

COVID-19

Breaking Down the “Outbreak Period” Extensions: The Clock May Begin Ticking Soon for Important Deadlines Suspended Due to COVID-19

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As the COVID-19 pandemic began to overwhelm the country last spring, the Departments of Labor (“DOL”) and Treasury (together, the “Departments”) became concerned that the disruption caused by the pandemic would create problems for participants in exercising certain rights or filing benefit claims and that group health plans may have difficulty in complying with certain notice obligations.

Therefore, on April 29, 2020, the Departments issued guidance extending certain deadlines related to retirement, health, and welfare plans in response to the current COVID-19 pandemic. Part of the guidance was federal regulations (the “Final Rule”), which extended the deadlines to elect COBRA, pay COBRA premiums, elect HIPAA special enrollment, and file benefit claims, appeals, and external review requests during the “Outbreak Period” related to COVID-19. We refer to the suspension of those deadlines as the “Outbreak Period Extensions.”

These extensions were similar to those adopted by the Departments in other disasters, such as hurricanes, but for COVID-19, have been on a much larger national scale and lasted much longer. There has been significant confusion regarding how employers, plans, and administrators should administer the Outbreak Period Extensions, and with the COVID-19 crisis continuing to drag on, there are many questions regarding when the Outbreak Period Extensions will expire. Adding to the confusion is a one-year statutory limit that applies to extensions mandated by the Departments. Since the Outbreak Period Extensions were first effective as of March 1, 2020, that one-year limit will be up shortly. As discussed below, while the Departments have not provided any further guidance on this issue, **plans and plan administrators should decide whether to end the extensions on midnight on February 28, 2021 based on this one-year limit.**

Read on for answers to some of the questions we have received in regard to these issues, including why the COVID-19 public health emergency declaration made (and periodically extended) by the Department of Health and Human Services ***does not impact this rule.***

What deadlines were suspended under the Final Rule?

Most are deadlines that apply to health and welfare participants, and they are reviewed in detail [here](#). Most notably, they include the deadlines for making elections under COBRA, the deadlines for paying COBRA premiums, the deadlines for filing a claim or appeal under the plan's claims procedure, the deadline for requesting external review, and the deadlines to request a HIPAA special enrollment period. The claims and appeals extensions also apply to other ERISA plans, such as disability plans.

The only deadline subject to the Outbreak Period Extensions that is applicable to plans and plan administrators is the 14-day deadline (44 days where the employer is the plan administrator) to provide a COBRA election notice to qualified beneficiaries.

How long did the Departments say the Outbreak Period Extensions would last?

In the Final Rule, the Departments stated that, "[s]ubject to the statutory duration limitation in ERISA section 518 and Code section 7508A, all group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA or the Code must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or such other date announced by the Departments in a future notification (the "Outbreak Period")."

What does that mean, practically?

It might be helpful to provide an example. Let's assume Anne, an employee in a group health plan, experienced a COBRA qualifying event and was provided a COBRA election notice on April 1, 2020.

Ordinarily, Anne would have 60 days to make her COBRA election (the 60-day period between April 2, 2020 and May 31, 2020). However, the Final Rule tells us that in determining the 60-day election period, the plan must disregard the period from March 1, 2020 until the end of the "Outbreak Period." So, for Anne, the 60-day period does not start to run until the end of the "Outbreak Period."

(But we also note that this extension is "subject to the statutory duration limitation in ERISA section 518 and Code Section 7508A." This is important, so keep it in mind.)

OK, so the Final Rule provides that in order for us to determine Anne's COBRA election period, we need to know when the "Outbreak Period" ended. When did the "Outbreak Period" end?

Notably, the Outbreak Period has not ended.

The Final Rule says that the Outbreak Period began on March 1, 2020, and ends 60 days after "the announced end of the National Emergency or other date announced by the Departments in a future notification."

The Final Rule defines the "National Emergency" in reference to two actions taken by former President Trump on March 13, 2020. President Trump issued a proclamation declaring a national emergency under the National Emergencies Act ("NEA"), and separately declared an emergency under the Stafford Act (both, obviously, in regard to COVID-19). This has resulted in some confusion, as the NEA and Stafford Act are separate federal statutes, and as the Congressional Research Service has noted, "the act of simultaneously declaring an emergency pursuant to the NEA and the Stafford Act nationally for the same threat or hazard appears to be unprecedented." Also, as discussed in more detail below, the Departments' authority to provide disaster-related extensions of ERISA and Code deadlines appears to be tied only to a Presidentially-declared disaster under the Stafford Act, so it is unclear if the NEA disaster proclamation has any relevance.

In any event, the "National Emergency," as defined in the Final Rule, is still in effect. There has been no determination under either of these laws that the COVID-19 emergency has ended. Also, the Departments have not announced any other termination date for the Outbreak Period.

It's worth noting that we have some indication that when the Outbreak Period Extensions were established, the Departments were not anticipating that the COVID-19 National Emergency would last as long as it has. Examples in the Final Rule of how to apply the extensions were based on the National Emergency ending on April 30, 2020, with the Outbreak Period ending on June 29, 2020.

I recently read that the federal government extended the COVID-19 emergency. How does that affect things?

