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COBRA & Additional Benefits Compliance During COVID-19

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TOPICS INCLUDE:

- Compliance Requirements
- COBRA Basics
- Employer COBRA Obligations
- Providing adequate time to enroll in COBRA continuation coverage
- Providing adequate time to pay COBRA premiums before dropping coverage
- Allowing COBRA participants to make “special” mid-year changes
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- Relief for Cafeteria Plans and FSAs



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Introduction



Introduction

The COVID-19 induced economic downturn has forced many employers to cut employee hours and undergo reductions in force, which in turn, has caused employees to lose healthcare coverage and required employers to offer COBRA continuation coverage.

Introduction

Recognizing the increase in COBRA coverage during this time, the Department of Labor (DOL) and the Internal Revenue Service (IRS) released temporary changes to certain COBRA rules which make it easier for employees to enroll in and pay for COBRA coverage. In addition, perhaps uncoincidentally, there has been a recent uptick of COBRA-related class action lawsuits against employers who fail to meet their COBRA obligations.

Introduction

Given these recent changes, it would be prudent for employers to audit their current COBRA processes to shore up any gaps in compliance. Below is an outline of how recent COBRA updates and changes affect employer COBRA obligations and how employers can ensure COBRA compliance in this changing landscape.

Introduction

Non-federal governmental group health plans, such as state and local group health plans (including group health plans sponsored by public schools and colleges), are encouraged—but not required—to comply with recently announced deadline extensions applicable to group health plans subject to ERISA. On April 29, 2020, the Department of Labor (“DOL”), Department of Treasury (“Treasury”), and the IRS issued guidance requiring extensions of certain deadlines applicable to employer-sponsored group health plans (such as deadlines under COBRA, HIPAA and ERISA).





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Compliance Requirements



Compliance Requirements

Employers can take the following steps to ensure their COBRA processes comply with recent regulatory changes:

Compliance Requirements

- Employers should ensure they are sending the updated versions of the COBRA general notice and election notice to qualified beneficiaries moving forward. In addition, employers should also notify qualified beneficiaries who experience a COBRA qualifying event after March 1, 2020 (and during the “Outbreak Period”) of their extended deadline to elect COBRA coverage. Employers should work with their COBRA vendor to ensure that qualified beneficiaries are receiving the proper notices.



Compliance Requirements

- Employers may want to check in with their COBRA vendors to understand how they are complying with the extended deadlines for premium payments during the “Outbreak Period.” Employers should notify COBRA participants of this limited extension.



Compliance Requirements

- Employers who are allowing “special” mid-year changes to their group health plans and/or flexible spending accounts (FSAs) should also notify and allow COBRA participants to make the same changes (upon carrier approval).





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COBRA Basics



COBRA Basics

Federal COBRA regulations require certain employers to offer covered employees and their covered beneficiaries (together “qualified beneficiaries”) the option to continue coverage under their group health plan if they experience a COBRA qualifying event that causes them to lose coverage. Employers who had more than 20 employees in the prior calendar year are subject to federal COBRA regulations, which require employers to notify individuals of their COBRA rights and to administer COBRA according to specific rules.

COBRA Basics

A reduction in hours, temporary furlough, or termination are considered COBRA qualifying events if they cause employees (and their dependents) to lose their employer-sponsored group health plan coverage. Thus, employers who have undergone COVID-19 related furloughs or reductions in force should be especially cognizant of their responsibilities under COBRA.



COBRA Basics

Although many employers use third-party vendors to administer COBRA, it is important to emphasize that employers are legally responsible to fulfill their COBRA obligations and may be subject to penalties and lawsuits for noncompliance.



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Employer COBRA Obligations

Employer COBRA Obligations

- **COBRA General Notice:** Employers are required to provide each covered employee and their spouse (if any) with a written notice of their COBRA rights within 90 days of being covered under the plan.



