

## The End of the COVID-19 Emergency Declarations

Today marks the end of the COVID-19 public health emergency that first began on March 13, 2020. The end of the public health emergency has a wide range of implications for employer sponsored benefit plans. This alert summarizes certain changes in plan administration that employers will face as a result of the end of the COVID-19 emergency periods, including the end of the tolling of deadlines relating to COBRA, ERISA claims submission and appeals, and HIPAA special enrollment deadlines, as well as other aspects of benefit plan administration.

### **I. Background**

Shortly after the COVID-19 public health emergency (the “Public Health Emergency”) and the COVID-19 national emergency (the “National Emergency”) and, together with the Public Health Emergency, the “Emergency Periods”) were declared in 2020,<sup>1</sup> the Employee Benefits Security Administration (“EBSA”), the Department of Labor (“DOL”), the Internal Revenue Service (the “IRS”) and the Department of the Treasury (“Treasury”) issued a joint notice of relief, and the EBSA and the DOL, in coordination with the IRS and the Department of Health and Human Services (“HHS”) also issued Disaster Relief Notice 2020-01, which was modified by EBSA Disaster Relief Notice 2021-01 (collectively, the “Relief Guidance”). The Relief Guidance, along with the Coronavirus Aid, Relief, and Economic Security Act (H.R.748) (the “CARES Act”)<sup>2</sup> had a significant impact on employee benefit plan administration. Among other things, the Relief Guidance required employee benefit plans to follow specific guidelines regarding coverage of certain services, and to toll various deadlines related to health and welfare plans, as discussed in our prior alerts available [here](#) and [here](#). On January 30, 2023 the Biden Administration announced that on May 11, 2023 the National Emergency and the Public Health Emergency would end. On March 29, 2023, HHS, the DOL and Treasury released additional guidance intended to facilitate the transition to the end of the Emergency Periods (the “FAQs”).

### **II. Deadline Tolling**

As described in our prior [alert](#), the Relief Guidance generally provided that certain timeframes to take actions under employee benefit plans are disregarded when determining the due dates to take those actions. Specifically, the timeframes to take the action were required to be tolled until the earlier of 60 days after the end of the National Emergency (the entire period, including the 60 days, is referred to as the “Outbreak Period”) or one year after the date the individual was first eligible for relief (which would generally be the original start date of the timeframe to take the action (“Start Date”) for Start Dates that occurred after March 13, 2020). As discussed further below, the timeframes (and the resulting deadlines) that were tolled under the Relief Guidance included, among other things, COBRA deadlines, HIPAA special enrollment deadlines, plan notice deadlines, ERISA claims procedures and group health plan external review deadlines. Since the Emergency Periods ended (or are treated as ending<sup>3</sup>) on May 11, 2023, the Outbreak Period expires on July 10, 2023, and the tolling relief generally

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<sup>1</sup> The Public Health Emergency was originally declared by the U.S. Department of Health and Human Services effective January 31, 2020. The National Emergency was originally declared by President Trump effective March 13, 2020.

<sup>2</sup> See discussion in our prior alerts [here](#) and [here](#).

<sup>3</sup> On April 10, 2023, President Biden signed a resolution ending the National Emergency as of that day. This initially raised some questions as to whether the “Outbreak Period” would end sooner than originally anticipated, but we understand that the DOL has informally provided guidance that the Public Health Emergency still ends on

ends on July 10, 2023 (to the extent tolling has not already ended sooner under the one-year maximum tolling limit).

A. COBRA Deadlines

Many of the timeframes to perform actions relating to COBRA continuation coverage were tolled during the Outbreak Period. The Relief Guidance generally provides that the timeframe to perform an action (such as make a COBRA election) is tolled from the Start Date to take such action until the earlier of one year from the Start Date<sup>4</sup> or the end of the Outbreak Period. This period of tolling is disregarded when determining the deadline by which certain actions relating to COBRA administration must be performed, such as an individual informing the plan administrator of a qualifying event or electing COBRA, and the date by which COBRA election notices were required to be provided by the plan to participants.

