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Employee Benefits Update

May 2020

The Impact of the COVID-19 Pandemic on Your Employee Benefit Plans: Part 5 The Government Issues Initial Regulatory Relief and Guidance

Executive Summary

Following the enactment of the CARES Act, and given the ongoing COVID-19 pandemic, the Department of Labor (“DOL”), the Department of Treasury (“Treasury”), the Internal Revenue Service (the “IRS”), and the Department of Health and Human Services provided welcome regulatory relief to benefit plans and participants in the following guidance that was issued recently:

- EBSA Disaster Relief Notice 2020-01, issued on April 28, 2020 (the “EBSA Notice 2020-01”);
- A final rule and joint notice issued by the DOL, the Treasury, and the IRS on April 28, 2020 (the “Joint Notice”);
- A list of FAQs on COVID-19 for Participants and Benefits Coverage issued by the DOL on April 28, 2020 (the “DOL FAQs”); and
- A series of FAQs on the special CARES Act distribution and loan provisions for eligible retirement plans issued by the IRS on May 4, 2020 (the “IRS FAQs”).

This guidance provides participants and plan sponsors with additional flexibility during the COVID-19 pandemic to comply with otherwise applicable deadlines and procedures, and answers some key questions about health plan coverage, retirement plan loans, and retirement plan distributions. Plan sponsors should work closely with the third-party administrators of their benefit plans to ensure their good faith compliance with these new standards.



I. ***EBSA Notice 2020-01***

EBSA Notice 2020-01 provides good faith relief from certain deadlines that would otherwise affect the operations of retirement, health and welfare benefit plans during the COVID-19 “Outbreak Period”, which is defined to be the period that started March 1, 2020 and that ends 60 days following the announcement of the end of the COVID-19 national emergency. Specifically, EBSA Notice 2020-01 provides good faith relief for deadlines during the Outbreak Period in four critical areas that affect benefit plan administration and operations:

Participant Disclosures and Notices

During the Outbreak Period, plan sponsors and fiduciaries are relieved from complying with strict deadlines for furnishing certain required notices or disclosures to plan participants, beneficiaries and other persons, as long as they act in good faith to furnish any required notice or disclosure as soon as administratively practicable. The notices for which the relief may apply include, but are not limited to:

- Annual funding notices;
- Summary annual reports;
- Summary plan descriptions and summaries of material modifications;
- Investment mapping notices;
- Qualified domestic relations order notices;
- Notices of adverse benefit determinations and appeals; and
- Blackout notices. Furthermore, advance blackout notices for individual account plans, like 401(k) and 403(b) plans, will not be required during the Outbreak Period, and the DOL will not enforce the otherwise applicable requirement to make a written determination that the COVID-19 emergency qualifies as a circumstance beyond the plan's reasonable control that prevents the plan from issuing a blackout notice.

In addition to acting in good faith to provide these notices and disclosures as soon as administratively practicable, plan sponsors may also use electronic means of communication for individuals that are reasonably believed to have effective access to electronic media (*e.g.*, emails, text messages, continuous access websites). This permissive approach to electronic disclosures appears to signal that the DOL is finalizing its much-awaited regulations permitting the electronic disclosure of all retirement plan information.

Retirement Plan Loans, Distributions and Related Retroactive Amendments

EBSA Notice 2020-01 also provides plan fiduciaries with relief in connection with authorizing retirement plan loans and distributions and adopting related retroactive amendments. If a retirement plan does not follow verification requirements under the terms of its plan document for plan loans or distributions, the DOL will not treat it as a failure if (i) it is solely attributable to the COVID-19 outbreak; (ii) the plan administrator makes a good faith, diligent effort to comply with those requirements; and (iii) the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling documentation, as soon as practicable. It is important to note that this relief is only provided by the DOL and does not govern any issues that may fall under the jurisdiction of the IRS.

In addition, as noted in our prior [COVID-19 newsletters](#), the CARES Act permits retirement plans to extend loan repayments for outstanding participant loans to a “qualified individual” for up to one year, with subsequent reamortization, and to increase the permissible limits for new retirement plan loans that are made before September 22, 2020.

In connection with these changes, the DOL will not treat any person as having violated plan loan requirements and limitations under Title I of ERISA solely because: (1) such person made a plan loan to a qualified individual under the CARES Act and applicable IRS guidance; or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act and applicable IRS guidance. Furthermore, the Notice confirms that EBSA will treat a plan that offers participant loans authorized under the CARES Act as having complied with the terms of an amendment to implement such loans, provided that the amendment is adopted by the last day of the first plan year beginning on or after January 1, 2022 (or such later date as permitted by the Treasury), and the terms of the amendment comply with the CARES Act.

Timing of when Participant Contributions Must be Remitted to Benefit Plan

EBSA Notice 2020-01 states that the DOL will not take enforcement action against plan sponsors and fiduciaries who experience delays in depositing participant contributions and loan repayments as a result of the COVID-19 pandemic, provided that any delay is temporary and the plan administrator continues to satisfy its ERISA fiduciary obligation to act reasonably, prudently, and in the best interest of plan participants to deposit such payments as soon as is reasonably practicable.