Employer COBRA Obligations

- **COBRA Election Notice:** If an employee experiences a COBRA qualifying event that causes them to lose coverage, employers must provide all qualified beneficiaries with a notice that describes their rights to COBRA continuation coverage and how to elect coverage within 44 days of the COBRA qualifying event.



Employer COBRA Obligations

The DOL provides model notices that employers can use to satisfy the above notice requirements.

However, it is important to note that the DOL model COBRA Election Notice is not meant to be used “as is” and requires employers to tailor the notice according to their situation.



Employer COBRA Obligations

Notably, there has been a recent uptick of class action lawsuits against employers which allege that they failed to provide adequate COBRA election notices by failing to properly customize the DOL election notice (and include sufficient information in the notice). The lawsuits allege a variety of deficiencies with respect to the COBRA election notice including the:

Employer COBRA Obligations

- failure to include the plan administrator's name, address, and phone number;
- failure to include the election form;
- failure to include the date on which COBRA continuation coverage will end;
- failure to provide an address to which COBRA payments should be sent;
- failure to be written in a manner that the average participant can understand; and/or
- failure to meet foreign language requirements.



Employer COBRA Obligations

Although these cases are still making their way through the courts and have not yet been substantively decided, they serve as a warning sign for employers. Employers should ensure that the COBRA election notices that they send out provide all of the required information.



Employer COBRA Obligations

Although many employers work with COBRA vendors to provide these COBRA notices, it is ultimately the employer's responsibility to provide proper notices in a timely manner. Employers may be subject to a penalty of \$110 per day, daily excise taxes, or a potential lawsuit from affected qualified beneficiaries if they fail to provide proper COBRA notices within the required timeframe. Many lawsuits have also been brought against employers who fail to timely provide COBRA election notices to all qualified beneficiaries.



Employer COBRA Obligations

Employers are required to provide the notices in a written format and are permitted to mail a single notice for all qualified beneficiaries if they reside at one mailing address. Employers can provide the notices electronically, but only if they first obtain any needed consent from all appropriate individuals pursuant to the DOL electronic disclosure rules.



Recent Changes

- On April 28, 2020, the DOL released Disaster Relief Notice 2020-01, which provides relief to employers who fail to furnish COBRA notices during the “Outbreak Period” (which begins on March 1, 2020 and ends 60 days after the end of the COVID-19 National Emergency, which is to be determined) as long as the plan acts in good faith and furnishes the required notices as soon as administratively practicable.



Recent Changes

- In addition, employers can provide COBRA notices electronically (via email, text message, or through a website) during the “Outbreak Period,” if they reasonably believe that plan participants and beneficiaries have access to these electronic mediums.

Recent Changes

- On May 1, 2020, the DOL released an updated model general notice and an updated model election notice.

Employer Action Items

- Employers should send (or ensure that their vendor sends) the updated versions of the COBRA model general notice and model election notice, as applicable, or a more detailed version of these notices that the employer has agreed upon with their vendor.

Employer Action Items

- Although employers have flexibility with providing notices during the “Outbreak Period,” employers should continue to provide the COBRA notices within the “normal” timeframes if they are able.

Employer Action Items

- Employers may now provide COBRA notices electronically (even without prior consent) during the “Outbreak Period” if they reasonably believe that plan participants and beneficiaries have access to these electronic mediums.



Employer Action Items

- Employers who rely on vendors to send COBRA notices should ensure that their vendor receives accurate and up-to-date information on any enrollments or COBRA qualifying events (e.g. terminations, furloughs, etc.) so that notices are sent timely. Many employers periodically audit their vendor “file feeds” to ensure the appropriate information is being transmitted, which is a recommended best practice.





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Provide qualified beneficiaries
adequate time to enroll in
COBRA continuation coverage

General Rule

Employers must provide COBRA qualified beneficiaries with at least 60 days to elect COBRA continuation coverage. The 60 days begins from the date the election notice is provided, or the date a qualified beneficiary would lose coverage due to the qualifying event, whichever is later.

