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# New Health Plan Regulations

- On April 28, 2020 the IRS and DOL issued new regulations providing relief for plan enrollees from certain deadlines
- Relief is retroactively effective to March 1, 2020
- Relief applies for 8 different enrollee deadlines
- (1) HIPAA special enrollment (usually 30 days after special enrollment event, but can be 60 days for some events)
  - Does NOT protect initial enrollment – employers CAN enforce those
- (2) COBRA election period (60 days)
  - Does not seem to affect state "mini-COBRA" laws
- (3) Time to make COBRA premium payments (45 days for first payment; 30 days for subsequent payments)

# New Health Plan Regulations

- (4) Date for COBRA qualified beneficiary to notify plan of disability or second qualifying event
- (5) Date within which individuals may file a benefit claim under plan's claims procedures, per ERISA regulations
- (6) Date to file an appeal of a denied claim (ERISA)
- (7) Date by which claimants may request external review
  - Would not apply to self-funded plans which are "grandfathered"
- (8) Date by which individual may file information to perfect a request for external review

# Which Plans are Impacted?

- ERISA-covered plans generally are impacted
- Non-ERISA plans generally are not impacted, it seems
  - CMS issued a notice on May 14 which encourages self-funded, non-ERISA plans to comply with the IRS and DOL rules. Compliance not mandatory (unless non-grandfathered and enrollee sues, maybe?)
- Medical plans impacted, but appears that other plans (dental; vision; health FSA; HRA, etc.) also impacted
  - Confirmed by a DOL official on a webinar from May 15
  - For example, suppose that a health FSA's plan year is the calendar year. It requires that claims be submitted by April 30, 2020 for the 2019 plan year. After that, amounts are forfeited.
  - Amounts cannot be forfeited in May 2020, etc. because of extension

# How Long Does Extension Last?

- Relief was triggered by federal government's declaration of national emergency
- Under law, delays under ERISA / Code can last for a maximum of one year
  - So, it appears delays we will discuss must end on February 28, 2021
- Delays all "keyed off" date when federal government ends the national emergency
- For example, suppose it ends on May 31, 2020. Once it ends, the deadlines for plan enrollees last another 60 days; then whatever time period the enrollee had not yet "used up"

# How Long Does Extension Last?

- Example: Aaron received a COBRA election notice on February 1, 2020, while Betty received a COBRA election notice on April 1, 2020.
  - By when must Aaron elect COBRA? By when must Betty?
- Aaron's 60 days started on February 1. So he "uses up" 29 days in February. So he still has not "used up" 31 days (60 - 29).
  - If the national emergency ends on May 31, the "outbreak period" lasts another 60 days, until July 30, 2020. Aaron then receives the balance of his remaining days (31), starting on July 31, 2020
  - So, Aaron has until 31 days after July 31, 2020, or August 30, 2020. Aaron needs to have elected COBRA by then

# How Long Does Extension Last?

- Betty receives even longer than Aaron because she has not "used up" any of her 60 days. That's because her COBRA notice was sent on or after March 1, during the emergency period
- So, if the emergency ends on May 30, the "outbreak period" runs for another 60 days (until July 30, 2020 – the same as for Aaron)
- Betty then receives her "unused" days (60)
- The 60 days start on July 31, 2020. They end on September 28, 2020 (1 day in July; 31 days in August; 28 days in September)
  - Betty needs to elect COBRA – retroactive to April 1 – by September 28

# How Long Does Extension Last?

- That's already a pretty long time
  - But note that assumes the national emergency ends as of May 31, 2020 – which seems unlikely, so expect longer delays in reality
- In addition, those time periods are just the time periods to elect COBRA – not to pay for it
- No IRS or DOL examples in the new regulations demonstrate the extended election period AND the extended payment periods, so some uncertainty on how it will work
- Let's consider Aaron. It seems he would have 45 days starting on the day after he elected COBRA to make first payment
  - That is, it seems to start running on August 31 (1 day after August 30)



# How Long Does Extension Last?

- So, Aaron would seem to have until October 14, 2020 (1 day in August; 30 in September; 14 in October) to pay for February coverage
- What about subsequent months (March, April, May, etc.) for Aaron?
  - Typical due date is the first of the month but an employer could have selected a different date. Then COBRA grants qualified beneficiaries a 30-day grace period
  - Perhaps means that Aaron has 30 days from August 31 (the end of the month which contains the August 30 date) to pay for the other months in the emergency period (March – August)
  - If so, Aaron must make the "second" payment by September 30, 2020

# How Long Does Extension Last?

- But the September 30, 2020 due date for the "second" payment is BEFORE the "initial" payment due date of October 14, 2020! So the "first" payment is due after the "second" payment (or, alternatively, the "second" payment is due before the "first" payment)
  - Odd result. Hopefully will be clarified in future guidance. Could create confusion about what Aaron's payment represents
    - E.g., if Aaron's monthly cost is \$1,000 and Aaron pays \$1,000 on September 30, is that for the "initial" month? Or the "second" month?
- Qualified beneficiaries can pay for partial months. If so, just cover them for those partial months

# Other COBRA Concerns

- What happens to COBRA claims during this long time period?
- ERISA / COBRA rules do not REQUIRE that claims be "pending" or "denied"
- In theory, TPA could process claims; if COBRA not elected and paid for, TPA could "chase" enrollee / provider
  - Not a great strategy. TPA probably will not recover all the \$ it paid. Employer will be mad
- We expect most employers / TPAs / PBMs to take the opposite approach
  - Deny claims now; if COBRA elected and paid for, process claims then
- Is this long delay ok under ERISA claims and appeal rules?

