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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

U.S. DEPARTMENT OF LABOR (FINALLY!) ISSUES GUIDANCE REGARDING APPLICATION OF PRIOR RELIEF EXTENDING BENEFIT PLAN DEADLINES

On February 26, 2021, the Department of Labor (“DOL”) issued long-awaited follow-up guidance to its April 2020 guidance that extended certain plan and participant deadlines in light of the COVID-19 pandemic. The April 2020 guidance (see our prior LEGALcurrents [here](#)) was issued jointly with the Department of Treasury and required benefit plans to ignore days that fall within the period of time defined in the guidance as the “Outbreak Period” when calculating certain deadlines.

The April 2020 guidance defined the Outbreak Period as the period beginning March 1, 2020 and ending 60 days after the end of the COVID-19 National Emergency Declaration. To date, the National Emergency Declaration remains in effect. The ERISA and Internal Revenue Code provisions on which the April 2020 guidance was based specify that the maximum period to be disregarded in applying deadlines is one year. February 28, 2021 marked one year since the March 1, 2020 start date of the Outbreak Period and employers have asked what happens to delayed benefit plan deadlines after February 28, 2021. Because the National Emergency Declaration is still in effect, the Outbreak Period as defined in the April 2020 guidance has not yet ended. Some benefit plan service providers (particularly COBRA administrators) had suggested that the one-year limitation meant that all deadline extensions would end at the end of the day on February 28, 2021. Other commentators suggested that the DOL and Treasury would simply declare that a new one-year period would start on March 1, 2021, continuing all existing deadline extensions. The DOL’s February 26, 2021 guidance (Disaster Relief Notice 2021-01 - see on the DOL website [here](#)) (“the Notice”) doesn’t take either approach. The approach required by the Notice is likely to present administrative complications for employers and their third-party service providers.

The Notice provides that the one-year limitation on the “disregarded period” (i.e., the days that aren’t counted in applying the specified deadlines) is applied separately to each *individual* action/deadline date that would fall within the Outbreak Period. In essence, each individual has his or her own up-to-one-year delay of the deadline that would otherwise apply to a specified action to be taken by the individual. As stated in the Notice, the applicable period is disregarded until the earlier of (a) one year from the date the individual was first eligible for relief for purposes of that deadline, or (b) 60 days after the announced end of the National Emergency (in other words, the end of the Outbreak Period as originally defined).¹

¹ Note that in addition to adding a one-year time limit on deadline extensions, the Notice appears to shorten the deadline extensions for individuals when the Outbreak Period ends within less than 1 year from the original deadline. Under the Notice, if the Outbreak Period ends within less than a year of the normal plan due date, the

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The application of this rule is best illustrated by several examples. These examples all pertain to COBRA elections and premium payment deadlines, which are likely to be the actions that have been the most delayed by individuals during the pandemic, but note that the guidance in the Notice applies to all deadlines addressed in the April 2020 guidance, including special enrollment deadlines and claims submission deadlines. Note also that in the examples below, to help simplify illustration of the rules, it is assumed that coverage ends on the date the employee terminated employment and that the employee received a COBRA election notice on the date of termination of employment.

Example 1: Employee terminated employment January 1, 2020, and so under normal COBRA rules, the employee would have a 60-day COBRA election period beginning on the next day and ending on March 1, 2020. Because March 1, 2020 fell within the Outbreak Period (the first day of the Outbreak Period), that individual's maximum one-year disregarded period began March 1, 2020 and would end at the end of the day on February 28, 2021. After the examples included here, we suggest an approach for situations like this, where (due to the late arrival of the DOL's guidance) there would be little to no time for an individual to take required action if the employer strictly implements the Notice.

Example 2: Employee terminated employment June 2, 2020, which under normal COBRA rules would have triggered a 60-day COBRA election period ending on August 1, 2020. Because August 1, 2020 fell within the Outbreak Period, that individual's maximum one-year disregarded period would end on the earlier of (a) July 31, 2021 (one year from the date the individual was first eligible for relief) or (b) 60 days after the announced end of the National Emergency. So, for example, if the announced end of the National Emergency was May 1, 2021, the Outbreak Period would end on June 30, 2021, and so the individual's COBRA election would be due no later than July 1, 2021.

Example 3: Employee terminated employment March 1, 2020, which under normal COBRA rules would have triggered a 60-day COBRA election period ending on April 30, 2020. Because April 30, 2020 fell within the Outbreak Period, the individual's maximum one-year disregarded period would end on the earlier of (a) April 29, 2021 or (b) 60 days after the announced end of the National Emergency. If we assume that the National Emergency does not end until June 1, 2021 (meaning, the Outbreak Period would end on July 31, 2021), the individual's COBRA election would be due by April 30, 2021. If the individual elected COBRA on April 30, 2021, that would trigger the start of the 45-day period during which the individual must make his or her first COBRA premium payment. That 45-day initial payment period normally would end June 14, 2021. Because June 14, 2021 would fall within the Outbreak Period (in this example), the deadline date for making the first premium payment would be extended until August 1, 2021 (the earlier of (a) one year from June 14, 2021, or (b) 60 days after the announced end of the National Emergency). This example illustrates

deadline to take action appears to be the day after the end of the Outbreak Period. Under the April 2020 guidance, the deadline would be calculated by disregarding days that fell within the Outbreak Period. So, for example, if an individual received a COBRA election notice during the Outbreak Period, the deadline to elect COBRA (normally 60 days after receipt of the COBRA election notice), under the April 2020 guidance, would be 60 days *after* the end of the Outbreak Period. Under the Notice, the deadline would be the day after the end of the Outbreak Period (or one year from the original due date, if earlier). We do not know if this acceleration of the deadline was intentional.

the extreme deadline delays that can occur in connection with COBRA, as a result of multiple deadlines (election deadline and first payment deadline) each having their own delay.

The Notice will likely create administrative difficulties, particularly for larger employers who outsource COBRA and health plan enrollment functions to third-party service providers, and who may have numerous employees who have delayed taking action during the first year of the Outbreak Period. Employers, or their service providers, may not have anticipated having to determine the deadline extension period on an individual-by-individual basis. Employers who use third-party service providers for COBRA and/or enrollment services should contact those vendors as soon as possible to determine the service provider's ability to apply the new guidance.

As illustrated in Example 1 above, the late arrival of the Notice may cause some individuals to have little to no time to take required actions if an employer strictly applies the Notice as written. Though the Notice doesn't require that a plan fiduciary provide any specific relief to an individual whose deadline extension will end March 1, 2021, or shortly thereafter, it does note that the pandemic may continue to cause issues for individuals and says that plan fiduciaries "should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames."

Because the DOL published this Notice two days before the potential last day of the deadline extension for some individuals (e.g., Example 1), employers who had not previously guessed correctly at the DOL's potential guidance likely will not have communicated to individuals whose extended deadlines (under the Notice guidance) will end in the near future. Employers should consider delaying the expiration of the deadline extension date for a brief period to allow time to communicate the expiration of the deadline extension to such employees.

If you have any questions regarding the benefit plan extension guidance, please contact any member of the [Employee Benefits and Executive Compensation](#) group at 585.232.6500 or 716.853.1616, or visit www.hselaw.com.

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