

COBRA and ERISA

Plan Deadlines Extended for employer-sponsored health, accident and disability plans



The Department of Labor and the IRS have issued a [notice](#) extending certain deadlines for participants and beneficiaries and plan administrators, including deadlines relating to COBRA, special enrollment rights, and claims and appeals deadlines. This advisory provides a high-level discussion of the extensions as applicable to private sector employer sponsored accident, health and disability plans and what the extensions may mean for employers. Rules specific to church plans and governmental plans are not addressed here. DOL and IRS have also provided [FAQs](#) that discuss the extension as well as other issues.



Extension period

The extension period is not a set date, but rather depends on when the National Emergency announced by the President relating to COVID-19 ends. We don't know at this point when that will be. Under the extension, plans disregard the period between March 1, 2020 and 60 days after the announced end of the COVID-19 National Emergency when calculating the plan-related time periods described below. This period is referred to as the "Outbreak Period" in the DOL/IRS guidance. For example, if the National Emergency were to end on Nov. 30, 2020, the Outbreak Period would end on Jan. 29, 2021.

Under the extension:

- If a time period began before March 1 but did not expire before March 1, the period is extended (or "tolled") until the end of the Outbreak Period.
 - *Example:* Employee A had a reduction in hours that triggered COBRA rights. Employee A's 60-day COBRA election period began on Feb. 1. As of March 1, 2020, 28 days of A's election period had passed. For purposes of this example, let's assume that the National Emergency ends on Nov. 30, 2020, so that the Outbreak Period ends on Jan. 29, 2021. The period between March 1, 2020 and Jan. 29, 2021 is disregarded in counting A's 60-day election period. Thus, A has until April 1, 2021 to elect COBRA (32 days after the end of the Outbreak Period).
- The start date of a time period that would otherwise begin on or after March 1 is postponed until the end of the Outbreak Period.
 - *Example:* Let's suppose employee B was laid off due to COVID-19, triggering COBRA rights, and that B's COBRA election period would otherwise begin on April 1, 2020. Again, let's assume that the Outbreak Period ends on Jan. 29, 2021. B's 60-day election period would begin on Jan. 30, 2021.

Time periods subject to the extension

COBRA notices:

COBRA requirements apply generally to group health plans, however there are important exceptions.

COBRA requirements do not apply to group health plans of small employers. Small employers for this purpose are those that, in the prior calendar year, normally employed less than 20 employees on a typical business day.

In addition, COBRA requirements do not apply to plans that are exempt from ERISA because they qualify under the exception for “voluntary plans”. Many employers make supplemental excepted benefit coverage such as critical illness coverage, hospital indemnity and other fixed indemnity coverage, and vision and dental plans, available to their employees through “voluntary” arrangements to distinguish the benefits from employer-sponsored primary health coverage and retirement plans. These supplemental insurance benefits are often offered by insurers at the worksite and premiums are paid through payroll deduction. If the voluntary plan requirements under ERISA are met, then the arrangement through which supplemental plans are made available by insurers is not subject to ERISA requirements. Thus, if the arrangement qualifies as a voluntary plan under ERISA, then COBRA does not apply. Further information on the ERISA exception for voluntary plans may be found in the [Aflac voluntary plan advisory](#).

The following COBRA deadlines applicable to plan participants and beneficiaries must be applied without regard to the Outbreak Period:

- A qualified beneficiary’s 60-day period to elect COBRA;
- The 45-day grace period from the date COBRA is first elected to pay the first premium and the 30-day grace period each month thereafter to pay the monthly COBRA premium. Plans and insurers may not deny coverage based solely on late payment of premiums and may make benefit payments retroactively once premiums are paid.
- The qualified beneficiary’s 60-day period to notify the plan administrator of a qualifying event (or second qualifying event) or a determination of disability.

In addition, the plan administrator’s 14-day period for sending COBRA election notices (or the 44-day period if the employer is the plan administrator and sends the notices directly) may be applied without regard to the Outbreak Period. That is, the plan administrator is not required to take advantage of this extension, but the notice is considered timely if the plan administrator does so.





Claims and appeals deadlines; deadline for request of external review

All employee welfare benefit plans subject to ERISA, including group health plans, accident and disability plans, are required to have a process for the filing of claims and initial claims determination, as well as a process by which participants and beneficiaries may appeal a claim that has been denied. ERISA sets forth the details for claims and appeals, including filing deadlines. As discussed above, in some cases, coverage may not be subject to ERISA if the requirements for the voluntary plan exception are satisfied.

