

Department of Labor Guidance Could Have Major Impact

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Labor and Employment Alert
5.13.20

Guidance released by the Employee Benefits Security Administration of the U.S. Department of Labor has somewhat flown under the radar. However, it could have a major impact on employers that provide health insurance to employees, as well as their insurers.

The guidance, formally published on May 4, 2020 and discussed generally here, provides that the "Outbreak Period" (March 1, 2020 through 60 days following the date that the national emergency is formally declared to be over) shall not be included in determining the deadline for the exercise of certain participant rights, including continuation of health insurance coverage rights under COBRA. At first glance, this guidance does not appear particularly dramatic. However, in practice, it could cause a significant burden to employer health plan sponsors, particularly self-insured plan sponsors, as well as health insurers that provide coverage for such plans.

COBRA applies to employer health plan sponsors with 20 or more employees. It provides that, upon the occurrence of a "qualifying event" (such as the death or termination of employment of a covered employee), which causes the loss of employer sponsored health insurance coverage, an individual may elect to continue participation in such coverage at his or her own expense for a specified period of time (generally 18 to 36 months). An individual who elects such coverage must be treated the same as a "similarly situated" active employee participant in the plan. Employers are required to notify individuals of these rights via a "COBRA notice."

Under COBRA, participants and beneficiaries who lose their health coverage due to a qualifying event generally have 60 days from the date a COBRA notice is received to elect to continue their participation in the plan. During this period of time (referred to as the "Election Period"), an insurer or plan sponsor may terminate coverage; however, it must be prepared to retroactively reinstate coverage if the individual elects continuation coverage and pays the premiums which have come due.

Under the guidance, the Election Period remains 60 days; however, the Outbreak Period does not count towards this limitation. Accordingly, a plan sponsor (or insurer) must remain prepared to retroactively re-enroll a participant for 60 days following the termination of coverage plus the entire length of the Outbreak Period. It is possible for a participant or beneficiary to elect continuation following the full extended Election Period, and after determining that health expenses accrued during that period exceed the premium payments owed. Upon payment of the back premiums, the plan would be required to pay any claims which had been accrued during the election period. This could result in "adverse selection," preventing the normal risk balancing that drives the calculation of insurance premiums.

Even more dramatically, once elected, COBRA provides a 30-day "grace period" for payment of the premium each month. Prior to the guidance, this meant that a plan was not permitted to terminate an individual's continuation coverage until 30 days after the first of the month for which coverage was elected. If the premium is not paid by the expiration of the grace period, the plan would be forced to attempt to recoup any benefits paid, either from the provider or from the COBRA participant directly.

With the guidance, any grace period is tolled for the duration of the Outbreak Period, meaning that a plan cannot terminate a COBRA participant's coverage (once elected), until the Outbreak Period ends. This could force a plan to carry an individual's coverage (with no premium payment) for an extended period, with no guarantee that benefits paid or delinquent premiums would be collectible at the end of the period.

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