Adding to the confusion is that the Department of Health and Human Services ("HHS") has declared its own "public health emergency" in relation to the COVID-19 pandemic. HHS' "public health emergency" declarations expire automatically after 90 days unless the Secretary of HHS issues an extension, and HHS has been issuing extensions on a regular basis since last year. The last declaration came out in January 2021 and extends through April 20, 2021.

HHS' public health emergency declarations are issued pursuant to the Public Health Service Act, and are completely separate from the NEA and Stafford Act disaster declarations discussed above. However, to be clear, the HHS public health emergency has no relevance to the Outbreak Period Extensions (which are under the jurisdiction of DOL and Treasury). Note that the HHS public health emergency declaration is important, however, because among other things, it triggers the requirement for group health plans and issuers to provide coverage at 100% without cost share for COVID-19 testing and related services under the Families First Coronavirus Response Act and the Coronavirus Aid, Relief and Economic Security Act.

So, if the Outbreak Period has not ended... how do we determine Anne's COBRA election period?

Again, the Final Rule said that the plan must disregard the period from March 1, 2020 until the end of the "Outbreak Period" (60 days after the end of the National Emergency) in determining how long our hypothetical employee Anne has to elect COBRA.

Her COBRA election period started on April 2, 2020, which is within the period that the plan must disregard under the rules. And as mentioned above, the Outbreak Period is still in effect. As a result, Anne's COBRA election period has not even started to run at the current time.

What was that you said above, that we should keep in mind ERISA Section 518 and Code Section 7508A? That sounded intriguing.

Intriguing, huh? We figured if you'd read this far, you were our type of person....

As we noted above, the Final Rule provides that the Outbreak Period Extensions are "subject to the statutory duration limitation in ERISA section 518 and Code section 7508A." Essentially, these are the provisions of ERISA and the Code that gave the Departments the authority to suspend the statutory deadlines in the first place. ERISA Section 518 provides, in relevant part, as follows:

In the case of a...plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Presidentially declared disaster [under the Stafford Act]...the [Departments] may, notwithstanding any other provision of law, prescribe, by notice or otherwise, **a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted to be completed under this chapter.**

Code Section 7508A is substantially similar. Since there was a Presidentially-declared disaster under the Stafford Act, the Departments had the authority to establish the Outbreak Period Extensions. However, these provisions of law only allow for "a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted."

As a result, notwithstanding the fact that National Emergency (on which the Outbreak Period is based) has not ended, this statutory provision suggests that the Departments cannot prescribe an extension of deadlines that exceeds one year.

So how does the 1-year limitation on extensions in ERISA/the Code impact the Outbreak Period Extensions?

The Departments have not provided any further guidance with regard to this issue, and to our knowledge, this is the first time that a “disaster-related” extension to the ERISA and Code deadlines has ever bumped up against the one-year limit.

Based on the one-year limit described in the statutes and the Final Rule, and in the absence of guidance from the Departments (and believe us, we have asked!), we think that plans and plan administrators are likely to take the position that the suspension of deadlines under the Outbreak Period Extensions expires on February 28, 2021 (one year after the Outbreak Period Extensions began, on March 1, 2020). This seems consistent with the statutory intent in ERISA/the Code, which limits the Departments’ ability to create blanket extensions in excess of a one-year period.

Under this interpretation, going back to our hypothetical example, Anne’s COBRA election period would begin running on March 1, 2021 and she would have until April 29, 2021 (60 days) to make a COBRA election (and, if she makes an election and pays the retroactive COBRA premiums due, her COBRA coverage would be retroactive to her loss of coverage as of April 1, 2020).

Are there other potential interpretations of how the ERISA/Code language interplays with the Outbreak Period Extensions?

Yes. One alternative interpretation is that the one-year statutory limit on the extension of deadlines applies on a case-by-case basis. In other words, each deadline that began on or after March 1, 2020 would be suspended for the duration of whichever period ends earlier: (1) one year from the date that the specific deadline would otherwise have begun; or (2) the Outbreak Period.

Under this interpretation, Anne’s COBRA election period would be suspended for the maximum one-year period that applies to her, from April 2, 2020 to April 1, 2021. Her COBRA election period would then run from April 2, 2021 to May 31, 2021.

This interpretation could cause administrative complications for a plan administrator, depending on its process for tracking deadlines. It also may go beyond what the statute and the Departments would require.

Could the Departments take action to further extend the Outbreak Period Extensions?

We believe the language in ERISA Section 518 and Code Section 7508A likely limits the ability of the Departments to “extend the extensions” past the one-year period, in the absence of another disaster. However, it is possible the Departments could attempt to do so or issue a new rule providing for a second, prospective extension.

Is any other COVID-19 relief issued by the Departments impacted by the ERISA limitation?

The one-year limit under ERISA Section 518 also comes into play for the relief DOL provided in the EBSA Disaster Relief Notice 2020-01. This notice provides that 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 60 days after the announced end of the COVID-19 National Emergency, 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.”

However, this relief is caveated with the language “Subject to the duration limitation in ERISA section 518....” So, it looks like the non-enforcement relief plans have been able to rely on during COVID with respect to providing notices and disclosures also will be discontinued, unless DOL takes action otherwise.

The Disaster Relief Notice can be found [here](#).