Despite this non-enforcement policy, we urge caution here, for several reasons. First, the DOL historically has taken the position that given the wide use of payroll-related technology by employers of all sizes, most employers should be able to remit participant contributions within a few business days; consequently, we anticipate that the employer will face a high burden in order to provide that delays were due to the COVID-19 pandemic. Secondly, the relief provided in the EBSA Notice extends only to participant contributions, which means that employers must continue to make any required employer contributions on a timely basis, in accordance with the terms of their plans (which may require contributions every payroll period) and consistent with their past administrative practices.

Form 5500 and M-1 Filing Deadlines

The due date to file a Form 5500 otherwise due between April 1, 2020 and July 14, 2020, has been extended to July 15, 2020.

To date, however, the DOL has not extended the due date for 2019 Form 5500 filings for calendar year plans. That means that for calendar year plans, the normal Form 5500 due date remains July 31, 2020 with an option to extend the Form 5500 deadline until October 15th by filing an IRS Form 5558 before the plan's normal deadline.

Form M-1 filings required for multiple employer welfare arrangements (MEWAs) are provided relief for the same period of time as the Form 5500 relief.

II. *Joint Notice*

The Joint Notice extends key deadlines in three primary areas involving benefit plan operations:

Claims Procedures

All ERISA-covered benefit plans, whether retirement plans, health plans or welfare plans, are required to maintain reasonable claims procedures that provide participants with a reasonable opportunity for a full and fair review of denied claims. These requirements include certain timeframes during which certain actions must take place. To provide additional flexibility and protection to plan participants, the Joint Notice provides that all ERISA-covered plans must disregard the Outbreak Period for all plan participants, beneficiaries and claimants in determining (1) the date within which an individual must file a claim for benefits under the plan's claims procedures; (2) the date within which a claimant must file an appeal of an adverse benefit determination, including a request for an external review, under the plan's claims procedures; and (3) the date by which claimants may provide additional information upon a finding that the request for an external review was not complete. This relief will require plan sponsors to work with their third-party claims administrators to ensure that they are complying with the additional relief provided to participants and not denying benefit claims prematurely.

HIPAA Special Enrollment Periods

The Joint Notice also extends the HIPAA special enrollment window under group health plans for employees who gain a dependent by birth, marriage, adoption, or placement for adoption, and for employees, spouses, and dependents who lose coverage under another group health plan. Normally, individuals have 30 days (in some cases 60 days) after the occurrence of the HIPAA special enrollment event to request enrollment in a health plan outside of the regular open enrollment period. Those deadlines are now tolled during the Outbreak Period.

COBRA Continuation Coverage

Lastly, the Joint Notice extends certain time frames regarding continuation of group health plan coverage under COBRA, to provide participants with additional time to elect and pay for such coverage. A summary of those changes and other recent developments affecting COBRA rights and obligations is available in our Employee Benefits Update available [here](#).

III. *The DOL FAQs*

The DOL issued FAQs that provide additional helpful information for participants to better understand how their rights are affected by the COVID-19 pandemic, which are available [here](#).

Highlights of the DOL’s FAQs include the following:

- How health plan coverage, and premium payments, during the COVID-19 pandemic may be handled for individuals whose place of employment has temporarily closed;
- The ability of employers to change or terminate health benefits or retirement plan benefits in certain circumstances, provided that they have adequately reserved their rights to do so and provide any required notices;
- How plan participants, including pension plan retirees, should obtain information about their plan benefits;
- An explanation of the relaxed participant loan and retirement plan distribution rules under the CARES Act; and
- Information that certain plan disclosures may be delayed by the COVID-19 pandemic.

IV. *The IRS FAQs*

The IRS FAQs provide clarifying information on the special coronavirus-related distributions and expanded loan options for retirement plans permitted under the CARES Act. Highlights of the IRS FAQs, which are available [here](#), include the following:

- Explaining the definition of “qualified individuals” under the CARES Act for purposes of receiving the coronavirus-related distributions and expanded loan options. Of particular note is that, at this time, the IRS FAQs do not expand the definition of a “qualified individual” to include a participant’s spouse who may have experienced adverse financial consequences because they have been laid off, furloughed, or experienced a reduction in hours, nor does the definition of a “qualified individual” include a person whose pay has been reduced as a cost-cutting strategy but whose hours remain the same. However, the IRS and Treasury do reserve the right to further expand the list of factors taken into account in order to determine whether a person is a “qualified individual” for purposes of these distribution and loan rights;
- Clarifying how the tax treatment, tax reporting and repayment options of coronavirus-related distributions will be implemented;
- Providing that an individual can characterize a distribution that they receive as a “coronavirus-related distribution”, even if their employer does not add this feature to their retirement plan;
- Affirming that a plan administrator can rely on an individual’s certification that they are eligible to receive a coronavirus-related distribution unless they have “actual knowledge” to the contrary; and
- Clarifying that it is optional for employers to adopt some, none, or all of the CARES Act distribution and expanded loan provisions.



To discuss the impact of the recent regulatory guidance on your employee benefit plans, please contact any member of our Employee Benefits and Executive Compensation Group below.

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