



Employee Benefits COVID-19 and COBRA Update

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Employee Benefits COVID-19 and COBRA Update

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Agenda

- Overview of Recent Developments
- Group Health Plans: Coverage Requirements
- Group Health Plans: Other Requirements
- COBRA Notices and Coverage
- Cafeteria Plans
- Retirement Plans: CRDs and CARES Act Plan Loan Relief
- Retirement Plans: Other Issues
- Retirement Plans: Electronic Disclosure Rule



Recent Developments

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Developments Since April 9 Webinar

- FAQs on FFCRA and CARES Act issued jointly by HHS, DOL and Treasury
- FAQs on coronavirus-related relief for retirement plans issued by IRS
- Outbreak Period deadline extension guidance jointly issued by DOL and IRS
- Revised model COBRA initial (general) and election notices issued by DOL
- Relief on required ERISA notices under EBSA Disaster Relief Notice 2020-01 (the "Notice") issued by DOL
- Cafeteria plan guidance issued by IRS
- Outbreak Period deadline extension guidance issued by HHS
- Final electronic disclosure rules for retirement plans issued by DOL

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Group Health Plans: Coverage Requirements

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COVID-19 Testing

- FAQs clarified that retiree-only group health plans (GHPs) are not subject to the requirement to provide no-cost COVID-19 testing
- GHPs must pay 100% for visit if COVID-19 test administered or ordered, both in-network and out-of-network
 - Out-of-network: pay negotiated rate or rate published by the provider on public website
- GHP does not need to pay 100% for visit where COVID-19 is discussed, but during which no test is administered or ordered

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Scope of COVID-19 Testing Requirement

- GHP must pay 100% of the cost for items and services provided during a visit that “relate to the furnishing or administration” of the COVID-19 test or that relate “to the evaluation of such individual for purposes of determining the need” for testing
- Includes items and services in a variety of settings:
 - Doctor’s office
 - Urgent care center
 - Emergency rooms
 - Drive-through testing/screening sites and other non-traditional settings
 - Tests ordered during telehealth visit

Scope of COVID-19 Testing Requirement

- GHP must pay 100% of following related services:
 - Cost of provider visit at which COVID-19 test is administered or ordered
 - Cost of other tests performed at the same visit for other causes of respiratory illness, such as a flu test or blood test, related to determining the need for COVID-19 diagnostic testing
- Cannot impose prior authorization or medical management requirements

Scope of COVID-19 Testing Requirement

- GHP must pay for COVID-19 testing, including serologic tests (tests for presence of COVID-19 antibodies), that meet one of the following requirements:
 - Approved by FDA
 - Developer intends to seek or has sought an emergency use authorization (EUA) under section 564 of the Federal Food, Drug and Cosmetic Act and such has not been denied
 - List of EUA approved tests available on FDA website
 - Developed in and authorized by a state that has notified HHS of its intention to review COVID-19 tests
 - Approved by the HHS Secretary in guidance

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HDHP Guidance

- HDHP may provide coverage for treatment of COVID-19 before participant meets deductible
 - Coverage can be provided for any diagnostic testing subject to FFCRA/CARES mandate
- HDHP may provide retroactive coverage for telehealth benefits before participant meets deductible
- Coverage for COVID-19 treatment and for telehealth need not be provided at 100%
 - Could impose copayment or coinsurance
- Both may apply for expenses incurred on or after January 1, 2020

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Implementation and Communication

- Determine if GHP will provide special coverage for COVID-19 treatment and telehealth
 - If so, when will special coverage begin and end
- Contact insurers, TPAs, and stop-loss insurers concerning the changes in the law
- Notify employees of changes
 - Summary of material modification (SMM) or updated summary plan description (SPD) on testing changes, even if additional changes are not adopted
 - Other employee communication materials

Group Health Plans: Other Requirements

Outbreak Period Deadline Relief

- Primarily affects deadlines applicable to participants
- Applies only to ERISA plans
 - HHS urges local government GHPs to voluntarily use these rules
- Outbreak Period defined
 - For determining certain deadlines, the time between March 1, 2020 to 60 days after COVID-19 national emergency period ends (“Outbreak Period”) is ignored
 - Outbreak Period cannot exceed one year
 - Does not apply to deadlines that elapsed prior to March 1, 2020

