

COBRA Administration Issues Emerge During COVID-19 Outbreak Period

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In the September/October 2020 publication of the Journal of Compensation and Benefits article titled Impact of COVID-19 on COBRA Litigation and Best Practices, we addressed federal guidance extending certain Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) deadlines due to the novel coronavirus (COVID-19), in addition to recent class action COBRA lawsuits filed during the COVID-19 pandemic. This supplement article analyzes emerging COBRA administration issues caused by the ongoing COVID-19 related COBRA deadline extensions. Legal paths to the end of the COVID-19 national emergency (and a corresponding end to the extension of certain COBRA deadlines) are analyzed. New best practices have

emerged in response to the ongoing COVID-19 pandemic, and additional action items are suggested for group health plan sponsors and COBRA administrators.

OVERVIEW: COBRA DEADLINES EXTENDED DURING COVID-19 OUTBREAK PERIOD

On March 13, 2020, President Trump declared a national emergency in response to the COVID-19 pandemic. The Internal Revenue Service (IRS), Department of Treasury, and Department of Labor (DOL) subsequently issued guidance on April 28, 2020, extending certain COBRA deadlines due to the ongoing pandemic.¹ The guidance provides individuals additional time to elect COBRA coverage, pay the initial and ongoing COBRA premiums,

and notify the plan of a COBRA qualifying event or disability determination. These COBRA deadlines must be disregarded during the entire COVID-19 “Outbreak Period.”

The “Outbreak Period” is defined as the period from March 1, 2020, through 60 days after the announced end of the COVID-19 national emergency. Thus, the final 60 days of extended deadline relief do not begin to run against COBRA beneficiaries until the COVID-19 national emergency is declared to be over. In now outdated examples included in the COBRA deadline extension guidance, the regulators applied an assumption that the COVID-19 national emergency would end on April 30, 2020, with the Outbreak Period ending 60 days later, on June 29, 2020. Although the assumption

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that the COVID-19 national emergency would end on April 30, 2020, was likely provided for illustrative purposes only, it is perhaps indicative of the regulators' expectations regarding the progression of the pandemic at the time they issued the guidance.

Few anticipated that the COVID-19 national emergency would still be ongoing at the time this article is being published, and that COBRA beneficiaries would have an open-ended COBRA election and premium payment period for the remainder of 2020 as a result. Group health plan sponsors and COBRA administrators have questioned their rights and responsibilities during this open-ended COBRA deadline extension period as administrative issues emerge, as discussed below. The burning question for those involved in COBRA administration is: when will the Outbreak Period end?

THE END OF THE "OUTBREAK PERIOD": THREE PATHS TO THE END OF THE COVID-19 NATIONAL EMERGENCY

Absent new guidance from the regulators that discontinues the deadline extensions required during the Outbreak Period, COBRA deadlines will continue to be tolled until the COVID-19 national emergency

has ended. There are currently only three legal paths to the end of the COVID-19 national emergency. The National Emergency Act provides specific mechanisms to end national emergencies so that they do not continue into perpetuity.² First, a national emergency automatically terminates on the one-year anniversary of the date the emergency was declared, unless the President announces that the national emergency will continue. To avoid an automatic termination, the President must publish a notice in the Federal Register within 90 days prior to the national emergency anniversary date, and must also deliver a notice to Congress. Second, the President can issue a proclamation terminating the national emergency. Third, Congress can enact a joint resolution terminating the national emergency.

Notably, after a national emergency is announced, the National Emergency Act requires Congress to meet every six months and determine whether the national emergency should be terminated by joint resolution.³ However, Congress has historically declined to follow this section of National Emergency Act. The first and only time Congress met within the six-month statutory deadline to consider whether a national emergency

should be terminated by joint resolution was in 2019, when Congress met to review President Trump's declaration of a national emergency at the southern U.S. border.⁴

In light of recent spikes in COVID-19 cases in the U.S. and partisan disagreement over management of the virus, it is highly unlikely that Congress will meet to consider terminating the national emergency pursuant to a joint resolution. The possibility of termination by resolution of Congress is even more unlikely when one considers that such a resolution would likely require the support of two-thirds majorities in both the House and Senate to avoid a Presidential veto;⁵ this would be almost impossible to achieve given the current political climate. The possibility of a Presidential proclamation ending the COVID-19 national emergency, or, alternatively, the President allowing the national emergency to automatically terminate upon the one-year anniversary (March 13, 2021), likely depends on the progression of the pandemic and the results of the 2020 presidential election.

