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When COBRA Meets COVID-19: Concerns for Plan Administrators and TPAs

By Jean E. Tomasco

What happens when COBRA meets COVID? While it may sound like the premise of a horror movie along the lines of "Snakes on a Plane" or "Sharknado," extensions of COBRA notice deadlines due to the pandemic have the potential to be a fright fest for group health plan administrators and third-party administrators (TPAs).

COBRA Basics

For group health plans sponsored by employers with 20 or more employees, COBRA (the Consolidated Omnibus Budget Reconciliation Act) allows plan participants and their covered dependents to elect to continue coverage under their plan when they might otherwise lose it due to a "qualifying event."

Qualifying events include termination of employment, such as furloughs and layoffs, as well as reduction of an employee's work hours below the threshold necessary for plan participation. Certain leaves of absence (although not those granted under the Family and Medical Leave Act) may constitute a qualifying event if the plan doesn't otherwise allow participants to continue coverage while on leave. Other qualifying events include a covered dependent "aging out" of the plan, death of the covered employee, and divorce from the covered employee.

The maximum period for COBRA coverage depends on various factors, including the nature of the qualifying event, but ranges between 11 and 36 months. Unless an employer agrees to cover a portion of the COBRA premiums—which is not required—a person electing continuation coverage must pay the full monthly premium for the group coverage, including any portion of the premium previously paid by the employer. In addition, an administrative fee of up to 2 percent of the premium can be charged. While COBRA coverage can be expensive, it may be more affordable than similar coverage in the marketplace, particularly for individuals with chronic health conditions and significant medical expenses.

COBRA Notices

Plan administrators (or TPAs retained to handle COBRA administration) are required to provide participants with certain notices regarding their right to continuation coverage under COBRA. There is an initial general notice that must be provided to participants and their spouses within 90 days after they begin participating in the plan. The U.S. Department of Labor (DOL) has a model notice for this purpose. This general COBRA information also must be in the plan's summary plan description (SPD), and employers often include it in their employee handbooks as well.

COBRA also mandates that, at the time of a qualifying event, any qualified beneficiaries (the eligible employee and participating spouse and dependents) must be given information about their COBRA rights, including their options for electing continuation coverage, the costs, and the time periods for electing coverage and paying premiums. While the DOL has a model notice for this as well, many administrators devise their own forms. The notice and election process is complicated and more likely to cause potential problems for plan administrators if not done correctly.

Once a group health plan is informed by the employer or participant that a qualifying event has occurred, the plan administrator (or TPA) must provide the information regarding COBRA rights and election notices to the qualified beneficiaries within 14 days. Qualified beneficiaries must be given at least 60 days to elect coverage; the election period begins on the *later* of the qualifying event, the date they would otherwise lose coverage under the plan, or the date they receive the election notice. (Each qualified beneficiary has the right to make their own decision; they need not follow what the employee or another qualified beneficiary may decide.)

A plan must provide at least 45 days following the initial election for the qualified beneficiary to pay the first premium. ERISA §602(3)(B), 29 U.S.C. § 1162(3)(B), I.R.C. §4980B(f)(2)(C). Subsequent COBRA premium payments are due monthly (typically on the first of the month), with a 30-day grace period. ERISA §602(2)(C), 29 U.S.C. §1162(2)(C). COBRA continuation coverage may be terminated for failure to pay premiums on time.

Adding the 60-day election period to the 45-day period for the initial premium payment, a qualified beneficiary has up to 105 days before a premium is due. Rather than elect and pay for COBRA coverage right away, a qualified beneficiary may elect coverage but hold the premium payment until near the end of the 45-day period, to give themselves time either to see whether they incur medical expenses that would exceed the cost of the COBRA premium or to try to obtain other health insurance.

The Pandemic and Its Effect on COBRA

As we are all too aware, in early 2020 the coronavirus began spreading rapidly in the United States and the rate of COVID-19 cases started to increase exponentially. On March 13, 2020, President Trump declared a National Emergency beginning March 1, 2020, as a result of the COVID-19 outbreak. The Department of Health and Human Services (HHS) also has made a determination that a public health emergency exists.

Facing state shutdown orders and supply-chain disruptions, many businesses were hard hit by the pandemic and began laying off employees or significantly reducing their hours. In most cases, these events would be qualifying events triggering the COBRA notice, election, and premium payment process, requiring qualified beneficiaries to decide within that 105-day window whether to elect, and then pay for, continued health insurance coverage.

Relief: Tolling Deadlines during the "Outbreak Period"

Recognizing the numerous challenges faced by plan participants and beneficiaries as result of the pandemic as well as the difficulty group health plans might have in complying with certain notice obligations, on May 4, 2020, the DOL (Employee Benefits Security Administration), the Department of the Treasury, and the Internal Revenue Service (the "Agencies") jointly issued relief by extending certain deadlines under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code for health plans, certain other group welfare plans, pension plans, and participants and beneficiaries of those plans (the "Relief Notice"). 85 Fed. Reg. 26351 (May 4, 2020).

