

## BENEFITS BRIEF

### TWO CRITICAL ADDITIONS TO GROUP HEALTH PLAN SPONSORS' "TO-DO" LIST (Part 1 of 2)

April 2021

2021 is shaping up to be a busy year for group health plan sponsors and their advisors and service providers, as several new group health plan mandates become effective next year and preparations will be needed to assure plans are positioned for timely compliance.<sup>1</sup> A much more pressing obligation of group health plan sponsors and their service providers, however, is addressing the extension of the COBRA group health plan continuation election and payment deadlines applicable to ERISA-governed benefit plans<sup>2</sup> occasioned by a recently issued DOL notice and the new temporary 100% COBRA subsidy and special COBRA enrollment election added by the American Rescue Plan Act of 2021 recently signed by the President. In this series of *Benefits Briefs*, we will provide a general overview of these changes and suggest actions group health plan sponsors and their plan administrators and service providers should consider taking; in Part 1, we will discuss the COBRA deadline extensions and in Part 2, we will discuss the new COBRA subsidy and special COBRA enrollment election.

#### **TO-DO LIST ADDITION #1 - Addressing the COBRA Election and Payment Deadline Extensions**

In EBSA Disaster Relief Notice 2021-01 (the "2021 DOL Notice"), the Department of Labor clarified the application of certain employee benefit plan deadlines originally extended effective March 1, 2020 in response to the COVID-19 pandemic. While the 2021 Notice clarifies more than revised deadline extensions for COBRA initial elections and payments,<sup>3</sup> our discussion in this *Benefits Brief* will focus solely on the COBRA deadline extensions.

#### ***The 2020 Extensions***

In late April 2020, the Department of Labor and the Internal Revenue Service issued a Joint Notice (the "DOL/IRS Joint Notice") requiring group health plans to disregard the period of time between March 1, 2020 and 60 days after the end of the Presidentially-declared COVID-19 National Emergency for purposes of the otherwise applicable deadlines for making an initial COBRA election, paying the COBRA premium, or providing a notice of disability or COBRA qualifying event. This "tolling" or "pausing" of the normal COBRA deadlines was

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<sup>1</sup> Next year and in future years, group health plans will be subject to new cost transparency rules as well as rules to prevent "surprise bills" for covered services among other mandates. We plan to publish a summary of these new mandates in the near future.

<sup>2</sup> Our discussion in this Part 1 will be limited to changes affecting employee benefit plans subject to the labor code provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). This generally includes plans of for-profit employers and tax exempt employers but excludes plans of governmental entities and churches that have not affirmatively elected to be subject to ERISA.

<sup>3</sup> The extensions also apply to special enrollment elections under cafeteria plans and claims processing deadlines for employer pension and health and welfare plans. The initial COBRA extensions and this clarification only apply to group health plans subject to COBRA under federal law and do not apply to small plans subject to State min-COBRA statutes.

only limited by the DOL's and IRS's authority to approve an extension of no more than one year. A detailed explanation of the DOL/IRS Joint Notice and the administrative burdens and liability risks with these extensions can be found *here*.

### ***The New Interpretation***

With the extensions under DOL/IRS Joint Notice being effective March 1, 2020 and the limit on the DOL's and IRS's authority to extend deadlines limited to one year, the DOL/IRS Joint Notice was interpreted by plan sponsors and benefits professionals as expiring on February 28, 2021 unless the COVID-19 National Emergency was earlier rescinded. On February 26, 2021, the final business day before the one-year anniversary of the effective date of the extensions, the Department of Labor clarified that instead of applying the one-year limitation on a plan-wide basis, the one-year period was to be applied on a per-individual basis, with the one-year period commencing on the individual's qualifying event.<sup>4</sup> Thus, for example, rather than the election period "re-starting" for all qualified beneficiaries on March 1, 2021, the election period for a qualified beneficiary who became entitled to COBRA on September 1, 2020 would not start until *September 1, 2021*, at which time the participant was entitled to the normal 60-day COBRA election period;<sup>5</sup> the only exception would be if the COVID-19 National Emergency was earlier rescinded, in which case the normal 60-day COBRA election period would start 60 days from the rescission. Under the 2021 DOL Notice, the "tolling" ceased on March 1, 2021 *only* with respect to qualified beneficiaries whose qualifying event occurred prior to March 1, 2020; for those individuals, the remainder of their election period (i.e., after considering the days that expired prior to March 1, 2020) "re-started" on March 1, 2021.

Making matters worse, the 2021 DOL Notice also suggests the one-year delay applies to each action listed in the DOL/IRS Joint Notice, so, for example, a separate one-year delay would apply to a qualified beneficiary's COBRA payment obligation after he/she made his/her initial COBRA election.

### ***DOL Suggestions for Plan Fiduciaries***

The 2021 DOL Notice included several admonitions to group health plan sponsors in administering their plans. After positing the "guiding principle was ... to act reasonably, prudently, and in the interests of the workers and their families who rely on their health ... plans for their physical and economic well-being," the 2021 DOL Notice suggests "plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits ... and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames." By way of example, the DOL indicated

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<sup>4</sup> The 2021 DOL Notice indicated the Internal Revenue Service and Department of Health and Human Services concurred in the DOL's interpretation of the prior guidance.

<sup>5</sup> The extension does not extend the maximum COBRA election period, only when the initial election must be made, and an electing qualified beneficiary must still pay premiums for coverage retroactive to the qualifying event; nevertheless only those beneficiaries with significant claims are likely to make the election (i.e., only if the anticipated benefits to be received will exceed the premiums due).

- the plan administrator needed to consider sending a notice regarding the end of the relief period if the plan administrator knows or should reasonably know the end of the relief period a participant is exposed to a risk of losing protections, benefits, or rights under the plan;
- prior disclosures that failed to provide accurate information regarding the deadlines to take actions may need to be amended and re-issued; and
- plans needed to consider ways of ensuring participants and beneficiaries who are losing coverage are made aware of other coverage options that may be available to them.

Implicit in the 2021 DOL Notice is the need to promptly provide these disclosures to affected individuals. Unfortunately, the 2021 DOL Notice does not contain any “model” notices to be used for this purpose, nor does the Notice suggest the DOL intends to provide suggested notices to be used.

### ***Observations and Action Items***

No one expected the extensions would be applied on a qualified beneficiary-by-qualified beneficiary basis much less on a per-action basis for each qualified beneficiary so the DOL’s new interpretation will further complicate COBRA administration for the near future. Plan sponsors who outsource their COBRA responsibilities still retain the legal responsibility to assure compliance but can expect increased costs for COBRA administration due to the individual tracking required. Plan sponsors who self-administer COBRA will need to modify their policies and procedures to address these new rules.

Before taking any action in response to the 2021 DOL Notice, a prudent plan sponsor or plan administrator of a fully-insured plan will consult its insurer and COBRA administrator (if applicable) as to an appropriate communications strategy. Likewise, a prudent plan sponsor or plan administrator of a self-funded plan should consult its claims administrator and COBRA administrator (if applicable) as to an appropriate communications strategy and consult its claims administrator and stop-loss insurer as to required plan amendments and strategies for mitigation of risk of gaps in stop-loss coverage. Regardless of whether the plan is fully-insured or self-funded, plan sponsors and fiduciaries should start this dialogue as promptly as possible.

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