

**ALERT**

**Employee Benefits**

**HINKLE**

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## **COBRA: NEW DEVELOPMENTS – SUSPENDED DEADLINES**

If you're an employer and you offer a group health plan to your employees that is subject to COBRA, you will be affected by two recent developments coming out of Washington:

- (1) **New Guidance Regarding Suspension of COBRA Deadlines.** The Department of Labor ("DOL") issued new guidance at the end of February regarding the suspension of certain plan-related deadlines (including various COBRA deadlines) during the current COVID-19 "Outbreak Period." The new guidance explains when the suspended deadlines will end (which must be calculated on an individual basis), as discussed below.
- (2) **COBRA Provisions in the Stimulus Bill.** The recently enacted American Rescue Plan of 2021 includes multiple COBRA provisions. These provisions took immediate effect when the bill was signed by the President on March 11, 2021. This Alert contains an overview of what we know as of now.

### **New Department of Labor Guidance on Suspension of COBRA Deadlines**

#### **Background**

In April of last year, the DOL and the Internal Revenue Service ("IRS") announced that several deadlines that would normally apply to employee benefit plans were being retroactively suspended to March 1, 2020. This suspension period was to continue until 60 days after the end of the COVID-19 National Emergency. (See our May 11, 2020 Alert on this [HERE](#).) However, the *statutory* authorities in ERISA and the Internal Revenue Code (the "Code") permitting these extensions only allow for a maximum extension period of one year.

At the time this suspension was announced, we all expected – or, at least, hoped – that the COVID-19 National Emergency would soon be over. Therefore, the statutory deadline was not initially a focus of concern. When the pandemic lingered, it became unclear whether the Outbreak Period could extend beyond February 2021. With this in mind, the DOL issued additional guidance on February 26, 2021.

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## Plans Required to Suspend Deadlines

Because the authority to suspend these deadlines is found in the provisions of ERISA and in a portion of the Code, the suspension applies only to those employee benefit plans that are subject to Title I of ERISA and/or to the relevant portion of the Code.

This includes plans offered by non-governmental, private sector employers. It does not include plans offered by state and local governments. However, the Department of Health and Human Services, which has authority under the Public Health Service Act to regulate aspects of state and local government plans, has encouraged state and local government plans to voluntarily suspend the same deadlines.

The impact falls mostly on group health plans – and that’s what we are focusing on in this Alert – but the suspension of claims-related deadlines will also affect other types of welfare benefit plans, such as disability plans, as well as qualified retirement plans, such as 401(k) plans.

## Suspended Deadlines for Group Health Plans – More Than Just COBRA

The deadlines that were suspended for group health plans mostly affect, but are not limited to, COBRA-deadlines. The following deadlines were suspended by the IRS and DOL, beginning March 1, 2020:

- (1) **HIPAA Special Enrollment Rights.** The deadline for an individual to exercise HIPAA special enrollment rights, such as for a new spouse or a newborn child or upon the loss of other coverage;
- (2) **Notifying a Plan of a COBRA Qualifying Event.** The deadline for an individual to notify a group health plan of a COBRA qualifying event, such as a divorce;
- (3) **Electing COBRA.** The deadline for a qualified beneficiary to elect COBRA continuation coverage;
- (4) **Paying COBRA Premiums.** The deadline for a qualified beneficiary to make COBRA premium payments;
- (5) **Claims-Related Deadlines.** The deadline for an individual to file a claim for benefits, appeal an adverse benefit determination, and/or request an external review of a claim that has been denied; and

- (6) **“Perfecting” a Request for External Review.** The deadline for a covered individual to “perfect” a request for external review if the original request was determined not to be complete.

Additionally, various deadlines that apply to plan sponsors and/or plan administrators were also suspended temporarily.

### **New DOL Guidance**

On February 26, 2021 – the last business day before the one-year anniversary of March 1, 2020 (the effective date for these suspended deadlines), the DOL issued EBSA Disaster Relief Notice 2021-01. Key takeaways from this Notice include the following:

- (1) *The “new deadline” for a deadline that has been suspended is calculated by adding one year to what would otherwise have been the original deadline. This is the rule unless the current COVID-19 National Emergency ends earlier. (See examples below.)*
- (2) *If the COVID-19 National Emergency ends earlier, the “new deadline” should be calculated from the date that is 60 days after the end of the COVID-19 National Emergency.*
- (3) **Suggested Notices.** Additionally, although the original guidance from 2020 did not require plans to notify individuals of a suspended deadline, the new guidance strongly suggests that plan administrators should consider taking the following actions:
  - (a) Sending a notice to an individual when his/her “new deadline” is approaching.
  - (b) Resending COBRA notices that were previously provided in order to provide updated information about the deadlines that now apply.
  - (c) Sending a notice to covered persons who will soon be losing coverage, informing them that coverage may be available on the Exchange.

### **Calculating the Suspended Deadline - Examples**

Here are some examples of when the above suspended deadlines end according to the new rule:

#### ***Example 1 - COBRA Event Before the Suspension Period***

In January 2020, in what seems like a distant memory of pre-COVID-19 times, Employee A voluntarily terminated employment. Employee A was participating in your major medical plan and elected COBRA coverage. Because your plan

allows active coverage to continue through the end of the month in which a triggering event occurs, Employee A lost active coverage January 31, 2020, and COBRA coverage began February 1, 2020.