In addition, group health plans subject to the ACA are required to have an independent external review process for certain claims. Grandfathered group health plans and excepted benefit plans are not subject to the external review requirements. The deadlines for filing a claim, appeal, or request for external review vary based on the type of claim.

The extension applies to:

- The time period under any ERISA welfare plan for the claimant to file a benefit claim (including the run out period for Health FSAs) and the 180-day period to file an appeal (if the plan offers a second level internal appeal, the period for filing a second level of appeal, as determined by the plan, is also impacted); and
- A claimant's period to request external review or perfect an external review for a claim under a group health plan subject to the ACA requirements.

HIPAA special enrollment rights

HIPAA generally requires group health plans to provide a special enrollment period during which individuals experiencing certain events and who have previously declined coverage under the plan are allowed to enroll. Examples of circumstances in which a special enrollment period must be available include the following:

- An employee or dependent loses eligibility for another group health plan in which the individual was previously enrolled;
- An eligible employee has a new dependent by birth, marriage, adoption or placement or adoption; and
- An individual loses coverage under the Children's Health Insurance Program (CHIP) or Medicaid.

The extension applies to the 30-day or 60-day time period to request special enrollment in a group health plan.

Excepted benefit plans (e.g., vision, dental, and Health FSAs) are not subject to the HIPAA special enrollment rules so that the extension is not applicable to these types of plans.

Application of the extension period to different types of plans

Whether a particular extension applies depends on the type of plan (e.g., whether it is subject to ERISA, whether the plan is a health plan or some other type of plan) and the particular requirement. The following chart provides a high-level summary of whether the extensions apply to certain types of plans.

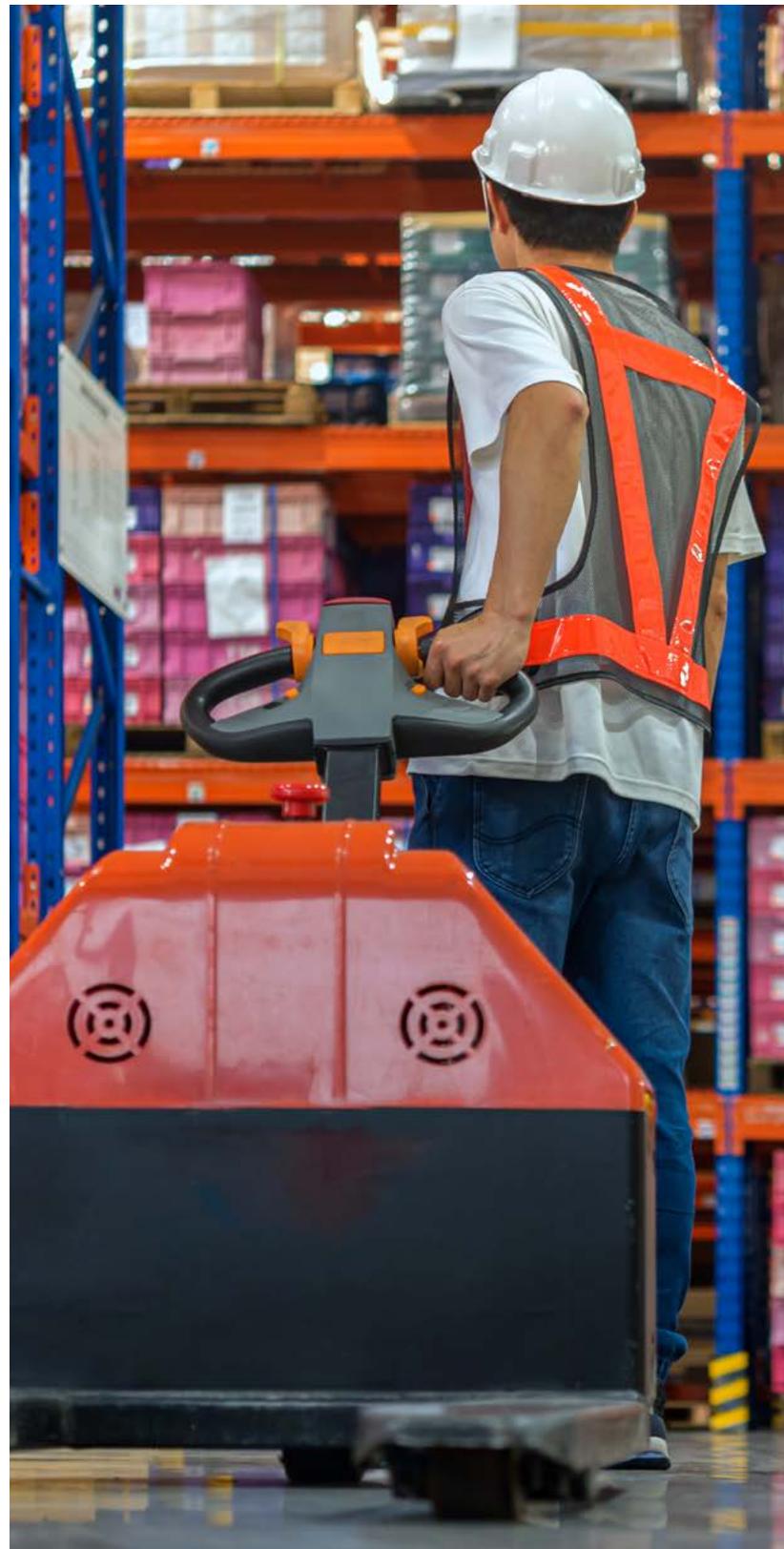
Plan type	COBRA election and premium payment extensions	Claims and appeals extensions	External review extensions	Special enrollment election extensions
ERISA group health plan (GHP)	Y	Y	Y	Y
Grandfathered GHP	Y	Y	n/a	Y
ERISA excepted benefits (e.g., vision, dental, FSA)	Y	Y	n/a	n/a
Other ERISA plan (e.g., accident or disability)	n/a	Y	n/a	n/a
Non-ERISA plan (e.g., non-ERISA coverage that meets the voluntary supplemental plan exception, dependent care or transit)	n/a	n/a	n/a	n/a



