

NEWLY ANNOUNCED DEADLINE EXTENSIONS AND OTHER DISASTER RELIEF FOR EMPLOYEE BENEFIT PLANS

Hodgson Russ Employee Benefits Alert
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The federal agencies charged with broad oversight and enforcement authority respecting employer-sponsored benefit plans have issued joint notices announcing the extension of numerous plan-related deadlines during the COVID-19 outbreak. The first, EBSA Disaster Relief Notice 2020-01, was issued on April 28, 2020 by the U.S. Department of Labor (“DOL”) in coordination with the Department of Treasury/Internal Revenue Service (“IRS”) and the Department of Health and Human Services (“HHS”), outlining relief available for employers and plan sponsors regarding multiple administrative compliance deadlines under ERISA. The second, a Final Rule jointly issued by the DOL and IRS on April 30, 2020 gives employers and participants additional time to satisfy deadlines concerning COBRA continuation coverage, HIPAA special enrollment periods, and internal and external claims review procedures.

General ERISA Employee Benefit Plan Deadlines Under Notice 2020-01

The relief offered pursuant to Notice 2020-01 is available during an “Outbreak Period” commencing March 1, 2020 and continuing through the date that is 60 days after the announced end of the COVID-19 national emergency, or another date subsequently announced by the DOL. The extensions provided in Notice 2020-01 apply to participant disclosures and other documents required to be provided under ERISA. In general, a pension or welfare benefit plan or fiduciary acting in good faith may provide a required notice, disclosure or document “as soon as administratively practicable under the circumstances.” This standard can be satisfied through the electronic transmission of such disclosures and documents to plan participants, provided the plan fiduciary reasonably believes the individual has the ability to access such electronic communications, including email, text messages or posting to a website. HHS will extend similar relief to non-ERISA governmental plans.

Form 5500 and Form M-1 Filing Deadlines. Notice 2020-01 confirms that the Form 5500 deadlines for pension and welfare benefit plans are subject to the relief announced under recent IRS guidance. In general, the filing deadline for Form 5500s and other tax filings due between April 1 and July 14, 2020 has been extended until July 15, 2020. Calendar year plans wishing to file after the regular July 31 due date must file Form 5558 to request an extension. Multiple Employer Welfare

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Arrangements (“MEWAs”) required to file Form M-1 will have similar relief from the filing deadlines, that is, until July 15, 2020.

Retirement Plan Specific Relief/Extensions Under Notice 2020-01

Plan Loans and Distributions – Verification Procedures. If a retirement plan administrator fails to follow procedural requirements for plan loans or distributions imposed by the terms of the plan, the DOL will not treat it as a failure if:

- The failure is solely attributable to the COVID-19 outbreak;
- The administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
- The administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

The relief only applies to verification procedures imposed by plan terms that are ERISA required and are within the interpretive and regulatory authority of the DOL. The relief, for example, does not apply to spousal consent requirements or other regulatory/statutory requirements that are under the jurisdiction of the Treasury Department or the IRS.

Plan Loans – CARES Act Loan Relief. During the 180-day period beginning on March 27, 2020, the CARES Act permits qualified retirement plans that offer participant loans to grant loans to certain qualified individuals under temporarily modified Code limits in an amount up to the lesser of \$100,000 (normally \$50,000) or 100% (normally 50%) of the participant’s nonforfeitable accrued plan benefit. And for qualified individuals who have outstanding plan loans from qualified retirement plans, the CARES Act permits plans to delay for up to one year the due date of any repayments otherwise payable during the period beginning on March 27, 2020 and ending on December 31, 2020. The DOL has advised the IRS that it will not treat any person as having violated certain ERISA requirements, including the adequate security and reasonably equivalent basis requirements, solely because: (1) a plan loan is made to a qualified individual during the loan relief period in compliance with the CARES Act; or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act.

CARES Act Relief for Plan Loans/Distributions – Plan Amendments. If an employer’s retirement plan is amended to provide the relief for plan loans and distributions made available by the CARES Act, the DOL will treat the plan as being operated in accordance with the terms of such amendment prior to its adoption if: (1) the plan is timely amended (generally before the last day of the plan year beginning in 2022), and (2) the amendment otherwise meets the conditions of the CARES Act.