# COBRA / Communication Issues

- Could delay in processing claims lead to stop-loss contract issues?
- Could delay lead to loss of provider discounts under network contract?
- Communication issues a big concern
- Regulations were effective immediately
  - Seems to be on May 4, publication date in Federal Register, although a bit unclear
  - And, again, retroactively effective to March 1, 2020
- Regulations do not address if this delay must be communicated to anyone

# Communication Issues

- Maybe argue that this is a "material modification" and therefore have until 210 days into NEXT plan year to inform
- However, seems a bit risky. One can imagine a plaintiff's lawyer arguing that plan fiduciaries "knowingly" communicated "false" information by not correcting these dates
  - And that some enrollees "relied" on this "false" information to their "detriment" (e.g., by "hastily" declining COBRA, before federal government created new COBRA subsidy in some future law)
  - And declining coverage meant the enrollee went uninsured. Lack of coverage led to not seeking medical treatment, which led to bad health outcome / death
  - Obviously, speculative – trying to put on "plaintiff's lawyer hat"

# Communication Issues

- Also note that these dates may be "baked into" lots of communications
  - Summary plan descriptions ("SPDs"); plan documents; wrap plans; explanations of benefits ("EOBs"); special enrollment forms, etc.
- Plan sponsors should check with TPAs, PBMs, COBRA vendors, etc. to see how they are approaching this
- Some are sending out new notices / "cover letters" for ALL who could be affected starting March 1
  - Others just sending out new notices / "cover letters" for those starting COBRA, etc. on April 28 or May 5
  - You could have two different TPAs who are doing it differently – harmonize?

# Retroactive Application of Rules

- Also you should look to see who was impacted and now should be "un-impacted"
- For example, suppose Carol was supposed to have paid her COBRA premium by March 31, 2020. She did not. So Carol was removed from the plan
  - 100% legal on that date
  - Now, though, it appears that Carol must be allowed back into the plan and given an opportunity to pay that premium (i.e., now "illegal" to have removed Carol)
    - By when? Many months from now, it seems (see prior examples of Aaron and Betty)
- Check your / TPA / PBM / COBRA vendor records for this

# New IRS Relief From Last Week

- IRS Notice 2020-29 – for mid-year elections during calendar year 2020, cafeteria plan may permit employees to:
  - For health coverage, make a new election on a prospective basis, if employee previously declined coverage
    - That is, you could have a "mid-year" open enrollment period
  - For health coverage, revoke existing election and go into other coverage (with an attestation if coverage from someone else)
  - Revoke election, make new election, decrease or increase existing health FSA election on a "prospective basis"
  - Same for dependent care assistance plan ("DCAP")
- All are optional. You can "pick and choose" which to adopt (if any). Applies to all employees (not just COVID-19 impacted)



# New IRS Relief

- If employee has unused amounts in health FSA or DCAP as of the end of a grace period or plan year ending in 2020, plan can allow employees to apply those unused amounts to pay or reimburse medical care expenses or dependent care expenses through December 31, 2020
- Prior relief on high-deductible health plans ("HDHPs") applies retroactively to January 1, 2020
- Appears that employers can put limits on health FSA / DCAP / health plan elections
  - "An employer ... is not required to provide unlimited election changes"

# New IRS Relief – "Windfall" Concerns

- Employer can also protect itself and not allow salary reductions if reduction would provide employee a "windfall"
  - E.g., Sneaky Sam elected to put aside \$100 / month into a health FSA (\$1,200 over 2020). Sneaky Sam had \$1,200 in medical expenses in January 2020. He already received a \$1,200 reimbursement check
  - Sneaky Sam has paid for 5 months (i.e., \$500). He now wants to reduce his future contributions to \$0 / month. This will give him a \$700 "windfall" (since he paid \$500 but received \$1,200)
  - Sneaky Sam's employer can prevent that by careful drafting in its health FSA amendment
    - But poor drafting could allow Sneaky Sam to obtain the windfall

# New IRS Relief

- Amendments for 2020 plan year must be adopted on or before December 31, 2021 (not 2020), "provided ... the employer informs all employees eligible to participate in the Section 125 cafeteria plan of the changes to the plan"
  - By when – and how – must employees be so told?
- IRS Notice 2020-33 increased carryover limit for health FSAs
  - Was \$500, now is about 20% of maximum health FSA contribution
  - Current limit is \$2,750, so 20% = \$550
  - Will require a plan amendment if you want to adopt it
  - For plan years starting in 2020, carried over into 2021 and beyond
- Also clarified a technical point on individual coverage HRAs

# Questions?

