



Surprise DOL Guidance on Conclusion of One-Year ERISA Compliance Relief Period

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Even with widespread bipartisan support, it can be difficult to draft legislation to address all possible contingencies. In the wake of the events of September 11, 2001, Congress enacted ERISA §518 and Internal Revenue Code (the “Code”) §7508A, which generally allow the Secretaries of Labor and Treasury to disregard a period of time of less than one year in determining employee benefit deadlines when a plan, sponsor, administrator, participant, beneficiary, or other person is affected by a presidentially declared disaster. ERISA §518 was later amended to permit the Secretary of Labor to allow extensions of these deadlines in the case of a public health emergency declared by the Secretary of Health and Human Services. The premise with respect to these provisions, whether a terrorist attack or public health emergency, was that a one-year period would be enough to address any extraordinary circumstances. Unfortunately, the COVID-19 pandemic has exceeded the limits of the one-year period of extension, thereby creating a significant administrative problem for employee benefit plans.


On March 13, 2020, President Trump issued the *Proclamation Declaring a National Emergency Concerning the Novel Coronavirus Disease Outbreak* and by separate letter determined that a national emergency exists nationwide, beginning March 1, 2020, as the result of the COVID-19 outbreak. In response to the emergency and acting pursuant to ERISA §518 and Code §7508A, the Department of Labor (“DOL”) issued EBSA Disaster Relief Notice 2020-01. The Department of Treasury (“Treasury”), Internal Revenue Service (“IRS”) and DOL also jointly issued a Notice of Extension of Certain Time Frames for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (the “Joint Notice”). (EBSA Notice 2020-01 and the Joint Notice are referred to together as the “2020 Notices.”) These 2020 Notices provide relief for certain time-sensitive actions related to employee benefit plans that are required or permitted under Title I of ERISA or the Code. With respect to health and welfare plans, two compliance areas that were significantly affected were COBRA elections and claims review procedures. The relief provided under the 2020 Notices continues until 60 days after the announced end of the emergency, but the one-year period under ERISA §518 and Code §7508A ended on February 28, 2021. This has created a compliance conundrum, which the DOL has now addressed by issuing additional guidance.


On March 1, 2021, the DOL issued **EBSA Disaster Relief Notice 2021-01** (the “2021 Notice”), which notes that the IRS and Treasury have also reviewed and agreed. This guidance takes the position that an individual with a timeframe that is subject to relief under the 2020 Notices will have the applicable deadline periods disregarded **until the earlier of one year from the date that that individual was first eligible for relief or 60 days after the announced end of the National Emergency** (the “Outbreak Period”). On that date, the timeframe within which that individual must act will resume. For example, if an individual was required to make a COBRA election by March 4, 2021, that election will not need to be made until the earlier of March 3, 2022, or the end of the Outbreak Period, ensuring that the delay for each individual will not exceed one year.

The DOL is aware of both the complexity of this approach and the ongoing nature of the pandemic. It indicated that the guiding principle is to “act reasonably, prudently, and in the interest of workers and their families,” and that plan fiduciaries should make “reasonable accommodations” to prevent the loss or undue delay of benefits and “should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.” The DOL also suggested steps that employers might take prior to the extended deadlines, such as affirmatively sending notices to participants, advising them of a risk of loss of coverage or benefits because of an ongoing deadline. Also, for many plan sponsors, plan disclosures that reflect the DOL’s new statutory interpretation may need to be issued. Further, with respect to group health plans, the DOL observed that plans should consider ways to ensure that participants and beneficiaries who are losing coverage under a group health plan are made aware of other (possibly less expensive) options that are available to them, such as the opportunity to obtain coverage from a Health Insurance Marketplace. As a practical matter, coordination will be necessary with COBRA administrators and TPAs to determine how these individual time periods should be implemented. Finally, from an enforcement perspective, the DOL stated that in the case of fiduciaries who have acted in good faith and with reasonable diligence under the circumstances, the DOL’s approach to enforcement will not be unduly punitive but instead will emphasize compliance assistance and include grace periods and other relief.

Since the time frames for certain participants to act could have ended today or could have ended earlier this week, action for most health and welfare plan sponsors should be a priority item. Plan sponsors will need to understand the new interpretation of the extension as applied to its participants. Contact one of the authors to assist you in working through this unanticipated DOL interpretation of the COVID-19 deadline delay.


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