Recent Changes

In light of COVID-19, the DOL and IRS have provided qualified beneficiaries additional time to elect coverage if their deadline to elect falls within the “Outbreak Period” (i.e. after March 1, 2020, as discussed in the section above). This means that qualified beneficiaries who experience a COBRA qualifying event during the “Outbreak Period” must be given until 60 days after the end of the “Outbreak Period” to elect COBRA coverage.

Recent Changes

Qualified beneficiaries who wait to elect COBRA coverage should be aware that coverage will be effective retroactive back to when they first lost coverage. This means that they will be responsible for paying COBRA premiums from the time they first lost coverage to the time when they elect coverage, which could cost them a significant amount in premiums. As such, employers should notify qualified beneficiaries of their extended deadline to elect coverage and the implications of waiting to elect coverage.

Employer Action Items

- Employers may want to check in with their COBRA vendors to understand how they are complying with the extended deadline to elect COBRA coverage.

Employer Action Items

- It is best practice for employers to notify their employees and COBRA qualified beneficiaries of the extended time period to elect COBRA coverage. Employers should check with their COBRA vendor to see whether they will help provide this employee notice.

Employer Action Items

- If an employer decides to change COBRA vendors, employers should ensure that their new COBRA vendor receives data on COBRA beneficiaries' elections and payments back to the beginning of 2020. Because of the extended COVID-19 deadlines, COBRA beneficiaries have more time to enroll in COBRA coverage and/or make premium payments and the COBRA vendor needs to have accurate information to process these requests.





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Provide COBRA participants
adequate time to pay for their
COBRA premiums before
dropping coverage

General Rule

If COBRA participants fail to pay their premiums when they are due, employers must give participants at least a 30-day grace period to pay their premiums (or 45 days for an initial COBRA payment) before terminating their coverage.

Recent Changes

In light of COVID-19, the DOL and the IRS have provided COBRA participants additional time to pay their COBRA premiums if the end of their grace period falls within the “Outbreak Period” (i.e. after March 1, 2020). This means that if a payment was due during the “Outbreak Period,” the participant will have 30 days (or 45 days, if applicable) after the end of the Outbreak Period to make their payments.



Recent Changes

Plans must continue to provide coverage to COBRA participants during the Outbreak Period even if they miss premium payments during that time; however, if a participant fails to pay the premiums once they become due after the end of the Outbreak Period, the plan can retroactively terminate coverage for the months the premiums were unpaid. It is unclear from the new regulations how carriers and vendors will handle missed payments and employers should reach out to their carriers or vendors for any needed guidance.



Employer Action Items

Employers should work with their COBRA vendor and their carriers to determine how they will treat the non-payment of premiums.

Employer Action Items

It is best practice for employers to notify COBRA participants of the extended time period to make premium payments. Employers should check in with their COBRA vendors to see if they will be providing notice to qualified beneficiaries.

Employer Action Items

If an employer decides to change COBRA vendors, employers should ensure that their new COBRA vendor receives data on COBRA beneficiaries' elections and payments back to the beginning of 2020. Because of the extended COVID-19 deadlines, COBRA beneficiaries have more time to enroll in COBRA coverage and/or make premium payments and the COBRA vendor needs to have accurate information to process these requests.





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If an employer allows active employees to make “special” mid-year changes, they should also allow their COBRA participants to make the same “special” mid-year changes

Employer Obligation

COBRA participants are entitled to the same benefits, choices, and services that similarly situated active plan participants (i.e. current employees) are receiving under the plan, such as the right to open enrollment and the right to choose among available coverage options. Any change made to the plan's terms that apply to similarly situated active employees and their families will also apply to qualified beneficiaries receiving COBRA continuation coverage.