Normally, Employee A would have 45 days to make the first COBRA coverage premium payment, i.e., until March 16, 2020 (29 days in February 2020 plus 16 days in March). However, under the above guidance, her deadline was tolled on March 1, 2020 to pay both her initial premium and subsequent premiums. Furthermore, based on the most recent guidance, the 45-day time period to pay the first COBRA premium expired one year after what would otherwise have been the deadline. It is not clear from the guidance if the one-year deadline would have been March 15, 2021 or March 16, 2021 because the guidance calculates the one year period two different ways in its examples. If Employee A wanted to keep her coverage, she needed to pay all of her COBRA premiums (not just the initial premium) by the new deadline.

***Example 2 – COBRA Event in the Middle of the Suspension Period***

Your company sponsors a medical plan, which provides that when an individual loses coverage, coverage continues through the end of that month. The termination of employment is a COBRA qualifying event that normally requires the plan administrator (where the plan administrator is the same as the employer) to provide the COBRA election notice within 44 days of the loss of coverage. (Note – for some plans, the 44-day period might be measured from the actual date of termination.) Employee B was participating in your major medical plan last year and terminated employment on June 15, 2020. Normally, you would have had 44 days measured from June 30, 2020 (the date of the loss of coverage), to provide Employee B with the COBRA election notice. Employee B, in turn, would normally have 60 days from *the later of* June 30<sup>th</sup> or the date the election notice is provided to elect COBRA.

Let's look at two ways the above scenario could play out:

**Situation One:**

You provided the COBRA election notice on Employee B's date of termination. The 60-day clock for Employee B to elect COBRA would normally have begun on July 1, 2020 and ended on August 29, 2020 (60 days later). However, in light of the above guidance, the 60-day time period to elect COBRA was suspended. Employee B now has until August 29, 2021 to elect COBRA. This is one year from the date his normal COBRA period would have ended, if it had not been for the above guidance. (Don't forget, however, that should the National Emergency be declared to end earlier, Employee B's election period will end earlier.)

Situation Two:

Although you normally would have provided the Election Notice at the time of termination, you were working remotely that month and, in general, were not giving COBRA election paperwork to qualified beneficiaries due to the suspended deadlines. Under the terms of the plan, you would normally have 44 days, measured from June 30, 2020 (the date of coverage loss), to provide the COBRA election notice, i.e., until August 13, 2020. You now have until August 13, 2021 to provide the COBRA election notice. (Again, don't forget that, should the National Emergency be declared to end earlier, you will need to send the notice earlier.)

***Example 3 – HIPAA Special Enrollment Event at the End of the Suspension Period***

HIPAA requires your medical plan to allow at least 30 days to specially enroll a newborn upon birth. Your medical plan is slightly more generous and allows individuals to exercise their HIPAA special enrollment rights for up to 31 days after the birth of a child. Employee C participates in your major medical plan and had a baby on February 15, 2021. Normally, Employee C would have had until March 18, 2021, to enroll the newborn (13 days remaining in February plus 18 days in March). However, in light of the above guidance, Employee C has one year past her deadline to enroll the newborn, thereby making her deadline March 18, 2022. (Don't forget, however, that should the National Emergency be declared to end earlier, Employee C's election period will end earlier.)

**American Rescue Plan COBRA Provisions**

Here's an overview of what employers and plan administrators will be required to do:

- (1) **Subsidized COBRA Coverage.** "Assistance eligible individuals," as defined in the American Rescue Plan, are entitled to receive a 100% COBRA premium subsidy for COBRA coverage provided from April 1, 2021, through September 30, 2021, if certain conditions are met. Employers will be able to claim a tax credit for the amount of this COBRA premium subsidy.
- (2) **Option to Change COBRA Coverage.** Employers may choose (but are not required) to allow "assistance eligible individuals" to change to lower-cost COBRA coverage if such coverage is available.
- (3) **"Second Bite at the Apple."** An "assistance eligible individual" who had not previously elected COBRA must be given a second chance to elect COBRA. If COBRA had previously been elected but COBRA coverage had subsequently been dropped, an "assistance eligible individual" must be given the right to re-elect COBRA.

- (4) **Required Notices Under the American Rescue Plan.** Notices must be sent to “assistance eligible individuals” informing them of their right to a “second bite at the apple,” the option to change coverage (if allowed by their employer), and their right to receive subsidized COBRA coverage. Going forward, additional information will also need to be included in all COBRA election notices through September 30, 2021. The DOL is required to provide model notices within 30 days after enactment and additional guidance from the DOL will affect what needs to be done to comply with these notice requirements.

To say that complying with all of these requirements will be a “challenge” is an understatement. That’s particularly true when employers and plan administrators are being required to comply with these requirements “on the fly” and when it’s not always clear how the provisions of the American Rescue Plan are supposed to interface with the existing DOL guidance suspending most COBRA deadlines.

As the President himself said when he was discussing the implementation of the American Rescue Plan:

[I]t’s one thing to pass a historic piece of legislation like the American Rescue Plan, and it’s quite another to implement it. And the devil is in the [details](#).

We hope this information is helpful. If you have any questions, please do not hesitate to call the Employee Benefits team at Hinkle Law Firm at (316) 267-2000.

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