Participant Contributions and Loan Repayments – Deposit Timing. ERISA and DOL guidance prescribe strict rules that establish the time period within which participant contributions and loan repayments must be transmitted to a plan’s trust.

The DOL recognizes that some plan sponsors and service providers may not be able to forward those participant contributions and loan repayments to plan trusts within prescribed timeframes during the Outbreak Period. Accordingly, the DOL announced it will not – solely on the basis of a failure attributable to the COVID-19 outbreak – take enforcement action with respect to a temporary delay in forwarding participant contributions and loan repayments to the plan. Nonetheless, employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.

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Blackout Notice Relief. Generally, a plan administrator is required to provide 30 days' advance notice to participants and beneficiaries whose rights (direct investments, obtain loans, obtain other distributions, etc.) with respect an individual account plan will be temporarily suspended, limited, or restricted by a blackout period. The DOL announced relief generally available under ERISA that provides an exception to the advance notice requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator does apply to blackout notices. Furthermore, a fiduciary need not make a written determination regarding the plan's inability to provide an advance blackout notice because pandemics are by definition beyond a plan administrator's control.

General ERISA Fiduciary Compliance Guidance Under Notice 2020-01

In Notice 2020-01, the DOL acknowledges that affected retirement and welfare plan participants and beneficiaries may encounter problems due to the COVID-19 outbreak. Against the backdrop of the COVID-19 outbreak, the Notice states that the "guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being." Plan fiduciaries are instructed to "make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes." The DOL also describes an approach to enforcement that will emphasize compliance assistance and include grace periods and other relief where appropriate.

Welfare Plan Deadlines Under Joint DOL/IRS Final Rule

The separately issued joint DOL/IRS Final Rule extends multiple deadlines respecting the administration of HIPAA special enrollment periods, COBRA continuation coverage, and internal and external claims review procedures. The proffered relief is intended to mitigate the potential adverse impact of the pandemic on individuals who might suffer a loss or lapse of coverage, or the denial of a claim for benefits due to missing important statutory deadlines. The joint Final Rule states that ERISA-covered employee benefit plans "must disregard" the Outbreak Period for all participants and beneficiaries when determining the following welfare plan deadlines:

HIPAA Special Enrollment. The 30-day period (or 60-day period applicable to CHIP special enrollments) to provide notice of a special enrollment event is extended.

COBRA Election, Payment and Notices. Multiple deadlines for COBRA-related group health plan continuation elections and notifications have been extended, including:

- The 60-day period for electing COBRA continuation coverage;
- The date for making COBRA premium payments (45 days for initial premiums, and 30 days for subsequent premiums);
- The date for individuals to notify the plan of a qualifying event or determination of disability; and
- The deadline for employers to provide COBRA election notices.

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The Final Rule includes a statement by HHS encouraging sponsors of non-federal governmental group health plans to extend similar timeframes and relief consistent with that afforded to ERISA-covered plans.

Claims Procedure Relief Under Joint DOL/IRS Final Rule

Employer-sponsored welfare and retirement plans subject to ERISA or the Code must disregard the Outbreak Period in determining the following claims procedure dates:

- The date within which individuals may file an initial benefit claim under the plan's claims procedure;
- The date within which claimants may file an appeal of an adverse benefit determination under the plan's claims procedure;
- The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination under a group health plan; and
- The date within which a claimant under a group health plan may file information to perfect a request for external review upon a finding that the request was not complete.

For any questions regarding how this guidance affects your employer-sponsored retirement and welfare benefit plans, please contact Peter Bradley (716.848.1446) or Amy Walters (716.848.1481).

Please check our Coronavirus Resource Center or CARES Act page to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.

If you received this alert from a third party or from visiting our website, and would like to be added to our Employee Benefits mailing list, or any other mailing list, please visit us at: <https://forms.hodgsonruss.net/subscription-center-hr.html>

EBSA Disaster Relief Notice 2020-01, "Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak" (April 28, 2020); and Final Rule: Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak, 29 CFR Parts 2560 and 2590, 26 CFR Part 54, 85 Fed. Reg. __ (to be published May 4, 2020).