ALERTS

Benefit Plan Updates (COVID-19)

May 19, 2020

The Department of Labor ("DOL"), in conjunction with the Department of the Treasury, the Internal Revenue Service and the Department of Health and Human Services (collectively, the "Agencies"), recently issued guidance that provides a host of relief to ERISA benefit plan sponsors, participants and beneficiaries extending the timeframe for certain deadlines that would otherwise arise during the period between March 1, 2020 through 60 days after the declared end of the COVID-19 pandemic (or a later date that may be declared by the Agencies) ("Outbreak Period"), including providing certain participant communications, submitting claims and appeals, rolling over certain eligible distributions, enrolling in COBRA, taking advantage of certain special enrollment rights in light of the COVID-19 pandemic as well as increasing flexibility with respect to elections under employer-sponsored health plans, health flexible spending accounts ("FSAs") and dependent care assistance programs ("DCAPs"). The purpose of the relief is to ensure that sponsors of, and participants and beneficiaries in, qualified plans have the flexibility and necessary amount of time to make important decisions regarding their health and pension benefits.

Deadlines Extended for Participants and Beneficiaries

Health Plans. For ERISA-covered health plans, the Outbreak Period shall be disregarded when determining whether a participant timely:

- Enrolls in the plan due to a special enrollment right (e.g., after the birth or adoption of a child, or losing coverage under another plan) (without

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this extension, the deadline for enrolling is generally 30 days after the event leading to the special enrollment right);

- Notifies the plan of a COBRA-qualifying event, including a divorce, legal separation, a determination of a disability that could lead to extended COBRA coverage;

- Elects COBRA coverage (without this extension, the deadline for electing COBRA coverage is generally 60 days after the participant receives his or her COBRA election notice or actually loses coverage under the plan, whichever is later);

- Makes COBRA premium payments (without this extension, the deadline for the initial COBRA premium payment is generally 45 days after electing COBRA coverage, with premiums due monthly thereafter, subject to any grace period available under the terms of the plan);

- Files a claim for health benefits, or appeals an adverse benefit decision, under the plan's claims and appeals procedures; or

- Files a request for an external review of an adverse benefit determination, or files additional information if such request was incomplete (applicable only to non-grandfathered health plans).

Retirement Plans. For ERISA-covered qualified pension plans, the Outbreak Period shall be disregarded when determining whether a participant timely:

- Files a claim for pension benefits, or appeals an adverse benefit decision, under the plan's claims and appeals procedures.

Participants in qualified pension plans that accept rollovers of eligible distributions can now roll over eligible distributions within 60 days of receipt of the distribution or July 15, 2020, whichever is later.

Deadlines Extended for Plan Sponsors

Plan sponsors of qualified pension plans can also take advantage of the Outbreak Period for the following:

- Distributing certain participant communications (to the extent such communications had not already been sent at the time the guidance was issued). This includes annual funding notices, SPDs, SMMs, pension

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benefit statements, COBRA notices, claims and appeals notices, blackout notices and the multiemployer plan summary reports that are required under Section 104(d) of ERISA. Because the guidance requires plans to make good-faith efforts to provide the communications as soon as administratively feasible, plans should make best efforts to continue to provide participant communications on a timely basis. The DOL specified that good-faith acts include the use of electronic communications if the fiduciary reasonably believes the participant or beneficiary has effective access to such mode of communication, including email, text messages and continuous access websites.

- Transmitting participant contributions or repayment of a participant loan within the prescribed timeframes (generally on the earliest date on which such amounts can reasonably be segregated from the employer's general assets). Employers must act reasonably, prudently and in the interest of employees to comply as soon as administratively practicable under the circumstances.

- Filing the Form 5500 Annual Return/Report.

Health Plan Sponsor Considerations

New Model COBRA Notice and COBRA Procedures

In conjunction with this new guidance, the DOL has updated its model COBRA notice and election forms. These new forms now clarify for participants how COBRA and Medicare interact for purposes of enrolling in either (or both) for coverage, which coverage pays primary or secondary, and whether enrolling in Medicare can lead to an early termination of COBRA coverage. The new COBRA notices do not, however, address the temporary extensions described herein about the COBRA deadlines due to the COVID-19 pandemic. Plan sponsors, employers and third-party administrators may wish to review their current COBRA policies and practices to ensure they are issuing the appropriate COBRA notices on a timely basis to COBRA qualified beneficiaries, especially in light of the recent spate of class-action lawsuits against large companies alleging failure to timely provide such notices.

Mid-Year Changes to Cafeteria Plans

The IRS recently issued a notice that allows plan sponsors of cafeteria plans, including both self-insured and fully-insured group health plans, in

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their discretion, to permit employees to make prospective mid-year election changes under employer-sponsored group health plans, FSAs and DCAPs. For example, employers that sponsor group health plans can amend their plans prospectively to allow employees who make salary reduction contributions under the plan to:

- Make a new election for coverage under a group health plan, even if the employee initially declined coverage during open enrollment and is not eligible for a special enrollment right (as discussed above);
- Revoke an existing election for coverage under a group health plan and make a new election to enroll in a different plan sponsored by the employer (for example, by changing an election from single coverage to family coverage);
- Completely revoke an existing election for coverage under a group health plan, but only if the employee attests in writing that he or she is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer, and only if the employer does not have actual knowledge to the contrary;
- Revoke an election, make a new election or decrease or increase an existing election regarding an FSA (including a limited purpose FSA that is provided in conjunction with a health savings account) and/or a DCAP on a prospective basis; and
- Provide an extended period of time to apply unused amounts in a FSA or DCAP with a grace or carryover period for medical or dependent care expenses incurred through Dec. 31, 2020.

Plan sponsors can choose to implement any or all of the above mid-year election changes as long as they are implemented prospectively and any changes do not cause the plan to run afoul of other applicable rules and regulations, including the nondiscrimination rules that apply to self-insured health plans. If implementing any of these newly-permissible mid-year election changes, plan sponsors will need to notify participants accordingly and timely amend their plan documents (no later than Dec. 31, 2021).

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If you have any questions concerning this *Alert*, or wish to update your plan documents and participant communications to reflect these relief measures, please contact your attorney at Schulte Roth & Zabel or one of the authors.

This is a fast-moving topic and the information contained in this Alert is current as of the date it was published.

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