



IRS Issues Clarification Regarding COBRA Election and Payment Deadline Relief

Introduction

The following general summary is intended to educate employers and plan sponsors on the potential effects of recent government guidance on employee benefit plans. This summary is not and should not be construed as legal or tax advice. The government's guidance is complex and very fact specific. As always, we strongly encourage employers and plan sponsors to consult their own legal or benefits counsel for advice on how this guidance applies to their specific circumstances.

On October 6, 2021, the Internal Revenue Service (IRS) – in coordination with the Department of Labor (DOL) and the Department of Health and Human Services (HHS) (together, the “Agencies”) - has issued Notice 2021-58*, which clarifies the COBRA election and payment deadline relief afforded under the “Joint Notification of Extensions of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak” (the “Final Rule”)† and additional guidance issued by the DOL’s Emergency Relief Notices‡. Moreover, this notice addresses the interaction between the Emergency Relief Notices and COBRA premium assistance available under the American Rescue Plan Act (ARPA)§.

Background

On April 29, 2020, the DOL Employee Benefits Security Administration (EBSA) issued Disaster Relief Notice 2020-01, which provides relief during the “Outbreak Period” (defined as the period beginning March 1, 2020 and ending sixty days after the date on which the President declares the COVID-19 national emergency has ended) for all disclosures and notifications required under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) (except those referenced in the Final Rule) and states that a plan will not be in violation of ERISA as long as these disclosures and notifications are provided “as soon as administratively practicable under the circumstances.”

The Final Rule first provided that all group health plans, disability and other employee welfare plans, and all pension plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) or the Internal Revenue Code (the Code) must disregard the Outbreak Period for

* <https://www.irs.gov/pub/irs-drop/n-21-58.pdf>

† <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>

‡ <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01> and <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01>

§ See our previous compliance alert, [here](#).

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impacted participants and beneficiaries when calculating, among other things, the 60-day election period for electing COBRA coverage and the date by which COBRA premium payments must be made. The Final Rule also suspends the 14-day deadline for a plan administrator to provide a COBRA election notice to qualified beneficiaries. This period would commence again when the Outbreak Period ends.

Almost a year after the first national emergency declaration – on February 26, 2021 – the DOL Employee Benefits Security Administration (EBSA) issued Disaster Relief Notice 2021-01** to explain that, while the statutory provisions in ERISA and Code § 7508A(b) limited the maximum period permitted to be disregarded with respect to these plan deadlines to a period of one year from the date the individual action would otherwise have been required or permitted, this one-year period is applied on an individual-by-individual basis. Specifically, these deadlines would be tolled until the earlier of (a) one year from the date the individual was first eligible for the relief; or (b) the end of the Outbreak Period (i.e., 60 days after the end of the announced end of the National Emergency Period. This meant that, in short, every plan participant and beneficiary who was subject to one of the aforementioned plan deadlines that would have occurred on or after March 1, 2020 would have up to one year following what would have been that specific deadline to take that specific action (unless the Outbreak Period ended prior to that date).

However, this guidance presented confusion with respect to those individual plan deadlines that are calculated based on another plan action (e.g., if the deadline by which a plan participant may file a claim is tolled for one year, would the individual’s deadline to appeal that claim’s denial also suspended for a year from that claim’s denial date?). With respect to COBRA deadlines, if a qualified beneficiary’s 60-day COBRA election period is suspended for up to one year, is that qualified beneficiary’s 45-day initial premium payment deadline (which begins following the date of COBRA election) also suspended for one year? HealthEquity, Inc. submitted comments and referenced those by the American Benefits Council, requesting further guidance on this issue.††

Days later – on March 11, 2021 – President Biden signed into law the American Rescue Plan Act of 2021 (ARPA), which – among other things – provided for a federal subsidy of 100 percent of the COBRA continuation coverage premiums for qualified beneficiaries whose COBRA qualifying event was the covered employee’s involuntary termination of employment^{‡‡} or reduction of hours for coverage periods between April 1, 2021 and September 30, 2021 (the “Subsidy Period”). These individuals are referred to within ARPA as “Assistance Eligible Individuals.” ARPA also introduced new COBRA notice obligations and deadlines on group health plans; the DOL later confirmed that the Outbreak Period extensions did not apply to notice or election deadlines related to the COBRA Premium Assistance.^{§§} Later agency guidance also clarified that AEIs electing COBRA retroactive to their original date of coverage loss could be required to pay COBRA premiums for that retroactive period prior to April 1, 2021, consistent with the Outbreak Period extensions; however, if the AEI declined retroactive COBRA coverage at the time they elected

** <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01>

†† Our comments can be viewed [here](#).