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Outbreak Period Deadline Relief: *HIPAA Special Enrollment*

- HIPAA special enrollment deadlines:
 - Marriage (30 days after marriage)
 - Birth/adoption/placement for adoption of child (30 days after birth/adoption/placement)
 - Loss of other coverage (30 days after loss)
 - Loss of Medicaid or SCHIP coverage (60 days after loss)
 - Acquisition of Medicaid/SCHIP premium assistance (60 days after acquisition)

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Outbreak Period Deadline Relief: *HIPAA Special Enrollment*

EXAMPLE:

- Employee married on February 14, 2020
 - 30-day enrollment period would normally end on March 15, 2020
 - New deadline: 75 days after end of national emergency
 - Employee enrolls new spouse on July 14, 2020: coverage effective August 1, 2020

Note: retroactive coverage must be provided for birth, adoption and placement for adoption

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Outbreak Period Deadline Relief: *ERISA Claims and Appeals*

- ERISA claims and appeals
 - Date by which claim for a benefit must be filed
 - Date by which appeal must be made after initial adverse benefit determination
 - Date to request external review
 - Date to file additional information to perfect a request for external review
- Impacts flexible spending accounts (FSAs) (see slide 29)

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Outbreak Period Deadline Relief: *Communications*

- Notify employees of changes
 - Changes will require a SMM or updated SPD for ERISA plans
 - Other types of employee communications
- Update claims and appeals correspondence

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Relief for Plan Reporting and Disclosure Deadlines

- Plan administrators will not be in violation of ERISA for failing to furnish a notice, disclosure, or other document required by Title I of ERISA within the statutory timeframe during the Outbreak Period
 - Plan administrator must act in good faith to provide documents as soon as administratively practicable
 - Examples: SPD, SBC, SMM
 - Does not apply to COBRA notices
- Deadline for Form 5500 and M-1 filings due from April 1 to July 14 is extended until July 15, 2020

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COBRA Notices and Coverage

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Outbreak Period Deadline Relief: *COBRA Deadlines*

- Most participant COBRA deadlines delayed
 - 60-day period to elect COBRA
 - All COBRA payment deadlines (initial and ongoing)
 - Deadlines for employee to notify GHP of divorce or dependent child losing eligibility
 - Deadline to notify GHP of disability determination by SSA (for purposes of 11-month COBRA extension)

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Outbreak Period Deadline Relief: *COBRA Deadlines*

EXAMPLE:

- COBRA election notice sent out on January 2, 2020
 - Election deadline (without delay) would require election to be made by March 1, 2020
 - New delayed deadline to elect COBRA: 61 days after end of COVID-19 national emergency period

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Outbreak Period Deadline Relief: *COBRA Deadlines*

EXAMPLE:

- COBRA payment for February coverage due on February 1, 2020
 - 30-day grace period ends March 2, 2020
 - New delayed deadline for this payment: 62 days after end of COVID-19 national emergency period
 - Claims can be pended for February claims until payment is received

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Outbreak Period Deadline Relief: *COBRA Deadlines*

- Other participant deadline extensions applicable to GHPs also apply to COBRA coverage (HIPAA special enrollment, ERISA claims and appeals)
- GHPs' deadline to send out COBRA election notices delayed
 - 14 days generally, unless employer is plan administrator, then 44 days
 - Most GHPs will not want to delay sending out COBRA notices

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Outbreak Period Deadline Relief: *Communications*

- Changes need to be communicated to participants and qualified beneficiaries (QBs)
 - New election notices?
 - Other types of communications?
- Disclosure to requesting health care providers regarding QBs' coverage status during Outbreak Period
 - No coverage but will have coverage retroactively if COBRA payments timely made
 - Have coverage subject to retroactive termination if COBRA payments not made timely

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New COBRA Model Notices: Medicare