Of significant note, the Relief Notice provides that all group health plans subject to ERISA or the Code must *disregard* the period from March 1, 2020, until 60 days after the announced end of the National Emergency, or such other date announced by the Agencies in a future notification. This tolling period is known as the "Outbreak Period." 85 Fed. Reg. 26353.

In addition to the Relief Notice, the DOL issued EBSA Disaster Relief Notice 2020-01, separately announcing an extension of deadlines for furnishing other required notices or disclosures to plan participants, beneficiaries, and other persons so that plan fiduciaries and plan sponsors have additional time to meet their obligations during the COVID-19 outbreak.

This extension applies to the furnishing of notices, disclosures, and other documents required by provisions of Title I of ERISA over which the DOL has interpretive and regulatory authority, other than those notices and disclosures already addressed in the Relief Notice. An employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished during the Outbreak Period, provided the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances.

The Outbreak Period is tied to the President's National Emergency declaration, which does not have a set end date and remains in effect as of this writing. Given the increasing number of COVID-19 cases as we head into winter, as well as the fact that HHS has extended into January 2021 its own determination that a public health emergency exists, it seems unlikely that an end to the National Emergency will be announced soon. Unfortunately, it may extend well into 2021.

However, although there is no set end date for the National Emergency, the Relief Notice and EBSA Notice indicate that the tolling period for deadlines during the Outbreak Period is subject to the statutory duration limitation in ERISA §518, 29 U.S.C. §1148, and Internal Revenue Code §7508A. These sections generally limit to a maximum of one year the length of any tolling period attributable to a Presidentially declared disaster or HHS public health emergency. (Furthermore, no plan shall be treated as failing to operate in accordance with the terms of the plan solely as a result of complying with the postponement of a deadline under those sections.)

Assuming there is no executive or legislative action that would change the statutory duration limitation, the Outbreak Period therefore would end, at the latest, on March 1, 2021, even if the National Emergency and/or HHS public health emergency declarations extend beyond that. At present, however, as it is possible—albeit unlikely—that either declaration could end earlier, the last date of the Outbreak Period cannot be determined with certainty.

Effect of the Tolling Period on COBRA Deadlines

The tolling of deadlines during the Outbreak Period expressly applies to the 60-day COBRA election period as well as any deadlines for making COBRA payments, including not only the 45-day period following the initial election, but also the subsequent monthly deadlines for making premium payments to maintain COBRA coverage. 85 Fed. Reg. 26354.

To illustrate the effect of the Relief Notice extensions on COBRA deadlines, assume the Outbreak Period ends on March 1, 2021. John Employee, a participant in his employer's health plan, was laid off fairly early in the pandemic, on May 15, 2020. The plan administrator provided him with a COBRA election notice on June 1, 2020. Under the standard COBRA deadlines, he would normally have had until July 31, 2020, to decide whether to elect COBRA coverage. However, given the Relief Notice, John now has until April 30, 2021 (60 days after the end of the Outbreak Period), to elect COBRA coverage, and another 45 days following the election to pay the initial premium.

Plans also can disregard the Outbreak Period when determining the date for providing a COBRA election notice. 85 Fed. Reg. 26454. Nevertheless, plans should consider providing election notices as they usually would under the standard timeframes, for several reasons. It can minimize the amount of time following the Outbreak Period for elections to be made as the notices will have already been sent out. Further, qualified beneficiaries with health issues may want to elect COBRA coverage sooner rather than later to avoid problems with payment of medical claims. In addition to the standard COBRA election notice, however, plan administrators should include information explaining the extended deadlines under the Relief Notice so qualified beneficiaries can make an informed decision.

Questions for Plan Administrators to Consider

Given the tolling of COBRA deadlines by the Relief Notice, there is a far longer period when plans will be "in limbo"—that is, when plan administrators and TPAs do not know whether qualified beneficiaries will elect and pay for continued health coverage. In addition, because of lags between when the National Emergency was declared, the Relief Notice published, and the date the National Emergency actually began, there are a number of questions for plan administrators and TPAs to consider, as follows.

What should plans do about qualified beneficiaries who have not yet elected COBRA or paid premiums, and now have an extended time to do so?

During "normal" (non-pandemic) times, while waiting for qualified beneficiaries to elect and pay premiums for coverage, plans usually take one of the following approaches: (1) they terminate coverage when the qualified beneficiary would otherwise lose it and, if payment is received, retroactively reinstate coverage; or (2) they continue coverage until the end of the 105-day initial window (or 30-day payment grace period for subsequent payments) and, if payment isn't received, retroactively cancel coverage back to the date when it otherwise would have been lost.

In either case, if a medical provider asks about coverage for someone seeking treatment, the plan administrator (and insurer if the plan is insured) should accurately advise the provider of the qualified beneficiary's status and that coverage is not guaranteed but, rather, is contingent on the payment of premiums.