‡‡ Other than by reason of such employee’s gross misconduct

§§ See “FAQs About COBRA Premium Assistance Under the American Rescue Plan Act of 2021,” Q&As-5, -10, and -13 (April 7, 2021); available [here](#) (as visited October 12, 2021)



COBRA with the premium subsidy, the AEI would lose the right to later elect coverage for the retroactive period.^{***}

Tolled COBRA Premium Payment Deadlines, Clarified

As alluded above, qualified beneficiaries generally have 60 days to elect COBRA continuation coverage. The IRS COBRA regulations provide that a qualified beneficiary's 45-day initial premium payment deadline is generally calculated from the "date on which the election of COBRA continuation coverage is made for that beneficiary."^{†††} Until the release of Notice 2021-58, it seemed, if a qualified beneficiary whose COBRA election deadline was extended for a year and makes her/his election on that date, her/his initial premium payment deadline would also be suspended for up to one year from the date of the election.

However, Notice 2021-58 clarifies that the periods to be disregarded for a qualified beneficiary to both elect COBRA and make initial (and subsequent) premium payments run concurrently and does not apply with respect to each deadline. For qualified beneficiaries who **make their COBRA election within the generally applicable 60-day election period**, such qualified beneficiaries will have **one (1) year and 45 days after the date of election** to make the initial COBRA premium payment. For any qualified beneficiary who enjoyed the tolled election period and made her/his election outside of the generally applicable 60-day election period, that qualified beneficiary will have **one (1) year and 105 days (i.e., 60 + 45) from the date the COBRA election notice was provided.**

Subsequent COBRA premium payments (the deadlines for which are generally 30 days after the first day of that period^{†††}) will be due one year from their original deadline dates.

Examples

COBRA Election Made Within Original 60-Day Election Deadline

Adam has a COBRA qualifying event and is provided a COBRA election notice on December 1, 2020. Adam's initial 60-day COBRA election deadline would generally be January 30, 2021 (i.e., 60 days from December 1, 2020). On December 31, 2020, Adam elects COBRA coverage retroactive to December 1, 2020. Generally, his initial premium payment deadline would be February 14, 2021 (i.e., 45 days after December 31, 2020). However, due to the Outbreak Period tolling provisions of the Final Rule and Notice 2021-58, Adam's initial premium payment deadline is February 14, 2022 (i.e., one year from his original 45-day deadline, or 1-year-and-45 days from the date of his election). Adam's initial premium payment must include at least the COBRA premium for the December 2020 and January 2021 coverage periods. Adam's payment for the February 2021 coverage period (which would generally be due on or before March 3, 2021; or 30 days after February 1, 2021) must be made on or before March 3, 2022 (i.e., one year from his original February 2021 premium payment deadline date, or one (1) year and 30 days from February 1, 2021). The tolling period will continue to apply to each subsequent coverage period for the duration of the Outbreak Period. It is therefore possible that the COBRA premium payment

^{***} See IRS Notice 2021-31, Q&As-58 and -59, available [here](#)

^{†††} 26 CFR § 54.4980B-8, Q&A-5(b)

^{‡‡‡} 26 CFR § 54.4980B-8, Q&A-5(a)

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deadline for Adam's 18th month of COBRA coverage (i.e., May 2022) could also be suspended for up to a year, or May 31, 2023 (i.e., 1 year and 30 days from May 1, 2022).