- Updated to include Q&A on interaction of Medicare and COBRA
 - COBRA coverage can be terminated due to Medicare if QB enrolls in Medicare after COBRA has been elected
 - COBRA coverage cannot be terminated if QB enrolled in Medicare before electing COBRA
 - Also cannot be terminated for these QBs if QB later changes Medicare plans

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Cafeteria Plans

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Outbreak Period Deadline Relief: *ERISA Claims and Appeals*

- Applies to Health FSA deadlines to file a claim
- Example: Health FSA deadline to file a claim for 2019 is March 31, 2020 (aka “run-out period”)
 - New deadline for submitting Health FSA claims: 91 days after end of the national emergency
- Deadline for dependent care assistance plan (DCAP) does not change: DCAP not an ERISA plan

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Deadlines Delayed by IRS Notice 2020-23

- Cafeteria plans may be amended to allow employees with election deadlines originally due between April 1, 2020 and July 14, 2020 to have until July 15, 2020 to make or change their elections
 - Examples: new hire elections, mid-year status change elections
 - Can apply to Health FSAs, DCAP, and premium payment component
- Deadline for 2019 HSA Contributions delayed until July 15, 2020 (federal tax filing deadline)

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Cafeteria Plan Mid-Year Elections

- Employer may, but is not required to, allow employees to change GHP coverage in 2020 on a prospective basis:
 - Enroll in a GHP
 - Change GHP options:
 - HDHP to PPO
 - Employee-only to Family Coverage
 - Revoke health coverage (employee must certify that employee will enroll in other coverage immediately)
- Could have second “open enrollment” or could allow changes throughout the year

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Cafeteria Plan Mid-Year Elections

- Employer may, but is not required to, allow employees to change Health FSA or DCAP elections in 2020 on a prospective basis:
 - Enroll in a Health FSA or DCAP
 - End participation in a Health FSA or DCAP
 - Increase a Health FSA or DCAP election
 - Decrease a Health FSA or DCAP election
- Can limit decreases in Health FSA or DCAP elections to no less than amounts already reimbursed

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Cafeteria Plan Mid-Year Elections

- Plan can establish limitations on permissible mid-year changes:
 - Permit some, but not all, of the permissible changes
 - Establish a timeframe for accepting requests
 - Limit frequency of changes
- No “consistency” rule necessary, but plan can impose rules
- Must be offered on a nondiscriminatory basis
- Not limited to participants affected by COVID-19

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Grace Periods and Carryover

- Health FSA or DCAP with a grace period for calendar year 2019 (normally ending March 15, 2020) may expand grace period until December 31, 2020
 - Will impact HSA eligibility if unused amounts not converted to limited-purpose FSA
- Health FSA carryover amount for 2021 can be increased from \$500 to \$550

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Implementation and Communication

- Outbreak Period deadline relief is mandatory
 - Contact TPAs concerning these changes
 - Update participant communication materials
- Decide whether to permit any optional deadline extensions, mid-year election changes, grace period changes or carryover changes
 - Confirm administration with TPA
 - Amend cafeteria plan document
 - Issue updated SPD or SMM (ERISA plans)

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Relief for Plan Reporting and Disclosure Deadlines

- Also applies to Health FSA deadlines
- Plan administrators will not be in violation of ERISA for failing to furnish a notice, disclosure, or other document required by Title I of ERISA within the statutory timeframe during the Outbreak Period
 - Plan administrator must act in good faith to provide documents as soon as administratively practicable
 - Examples: SPD, SMM
 - Does not apply to COBRA election notices

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Retirement Plans: CRDs and CARES Act Plan Loan Relief

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Coronavirus-Related Distributions (CRDs)

- IRS FAQs confirm that CRDs are optional for plans
- Treasury Department and IRS may identify additional factors that make individuals qualified to receive a CRD in future guidance
- Existing limits on distributions from pension plans still apply (e.g., spousal consent, pension plan distribution restrictions)
- A qualified individual may treat a plan distribution that meets the requirements to be a CRD as such on the individual's federal income tax return even if the employer does not treat the distribution as a CRD