Considerations for employer plan sponsors

We don't know when the National Emergency will be lifted. This means that election periods and payment periods that began or otherwise ended during the Outbreak Period could be open for a very long time—and plans will be required to track those time periods. Thus, plan sponsors and administrators (including COBRA administrators) should discuss these new requirements with their legal advisors. Some high-level considerations follow:

- Although the guidance does not expressly require revisions to notices and/or Summary Plan Descriptions (SPDs), the guidance references fiduciary duties related to notification. While an SPD or SMM may suffice, more expedient approaches may be possible to notify plan participants – especially given the temporary nature of the guidance.
- Plan sponsors and administrators should review current notices and payment booklets to ensure compliance. It is extremely important to give qualified beneficiaries the information they need to stay on track. While qualified beneficiaries have an opportunity to delay electing COBRA and/or making payment, there are consequences to that (e.g., if you don't pay for 4 months and then decide that you need coverage for those 4 months, you have to pay for 4 months of COBRA premiums, which will be cost prohibitive for most people).
- Consideration should be given to creating an information supplement covering the COBRA extension provisions and including it with election and premium notices. Including the supplement with current notices and communications could suffice for prospective notice, but consideration should be given to how to address covered individuals and current qualified beneficiaries (including individuals who have not yet made their elections).



- The early termination notice that is typically sent following a failure to pay the premium by the end of the monthly grace period should be reviewed. Under the extension, failure to pay by the end of the normal grace period doesn't terminate the qualified beneficiary's right to COBRA as it otherwise would—the qualified beneficiary can still retroactively reinstate it by paying the premium at any time up to 30 days after the end of the Outbreak Period in the future.
- The guidance makes it clear that plans are not required to pay claims during the Relief Period where elections are not made and/or premiums are not paid in reliance on the extension; but it also states that the plan cannot deny coverage when premiums haven't been paid.



Conclusion

The extension was provided in order to assist workers impacted by COVID-19. However, the extensions also create new compliance concerns for plan sponsors. Employers and plan administrators should discuss these issues with counsel in advance to ensure ongoing compliance with their legal requirements during the Outbreak Period.

The information above is provided for general informational purposes and is not provided as tax or legal advice for any person or for any specific situation. Employers and individuals should consult their own tax or legal advisers.

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