Recent Changes

Due to COVID-19, the IRS is allowing employers to permit their employees to make mid-year changes to their group health plans (e.g. enroll and/or switch plans) and/or make changes to their health FSA election (e.g. elect coverage, revoke election, and/or change an existing election), even if they don't experience a "qualified life event." Employers can determine the conditions for when employees can make mid-year changes, as long as the changes are effective prospectively and made prior to January 1, 2021.



Recent Changes

COBRA participants must be treated the same as similarly situated employees. As such, employers who allow their employees to make “special” mid-year changes to their group health plans should also allow their COBRA participants to make the same changes under the same terms and conditions. Similarly, employers who allow “special” mid-year changes to their FSA should also allow their COBRA participants who are utilizing an FSA to also make the same changes.



Recent Changes

It is important to note that insurance or stop loss carriers do not have to allow these “special” mid-year enrollments and changes. As such, employers should check with their carriers to determine if any changes will be allowed.

Employer Action Items

- Employers should determine what “special” mid-year changes, if any, they would like to allow for their group health plans and/or their FSAs.
- Employer should check in with their carriers to determine what mid-year changes (if any) will be permitted.



ERISA and Internal Revenue Code Extensions

- The impacts of the COVID-19 National Emergency, as declared by President Trump on March 13, 2020, have been vast.
- As a result, many employers and employees are struggling to meet their various filing, notice, election, or other deadlines.
- To ease this burden, the DOL, IRS and HHS issued guidance and relief, including requiring employers to suspend the deadline for qualified beneficiaries to notify the plan of HIPAA special enrollment events, elect COBRA, or pay COBRA premiums during the “Outbreak Period.”
 - ❖ Outbreak Period runs from March 1, 2020 until 60 days after the National Emergency ends (or such other date as specified by the Agencies)



Relief for Cafeteria Plans and FSAs

- IRS Notices 2020-29 and 2020-33.
- This relief is **voluntary** for employers to adopt.
- Provides an extension of “Use or Lose” rule for plan years ending in 2020.
 - ❖ For unused amounts remaining in a health FS or a dependent care FSA as of the end of a plan year (or 2 ½ month grace period) ending in 2020, the plan may permit employees to apply those unused amounts to reimburse health FSA or dependent care FSA expenses, respectively, incurred through December 31, 2020
 - ❖ Mainly relevant to non-calendar year FSAs
 - ❖ For example, an employer with a plan year ending 3/31/2020 could allow employees until 12/31/2020 to incur claims
 - If the plan includes a carryover, it will apply after the end of the 2020



Relief for Cafeteria Plans and FSAs

- For mid-year elections made during calendar year 2020, a cafeteria plan **may** permit employees to:
 - ❖ With respect to employer-sponsored health coverage:
 - Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage;
 - Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis; and
 - Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer
 - ❖ With respect to a health FSA or dependent care FSA, make a new election, revoke an election, or decrease or increase an existing election on a prospective basis



Relief for Cafeteria Plans and FSAs

- Employers should secure carrier approval before allowing changes.
- Employers may set a timeframe for changes and may limit the scope of changes (e.g., employees may only enroll/add and not drop coverage).
- Employers may also prohibit an employee from reducing a health FSA election below the amount the employee has already received that plan year, to avoid the FSA being put in a deficit position.
 - ❖ For example, if an employee has elected \$2,750 and has contributed \$1,375 on July 1, but has received \$2,000 from the plan, a reduction on July 1 would be limited to \$625, so that the employee would contribute \$2,000 for the year



Relief for Cafeteria Plans and FSAs

- Notice 2020-33 increases the \$500 carryover limit to 20% of the maximum salary reduction amount (\$2,750 for 2020 plan years).
 - ❖ Carryover is \$550 for plan years beginning in 2020
- To use relief under Notices 2020-09 and 2020-33, an amendment for the 2020 plan year must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020.
 - ❖ Note, however, that all election changes must be made prospectively
 - ❖ This retroactive relief is intended to cover changes made prior to the Notices' release date (e.g., if an employer allowed mid-year enrollment earlier in the year based on a carrier's special enrollment opportunity)





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