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CARES Act Plan Loan Relief

- IRS FAQs confirm plan loan relief is optional for plans
 - Can adopt all or part of available relief
- IRS intends to apply same principles applied in 2005 to loan relief included in the Katrina Emergency Tax Relief Act (KETRA) to the extent provisions substantially similar
 - Safe harbor allowed for a period of loan suspension
 - Loan payments resume at the end of the suspension
 - Interest accrued during suspension period is added to loan principal and reamortized to provide substantially level installments over the remaining period of the loan
- DOL confirmed extending loan relief will not a cause a violation of ERISA's qualified plan loan requirements

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Implementation and Communication

- Continue to work with service providers and recordkeepers to implement decisions on whether to offer CRDs and/or plan loan relief, and communicate availability to participants
 - Issue updated SPD or SMM (ERISA plans)
- Monitor for further guidance from the IRS
 - FAQs said will release guidance on reporting on Form 1099-R later this year

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Retirement Plans: Other Issues

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Outbreak Period Deadline Relief: *ERISA Claims and Appeals*

- Also applies to ERISA retirement plans
- ERISA claims and appeals
 - Date by which claim for a benefit must be filed
 - Date by which appeal must be made after initial adverse benefit determination

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Relief for Plan Reporting and Disclosure Deadlines

- Also applies to retirement plan deadlines
- Plan administrators will not be in violation of ERISA for failing to furnish a notice, disclosure, or other document required by Title I of ERISA within the statutory timeframe during the Outbreak Period
 - Plan administrators must act in good faith to provide documents as soon as administratively practicable
 - Examples: SPD, SMM, 401(k) benefit statements
- Deadline for Form 5500 filings due from April 1 to July 14 is extended until July 15, 2020

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Additional Disclosure Relief For Blackout Notices

- Blackout notices normally required to be provided to participants and beneficiaries 30 days in advance of a blackout period
- No advance notice necessary if not possible due to COVID-19 pandemic
- COVID-19 pandemic is an event beyond the reasonable control of the plan administrator
 - Fiduciaries not required to make written determination

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Plan Loans and Distributions

- Fiduciary breach caused by failure to follow established procedural requirements excusable by DOL if:
 - Failure solely attributable to COVID-19 outbreak
 - Plan administrator makes good faith diligent effort to comply
 - Plan administrator makes reasonable attempt to correct any procedural deficiencies
- No relief for spousal consent requirements
- No relief for other requirements under the Internal Revenue Code or IRS regulations

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Participant Contributions and Loan Repayments

- Fiduciary breach caused by temporary delay in remitting participant contributions and loan repayments to plan during the Outbreak Period excused by DOL if:
 - Failure solely attributable to COVID-19 outbreak
 - Employer acts reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable
- Does not excuse use of participant contributions and loan repayments for business operations

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Retirement Plans: Electronic Disclosure Rule

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Electronic Disclosure Rule

- New voluntary safe harbor to use electronic media as default: the “notice-and-access” approach
 - Website posting with appropriate notice of internet availability (NOIA) furnished to email of covered individuals
 - Email delivery of covered documents direct to the electronic addresses of covered individuals
- NOIA and online delivery system have specific content, form, and manner requirements
- One-time initial paper notice required before new safe harbor is used

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Electronic Disclosure Rule

- Safe harbor applies to “covered individuals”:
 - Participants, beneficiaries, or other individuals entitled to documents, and
 - Those who provide the employer, plan sponsor, or administrator with a valid email address or smartphone number
- Employer cannot assign an email to be used solely for purposes of applying safe harbor, email must have another employment-related purpose
 - TPA and plan administrator cannot assign an email address

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Electronic Disclosure Rule

- Applies to “covered documents”:
 - Any pension benefit document or information required pursuant to ERISA Title I
 - Does not apply to documents that must be furnished only upon request
- Contains protections for covered individuals
 - Right to paper or to globally opt-out
 - NOIA required each time a new document is made available for review
 - Website retention
 - System check for invalid electronic addresses
 - System check at termination of employment

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Electronic Disclosure Rule

- Limited to ERISA retirement plans (not health and welfare plans)
- Effective July 27, 2020
- DOL enforcement policy of no action if plan administrator relies on the safe harbor before effective date
- Explicitly recognizes effects of COVID-19

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Questions?



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Additional EB Resources



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