

Recent Guidance Regarding Employee Benefit Plans

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There has been a recent flurry of regulatory guidance issued affecting employee benefit plans. Most of the guidance addresses challenges specifically created by the COVID-19 pandemic, while other guidance is applicable generally. Below is a summary of the various guidance that has been recently released.

Guidance Extending Deadlines for COBRA, HIPAA Special Enrollment and Benefit Claims

The [IRS and DOL have issued guidance](#) providing that group health plans, disability plans and other welfare benefit plans must disregard the “Outbreak Period” when determining certain deadlines applicable to HIPAA Special Enrollment, COBRA and benefit claims. The Outbreak Period runs from March 1, 2020, until 60 days after the end of the National Emergency as declared by the President, or another date as may be later announced by the IRS and/or DOL.

With respect to HIPAA Special Enrollments, this means that the deadline for an employee to request enrollment is 30 days after the Outbreak Period (or, put another way, 90 days after the declared end of the National Emergency). For example, if someone has a child born on August 1, 2020, and the National Emergency is declared over that same day, then the earliest possible deadline for requesting a HIPAA Special Enrollment would be October 29, 2020.

With respect to COBRA, the following deadlines must be modified to exclude the Outbreak Period: (i) the date by which the COBRA notice must be provided after the plan receives notice of a qualifying event; (ii) the qualified beneficiary’s 60-day COBRA election period (the 60-day COBRA election period would start the day after the Outbreak Period ends); (iii) the date by which an individual must notify the plan of certain COBRA-qualifying events (e.g., divorce); and (iv) the due date for COBRA premiums. COBRA premiums that would otherwise be due during the Outbreak Period must be considered timely as long as they are made within the plan’s grace period for making timely COBRA premium payments following the end of the Outbreak Period. For example, if the plan has a 30-day grace period, then any premiums due during the Outbreak Period will be timely as long as they are made within 30 days after the end of the Outbreak Period. However, as under existing COBRA rules, plans are not required to process medical claims for a period until COBRA premiums for that period have been received.

We recommend that you update or supplement your existing COBRA forms to address these new requirements, or contact your COBRA administrator to do the same.

With respect to benefit claims, the following deadlines must be modified to exclude the Outbreak Period: (i) the deadlines imposed by the plan for the filing of a benefit claim or appeal in accordance with the plan’s benefit claims and appeals procedure; (ii) the deadline for requesting an external review of a denied claim; and (iii) the deadline for providing missing information necessary for an external review. We recommend that you contact your claims administrator to ensure they are following these new guidelines.

Cafeteria Plan Election Changes

The IRS also released guidance (Notices [2020-29](#) and [2020-33](#)) that allows, but does not require, an employer to permit employees to, on a prospective basis: (i) enroll in the employer’s group health plan if the employee previously declined enrollment; (ii) revoke an existing election and enroll in different coverage under the employer’s group health plan; (iii) revoke an existing election without enrolling in different coverage under the employer’s group health plan (note: this

requires an employee attestation that the employee is enrolled in, or will immediately be enrolled in other health coverage not sponsored by the employer); and (iv) revoke an election, make a new election or decrease or increase an existing election applicable to a health or dependent care FSA.

The guidance also allows an employer to permit an employee to apply unused health or dependent care FSA funds that remain in the account as of the end of a grace period or plan year ending during calendar year 2020 for medical care or dependent care expenses, respectively, incurred through December 31, 2020, and it raises the permitted health FSA carryover amount from \$500 to \$550. These changes are all optional and only available during calendar year 2020 (except for the optional health FSA carryover increase, which will remain in effect after 2020). If any of these changes are desired, the cafeteria plan will need to be amended by December 31, 2021.

Revised Model COBRA Notices

Finally, with little fanfare, the DOL issued revised model COBRA [general](#) and [election](#) notices. Notably, the notices do not take into account the extended COBRA deadlines described above, so employers must modify them accordingly. We recommend using the model forms absent compelling reasons not to use it. COBRA litigation remains active as a recent class-action lawsuit brought against Starbucks and Hershey demonstrate. The lawsuits generally allege that the COBRA election notice (which was not the DOL's model form) was deficient.

New Voluntary Electronic Disclosure Safe Harbor for Retirement Plans

The DOL issued a [Final Rule](#) allowing plan administrators to use electronic delivery of ERISA-required retirement plan disclosures as a default. The rule adds two optional methods for electronic delivery as a new, voluntary safe harbor. A plan administrator may post the documents to a website and direct participants to view the documents there. Alternatively, a plan administrator can send the documents via email (either as attachments or in the body of the email). In order to use the new safe harbor, the plan administrator must provide participants and beneficiaries with a paper notice that includes the individual's valid "electronic address" (e.g., email address or smart phone number) and that describes the individual's right to opt out of electronic delivery and receive paper copies. In practice, some plan administrators have already been providing electronic disclosures in accordance with one of the two newly blessed methods, so the guidance may not have impact. However, other plan administrators who have not yet utilized electronic delivery may now wish to avail themselves of the new safe harbor and capture significant cost savings.

The final rules are effective July 27, 2020. Notably (though perhaps inconsequentially), the final rule does not supersede the electronic delivery safe harbor that was promulgated in 2002, so a plan administrator who wishes to adhere to those procedures may still do so. Additionally, the new safe harbors are not available for welfare plans, however, it is anticipated the DOL will issue separate guidance for welfare plan disclosures.

Electronic Witnessing and Notarization of Participant Plan Elections

To aid in the execution of retirement plan participant (and spousal) elections, the IRS has temporarily modified the "physical presence" requirements of the Internal Revenue Code. [Notice 2020-42](#) provides that elections which require witness by a notary public or plan representative may be witnessed remotely via live audio-video technology as long as certain requirements are met. For remote notarizations, the relief requires that the remote notarization is consistent with state law requirements applicable to notary publics. For remote plan representative witnessing, the audio-video feed must be live, the individual signing the election must show a valid photo ID during the live session, the signed document must be faxed or transmitted electronically directly to the witnessing plan representative on the same day it was signed and the plan representative must acknowledge receipt of the signed document. The relief applies to elections made between January 1, 2020, and December 31, 2020.

If you have any questions regarding the topics discussed in this article, please contact **Christopher T. Collins** at +1 (312) 609-7706, **Philip L. Mowery** at +1 (312) 609-7642, **Jason P. Faust** at +1 (312) 609-7727 or any other Vedder Price attorney with whom you have worked.

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