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Agencies Provide COVID-19 Regulatory Relief for Employee Benefit Plans

by Martha L. Sewell

The Department of Labor in connection with other agencies (the "Agencies") have released guidance delaying and extending many common deadlines for employee benefit plans. In EBSA Disaster Relief Notice 2020-01, the DOL extended deadlines and provided other relief for employee benefits plans subject to Title I of ERISA. Further, the Department of Labor and the Department of the Treasury issued a joint notice to be published in the May 4, 2020 Federal Register extending certain deadlines for group health plans and deadlines relating to claims and appeals for all plans. The relief granted is similar to that provided in connection with prior natural disasters, like Hurricanes Katrina and Maria. The following summarizes this new relief (referred to as the "Relief Guidance") as it affects employee benefit plans under ERISA.

Relief Affecting Health and Welfare Plans

The Relief Guidance announces an extension of the deadline for individuals to take certain actions with respect to health and welfare plans. The Relief Guidance requires health and welfare plans to disregard the period from March 1, 2020 until 60 days after the announced end of the COVID-19 National Emergency or such other date announced by the Agencies in a future notice (the "Outbreak Period") when determining any of the following time periods and dates:

- The 30-day (or 60-day) period to request special enrollment under HIPAA;
- The 60-day period to elect COBRA continuation coverage;
- The date for making premium payments for COBRA continuation coverage;
- The date by which a qualified beneficiary must notify the plan of a qualifying event or a determination of disability for purposes of COBRA continuation coverage; and
- The deadline for a participant to file a request for external review with a plan that uses the Federal external review process and to submit information to perfect such a request.

The notice also provides that group health plans shall disregard the Outbreak Period when calculating the date for providing a COBRA election notice to qualified beneficiaries.

The Agencies acknowledge that there could be different Outbreak Period end dates in different parts of the country. For example, the national health emergency may continue longer in states like New York and New Jersey where the COVID-19 cases are more significant. If that occurs, the Agencies intend to issue additional guidance regarding the relief announced in the notice. If that guidance results in

employers and third party administrators having to administer different deadlines based on where an employee lives or works, this could be challenging to administer.

The Relief Guidance establishes the minimum time period that must be given for taking action, but does not prevent a plan from giving individuals a longer period of time. Plan administrators may find it easier administratively to apply a uniform period of time that begins at the end of the Outbreak Period (which may be longer than what is legally required) instead of trying to determine how much time each individual has based on any time that elapsed prior to March 1, 2020.

The Relief Guidance does not require notice to plan participants and beneficiaries regarding the suspension of the applicable time periods. However, plan administrators and COBRA administrators are required to provide some type of notice advising affected individuals of this relief in order to satisfy their fiduciary duties as well as to mitigate liability. In this regard, because the Relief Guidance extends time periods that are administered by both employers and COBRA administrators, both employers and COBRA administrators will be required to notify affected employees and qualified beneficiaries. Employers should also confirm that their third party administrators are prepared to implement these changes. The Relief Guidance relaxes the communication standards generally by allowing plan administrators and COBRA administrators to act in "good faith" in communicating with participants and beneficiaries. (See, ERISA Notices and Documents below for additional information.)

Relief Affecting Retirement Plans

Loan and Distribution Verification Procedures. In the Relief Guidance, the DOL indicates that an employee pension benefit plan will not be treated as failing to follow the terms of the plan for loans or distributions if (1) the failure is solely related to the COVID-19 outbreak, (2) the plan administrator makes a good faith effort to comply, and (3) the plan administrator makes a reasonable attempt to correct any deficiencies as soon as administratively practicable. The Relief Guidance notes that the above relaxed requirements are limited to those applicable under ERISA Title I, and do not include spousal consent or other requirements under the jurisdiction of the Internal Revenue Service.

CARES Act Participant Loans. The CARES Act temporarily increases the maximum plan loan amounts to the lesser of $100,000 or 100% of the employee's vested account balance and allows for a temporary delay in loan repayment. The Relief Guidance provides that the DOL will not treat any person as having violated ERISA Title I, including the adequate security and the reasonably equivalent basis requirements under ERISA Section 408(b)(1), because a participant takes a CARES Act loan or delays loan repayment.

Plan Contributions and Loan Repayments. DOL regulations generally require employers to contribute participant contributions and loan repayments to the plan trust as soon as the amounts can reasonably be segregated from the employer's general assets. During the Outbreak Period, the Relief Guidance provides that the DOL will not take enforcement action due to a temporary delay in forwarding such contributions and repayments, as long as the delay is related solely to the pandemic.

Blackout Notices. DOL regulations provide an exception to the blackout notice requirements when the inability to provide advance notice is due to events beyond the reasonable control of the plan and a fiduciary makes this determination in writing. The Relief Guidance provides that pandemics are by definition beyond the control of the plan administrator and a written determination by the plan administrator is not required. Further, the relief provided below under the section "*ERISA Notices and Documents*" applies to blackout notices, including those that are required to be provided after the blackout begins.

Relief Affecting All ERISA Employee Benefit Plans

Claims Procedures. The Relief Guidance provides that all ERISA employee benefit plans shall disregard the Outbreak Period when determining the date within which an individual may file a benefit claim or an appeal of an adverse benefit determination under the plan's claims procedures. This includes a runout period under a health FSA or a health reimbursement arrangement, if that runout period ends after March 1, 2020. For example, a runout period under a health FSA for the 2019 calendar year that ended on March 30, 2020 is extended by the Relief Guidance – and now ends 30 days after the end of the Outbreak Period.

Claim Processing. While the Relief Guidance provides additional time for participants to file claims and appeals, the Relief Guidance does not automatically grant claims administrators and insurers additional time to process filed claims and appeals. However, the DOL indicates that its approach to enforcement will include grace periods and other relief, when appropriate, for situations including when physical disruption to a plan or service provider's place of business makes compliance or decisions impossible.

Form 5500 Filings. No new relief is provided with respect to the filing deadline for Form 5500s, but the DOL notes that it agrees with the relief already extended by the IRS pursuant to Notice 2020-23 (which extends the Form 5500 filing deadline only for certain fiscal-year plans). Form M-1 is eligible for the same filing deadline extension that applies to Form 5500s.

ERISA Notices or Documents. The Relief Guidance provides that a plan or fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure or document that must be furnished during the Outbreak Period. However, such relief requires the plan or fiduciary to act in good faith and furnish the notice, disclosure or document as soon as administratively practicable. Acting in good faith includes the use of electronic communications as long as the plan or fiduciary believes that the affected participants have effective access to such communication method – a standard that is considerably lower than the safe harbor in existing DOL regulations. Documents that are included in this relief include SPDs, SMMs and blackout notices that would be required to be furnished during the affected period. The Relief Guidance does not specifically apply to notices that are not under the DOL's interpretive and regulatory authority, such as safe harbor plan notices.

General Fiduciary Compliance. The Relief Guidance instructs plan administrators generally to make reasonable accommodations to prevent participants or beneficiaries from losing benefits or having benefits delayed, particularly in the case of pre-established timelines. The DOL also announced that as

an enforcement matter, it will emphasize compliance assistance and provide relief where appropriate. This portion of the Relief Guidance was "coordinated with and reviewed by" the Treasury/IRS and Department of Health and Human Services, which advised the DOL that "they concur with relief specified in this notice in the application of laws under their jurisdiction." Accordingly, although this enforcement policy is specific to the DOL's enforcement policies, there is an implication that, at least in some contexts, other agencies will take a similar approach to enforcement.