COBRA Election Made During Tolloed Election Period

Assume the same facts as above, except Adam does not elect COBRA coverage on December 31, 2020. Because his election period is tolled for up to one year following his 60-day election deadline, he will have until January 30, 2022 (i.e., 1 year and 60 days from the date of his election notice) to make his COBRA election. Adam elects COBRA on May 15, 2021 retroactive to December 1, 2020. Because his election was outside of the original 60-day election period, Adam has until March 16, 2022 to make the initial COBRA premium payment (i.e., 1 year and 105 days from the December 1, 2020 date of his COBRA election notice, or one year from the generally applicable maximum standard COBRA election and initial premium payment periods). Adam's initial premium payment must include at least the COBRA premiums for the December 2020 through February 2021 coverage periods. Adam's monthly payment for the March 2021 coverage period (which would generally be due on or before March 31, 2021; or 30 days from March 1, 2021) must be made on or before March 31, 2022 (i.e., one year from his original March 2021 premium payment deadline date, or 1 year and 30 days from March 1, 2021). The tolling period will continue to apply to each subsequent coverage period for the duration of the Outbreak Period.

In Notice 2021-58, the IRS acknowledges some qualified beneficiaries would have assumed the disregarded periods for making COBRA elections and making initial deadlines run consecutively and may have less time (i.e., less than 1 year and 45 days from the date of their election that was more than 60 days from the date of their election notice). Therefore, Notice 2021-58 provides transition relief that in no event will an initial COBRA premium payment be due before November 1, 2021 provided the qualified beneficiary makes that initial COBRA premium within one (1) year and 45 days after the date of her/his COBRA election.

Examples

Within Transitional Relief Threshold

Barbara has a COBRA qualifying event and is provided a COBRA election notice on March 1, 2020. Barbara's initial 60-day COBRA election deadline would generally be April 30, 2020 (i.e., 60 days from March 1, 2020). On September 30, 2020, Barbara elects COBRA coverage retroactive to March 1, 2020. Pursuant to this Transition Relief, Barbara has until November 1, 2021 to make her initial COBRA premium payment. While this is more than the otherwise applicable "one (1) year and 105 days following the election notice date" rule (in Barbara's case, this would have been June 14, 2021), November 1, 2021 falls within the Transition Relief's "one (1) year and 45 days after the election date" threshold. Barbara's initial premium payment must include at least the COBRA premiums for the March through October 2020 coverage periods. Barbara's payment for the November 2020 coverage period must be made by December 1, 2021 (i.e., one (1) year from the original November 2020 premium payment deadline date, or one (1) year and 30 days from November 1, 2020).

Outside of Transitional Relief Threshold/Untimely Initial Premium Payment

Assume the same facts as above, except Barbara elects COBRA coverage on May 31, 2020, retroactive to March 1, 2020. As stated in the previous example, under the general provisions of Notice 2021-58, Barbara would have until June 14, 2021 to make her initial premium payment.



Therefore, Barbara is ineligible for the transition relief as November 1, 2021 is more than the date that is one (1) year and 45 days from the date of her COBRA election, or July 15, 2021.

Interaction with ARPA's COBRA Premium Assistance

Notice 2021-58 reiterates the DOL's previous confirmation that the deadline extensions associated with the Outbreak Period do not apply to ARPA notice deadlines or special second election periods. While an individual can generally make a retroactive COBRA coverage election (pursuant to the extension provisions of the Final Rule and Notice 2021-58) or may elect COBRA coverage and Premium Assistance prospectively for any applicable coverage period beginning on or after April 1, 2021, Notice 2021-58 reiterates that any of the plan deadline extensions will apply with respect to COBRA premium payment deadlines for coverage periods beginning after the Subsidy Period (i.e., on or after October 1, 2021).

Examples

Retroactive COBRA Election During Tolled Election Period by an AEI

Christopher is involuntarily terminated from his employer and is provided a COBRA election notice on November 1, 2020 but does not elect. On May 31, 2021, due to his involuntary termination of employment and because he has yet to elect COBRA, he is provided a COBRA Continuation Coverage Notice in Connection with Extended Election Periods Under the American Rescue Plan Act of 2021 on May 31, 2021 affording him to elect COBRA prospectively from the date of his election, or to choose to start his COBRA coverage as of April 1, 2021. Under the Outbreak Period extension rules, he has until December 31, 2021 (i.e., 1 year and 60 days from the date of his COBRA election notice) to make his COBRA election retroactively to November 1, 2020.

On June 30, 2021, he elects COBRA retroactive to November 1, 2020 and subsidized COBRA beginning on April 1, 2021. Because he is an AEI and made a timely election under ARPA's provisions (i.e., within 60 days of his COBRA Continuation Coverage Notice in Connection with Extended Election Periods Under the American Rescue Plan Act of 2021, or July 30, 2021), Christopher has subsidized COBRA coverage beginning April 1, 2021 and ending September 30, 2021.

