

Employee Benefit Plan Review

A Return to “Normal” – Actions for Benefit Plan Sponsors to Take to Prepare for the End of the COVID-19 National Emergencies

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The Biden Administration has announced that the declared COVID-19 national emergency and public health emergency will end on May 11, 2023. This announcement signals a near end to the extended deadlines currently in place for ERISA-governed plans and certain mandates related to coronavirus-related care that have been in place since 2020. Sponsors of employee benefit plans will need to start preparing now for these upcoming changes.

THE END OF THE “OUTBREAK PERIOD”

In 2020, the U.S. Departments of Labor and Treasury issued COVID-19-related relief, which temporarily extended certain plan deadlines, including the deadlines for requesting HIPAA special enrollment, electing COBRA continuation coverage, paying COBRA premiums, filing claims and appeals, and requesting an external review. The extended plan deadlines apply for the duration of the Outbreak Period, which is a defined period that began on March 1, 2020 (the start of the COVID-19 national emergency) and ends 60 days after the end of the national emergency. With the Biden Administration’s announced intent to end the national emergency period on May 11,

2023, the Outbreak Period will end on July 10, 2023. This means that employee benefit plans that are subject to ERISA and/or the Internal Revenue Code are required to toll certain deadlines occurring during the Outbreak Period (March 1, 2020, through July 10, 2023).

The following is a summary of the deadlines that the end of the Outbreak Period will impact and the steps that plan sponsors and administrators should take to prepare.

However, the tolling period ends the earlier of (1) one year from the date the individual first experienced an event that makes him or her eligible for relief, or (2) 60 calendar days after the announced end of the national emergency (i.e., July 10, 2023).

Once the Outbreak Period officially ends on July 10, 2023, employee benefit plans can no longer toll deadlines for events that occur after July 10, 2023, and the deadlines discussed

below will revert to their pre-pandemic timelines.

The following is a summary of the deadlines that the end of the Outbreak Period will impact and the steps that plan sponsors and administrators should take to prepare. Keep in mind that plan sponsors and administrators will need to assess each affected individual to determine whether the tolling deadline ends one year from the date the individual was first eligible for relief or 60 days after the announced end of the COVID-19 national emergency (i.e., July 10, 2023).

COBRA DEADLINES

During the national emergency, employee benefit plans were required to toll the following COBRA deadlines during the Outbreak Period:

- The 60-day deadline for qualified beneficiaries to elect COBRA continuation coverage.
- The 45-day (for the initial payment) and 30-day (for subsequent payments) deadlines for qualified beneficiaries to pay COBRA premiums.
- The 60-day deadline for individuals to notify the plan of a COBRA-qualifying event or a new Social Security disability determination.
- The deadline for plan sponsors and administrators to provide a COBRA election or disability extension notice (typically 30 days for the employer to provide notice to the plan administrator and 14 days for the plan administrator to provide the election notice to the qualified beneficiary).

With the declared end to the national emergency, these COBRA deadlines will return to their pre-pandemic timelines after July 10, 2023. This means COBRA-qualified beneficiaries must make their COBRA election within 60 days of receiving the election notice and they must pay the first premium within

45 days, or the plan is permitted to retroactively terminate coverage back to the date of the qualifying event. For qualified beneficiaries who delayed premium payments during the Outbreak Period, the end of the Outbreak Period may mean having to pay several months of retroactive premiums in order to keep their COBRA coverage. In addition, if a qualified beneficiary experiences a second qualifying event, or is eligible for the disability extension, they must notify the plan within 60 days after the second qualifying event or notice of the disability determination, as applicable.

With the end to the national emergency, the 30- and 60-day timeframes for HIPAA special enrollment requests will once again apply after July 10, 2023.

Example

A qualified beneficiary is provided a COBRA election notice on March 1, 2023. The 60-day election period begins the earlier of (1) one year from the date the qualified beneficiary received the COBRA election notice (i.e., February 29, 2024), or (2) 60 days following the declared end of the COVID-19 national emergency (i.e., July 10, 2023). As such, the qualified beneficiary has until September 8, 2023 (i.e., 60 days after the end of the Outbreak Period on July 10, 2023) to make their COBRA election.