Without guidance from the IRS or the DOL on this issue, plans will likely continue their usual approach even though the period of uncertainty will be longer given the tolling of the normal COBRA deadlines. Claims processors and benefits specialists who field calls from providers (and participants) asking about coverage status should be aware of the extended deadlines, the potential for delays, and the individual's status in the interim, and respond accordingly.

What about qualified beneficiaries who experienced a qualifying event shortly before the National Emergency began on March 1, 2020, but who had not elected and/or paid for COBRA coverage as of March 1, 2020? What about those who experienced a qualifying event after March 1, 2020, but before the Relief Notice was published?

The Outbreak Period, which began on March 1, 2020, is disregarded for purposes of determining the qualified beneficiaries' election period and premium due dates, and essentially acts like a "pause" button. Once the Outbreak Period ends, qualified beneficiaries would essentially pick up where they left off, and still have time to make an election or, if they have already made an election, pay the premiums due for their COBRA coverage.

For example, if a qualified beneficiary's election period had started to run before March 1, 2020, the plan can count that time toward the 60-day period, so that the individual will have fewer than 60 days remaining to make an election once the Outbreak Period ends. If the individual had already elected coverage but, as of March 1, 2020, still had time left to make a premium payment, they will have that remaining time to pay once the Outbreak Period ends. Plan administrators need to consider how this will be tracked and managed.

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Furthermore, because the National Emergency declaration was made two weeks after the stated beginning of the National Emergency, and the Relief Notice was not issued until two months later, individuals who were provided with COBRA election notices shortly before or following March 1, 2020, would not have received information about the tolling period. As accurate communications are important, plans would be well advised to provide the extension information to such individuals if they haven't already done so.

What if a qualified beneficiary waits until after the Outbreak Period to elect COBRA or pay premiums that otherwise would have come due during the Outbreak Period, but cannot afford the large premium payment due to ensure retroactive coverage for the entire period? What if they pay only part of it?

Generally, a qualified beneficiary who elects COBRA must pay the full premium retroactive to the date they otherwise would have lost coverage in order to continue coverage. However, an individual who waits until the Outbreak Period has run before making their election or before paying premiums that accrued during the Outbreak Period will have a large amount due in order to reinstate coverage and have it be continuous. (Depending on the date of the qualifying event and the end date of the Outbreak Period, the person could owe more than a year's worth of premium payments.) Absent further guidance or relief from the government, qualified beneficiaries may not be able to pay the full amount.

However, an example in the Relief Notice indicates that, if a qualified beneficiary makes a partial payment of the premium due in a timely manner, the beneficiary can obtain COBRA coverage equal to the number of months covered by the partial payment. The example (using an overly optimistic date of June 29, 2020, as the end of the Outbreak Period) indicates that a qualified beneficiary who makes a partial payment equal to two months' premiums on the premium due date (which date is determined by disregarding the Outbreak Period)—even though additional months of premiums are owed—would have coverage for the two months for which timely premium payments were made. Benefits and services provided by the group health plan during that two-month period would be covered under the terms of the plan. However, the individual would not be entitled to COBRA coverage for any month after that. *See* 85 Fed. Reg. 26354, Ex. 4. While the example involves monthly premium payments rather than an initial payment, it suggests limited coverage might be available for partial initial payments as well.

When the Outbreak Period ends, should plans send out COBRA notices to everyone who had a qualifying event shortly before or following March 1, 2020, and who has not already elected COBRA?

There is no legal requirement to do so. If a plan has sent out the notice and election forms to the qualified beneficiaries already, and has advised them of the Relief Notice extending their timeframe for electing coverage and paying premiums, an additional notice may not be necessary. However, sending an additional notice or reminder at the end of the Outbreak Period may be helpful, particularly if it sets out the final dates for individuals to make elections, the premium due date, and amount of the premiums due at that time. Plan administrators and TPAs therefore may want to consider doing so, especially if there is a risk that individuals may claim earlier notices were confusing or incomplete.

What if the President decides in the future that only certain parts of the country are experiencing an emergency due to the pandemic?

Given that COVID-19 cases continue to rise nationwide, it seems unlikely that this will occur before the March 1, 2021 latest end date for the Outbreak Period. However, the Relief Notice provides that, to the extent there are different Outbreak Period end dates for different parts of the country, the Agencies will issue additional guidance regarding the application of the relief.

Conclusion

The pandemic, and the National Emergency declaration, have gone on far longer than the Agencies (and most people) initially expected. As we head into 2021, which we hope will be much better than 2020, it is possible that the Agencies will provide further guidance as to what will happen when the long Outbreak Period finally draws to a close. Until then, plan administrators and COBRA TPAs should remain informed about the effects of the Relief Notice extensions, and ensure that qualified beneficiaries and providers are kept informed as well.

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