



HAYS COMPANIES

Notice Obligations Due to the Latest DOL Guidance on Extensions of Various Timeframes

DOL Disaster Relief Notice 2021-01 (the “Notice”) announced the DOL’s interpretation of how the one-year limit applies to the extensions of various deadlines under COBRA, HIPAA, and ERISA due to the COVID pandemic. In response to the issuance of the Notice, the Research and Compliance team has received questions regarding an employer’s notification obligations in light of the Notice. This article provides some general information about the notification requirements.

The Notice does not specifically require plan sponsors or plan administrators to issue any additional notices to employees, plan participants, or COBRA qualified beneficiaries. However, the DOL did provide some guidance regarding the responsibilities of plan fiduciaries related to the various deadlines that have been extended due to the outbreak period. Plan fiduciaries include the plan administrator, which in virtually all cases is the employer sponsoring the plan.

In particular, the DOL included the following guidance in the Notice about notifications (emphasis added; footnotes omitted):

The Department of Labor recognizes that affected plan participants and beneficiaries may continue to encounter an array of problems due to the ongoing nature of the COVID-19 pandemic in circumstances under which relief under the Notices is no longer available due to the statutory one-year limit on the Agencies’ authority to grant relief. The guiding principle for administering employee benefit plans is to act reasonably, prudently, and in the interest of the workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being. This means that plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.

For example, where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period

for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary ***should consider affirmatively sending a notice*** regarding the end of the relief period. Moreover, ***plan disclosures issued prior to or during the pandemic may need to be reissued or amended*** if such disclosures failed to provide accurate information regarding the time in which participants and beneficiaries were required to take action, e.g., COBRA election notices and claims procedure notices. Further, in the case of ERISA group health plans, plans should consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including the opportunity to obtain coverage through the Health Insurance Marketplace in their state.



The DOL appears to be saying that, to fulfill their ERISA fiduciary duties, in many cases, plan administrators should notify employees, participants, and COBRA qualified beneficiaries (as applicable) when the extended deadlines will expire based on the DOL's interpretation reflected in the Notice. As a result of the DOL's guidance, plan administrators should consider providing notifications in the following situations:

COBRA Timelines

For COBRA qualified beneficiaries who previously received an election notice and have not yet elected COBRA coverage:

- If any portion of the 60-day election period ran on or after March 1, 2020, the plan administrator should notify the qualified beneficiary when the extended election period will expire.
- The DOL guidance appears to suggest plan administrators consider an individualized approach, which would involve notifying qualified beneficiaries of the specific date on which their election period will expire. An alternative approach would be to send a general notification to all qualified beneficiaries informing them their election periods will expire on the **earlier** of (1) one year from the date on which the election period would have expired in the absence of the COVID-related extension; or (2) no more than 60 days after the end of the outbreak period (which has not been announced) depending on how much (if any) of the election period ran prior to March 1, 2020.
- These notifications should also include information about the Health Insurance Marketplace.
- These notifications could also include information about the extended deadlines for notifying the plan of a second qualifying event or a Social Security Disability determination.
- These notifications could also include information about the extended deadlines for payment of COBRA premiums.

For COBRA qualified beneficiaries who have not yet received an election notice and whose 60-day election period begins prior to the end of the outbreak period (which has not yet been announced):

The plan administrator should update the COBRA election notice to:

- Indicate the 60-day election period will expire on the **earlier** of (1) one year from the date on which the election period would normally expire in the absence of the COVID-related extension; or (2) 60 days after the end of the outbreak period (which has not yet been announced).
- Indicate that deadlines for notifying the plan of a second qualifying event or a Social Security Disability determination have been extended and describe how the one-year limit will impact those extensions.
- Indicate that the deadlines for payment of COBRA premiums have been extended and describe how the one-year limit will impact those extensions.



For COBRA qualified beneficiaries who previously elected COBRA coverage but failed to pay a COBRA premium that became due on or after March 1, 2020:

- If the COBRA qualified beneficiary failed to pay the initial COBRA premium, the plan administrator should notify the COBRA participant the 45-day deadline for the initial COBRA premium will expire on the **earlier** of (1) one year from the date on which the premium would have been due in the absence of the COVID-related extension; or (2) no more than 45 days after the end of the outbreak period (which has not yet been announced) depending on how (if any) much of the premium payment period ran prior to March 1, 2020.
- If the COBRA qualified beneficiary failed to pay any subsequent COBRA premiums (after the initial premium), the plan administrator should notify the COBRA participant that the grace period for such premiums (30 days or longer if provided by the plan) will expire on the **earlier** of (1) one year from the date on which the grace period for the monthly premium would have expired in the absence of the COVID-related extension; or (2) no more than 30 days (or longer if the plan has a longer grace period) after the end of the outbreak period (which has not yet been announced) depending on how much (if any) of the grace period ran prior to March 1, 2020.
- The DOL guidance appears to suggest plan administrators consider an individualized approach, which would involve notifying qualified beneficiaries of the specific dates on which the COBRA premiums for prior months will be due. An alternative approach would be to send a general notification (like that described above) to all qualified beneficiaries.