Next Steps

- Amend the plan document(s), summary plan description(s) and COBRA notice(s), as necessary, to reflect the pre-pandemic election, notice and payment

timelines in effect after July 10, 2023.

- Contact the plan's COBRA administrator to ensure that procedures and systems will be updated to reflect the pre-pandemic election and notice timelines in effect after July 10, 2023.
- Ensure that the COBRA administrator or plan administrator, as applicable, is prepared to track the various deadlines for affected qualified beneficiaries whose deadlines for elections, notices or payments were tolled during the Outbreak Period.
- Communicate with all affected qualified beneficiaries specifically and with plan participants more broadly about these upcoming deadline changes.

HIPAA SPECIAL ENROLLMENT DEADLINES

During the national emergency, employee benefit plans were required to toll the following HIPAA special election periods during the Outbreak Period:

- The 30-day deadline to request enrollment in a health plan upon experiencing a loss of eligibility for group health coverage or individual health insurance coverage, or acquiring a new spouse or dependent by marriage, birth, adoption, or placement for adoption.
- The 60-day deadline to request enrollment in a health plan upon experiencing a loss of Medicaid/CHIP eligibility or becoming eligible for a state premium assistance subsidy under Medicaid/CHIP.

With the end to the national emergency, the 30- and 60-day timeframes for HIPAA special enrollment requests will once again apply after July 10, 2023. This means that plan administrators receiving a late notice of a HIPAA special enrollment

request after the end of the Outbreak Period (i.e., July 10, 2023) are not required to honor these late requests.

Example

A plan participant gives birth to a child on March 11, 2023, and would like to enroll the child in health coverage. Due to the COVID-19 relief, the participant may exercise the special enrollment rights for the child up to 30 days after the earlier of (1) one year from the date from the date of the HIPAA special enrollment event (i.e., March 10, 2024), or (2) 60 days following the declared end of the COVID-19 national emergency (i.e., July 10, 2023). As such, the participant has until August 9, 2023 (i.e., 30 days after the end of the Outbreak Period on July 10, 2023) to request special enrollment.

Next Steps

- Amend the plan document(s), summary plan description(s) and any related notices, as necessary, to reflect the pre-pandemic timelines in effect after July 10, 2023.
- Ensure the plan administrator has procedures and systems updated to reflect the pre-pandemic timelines in effect after July 10, 2023.
- Communicate with all affected participants specifically and with plan participants more broadly about the upcoming deadline changes.

CLAIMS AND APPEALS DEADLINES

During the national emergency, employee benefit plans were required to toll the following claims, appeals and external review deadlines under ERISA through the Outbreak Period:

- The deadline to file a benefit claim under an ERISA plan’s claims procedures.
- The deadline to file an appeal of the plan’s adverse benefit determination.

- The deadline to request an external review.
- The deadline to submit additional information related to the external review request.

With the declared end of the national emergency, these ERISA deadlines will return to their pre-pandemic timelines after July 10, 2023.

Example

On April 10, 2023, a participant receives an adverse determination on a claim under his employer’s 401(k) plan. Under the terms of the 401(k) plan, the participant has 60 days to appeal an adverse determination. Due to the COVID-19 relief, the participant can delay his appeal up to 60 days after the earlier of (1) one year from the date of the adverse determination (i.e., April 9, 2024), or (2) 60 days following the declared end of the COVID-19 national emergency (i.e., July 10, 2023). As such, the participant has until September 8, 2023 (i.e., 60 days after the termination of the Outbreak Period on July 10, 2023) to file an appeal.

Next Steps

- Amend the plan document(s) and summary plan description(s), as necessary, to reflect the pre-pandemic timelines in effect after July 10, 2023.
- Confirm that the claim administrator’s procedures and systems will be updated to reflect the pre-pandemic timelines in effect after July 10, 2023.
- Communicate with all affected participants of beneficiaries specifically and with plan participants more broadly about these upcoming deadline changes.

