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Guidance Issued on Outbreak Period

Nicholas Tafaro | Cherry Hill Benefits/CHB Group | (856) 424-9744 | ntafaro@chb-group.com

On February 26, 2021, the Departments of Labor and the Treasury (“the Departments”) issued guidance addressing the COVID-19 Outbreak Period – specifically, the associated period of “up to one year” that may be disregarded for certain benefit plan deadlines. Unexpectedly, they have taken the interpretation that these benefit plan deadline extensions generally apply on an individual-by-individual basis. Individuals with timeframes that are subject to the extensions will have until the following deadlines to make benefit elections, payments, file a claim or benefit appeal as follows:

- one (1) year from the date they were first eligible for relief, or
- 60 days after the announced end of the National Emergency (the end of the Outbreak Period).

This is a different approach to what most practitioners thought, which would have had the clock start running on the disregarded timelines after February 28, 2021. Note, under this latest guidance, employers must notify affected individuals as to the end of the relief period. You will find further details follow.

Background

In May of 2020, the Departments issued a final rule that required all group health plans, disability plans, and other employee welfare benefit plans to disregard the period (“the Outbreak Period”) from March 1, 2020 until 60 days after the announced end of the National Emergency relating to the coronavirus pandemic with respect to the following periods and dates:

	Plans Affected	What's Extended
Special enrollment rights	Medical Only	Date to exercise a special enrollment right (30 days for loss of eligibility or acquisition of a dependent, 60 days for Medicaid/CHIPRA eligibility or premium assistance)
COBRA	Medical, Dental, Vision, Health FSA, EAPs, Onsite Clinics	<ul style="list-style-type: none"> • Date for the plan to provide COBRA election notice • 60-day election period • Due date for timely COBRA premium payments • Due date to notify of a qualifying event or disability determination
Claims for benefits	All ERISA covered benefits	Date to file a benefit claim
Appeals of denied claims	All ERISA covered benefits	Date to file an appeal of an Adverse Benefit Determination ("ABD")
External review	Non-grandfathered medical plans	<ul style="list-style-type: none"> • Date to request an external review after receipt of an ABD • Date to file information to perfect a request for external review

In addition, under Disaster Relief Notice 2020-01 deadlines to furnish certain required notices to plan participants, beneficiaries and other persons were likewise extended. A plan will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020 and the end of the Outbreak Period if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances.

Importantly, according to the regulations, the Departments could only prescribe "up to one year" that can be disregarded for these purposes. So, while the Outbreak Period remains ongoing, the one-year mark, February 28, 2021, has almost arrived.

What's New?

The Departments issued joint guidance on the application of the one-year expiration limitation as it applies to employee benefit plans. The Departments have determined:

- Individuals and plans with timeframes that are subject to the deadline extensions (as noted above) will have the applicable periods disregarded until the earlier of:

- one (1) year from the date they were first eligible for relief, or
- 60 days after the announced end of the National Emergency (the end of the Outbreak Period).

On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under COVID-19 relief will resume. In no case will a disregarded period exceed one year. The agencies provide the following examples:

- If a COBRA qualified beneficiary would have been required to make a COBRA election by March 1, 2020, the relief delays that requirement until February 28, 2021, which is the earlier of one year from March 1, 2020 or the end of the Outbreak Period (which remains ongoing).
- If a COBRA qualified beneficiary would have been required to make a COBRA election by March 1, 2021, the relief delays that election requirement until the earlier of one year from that date (i.e., March 1, 2022) or the end of the Outbreak Period.

If a plan would have been required to furnish a notice or disclosure by March 1, 2020, the relief would end with respect to that notice or disclosure on February 28, 2021. The plan fiduciary would be required to ensure that the notice or disclosure was furnished on or before March 1,

2021. The Department of Labor understands that many plans may have already returned to normal compliance procedures for furnishing notices and disclosures. Notices and disclosures properly furnished without relying on the relief in Notice 2020-01 do not need to be re-furnished.

Similarly, to the extent the plan can demonstrate that a notice or disclosure was actually received, it would not need to be re-furnished even if it was initially furnished in reliance on the relief in Notice 2020-01.

Employer Action

The Departments stress that employers should make every effort to ensure that benefits to which employees and other individuals are entitled are made available. Importantly the latest guidance requires employers/plans to affirmatively send a notice regarding the end of the relief period to impacted individuals.

Employers should work closely with their plan administrators and COBRA vendors to:

- Provide notice regarding the end of the relief period to affected individuals.
- Reissue or amend any plan disclosures that were issued prior to or during the pandemic if the earlier 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).
- Ensure that group health plans, 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.
- There is a special enrollment period in the 36 states that use the HealthCare.gov platform starting on February 15 and continuing through May 15. At least 13 states plus the District of Columbia, which operate their own Marketplace platforms, are offering a similar opportunity.

We will continue to monitor guidance in this area and provide updates as they become available.