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## Employee Benefits Update

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May 8, 2020

### New Model COBRA Notices and COVID-19 Extensions to COBRA Deadlines

#### *Executive Summary*

- On May 1, 2020, for the first time since 2014, the Department of Labor (“DOL”) issued updated model COBRA notices, available on the [DOL website](#), which employers and their COBRA administrators should start to use as soon as possible.
- In addition, the DOL and the Department of Treasury (“Treasury”), in consultation with the Department of Health and Human Services, recently issued guidance requiring employers to disregard the period from March 1, 2020 through sixty days after the announced end of the COVID-19 national emergency (the “Outbreak Period”) when applying deadlines related to COBRA. These extended deadlines should be implemented with care and will also require coordination with third-party COBRA administrators.

#### *Updated COBRA Model Notices*

The DOL updated its model COBRA general notice and model COBRA election notice by adding new paragraphs addressing enrollment in Medicare versus enrollment in COBRA continuation coverage. To explain the revisions in the updated model notices, the DOL published a corresponding FAQ and news release, which are available with the updated model notices on the [DOL website](#).

The new model COBRA notices come on the heels of an increasing number of class action lawsuits brought against employers of all sizes that use COBRA election notices other than the DOL’s model election notice. These class actions, which ask the court to award penalties and damages in the six- or seven-figures, allege that the employer’s COBRA election notices were deficient and lacked sufficient information to enable COBRA-qualifying individuals to effectively exercise their rights to elect continuation coverage.

Given this change in the COBRA landscape, we recommend, from both a compliance and risk-management perspective, that employers subject to COBRA (generally employers with 20 or more employees) use both the DOL’s new general notice and new election notice, tailored as necessary to reflect the employer’s COBRA procedures and offerings. Because employers retain the liability for COBRA compliance, employers that outsource COBRA administration should ensure that their vendors use the new model notices. Lastly, for the duration of the Outbreak Period, we recommend that COBRA notices reflect the changes to the COBRA-related deadlines during the Outbreak Period, which are discussed below.

## ***COVID-19 Extension of Certain COBRA Deadlines***

To minimize the possibility of individuals losing group health plan benefits because of a failure to comply with existing COBRA deadlines during the COVID-19 pandemic, the DOL and Treasury recently issued guidance requiring employers to disregard the Outbreak Period when determining certain COBRA deadlines that would otherwise fall within the Outbreak Period. The agencies indicated that future guidance may apply different end dates for the Outbreak Period to different parts of the country.

The guidance provided by the agencies specifically addresses extension of the following COBRA-related deadlines during the Outbreak Period:

- **The 60-Day Deadline to Elect COBRA:** The Outbreak Period must be disregarded when determining the 60-day COBRA election period deadline. For example, assume that an employee was terminated and provided with a COBRA election notice on April 1, 2020. If the end of the COVID-19 national emergency is declared on May 31, 2020, the end of the Outbreak Period will be July 30, 2020 (the 60<sup>th</sup> day after the end of the national emergency). The employee would have until September 28, 2020, 60 days after July 30, 2020, to elect COBRA.
- **COBRA Premium Payment Deadlines.** Normally, group health plans must allow at least 45 days for COBRA premiums to be paid after the initial COBRA election and 30 days for each premium payment due thereafter. The new guidance provides that the Outbreak Period must be disregarded when applying COBRA premium payment deadlines. For example, if a COBRA beneficiary had consistently paid their COBRA premiums on time but then did not make the March payment or any subsequent payments during the Outbreak Period, and the Outbreak Period ends on July 29, 2020, all past-due premiums would need to be paid by August 28, 2020, which is 30 days after the end of the Outbreak Period. No changes have been made to the current retroactive termination rules, which means group health plan coverage can be retroactively terminated if COBRA premiums are not received by the extended deadline.
- **Employee Notification to Employers of Certain COBRA Qualifying Events.** The Outbreak Period must be disregarded when calculating the 60-day deadline for individuals to notify the employer of a divorce, legal separation, a child's loss of dependent status under the group health plan or the determination of a disability.

Employers should review their COBRA records (or work with third-party COBRA administrators) to determine whether any of these COBRA-related deadlines were enforced on or after March 1, 2020 without disregarding the Outbreak Period, and if so, what remedial action should be taken for affected individuals.

Additional information about the impact of the COVID-19 pandemic on employee benefits is available in our prior [COVID-19 newsletters](#).



If you have questions about how these developments impact your COBRA obligations, please contact any member of our Employee Benefits and Executive Compensation Group.

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