkeepers) to ensure compliance with the new guidance. Plan sponsors of self-insured plans that have stop-loss coverage should also consider working with their stop loss carriers to confirm stop loss protection for claims that would normally have been denied were it not for the plan's compliance with the guidance.

If you have any questions regarding the benefit plan extensions, please contact any member of the Employee Benefits and Executive Compensation group at 585.232.6500, 716.853.1616, or visit www.hselaw.com