THE END OF THE “PUBLIC HEALTH EMERGENCY”

During the COVID-19 pandemic, the Secretary of HHS established a public health emergency, which was extended multiple times in

90-day increments. With the Biden Administration’s announcement that the public health emergency will end May 11, 2023, certain mandated relief for coronavirus-related care will also end on that date.

COVID-19 Testing and Vaccines

Under the Families First Coronavirus Relief Act (FFCRA), employer-sponsored group health plans, including insured, self-funded and grandfathered plans, were required to cover COVID-19 testing expenses without any cost sharing (i.e., no co-pays, coinsurance or other out-of-pocket expenses) during the public health emergency.

In addition, the CARES Act expanded this relief to include free coverage of preventive services and vaccines for the coronavirus, including services provided by out-of-network providers, without any cost sharing. This was further expanded on January 15, 2022, to over-the-counter COVID-19 tests.

With the end of the public health emergency, these free coverage mandates will no longer apply effective May 11, 2023. Plan sponsors will need to evaluate whether the group health plan will continue to offer these benefits with or without cost sharing and should amend the plan accordingly, if needed. Plan sponsors should keep in mind that the CARES Act also requires non-grandfathered health plans to offer in-network COVID-19 vaccinations without any participant cost-sharing as part of the ACA’s preventive services mandate, which applies indefinitely to in-network immunizations. These mandates are not tied to the public health emergency and will continue even after May 11, 2023.

Pre-Deductible COVID-19 Diagnosis and Treatment

During the pandemic, the IRS issued guidance under Notice 2020-15 that allowed HDHP plans to provide “first dollar coverage” for diagnosis and treatment of COVID-19 prior to the deductible

being satisfied without jeopardizing HSA eligibility. The IRS stated relief will last “until further guidance is issued.” Without further guidance, it is unclear whether this relief will end on May 11, 2023, with the end to the public health emergency or some other date. The IRS is expected to issue further guidance to clarify this issue.

Note, however, the end of the public health emergency does not impact previously issued legislation under the 2023 Consolidated Appropriation Act that provided a two-year extension on relief allowing HDHPs to cover telehealth and remote care services from a stand-alone vendor outside of the HDHP on a pre-deductible basis without risking HSA eligibility. This relief for HDHPs will expire on December 31, 2024 for calendar year plans and later for non-calendar year plans.

Employee Assistance Programs

During the national emergency and public health emergency, some

plan sponsors expanded their employee assistance program (EAPs) to offer COVID-19 diagnoses, testing and preventive care. Regulators permitted these EAPs to be temporarily treated as an “excepted benefit” (i.e., that it does not provide significant benefits in the nature of medical care) and, therefore, not subject to certain more stringent legal requirements under ERISA, COBRA, the Affordable Care Act, the Mental Health Parity rules and HIPAA, which normally apply to EAPs offering medical care. With the end to national emergency and public health emergency, plan sponsors with expanded EAPs offering COVID-19 diagnoses, testing and preventive care will need to comply with the laws that apply to all group health plans providing medical care. If plan sponsors offered these expanded EAP benefits, plan sponsors will need to evaluate whether these benefits will continue after May 11, 2023, and, if so, will need to ensure that they comply with applicable laws.¹ 🌐

NOTE

1. As of the original drafting of this article, it was unclear whether the National Emergency period would end on May 11, 2023. On April 10, 2023, however, President Biden signed into law H.J. Res. 7, which terminates the “National Emergencies Act” declaration concerning COVID-19 enacted on March 13, 2020, and establishes that the end date for the National Emergency is effective April 10, 2023, and that the end date of the Public Health Emergency is effective May 11, 2023. In addition, the Department of Labor has now published FAQs titled “Frequently Asked Questions about Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58,” which are intended to further assist plan sponsors and administrators with the implementation of the end of these emergency periods.

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