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IRS Seeks to Clarify COBRA Election and Premium Payment Deadlines due to COVID-19

10.7.2021

As summarized in this E-News Alert, new Internal Revenue Service (“IRS”) guidance seeks to clarify previously extended deadlines due to the ongoing COVID-19 pandemic for COBRA qualified beneficiaries to make COBRA elections and COBRA payments. The guidance is complex and best understood in examples provided by the IRS. COBRA election information provided to qualified beneficiaries should be reviewed to determine if modifications are needed in light of the IRS guidance. COBRA administrative practices may also need to be modified to conform to the new guidance.

Background

In our May 1, 2020 E-News Alert ([found here](#)), we informed you that on April 29, 2020, the U.S. Department of Labor (“DOL”) along with the IRS issued a joint final rule extending specific deadlines affecting COBRA continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims, and external review of certain claims. The joint final rule provided extra time for participants and beneficiaries of group health plans to meet certain deadlines affecting COBRA continuation coverage, special enrollment, filing claims for benefits, appeals of denied claims, and external review of certain claims. For disability, retirement and other plans, participants and beneficiaries had extra time to make claims for benefits and appeal denied claims.

Our prior E-News Alert explained that all group health plans, disability plans, and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA (the Employee Retirement Income Security Act of 1974 as amended) or the Code (the Internal Revenue Code of 1986 as amended) must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the COVID-19 National Emergency (the “Outbreak Period”) for all plan participants, beneficiaries,

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qualified beneficiaries, or claimants wherever located in determining various periods and dates.

In our prior E-News Alert, we noted that under statutory rules, any time period to be disregarded cannot be of more than 1 year of duration. When this 1-year period expired, the DOL issued new guidance in the form of EBSA Disaster Relief Notice 2021-01 which was summarized in our March 1, 2021 E-News Alert (**found here**). In essence, the DOL's February 2021 relief said that the delay of certain employee benefit deadlines due to COVID-19 is to be determined on an *individual-by-individual basis* – rather than a one-size-fits-all delay.

The February 2021 DOL relief provided that the disregarded period ends upon the earlier of (a) 1 year from the date individuals were first eligible for relief, or (b) 60 days after the announced end of the National Emergency (i.e. the end of the Outbreak Period). On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded will resume. In no case will a disregarded period exceed 1 year.

New IRS Guidance

In Notice 2021-58 the IRS now attempts to clarify that the disregarded period for an individual to elect COBRA continuation coverage and the disregarded period for the individual to make initial and subsequent COBRA premium payments generally run concurrently.

The IRS summarizes the following general COBRA timeline extensions during the Outbreak Period:

Payments

- If an individual elected COBRA continuation coverage outside of the (regular) initial 60-day COBRA election timeframe, that individual generally will have one year and 105 days after the date the COBRA notice was provided to make the initial COBRA premium payment.
- If an individual elected COBRA continuation coverage within the (regular) initial 60-day COBRA election timeframe, that individual will have one year and 45 days after the date of the COBRA election to make the initial COBRA premium payment.

For each subsequent COBRA premium payment, the maximum time an individual has to make a payment while the Outbreak Period continues is one year from the date the payment originally would have been due in the absence of the extensions provided by the agencies (including the mandatory 30-day grace period) (but subject to the transition relief described below).

Election

Individuals 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.

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These principles are designed so that individuals who delay electing COBRA may not have more than one year of total disregarded time for the COBRA election and initial COBRA payment. (However, a transition rule provides that in no event will an initial COBRA premium payment be due before November 1, 2021, as long as the individual makes the initial COBRA premium payment within one year and 45 days after the election date.)

Examples:

The IRS provides 10 examples to explain the COBRA extensions. Only some of the examples are summarized in this E-News Alert. Among other assumptions, all the examples assume that the Outbreak Period has not ended.

Example 1. **COBRA election made more than 60 days after receipt of COBRA election notice. When is payment to be first made?**

- (i) Facts. Individual A participates in Employer X's group health plan. On August 1, 2020, Individual A has a qualifying event and receives a COBRA election notice. Individual A elects COBRA continuation coverage on February 1, 2021, retroactive to August 1, 2020. When must Individual A make the initial COBRA premium payment and subsequent monthly COBRA premium payments?
- (ii) Conclusion. Individual A has until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after August 1, 2020), because Individual A did not elect COBRA continuation coverage within 60 days after receipt of the election notice. The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months that Individual A is eligible for COBRA continuation coverage.

Example 2. **COBRA election made within 60 days of the receipt of COBRA election notice. When is payment to be first made?**

- (i) Facts. Individual B participates in Employer Y's group health plan. Individual B has a qualifying event and receives a COBRA election notice on October 1, 2020. Individual B elects COBRA continuation coverage on October 15, 2020 retroactive to October 1, 2020. When must Individual B make the initial COBRA premium payment and subsequent monthly COBRA premium payments?
- (ii) Conclusion. Individual B has until November 29, 2021, to make the initial COBRA premium payment (one year and 45 days after October 15, 2020) because Individual A elected COBRA within 60 days of receiving the election notice. The initial COBRA premium payment would include only the monthly premium payment for October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual B is eligible for COBRA continuation coverage.

