



Navigating the COBRA Rules Under the Latest DOL and IRS COVID-19 Relief

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The changes in employment status due to the COVID-19 pandemic range from reduced hours, to furlough, to layoff, to leave of absence to employment termination. A chief concern for both employers and employees is how a change in employment status impacts an employee's right to continuing coverage under the employer's health plan. In the case of a change that may trigger COBRA rights, you will want to be aware of a recent Notice issued by the Department of Labor and IRS.

The joint IRS and DOL Notice issued on May 4, 2020 extends various timelines that apply to COBRA elections and premium payments, HIPAA special enrollment periods and benefit claims - under both welfare benefit and retirement plans. (Click [here](#) for a copy of the Notice.) The Notice generally provides that the timelines described in the Notice are suspended during the period March 1, 2020, until 60 days after the announced end of the National Emergency, a period the Notice calls the "Outbreak Period." This means, for example, that if the 60-day time period for electing COBRA coverage is triggered on or after March 1, 2020, the 60 days will not begin to run until the end of the Outbreak Period. If the 60-day election period was already running on March 1, 2020, the clock would stop, and resume at the end of the Outbreak Period. For example, if 30 days of the 60-day COBRA election period had run by March 1, the remaining 30 days would begin to run at the end of the Outbreak Period.

In a similar way, the Outbreak Period is disregarded for the 45-day deadline to pay the initial COBRA premium. If the employer provided the COBRA notice after March 1, 2020, the qualified beneficiary would have up to 60 days after the end of the Outbreak Period to elect coverage and up to 45 days after the election to pay the initial premium. Likewise, if one or more ongoing monthly premiums due during the Outbreak Period were not paid, the 30-day grace period that applies to premiums other than the initial premium would not begin to run until the end of the Outbreak Period.

COBRA is not the only approach for providing continuing employer health plan coverage. A number of employers have opted to cover employees under the health plan despite a reduction in hours, or a furlough or layoff that either is or could be considered a termination of employment. If an employer covers part-time or former employees under its plan, the relevant plan documents should be amended to make sure that the eligibility requirements in the plan document reflect the eligibility rules being applied in practice. More



importantly, no changes should be made to a health plan without the agreement of the insurer, an agreement we would recommend you get in writing. Even in the case of a self-funded plan, the employer will want to make sure the stop-loss insurer agrees to any changes to the plan's eligibility requirements. An employer does not want to relax its eligibility requirements only to have an insurer deny a claim on the grounds it was not obligated to cover someone because it never agreed to a change in the plan's eligibility requirements.

Another approach employers have used is to treat the loss of coverage due to a reduction in hours, furlough, layoff or leave of absence as a qualifying event under COBRA and provide a COBRA notice. In so doing, some employers continue to make the same employer contribution toward the individual's health coverage. While a COBRA premium can be 102% (and in some cases, 150%) of the total employer and employee contribution, and the entire amount can be charged to the COBRA qualified beneficiary, there is generally nothing that prevents an employer from subsidizing the COBRA cost to whatever extent it wants, and the employer contribution toward the cost of coverage will generally be tax free. Employers who take the COBRA approach do so because they want to start the COBRA continuation period running. If an employer instead continues to cover an individual under the plan without treating the change in employment status as a qualifying event, the COBRA qualifying event generally would not occur until the employer discontinues the arrangement and there is a resulting loss of coverage. Note, however, that in the case of a reduction in hours or other situations where a termination of employment does not occur, the loss of coverage (and therefore the COBRA qualifying event) may still not occur until a later date due to the operation of the Affordable Care Act's "lookback" and "stability period" rules, which can preserve an employee's health plan eligibility for the remainder of the stability period, such as the remainder of the year in which a reduction in hours or other change in status occurs.

One advantage to COBRA coverage is that most plans have a COBRA administrator that will be responsible for all notices and premium collections. Particularly if an individual has been furloughed or is on a leave of absence and is not being paid compensation, it will be necessary to have a mechanism in place to collect payments from those who are making payments. Many employers may not be staffed to process payments other than through payroll deduction, and it may be especially difficult to set up a procedure for doing so when the staff that might handle the payments is either not working or working remotely. Moreover, if the employer is collecting premium payments from a furloughed employee who is not receiving compensation, and the individual does not make a payment, he or she may be considered to have a COBRA qualifying event at that point, and the tolling period provided by the DOL/IRS Notice would apply.

One consequence of the DOL/IRS COVID-19 Notice is that it relieves qualified beneficiaries entitled to COBRA coverage from making any premium payments during the Notice's deferral period. That can be a significant benefit to cash-strapped individuals whose employment status has changed. The flip side is that



when the Outbreak Period ends, the individual generally will have to pay the entire amount of his or her deferred premiums in a lump sum in order to be entitled to retroactive coverage during the period the premium payments were deferred.

As you may expect, this article only covers the DOL/IRS Notice in the most general way. The application of the Notice to the facts on the ground can be complicated. An employer will have to be prepared to deal with the possibility that the extended timeframes will mean that individuals who have not made a COBRA election or are deferring COBRA premiums will seek medical services at a time when it is not clear they ultimately will elect COBRA coverage or timely pay the deferred premium. The Notice also extends the timeframes related to other COBRA qualifying events, such as divorce, where the employee or ex-spouse are subject to time periods for notifying the health plan of a qualifying event.

Continuation coverage would have to be coordinated with any FMLA rights and any continuation rights an individual may have under existing plan documents, employment agreements and personnel policies. Communication and documentation of any changes are critical. Unless the rules are clearly explained, an individual eligible for COBRA continuation may not only lose valuable rights but may look to the employer to remediate any loss. A lack of documentation, or ambiguous documentation, can be costly.

The DOL has issued additional COVID-19 employee benefit guidance, including recent FAQs, a notice that, among other things, provides flexibility for blackout periods required under retirement plans, and a model COBRA notice that provides added information for individuals who are eligible for Medicare. The DOL, IRS, HHS and other agencies are likely to provide additional relief, guidance or information. In sum, you can expect a fluid and rapidly changing regulatory environment.

You do not have to navigate these unusual times alone. If you have questions about the DOL/IRS Notice or any other employee benefit matter, please contact John Nichols, Virginia Schubert, Greg Kuhn, or your regular Lathrop GPM contact.