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ALERT

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Joint IRS and DOL Guidance Tolls Certain Employee Benefit Plan Notice and Election Deadlines Until End of COVID-19 National Emergency

Sally Lockwood Church | Dasha G. Brockmeyer

The Department of Labor (DOL) and Internal Revenue Service (IRS) have jointly issued guidance in the form of final rules and frequently asked questions (FAQ) providing relief from a number of deadlines imposed on participants and beneficiaries under employer-sponsored welfare and retirement plans. The guidance also states that the Department of Health and Human Services will adopt a temporary non-enforcement policy for similar deadlines imposed to non-federal governmental group health plans under the Public Health Service Act.

The rules toll certain deadlines related to COBRA, HIPAA special enrollment, and benefit claims for a period beginning on the March 1, 2020 declaration of the COVID-19 National Emergency until 60 days after the President declares the National Emergency has ended. This period is called the "Outbreak Period" in the rules. Undoubtedly, plan sponsors and administrators will have additional questions about how the rules and FAQs apply to specific facts and circumstances.

During the Outbreak Period, plan administrators are required to disregard the deadlines that would otherwise be imposed on participants and beneficiaries under the following circumstances:

- The 30-day (or, if applicable the 60-day) period to request a HIPAA special enrollment
- The 60-day period to elect COBRA
- The due date for COBRA premium payments
- The date a COBRA qualified beneficiary must provide notice of a qualifying event or a disability determination
- The date a claimant is required to file a claim for plan benefits
- The date the claimant is required to file an appeal of an adverse determination of a claim for benefits
- The date by which a claimant is required to file a request for an external review

Of most importance to employers during the COVID-19 crisis is the applicability of these rules to COBRA. If a reduction in hours, furlough or layoff results in a loss of employer-provided health care coverage, there is a COBRA "qualified event." A qualified event triggers a time period for the issuance of COBRA notices and a corresponding deadline for an employee (or former employee) and any covered dependents (each a "qualified beneficiary") to elect COBRA coverage. Under the existing COBRA rules, plan administrators are required to provide a 30-day grace period for non-payment of premiums, and COBRA coverage can be terminated for non-payment of premiums after the grace period.

As a result of the joint agency issued rules, plan administrators cannot terminate COBRA coverage for non-payment of premiums during the Outbreak Period. This puts both health care plans and employees in an unfortunate position. Plans will need to potentially provide COBRA coverage to qualified beneficiaries without receiving premium payments; and qualified beneficiaries who elect COBRA coverage after the Outbreak Period must pay all COBRA premiums for retroactive coverage. The failure to make timely COBRA payments after the Outbreak Period could significantly impact qualified beneficiaries as coverage could be retroactively terminated back to the qualified event. An advanced notice to participants explaining the consequences of non-payment may be necessary, although the new model notices do not contain such language.

The rules contain a number of examples on the application of these rules to COBRA. Assume an employee was furloughed on March 31, 2020. Typically, this employee would be required to make the COBRA election by May 30, 2020. As a result of this guidance, the employee's COBRA election period would not begin until after the end of the Outbreak Period. If the National Emergency lasts through May 31, 2020, the employee will have 60 days after July 30, 2020 to make the COBRA election. This means that COBRA coverage will take effect on and after the date the employer-provided coverage was lost, if the employee elects COBRA by September 28, 2020. While the employee typically has to make their first COBRA payment within 45 days of their COBRA election, the deadline for the first COBRA payment is delayed as well. In this example, if the employee elects COBRA continuation coverage on September 28, 2020, the first COBRA payment would not be due until November 12, 2020 but would include all premium payments for COBRA since April 1, 2020.

In separate guidance, DOL, in concurrence with the IRS, provided relief to employers for failure to provide notices, disclosures or other documents required by Title I of Employee Retirement Income Security Act (ERISA) during the Outbreak Period, as long as a good faith effort (including electronic means of communicating these disclosures to participants and beneficiaries) is made to distribute the notice or disclosure as soon as administrative practicable. In addition to the Final Rules and FAQ, new model COBRA notices were issued but have not been modified to reflect the operational changes during the Outbreak Period.

The DOL will also not pursue any action against the employer if the employer fails to timely forward participant contributions or loan repayments as a result of the pandemic, as long as the employer otherwise acts prudently and in the best interest of participants. Nor will the DOL treat the plan as failing to comply with the loan rules, if the plan fails to follow the verification requirements under its loan policy consistent with ERISA. However, in order to avoid prohibited transactions, IRS procedural requirements for loans must still be followed.

This alert was written by Sally Lockwood Church and Dasha G. Brockmeyer, members of the Firm's Employee Benefits Practice. Sally can be reached at (412) 209-2529 or at Sally.Church@saul.com. Dasha can be reached at (412) 209-2538 or at Dasha.Brockmeyer@saul.com. This publication has been prepared for information purposes only.

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