Thus, group health plan sponsors and COBRA administrators will almost certainly be administering the Outbreak Period COBRA deadline exten-

sions for the foreseeable future.

**EMERGING ISSUES:
ADMINISTERING COBRA
DURING THE COVID-19
OUTBREAK PERIOD**

Group health plan sponsors and third-party COBRA administrators have faced a number of administrative challenges as the Outbreak Period continues. While not an exhaustive list, the following issues have become recurring problems for plan sponsors and COBRA administrators:

- Some COBRA beneficiaries have incurred claims after electing COBRA, yet failed to pay premiums for several months, which results in significant premium delinquencies. This raises questions as to the carrier or group health plan’s obligations with respect to claims submitted during the Outbreak Period prior to receipt of required COBRA premiums. Complicating the matter, some carrier network contracts require payment to providers within certain timeframes. As the Outbreak Period continues, carriers are growing increasingly concerned about these contractual deadlines.
- Certain insurance carriers

invoice third-party COBRA administrators on behalf of fully insured groups for COBRA premiums after a participant elects COBRA. In many of these cases, the employer has no way of knowing whether the participant has been paying premiums to the COBRA administrator unless the administrator alerts the employer as to any deficiencies. This has created serious problems for some third-party COBRA administrators and their fully insured groups (which are typically strapped for cash due to the pandemic), as the administrator and/or group become financially responsible to the carrier for the delinquent COBRA premiums and cannot terminate the participant’s COBRA coverage due to nonpayment as a result of the Outbreak Period payment deadline extensions. In most cases, COBRA administrators and plan sponsors have been able to restructure premium payment arrangements with carriers prospectively to ensure claims do not continue to be paid for a period in which the required COBRA premium has not yet been received.

- Self-insured groups are growing increasingly concerned about adverse claims experience caused by COBRA beneficiaries playing the “waiting game” to elect COBRA coverage and pay required premiums during the Outbreak Period. Although such cases have been relatively uncommon thus far, some groups have experienced COBRA beneficiaries waiting several months to elect COBRA and pay required premiums only after they have incurred significant medical claims.
- COBRA administrators and plan sponsors remain uncertain about the circumstances in which COBRA coverage can be terminated during the Outbreak Period. Termination during the Outbreak Period is discussed in the following section.

A careful review of existing guidance and the specific facts at issue is required when addressing unique COBRA administration issues. For example, with respect to the carrier or group health plan’s obligations to pay claims submitted during the Outbreak Period after COBRA is elected but prior to the receipt of required COBRA premiums, the

Outbreak Period extension relief clarifies that while carriers and plans “may not deny coverage . . . [they] may make retroactive payments for benefits and services received by the participant during this time.” Thus, it appears carriers and plans may permissibly pend payment of claims for benefits incurred during the COBRA premium payment extension period until the participant pays their delinquent premiums. By contrast, denying claims upfront prior to receipt of COBRA premiums would likely be viewed as a prohibited denial of coverage during the Outbreak Period.

Additionally, plans should consider pre-COVID guidance and plan policies with respect to claims processing during a period of pending COBRA premium payment. As an example, the COBRA regulations permit plans to cancel coverage retroactively if payment is not made by the end of a payment grace period; however the plan must inform providers who inquire about an individual’s plan coverage that the participant is covered but that the coverage is subject to retroactive termination if timely payment is not made.⁶ In other words, the plan must inform the provider that claims will not be paid until COBRA premiums are received.