For COBRA qualified beneficiaries who elected COBRA continuation coverage that was in effect on or after January 1, 2020:

- The plan administrator should notify the COBRA participant the 60-day deadline for notifying the plan of a second qualifying event or a Social Security Disability determination will expire on the **earlier** of (1) one year from the date on which the deadline would have expired in the absence of the COVID-related extension; or (2) no more than 60 days after the end of the outbreak period (which has not been announced) depending on how much (if any) of the notice period ran prior to March 1, 2020.

For all current group health plan participants:

- The plan administrator should notify the participants that the 60-day deadline for notifying the plan of certain COBRA qualifying events (e.g., divorce, child ceasing to be a dependent, etc.) will expire on the **earlier** of (1) one year from the date on which the deadline would have expired in the absence of the COVID-related extension; or (2) no more than 60 days after the end of the outbreak period (which has not been announced) depending on how much (if any) of the notice period ran prior to March 1, 2020.
- This notice could also be provided to former participants who previously had coverage under the plan on or after January 1, 2020, because their dependents may have experienced a COBRA qualifying event prior to termination of the participant's participation in the plan.

SAMPLE NOTICE: Research and Compliance has drafted sample language below that an employer could use to notify group health plan participants and COBRA qualified beneficiaries regarding the expiration of the extensions of COBRA timelines. The sample language reflects the more generic approach, which does not include the specific date on which an extended deadline will expire for a particular qualified beneficiary. The sample language is not intended to constitute legal advice regarding the need to provide a notification or the content of a notification. It is intended to provide a sample starting point for an employer's notification, if it chooses to provide one. Any notification provided by an employer, including one based on the sample language we have provided, should be reviewed by an employer's qualified legal counsel.



Claims Filing Timelines

For all current participants of any ERISA-covered plan:

- The plan administrator should notify participants that the extended deadlines under the plan for filing claims and requesting appeals will expire on the **earlier** of (1) one year from the date on which the deadline would have expired in the absence of the COVID-related extension; or (2) on a date after the end of the outbreak period (which has not been announced), with the exact date depending on the length of the claim or appeal period and how much (if any) of it ran prior to March 1, 2020.
- This notice could also be provided to former participants who previously were covered under the plan and for whom the time period for filing a claim or requesting an appeal overlapped with the outbreak period.

HIPAA Special Enrollment Timelines

For all employees who have been eligible for coverage under the group medical plan on or after January 1, 2020:

- The plan administrator should notify the employees that the 30 or 60-day periods (or longer if provided by the plan) for requesting enrollment in the plan under the HIPAA special enrollment rules will expire on the **earlier** of (1) one year from the date on which the deadline would have expired in the absence of the COVID-related extension; or (2) no more than 30 or 60 days (or longer if provided by the plan) after the end of the outbreak period (which has not been announced) depending on how much (if any) of the special election period ran prior to March 1, 2020.
- This notice could also be provided to former employees who previously were eligible for coverage under the plan on or after January 1, 2020, because they may have experienced a HIPAA special enrollment event prior to termination of their employment.

Although it is our view that more communication is generally better than less communication, ultimately the decision regarding what notifications should be provided is one the plan administrator must make considering ERISA's fiduciary standards. Employers should consult their attorneys for advice about their fiduciary duties as plan administrators as they relate to this notification issue. A thoughtful analysis and a reasoned decision regarding what notifications to provide will play a significant role in determining whether a plan administrator has fulfilled its fiduciary duties.

Sample notification language can be found on the following pages of this document.

This document is provided for general information purposes only and should not be considered legal or tax advice or legal or tax opinion on any specific facts or circumstances. Readers are urged to consult their legal counsel and tax advisor concerning any legal or tax questions that may arise.

