



HR Preparedness Advisory

THE "TOLLING" OF ERISA PROGRAMS BY THE DOL

In May 2020, the Department of Labor (DOL) and IRS issued guidance to toll various notices, claims, and election deadlines due to COVID-19, including COBRA elections. Examples in the guidance assumed that the National Emergency effective March 1, 2020, would end in a few months, and the "Outbreak Period" would end 60 days later.

However, the relief granted was subject to a one-year statutory limit, and as February 28, 2021, approached with the National Emergency still in effect, many speculated on what action, if any, the agencies would take. On February 26, 2021, the DOL issued [EBSA Disaster Relief Notice 2021-01](#) providing some further relief but in a manner that will be difficult to administer.

The new relief was concurred in by the IRS and HHS. It concedes that relief is limited to one year but provides that the tolling period starts from March 1, 2020, or when the individual first became entitled to relief, whichever is later. It then runs for one year or until the end of the Outbreak Period, whichever is earlier.

Thus if an employee was laid off and their COBRA election period started to run on February 15, 2020, the election period would be tolled from March 1, 2020, until February 28, 2021, and their election period would resume running on March 1, 2021. On the other hand, if an employee left later and their COBRA election notice would have been due September 1, 2020, their tolling period will run from September 1, 2020, until August 31, 2021, or the end of the Outbreak Period if earlier.

While COBRA election and premium payment deadlines have received the most attention, other events are also affected. Those include the deadline to elect HIPAA special enrollment (such as for a newborn); deadlines to file claims, appeals, and requests for external review; and the deadline for the plan to provide the COBRA election notice to qualified beneficiaries (although there is little reason to delay that step).

This change makes the tolling period much more difficult to administer because it will now be individualized for each affected participant and situation, rather than ending at a uniform date. The guidance recognizes that participants will be losing relief as soon as March 1, 2021, and urges plan administrators to make "reasonable accommodation" to "minimize the possibility of individuals losing benefits" due to expiration of the tolling period.

Plans may thus want to consider extending deadlines that would expire soon, if allowed by a plan's insurer. Helpfully, the guidance also says that enforcement will focus on compliance assistance, as long as employers are acting in good faith and with reasonable diligence.



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While neither guidance expressly requires giving the participant notice that their tolling period has ended, the new guidance states that plan administrators should "consider affirmatively sending a notice regarding the end of the relief period." Also, COBRA notices that have been sent during the last year may have represented that the election period was tolled until the end of the Outbreak Period, which will no longer be true in many cases.

Therefore, plan administrators should review prior notices and be prepared to send out new notices restating the end of the COBRA election period, prioritizing election periods that started last March or before. For participants who elected COBRA but have deferred paying premiums, it may now be time to demand that they start being paid (or that participants may want to use the new open enrollment period for coverage on the Exchange).

The same considerations could apply in other areas, such as a claim for benefits for which the appeal period was tolled. Plan administrators may also want to distribute a general explanation of the new rules for the end of the tolling period to all participants, with examples of some common scenarios.

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