TERMINATING COBRA COVERAGE DURING THE COVID-19 OUTBREAK PERIOD

Under the Outbreak Period guidance, COBRA coverage cannot be denied during the Outbreak Period due to a failure to elect COBRA within the normal 60-day election window. Nor can coverage be terminated due to nonpayment during the Outbreak Period payment deadline extension periods. Therefore, the only circumstances in which COBRA coverage can be terminated during the Outbreak Period are as follows:⁷

- COBRA coverage is elected, but the maximum coverage period expires. The Outbreak Period relief does not prohibit plans from terminating COBRA coverage at the end of the otherwise applicable maximum COBRA coverage period.
- The employer and its controlled group terminate all group health plans. If there is no group health plan at the controlled group level, the employer’s COBRA obligation ceases to exist. However, in certain corporate transactions, successor COBRA liability can spring to a successor employer.

- The COBRA beneficiary becomes covered under another employer-sponsored group health plan. Practically, it is difficult for plan sponsors to know whether this event has occurred.
- The COBRA beneficiary becomes entitled to Medicare.
- A COBRA beneficiary in a disability extension period is found to no longer be disabled.
- Prior to the end of the maximum coverage period, for cause, on the same basis the plan terminates for cause for active employees (for example, fraud or failure to re-enroll in coverage during open enrollment).

Other than the expiration of the maximum COBRA coverage period, the above events do not automatically cause COBRA coverage to end. Therefore, plans must communicate that coverage will terminate following the occurrence of certain permissible events adopted by the plan in order for the plan to retain the right to terminate COBRA coverage. Interestingly, the DOL model COBRA election notice only states that “Continuation coverage may end before the [maximum coverage

period] in certain circumstances, like failure to pay premiums, fraud, or the individual becomes covered under another group health plan.” Therefore, plan sponsors and COBRA administrators should include in the election notice the additional circumstances listed above under which COBRA can terminate prior to the end of the maximum coverage period. A notice of termination of COBRA coverage must also be provided to COBRA beneficiaries when coverage terminates prior to the end of the maximum coverage period.⁸

Action Items

- The COVID-19 Outbreak Period will most likely continue for the foreseeable future, so plan sponsors and COBRA administrators would be wise to describe the deadline extensions in their template COBRA election notice if they have not done so already. Although there is no affirmative requirement to communicate these Outbreak Period

extensions, a description of the deadline extensions should be provided with the COBRA election notice so that COBRA beneficiaries understand they have additional time to elect COBRA and pay for coverage. Otherwise, a claimant can claim their COBRA rights were not properly explained, as required by ERISA § 606(a)(4).

- The COBRA election notice should include the full list of permissible circumstances under which COBRA coverage can terminate prior to the end of the maximum coverage period. This will increase the flexibility to move individuals off COBRA coverage as plans accumulate COBRA beneficiaries in the currently open-ended COBRA election and premium payment windows.
- Fully insured groups that outsource COBRA administration to a third-party vendor should ensure the

insurance carrier is not invoicing the COBRA administrator for COBRA premiums that may become the employer’s responsibility if the COBRA beneficiary does not ultimately pay for COBRA coverage. Similarly, self-insured plan sponsors should ensure their third-party administrator is not paying benefit claims submitted during a period in which the plan has not yet received the required COBRA premium payment.

NOTES:

¹The guidance consists of a joint final rule issued by the U.S. Departments of Labor and Treasury, EBSA Notice 2020-01, and COVID-19 FAQs for Participants and Beneficiaries.

²50 U.S.C.A. § 1622.

³50 U.S.C.A. § 1622(b).

⁴See Congressional Research Service Report R45908, Legal Authority to Repurpose Funds for Border Barrier Construction (December 30, 2019).

⁵See Congressional Research Service Report R46379, Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act (July 14, 2020).

⁶Treas. Reg. § 54.4980B-8, Q/A-5(c).

⁷ERISA § 602(2)(B) to (E).

⁸DOL Reg. § 2590.606-4(d).