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Example 3. **Timeframe for electing COBRA and making initial payment.**

(i) Facts. Individual C participates in Employer Z's group health plan. Individual C has a qualifying event and is provided a COBRA election notice on August 1, 2020. When must Individual C elect COBRA continuation coverage and, if Individual C elects COBRA continuation coverage, when must Individual C make the initial COBRA premium payment?

(ii) Conclusion. Individual C has until September 30, 2021 (one year and 60 days after August 1, 2020) to elect COBRA continuation coverage. If Individual C elects COBRA continuation coverage after September 30, 2020 (but on or before September 30, 2021) Individual C has until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after receipt of the election notice). If Individual C makes the initial COBRA premium payment on November 14, 2021, that premium payment would include the monthly premiums for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual C is eligible for COBRA continuation coverage.

Transition relief for COBRA premium payments due before November 1, 2021

Although the IRS' new general rule is that disregarded periods for COBRA elections and initial COBRA payments run *concurrently* with respect to each individual, the IRS acknowledges that some individuals may have assumed (albeit, incorrectly) that the disregarded period for making the initial premium payment begins on the date of the COBRA election – accordingly, these individuals who made elections more than 60 days after receipt of the election notice may have less time than they anticipated to make the initial premium payment.

To avoid inequitable outcomes, the IRS provides for a transition rule stating that in no event will such an individual be required to make the initial premium payment before November 1, 2021, even if November 1, 2021 is more than one year and 105 days after the date the election notice was received, provided that the individual makes the initial premium payment within one year and 45 days after the date of the election. This transition relief does not result in an individual having a disregarded period related to a particular COBRA timeframe that is more than one year.

Example

(i) Facts. Individual A participates in Employer X's group health plan. On April 1, 2020, Individual A has a qualifying event. Individual A receives the COBRA election notice on April 1, 2020 and elects COBRA continuation coverage on October 1, 2020, retroactive to April 1, 2020. As of July 15, 2021, Individual A has not made the initial premium payment. When must Individual A make the initial premium payment for COBRA continuation coverage retroactive to April 1, 2020?

(ii) Conclusion. Individual A has until November 1, 2021 to make the initial premium payment, even though November 1, 2021 is more than one year and 105 days after April 1, 2020. Although the disregarded periods for the COBRA election and the initial premium payment run concurrently,

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under the transition relief, an individual will not be required to make the initial premium payment before November 1, 2021, as long as the individual makes the initial premium payment within one year and 45 days after the date of election. November 1, 2021 is less than one year and 45 days after October 1, 2020. Therefore, Individual A remains eligible to make the initial premium payment by November 1, 2021. The initial COBRA premium payment would include the monthly premium payments for April 2020 through October 2020. The November 2020 COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual A is eligible for COBRA continuation coverage.

Extended COBRA deadlines and ARP COBRA premium assistance

In March 2021, the American Rescue Plan of 2021 (“ARP”) was enacted which, among many other provisions, provides for temporary COBRA premium assistance for certain “Assistance Eligible Individuals” for periods of coverage beginning on or after April 1, 2021, through periods of coverage beginning on or before September 30, 2021.

The extensions of the COBRA timeframes do not apply to the period for electing COBRA continuation coverage with COBRA premium assistance under the ARP. However, the disregarded periods continue to apply to payments of COBRA premiums after the end of the ARP COBRA premium assistance period, to the extent that the individual is still eligible for COBRA continuation coverage and the Outbreak Period has not ended.

Example

(i) Facts. Individual A works for Employer X and participates in Employer X’s group health plan. On August 1, 2020, Individual A has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual A receives a COBRA election notice on August 1, 2020, but, as of September 1, 2021, has not yet elected COBRA continuation coverage. Individual A also receives the notice of the ARP extended election period on May 31, 2021, but does not elect COBRA continuation coverage with premium assistance under the ARP. When is the last date for Individual A to elect COBRA continuation coverage retroactive to August 1, 2020?

(ii) Conclusion. Individual A has until September 30, 2021 (one year and 60 days after August 1, 2020) to elect COBRA continuation coverage retroactive to August 1, 2020. Provided Individual A elects COBRA continuation coverage by September 30, 2021, Individual A would have until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after August 1, 2020). The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual A is eligible for COBRA continuation coverage.

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The COBRA extensions announced by the IRS are complex. Kindly contact the author of this E-News Alert or another member of the Butzel Long employee benefits practice group with any questions or for assistance applying the new guidance.

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