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Guidance Clarifies Outbreak Period Rules for COBRA

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Recently, the Internal Revenue Service (“IRS”), in coordination with the Departments of Labor and Health and Human Services (collectively, “the Departments”), issued Notice 2021-58 which clarifies the deadlines for making COBRA elections and premium payments under the Outbreak Period rules.

Background

Briefly, in response to the COVID-19 pandemic, the Departments issued Emergency Relief Notices that established a disregarded period with respect to the following COBRA deadlines:

- 60-day period for individuals to elect COBRA.
- The due dates for making COBRA premium payments.
- The dates for individuals to inform plans of qualifying events or disability determinations.

- The date by which the plan (or sponsor/administrator) must furnish a COBRA election notice.

The disregarded period began on March 1, 2020, is measured on a participant-by-participant basis, and ends the earlier of:

- one year from the date that individuals and plans were first eligible for the relief, or
- 60 days after the end of the National Emergency (the end of the “Outbreak Period”).

There has been a lot of confusion around the Outbreak Period relief and applicable deadlines related to COBRA. IRS Notice 2021-58 provides some welcome clarification.

New Guidance

The guidance clarifies that the disregarded period for electing COBRA and the disregarded period for making

the initial or subsequent COBRA premium payments generally run concurrently. This means an individual who delays electing COBRA will have up to one year of total disregarded time to make the COBRA election and to make the initial COBRA payment (unless transition relief applies).

This guidance is helpful, as there was concern that an individual could have an additional year after electing COBRA to make the initial COBRA premium payment. This guidance confirms that the maximum one-year timeframes for the COBRA election and the initial COBRA premium payment run at the same time.

Therefore, individuals must make the initial COBRA election by the earlier of:

- one year and 60 days after the individual's receipt of a COBRA election notice, or
- the end of the Outbreak Period.

If an individual elected COBRA continuation coverage outside of the initial 60-day COBRA election timeframe, that individual generally will have one year and 105 days after the date the COBRA notice was provided to make the initial COBRA premium payment (60 days to make the initial COBRA election plus 45 days to make the initial COBRA premium payment = 105 days.)

If an individual elected COBRA continuation coverage within the initial 60-day COBRA election timeframe, that individual will have one year and 45 days after the date of the COBRA election to make the initial COBRA premium payment.

For each subsequent COBRA premium payment, the maximum time an individual has to make a payment while the Outbreak Period continues is one year from the date

the payment originally would have been due, including the mandatory 30-day grace period.

Transition Relief for Premium Payments Due Before November 1

The guidance provides that an individual will not be required to make the initial premium payment before November 1, 2021, even if November 1, 2021 is more than one year and 105 days after the date the election notice was received, provided that the individual makes the initial premium payment within one year and 45 days after the date of the COBRA election.

This transition relief is available because there was some confusion as to whether the disregarded period for making the initial premium payment begins on the date of the COBRA election and individuals who made elections more than 60 days after receipt of the election notice may have less time than they anticipated to make the initial premium payment.

Interaction with COBRA Subsidy

As a reminder, the disregarded periods under the Emergency Relief Notices do not apply to the periods for providing required notices of the American Rescue Plan Act ("ARP") COBRA subsidy or electing subsidized COBRA coverage (the subsidy was available from April 1, 2021 through September 30, 2021).

However, the disregarded periods continue to apply to payments of COBRA premiums after the end of the subsidy period to the extent the individual is still eligible for COBRA and the Outbreak Period has not ended.

How the Relief Applies

The guidance provides 10 examples to better illustrate how the relief applies. A few of these examples are summarized below. The examples assume the Outbreak Period has not ended during the specified periods.

Example 1: COBRA election made more than 60 days after receipt of COBRA election notice.

Joe has a qualifying event triggering COBRA on August 1, 2020 and receives the COBRA election notice that same day. Joe elects COBRA on February 1, 2021, retroactive to August 1, 2020.

- Joe elected COBRA more than 60 days after receipt of the COBRA election notice.
- Joe has until November 14, 2021 (one year and 105 days after August 1, 2020) to make the initial COBRA payment.
- Initial COBRA premium payment would include the months of August 2020 through October 2020.
- The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days from November 1, 2020) with premium payments due every month thereafter.