Once the Outbreak Period ends on July 10, 2023, COBRA administration will be impacted in the following ways:

- The timeframe allowed for qualified beneficiaries to notify the plan sponsor of qualifying events will begin to run again starting on the earlier of one year after the applicable Start Date (of the timeframe in which to provide such notification) and the end of the Outbreak Period. Plan sponsors who have modified their COBRA materials to reference the longer notification period may want to consider revising them accordingly.
- The timeframe allowed for plan sponsors to provide COBRA election notices was generally extended by the Relief Guidance to the earlier of one year after the applicable Start Date (of the timeframe in which to provide such notices) or the end of the Outbreak Period. Plan sponsors who have relied on the Outbreak Period relief to delay providing COBRA notices during the tolling period must start providing the COBRA notices in a timely manner on and after the end of the Outbreak Period.
- The 60-day period during which COBRA continuation coverage may be elected by a participant will begin to run starting on the earlier of one year after the applicable Start Date (of the timeframe in which to make such election) or the end of the Outbreak Period. The FAQs also clarify that qualifying events occurring during the Outbreak Period (which includes the 60 day period after the end of the Emergency Periods), will benefit from the tolling relief through the end of the Outbreak Period.
- The 45 (or 30) day period by which COBRA premiums are required to be paid will begin to run as of the earlier of one year after the applicable Start Date (of the timeframe in which to make such payment) or the end of the Outbreak Period. The Relief Guidance previously clarified that the disregarded period for an individual to elect COBRA and the disregarded period to pay the initial and subsequent COBRA premium payments generally run concurrently.
- The FAQs encourage plan sponsors to continue to provide additional time for impacted individuals to submit notices and make payments, although this is no longer mandated after the Outbreak Period ends.

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May 11, 2023 and the end of the “Outbreak Period” for purposes of various forms of DOL relief, including deadline tolling, will still be July 10, 2023 (which is 60 days after May 11, 2023).

<sup>4</sup> Note that tolling worked slightly differently for periods which had begun before the Outbreak Period was declared. In such instances the tolling would have ignored the period between the start of the Outbreak Period and the earlier of one year from the start of that period or the end of the Outbreak Period.

- In addition, plan sponsors may want to consider sending a notice to all impacted employees highlighting the revised deadlines.

B. HIPAA Special Enrollment Deadlines

The tolling of the 30 or 60 day timeframe for participants to request enrollment following a HIPAA special enrollment event (e.g., due to marriage, birth, adoption, or placement for adoption) will begin to run as of the earlier of one year after the applicable Start Date (of the timeframe in which to make such enrollment request) or the end of the Outbreak Period. The tolling relief still applies even if the special enrollment event occurs during the 60 day period after the end of the Emergency Periods but prior to the end of the Outbreak Period. Plans may, of course, still require the payment of premiums for the period of coverage during the disregarded tolling period. Although plan sponsors are encouraged to continue providing extensions of these deadlines, they are no longer required to do so after the end of the Outbreak Period. As with the COBRA deadline changes, employers may want to consider communicating these changes in HIPAA special enrollment deadlines to impacted individuals to avoid surprises to the individuals.

C. Required Plan Notices

The Relief Guidance provided that a benefit plan and the plan fiduciary will not violate ERISA by failing to furnish a notice, disclosure or document that must be furnished during the Outbreak Period if the plan and fiduciary acted in good faith and provided such documentation as soon as administratively practicable under the circumstances. Since the beginning of the Emergency Periods, many employers were eventually able to work with their plan vendors to provide timely plan notices in the normal course of business. To the extent a plan has continued to rely on the Relief Guidance to delay the furnishing of any notice, disclosure or document, that relief will cease at the end of the Outbreak Period and notices, disclosures and documents must be furnished in accordance with normal timing requirements.

D. ERISA Claims Procedures and External Review Deadlines

The timeframe during which a participant was required to submit a claim or an appeal under an ERISA plan's claims procedure or a group health plan's external review process was tolled until the earlier of one year after the applicable Start Date or the end of the Outbreak Period. Following the end of the Outbreak Period, the time periods for submitting such claims or appeals will generally resume running, meaning that individuals with claims or appeals to file will no longer continue to have the extra time afforded to them during the Outbreak Period.

