



ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES:

PRACTICAL

Q & A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, and Carolyn Smith provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan and Carolyn Smith are senior members of the Health Benefits Practice. Answers are provided as *general guidance* on the subjects covered in the question and are *not provided as legal advice* to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

CORONAVIRUS IMPACT ON HEALTH BENEFITS: AGENCIES ISSUE IMPORTANT GUIDANCE EXTENDING COBRA AND ERISA PLAN DEADLINES

Our last article covered recent Coronavirus legislation impacting health benefits under the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”).

The tri-agencies followed with additional FAQ guidance clarifying the impact of these laws.¹

This article provides a high-level overview of the subsequent agency guidance extending certain COBRA and ERISA welfare plan claim and appeal deadlines.²

Once again, things are very fluid and further guidance will undoubtedly be issued. More to come.

In accordance with ERISA Section 518, the DOL and the IRS have jointly issued a notice (“Joint Notice”) that directs group health plans and group health insurers to disregard the period between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency (the “Relief Period”) when calculating the plan related time periods described below.

Consequently, the application of the Joint Notice means that (i) any of the following time periods that began before March 1 but did not expire prior to March 1 are tolled until the end of the Relief Period, and (ii) the start date of any of the following time periods that would otherwise begin on or after March 1 is postponed until the end of the Relief Period:

- The 30-day or 60-day time period to request special enrollment in a group health plan (e.g., when a spouse loses eligibility for coverage under another group health plan due to a termination of employment, layoff or furlough). Note that as was the case pre-Guidance special enrollments are not required for certain excepted benefit plans (e.g., vision, dental, and Health FSAs);
- The qualified beneficiary’s 60-day period to elect COBRA for group health plans;
- The plan administrator’s 14-day period (44 days in the event the plan administrator is the plan sponsor) for sending COBRA election notices;
- The 45-day period (initial premium) and 30-day (subsequent premiums) period for qualified beneficiaries to make COBRA premium payments. The Joint Notice indicates that plans and insurers may not deny coverage based solely on failure to pay premiums during this period but may retroactively make payments once premiums are paid;

- The qualified beneficiary's 60-day period to notify the plan administrator of a qualifying event or a qualified beneficiary's second qualifying event during a COBRA period event (such as divorce, death, dependent child's loss of dependent status or a qualified beneficiary's determination of disability);
- The time period under any ERISA welfare plan for the claimant to file a benefit claim (including the run out period for Health FSAs) and the 180-day period to file an appeal (if the plan offers a 2nd level internal appeal, the period for filing a 2nd level of appeal, as determined by the plan, is also impacted); and
- A claimant's period to request external review or perfect an external review.

	COBRA election and premium extensions	Claims and appeal extensions	External review extensions	Special enrolment election extensions	Other benefit election extensions
ERISA Group health plan (GHP)	Y	Y	Y	Y	N
Church GHP	n/a	Y	Y	Y	N
Governmental GHP	Y	Y	Y	Y	N
Grandfathered GHP	Y	Y	n/a	Y	N
ERISA excepted benefit (vision, dental, FSA)	Y	Y	n/a	n/a	N
Church excepted benefit (vision, dental, FSA)	n/a	n/a	n/a	n/a	N
Governmental excepted benefit (vision, dental, FSA)	Y	n/a	n/a	n/a	N
Other ERISA plan (e.g., disability)	n/a	Y	n/a	n/a	N
Non-ERISA plan (e.g., dependent care or transit)	n/a	n/a	n/a	n/a	N

In addition to the Joint Notice , the agencies issued extensive FAQs. <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/covid-19.pdf>

We don't know when the National Emergency will be lifted. This means that election periods and payment periods that began or otherwise ended during the Relief Period could be open for a very long time—and plans will be required to track those time periods.

Thus, every plan sponsor and administrator (including COBRA administrators) should discuss these new requirements with their legal advisors. Some high level considerations follow:

- Although the guidance does not expressly require revisions to notices and/or SPDs, the guidance references fiduciary duties related to notification. While an SPD or SMM may suffice, more expedient approaches may be possible – especially given the temporary nature of the guidance;
- Plan sponsors and administrators should review current notices and



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payment booklets to ensure compliance. It is extremely important to give qualified beneficiaries the information they need to stay on track. While QBs have an opportunity to delay electing and/or making payment, there are consequences to that (e.g., if you don't pay for 4 months and then decide that you need coverage for those 4 months, you have to pay for 4 months of COBRA premiums, which will be cost prohibitive for most people).

- Consideration should be given to creating a supplement covering the COBRA extension provisions and including it with election and premium notices. Including the supplement with current notices and communications could suffice for prospective notice, but consideration should be given to how to address covered individuals and current qualified beneficiaries (including individuals who have not yet made their elections).
- The early termination notice that is typically sent following a failure to pay the premium by the end of the monthly grace period should be reviewed. Under the extension, failure to pay by the end of the normal grace period doesn't terminate the QB's right to COBRA as it otherwise would—the QB can still retroactively reinstate it by paying the premium at any time up to 30 days after the end of the Relief Period in the future.
- The guidance makes it clear that plans are not required to pay claims during the Relief Period where elections are not made and/or premiums are not paid in reliance on the extension; but it also states that the plan cannot deny coverage when premiums haven't been paid.

Employers and plan administrators should discuss these issues with counsel in advance to ensure ongoing compliance with their legal requirements during the Relief Period. ■

References

- 1 <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-42.pdf>
- 2 <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>



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