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Sample Notification Language

Editorial Note (Do Not Include in Notification): The sample language provided below is not intended to constitute legal advice regarding the need to provide a notification regarding the expiration of the COBRA timeline extensions, nor is it intended to constitute legal advice regarding the appropriate content of any such notification. It is intended to provide a sample starting point for an employer's notification, if it chooses to provide one. Any notification provided by an employer, including one based on the following sample language, should be reviewed by an employer's qualified legal counsel.

You are receiving this notification because you are a current or former participant in one or more of the group health plans that we sponsor. You were previously informed that certain deadlines related to COBRA continuation coverage had been extended due to the COVID national emergency. The extended deadlines include (1) the deadline to notify the plan of a qualifying event, a second qualifying event, and a Social Security Administration disability determination; (2) the deadline to elect COBRA continuation coverage; (3) the deadline for paying the initial COBRA premium following an election of COBRA coverage; and (4) the deadline for paying subsequent monthly COBRA premiums.

The prior notification regarding the extension of these deadlines did not specify the length of the extensions or when they would expire. The extension's expiration was not known at that time. In some cases, we still do not know specifically when the extension will expire. However, the Department of Labor (DOL) recently provided guidance regarding the length of the extensions that will impact the deadlines for certain actions related to COBRA continuation coverage under our group health plans.

EXPIRATION OF EXTENSIONS

The applicable COBRA time period cannot be extended more than one year beginning on the date on which the applicable time period would normally begin to run. As discussed below, the extension may be shorter than one year in some cases, but the law does not authorize the DOL to extend a deadline for a period of more than one year. Accordingly, except as provided below, the extended COBRA deadlines will expire one year after the date on which the deadline would have expired in the absence of the COVID-related extension.

Editorial Note (Do Not Include in Notification): Including examples of when the deadlines will expire is optional. If the examples are not included, remove the example from the Caution box below as well.

EXAMPLES:

CAUTION: These examples are for illustrative purposes only and are not intended to reflect your personal situation. The relevant dates for your personal situation likely will differ from these examples.

- If a participant and covered spouse divorced on March 1, 2020 (meaning they normally would have been required to notify the plan of the divorce no later than April 30, 2020), they must notify the plan of the divorce no later than April 30, 2021.
- If the deadline for making a COBRA election would have been April 30, 2020 (absent the extension due to COVID), the extension of that deadline will expire on April 30, 2021, and the qualified beneficiary must elect COBRA coverage by that date to preserve the qualified beneficiary's right to COBRA continuation coverage.



- If a qualified beneficiary elected COBRA coverage on March 31, 2020, but has not yet paid the initial COBRA premium (which would have normally been due May 15, 2020), the initial premium now must be paid on or before May 15, 2021.
- If the premium grace period for the COBRA premium due for the month of July 2020 would have normally expired on July 31, 2020, that COBRA premium grace period will now expire on July 31, 2021 (i.e., the July 2020 premium can be paid no later than July 31, 2021).

CAUTION: In some cases, an extended deadline will expire earlier than the one-year anniversary of the normal deadline as described above. When the federal government announces an end to the COVID national emergency (which has not yet occurred), the outbreak period will end 60 days later. Once the outbreak period ends, all extended COBRA timelines will begin running again. Qualified beneficiaries will then have the applicable time period (or the remaining amount of the applicable time period if it began to run prior to March 1, 2020) to act (e.g., provide notice to the plan, elect COBRA, and/or pay COBRA premiums) following the end of the outbreak period.

For example, if the COVID national emergency were to end on March 31, 2021, the outbreak period would then end 60 days later on May 30, 2021. In that case, the premium grace period for the COBRA premium referenced in the example described above (for the month of July 2020) would begin running on May 31, 2020, meaning the July 2020 premium would be due no later than June 29, 2021, if the plan provides a 30-day premium grace period.

ALTERNATIVES TO COBRA COVERAGE

If you are considering whether to elect or maintain COBRA continuation coverage, you should consider any alternatives you may have to COBRA coverage. Other options include (but are not necessarily limited to) the opportunity to obtain coverage through the Health Insurance Marketplace in your state. A special enrollment period is currently available through May 15, 2021, to individuals in the 36 states that use the HealthCare.gov platform. In addition, some states that operate their own Marketplace platforms are offering a similar special enrollment opportunity. For more information on the Health Insurance Marketplace special enrollment period, go to www.HealthCare.gov. For a list of states that do not use HealthCare.gov and links to their Marketplaces, go to: www.healthcare.gov/marketplace-in-your-state/.

QUESTIONS

If you have questions about COBRA deadlines (including when a particular deadline will expire in light of the information provided in this notification), or questions about the COBRA coverage available under our group health plans, please contact **[insert contact information]**.