III. Other Implications

A. Telehealth

The CARES Act permitted employers to offer stand-alone telehealth to employees who were not eligible for a group health plan during the Public Health Emergency. This relief will end at the close of the last plan year that began prior to May 11, 2023 (which, for calendar year plans, relief would end December 31, 2023). A revised summary plan description or a summary of material modifications may be required to be distributed reflecting the change to the stand-alone telehealth plan, but the agencies have provided limited relief from the requirement of providing the 60 day advance notice of a change to the summary of benefits and coverage ("SBC") in connection with the end of the Public Health Emergency. Following the end of this relief, employers that want to continue to offer a stand-alone telehealth benefit may need to analyze how they might provide this benefit in a manner that complies with the Affordable Care Act rules (and applicable exceptions).<sup>5</sup>

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<sup>5</sup> Note that legislation has been proposed to make stand-alone telehealth available on a permanent basis.

## B. COVID-19 Testing and Vaccines

After the end of the Public Health Emergency, employer-sponsored health insurance will no longer be required to cover:

- COVID-19 diagnostic testing and related services (e.g., over-the-counter tests or tests administered by healthcare providers) without imposing cost sharing such as deductibles or copayments, or other medical management tools such as pre-authorization.
- COVID-19 vaccines and boosters from out of network providers without imposing cost sharing or other medical management tools such as pre-authorization; except that non-grandfathered group health plans will still be required to cover COVID-19 vaccines from in-network providers at no cost to the participant as a preventive service in accordance with requirements under the Affordable Care Act.

Employers with fully insured health insurance may want to discuss with their insurers whether and what modifications to COVID-19 testing and vaccine benefits will occur after the end of the Public Health Emergency. The agencies have indicated that a plan will have satisfied its obligation to provide the normal 60 day advance notice of a material modifications to an SBC if it either previously notified the individual of the general duration of the additional benefits coverage or reduced cost sharing, or it notifies the individual of the same within a reasonable timeframe in advance of the reversal of the changes.

## C. Employee Assistance Programs (EAP)

The CARES Act stipulated that, during the Public Health Emergency or the National Emergency, including COVID-19 diagnosis or testing in an EAP would not cause such EAP to be considered a medical plan due to provision of significant benefits in the nature of medical care. Therefore, employers with EAPs that continue to include COVID-19 related testing or diagnosis should review their plans to determine whether the COVID-19 related services could now cause them to lose their status as an “excepted benefit” for HIPAA or Affordable Care Act purposes and/or potentially be considered a welfare benefit plan subject to ERISA.

## D. Mental Health Parity and Addiction Equity Act (MHPAEA)

During the Public Health Emergency, group health plans were permitted to disregard certain COVID-19 related benefits that were required to be provided without cost-sharing for purposes of certain MHPAEA testing requirements. Following the end of the Public Health Emergency, this limited MHPAEA relief ends, and plan sponsors who intend to keep certain no or low cost COVID-19 related services may want to consider conducting appropriate testing to ensure compliance with MHPAEA requirements.

## E. Qualified Disaster Relief (QDR) Payments

Some employers have utilized Internal Revenue Code (“Code”) Section 139 to provide payments under a QDR plan or program to their employees during the National Emergency. Code Section 139 allows for these special payments (which are excludable from income) for costs incurred due to the National Emergency. Once the National Emergency ends, it will be necessary for employers to revisit their QDR programs, because, although the payment does not have to be made during a period of a National Emergency, it must be made to offset a cost incurred due to the National Emergency, and such costs will become increasingly rare.

#### **IV. Takeaways**

Given the magnitude of this shift in plan operation and policy, plan sponsors should undertake a number of actions to prepare for the end of the Emergency Periods, including reviewing plan documents and procedures and making any necessary changes to plan design to ensure that plan rules and procedures comport with the changing rules. In addition, employers may consider sending communications to employees to inform them of the impact of the end of the Emergency Periods and the resulting change to certain deadlines, costs and coverage levels.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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