Christopher will have until February 14, 2022 (i.e., 1 year and 105 days from the November 1, 2020 date of his COBRA election notice) to make his initial COBRA premium payment. Christopher's initial premium payment must include at least the COBRA premiums for the November 2020 through January 2021 coverage periods. Christopher's payment for the February 2021 coverage period (which would generally be due on or before March 3, 2021; or 30 days from February 1, 2021) must be made on or before March 3, 2022 (i.e., one (1) year from his original February 2021 premium payment deadline date; or one (1) year and 30 days from February 1, 2021).

Christopher makes his initial COBRA premium payment by February 14, 2022, which includes the COBRA premiums for the November 2020 through January 2021 coverage periods. As this payment is timely under the generally applicable Outbreak Period deadline extensions, Christopher has COBRA coverage retroactively for those periods. However, Christopher makes his subsequent COBRA premium payment on May 1, 2022. Since his premium payment deadline for the February 2021 coverage period was March 3, 2022 (i.e., one (1) year from his original

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February 2021 premium payment deadline date; or one (1) year and 30 days from February 1, 2021), this payment is untimely. Christopher, therefore, will not have COBRA coverage for the February and March 2021 coverage periods. He will, however, have subsidized COBRA coverage beginning April 1, 2021 and ending September 30, 2021. The payment Christopher made on May 1, 2022 must be credited now to the first COBRA coverage period following the end of the COBRA Subsidy Period, or October 2021. Because this payment was postmarked May 1, 2022, this is within the period that is one (1) year and 30 days following the October 1, 2021 due date). The tolling period will continue to apply to each subsequent coverage period for the duration of the Outbreak Period.

Continued Ambiguities

While Notice 2021-58 provided welcome – although not necessarily timely – clarification concerning some of the confusion as to how all these rules and regulations intersected, it is not without its own raised questions.

Notice 2021-58 states that, “If an individual elected COBRA continuation coverage outside of the initial 60-day election timeframe, that individual generally will have one (1) year and 105 days after the date the COBRA notice was **provided** to make the initial COBRA premium payment.” This is, of course, consistent with current COBRA guidance. As illustrated above, election and initial premium payment deadlines are calculated by the date on which the election notice was mailed (either to^{§§§} or by^{****} the qualified beneficiary). However, in a later paragraph, Notice 2021-58 provides that “[i]ndividuals must make the initial COBRA election by the earlier of (1) one year and 60 days after the individual’s **receipt** of the COBRA election notice; or (2) the end of the Outbreak Period.” It is unclear if this discrepancy between “date sent” and “date received” was an unintended drafting glitch.

Furthermore, in the Final Rule, the DOL and IRS also provided tolling relief (of not more than one year) to employers and plan administrators with respect to providing a COBRA election notice to a qualified beneficiary losing group health plan coverage due to a qualifying event. For example, if the original deadline for providing a COBRA election notice was March 31, 2020, the new deadline is March 31, 2021. If the plan administrator provides the COBRA election notice on March 31, 2021, would this extend the qualified beneficiary’s total disregarded period for much longer than one year?

Conclusion

While it’s always better late than never, receiving clarifying guidance of this sort so late in the game presents challenges. However, it bears repeating that the DOL has previously acknowledged, in instances where fiduciaries have acted in “good faith and with reasonable

^{§§§} “Plans must give each qualified beneficiary at least 60 days to choose whether or not to elect COBRA coverage, beginning from the date the election notice is provided, or the date the qualified beneficiary would otherwise lose coverage under the group health plan due to the qualifying event, whichever is later.” [“An Employer’s Guide to Group Health Continuation Coverage Under COBRA,” available [here](#) (as visited October 12, 2021)]

^{****} “An election is considered to be made on the date that it is sent to the plan administrator.”[26 CFR § 54.4980B-6, Q&A-1(b)]

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diligence under the circumstances,” the DOL has commented its approach to enforcement will be “marked by an emphasis on compliance assistance,” including grace periods or other relief.

HealthEquity will continue to stay abreast of this topic and, as additional guidance or operational recommendations are available, we will advise accordingly.