Assume Joe makes his November 2020 payment timely (by December 1, 2021). However, Joe does not make a payment for December 2020 by December 31, 2021. What happens?

- Joe is not entitled to COBRA coverage for any month after November 2020 because he did not pay the December 2020 premium timely.

- The plan is not obligated to cover benefits or services for Joe that were incurred after November 30, 2020.

Example 2: COBRA election made within 60 days after receipt of COBRA election notice.

Mary has a qualifying event triggering COBRA on October 1, 2020 and receives her COBRA election notice that same day. Mary timely elects COBRA on October 15, 2020 (retroactive to October 1, 2020).

- Mary has until November 29, 2021 to make her initial COBRA premium payment (one year plus 45 days after October 15, 2020).
- Mary's initial COBRA premium payment would include only the monthly premium for October 2020.
- The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days from November 1, 2020). Premium payments are due every month after that for the months Mary is eligible for COBRA coverage.

Example 3. Timeframe for electing COBRA.

Karen has a qualifying event triggering COBRA on August 1, 2020 and receives her COBRA election notice that same day.

- Karen has until September 30, 2021 to elect COBRA (one year plus 60 days after August 1, 2020).
- If Karen elects COBRA after September 30, 2020 (but before September 30, 2021), she has until November 14, 2021 to make the initial COBRA premium payment (one year plus 105 days after

receipt of the Election Notice). The initial premium payment would include the monthly premiums for August 2020 through October 2020.

- The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days from November 1, 2020) with premium payments due every month thereafter.

Example 4. Applying transition relief to COBRA premium payments due before November 1, 2021.

Avery has a qualifying event triggering COBRA on April 1, 2020 and receives the COBRA election notice that same day. Avery elects COBRA on October 1, 2020 retroactive to April 1, 2020. As of July 15, 2021, Avery has not made the initial COBRA premium payment.

- Under the transition relief, Avery has until November 1, 2021 to make her initial COBRA premium payment. This is the case even though November 1, 2021 is more than one year and 105 days after April 1, 2020. This is because, under the transition relief, November 1, 2021 is less than one year and 45 days after Avery's COBRA election date of October 1, 2020.
- The initial COBRA premium payment would include the monthly premium payments for April 2020 through October 2020.
- The November 2020 premium is due by December 1, 2021 (one year and 30 days after the November 1, 2020), with premium payments due every month thereafter.

Example 5. Deadline to elect retroactive COBRA under the Emergency Relief Notices and not electing the COBRA subsidy.

Morgan had a qualifying event because he was involuntarily terminated from employment on August 1, 2020 and received a COBRA election notice that same day. As of September 1, 2021, he has not elected COBRA. Morgan also is an assistance eligible individual under ARP and received the required election notice on May 31, 2021. Morgan did not elect COBRA with premium assistance.

- Morgan had until September 30, 2021 to elect COBRA continuation coverage retroactive to August 1, 2020 (one year plus 60 days from August 1, 2020).
- If timely elected, Morgan has until November 14, 2021 to make the initial COBRA premium payment (one year plus 105 days after August 1, 2020).
- The initial COBRA premium payment would include the monthly premiums for August 2020 through October 2020.
- The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days from November 1, 2020) with premium payments due every month thereafter. Because Morgan did not elect the COBRA subsidy when offered, he is not eligible for subsidized COBRA premiums between April 1, 2021 – September 30, 2021.

Employer Action

Employers should:

- Work with their COBRA vendors to understand this new guidance and ensure administration is in accordance with the guidelines. Employers and COBRA administrators should review all the examples from the guidance to better understand these requirements.
- Understand that certain individuals may still elect retroactive COBRA coverage while the Outbreak Period is ongoing. Work with carriers (including stop loss) and TPAs to ensure appropriate coverage is available should an individual elect and pay for retroactive COBRA.
- Continue to monitor guidance and await further information as to when the Outbreak Period will officially expire.

For a copy of Notice 2021-58, visit <https://www.irs.gov/pub/irs-drop/n-21-58.pdf>.