



White House Signs Bill Terminating COVID-19 National Emergency Period; Outbreak Period End Date Remains July 10, 2023

On April 10, 2023, President Joe Biden signed into law a resolution¹ officially ending the COVID-19 National Emergency effective that date. This date is almost a month earlier than the May 11, 2023 date the White House had previously announced² for the end of both the COVID-19 Public Health Emergency (PHE) and National Emergency periods.

This earlier-than-anticipated termination date has potentially caused confusion and concern for plan sponsors, as COVID-19-related relief had suspended certain ERISA health and welfare plan benefit deadlines that fall within the COVID-19 "Outbreak Period," which is the period between March 1, 2020 and the earlier of (a) 60 days after the announced end of the national emergency due to COVID-19, or (b) one year from the plan or individual's original deadline date (which will vary by individual occurrence).

With the end of the National Emergency announced as April 10, 2023, there have been questions concerning whether this announcement would accelerate the end of the Outbreak Period and a return to pre-pandemic plan deadline calculations.

On March 29, 2023, the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the "Agencies") issued the "FAQs about Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58"³ announcing the Outbreak Period **will end on July 10, 2023**, which is 60 days after May 11, 2023.

The DOL has provided informal, verbal guidance affirming this end date for the Outbreak Period, the change to the National Emergency end date notwithstanding. Therefore, as of July 11, 2023, the generally applicable deadlines to make COBRA elections; make initial of monthly COBRA premium payments; provide notification of Social Security disability determinations; HIPAA special enrollment or COBRA qualifying events; and to file claims, appeals, and to for external claims review will still commence.

Background

On April 29, 2020, the Agencies jointly released guidance⁴ first providing deadline relief related to retirement, health, and welfare plans in response to the COVID-19 pandemic. The Final Rule: Extension

¹ <https://www.whitehouse.gov/briefing-room/legislation/2023/04/10/bill-signed-h-j-res-7/>

² See our Compliance Alert [here](#)

³ <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-58>

⁴ <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>; <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01>; <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/covid-19.pdf>

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of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak" provided, in part:

Subject to the statutory duration limitation in ERISA section 518 and [Internal Revenue] Code section 7508A, all group health plans, disability and other employee welfare benefit plans, and employee pension plans subject to ERISA or the Code must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency **or such other date announced by the Agencies in a future notification (the "Outbreak Period")** for all plan participants, beneficiaries, qualified beneficiaries, or claimants wherever located...⁵ [Emphasis supplied]

For the duration of the Outbreak Period, the following extensions were applied to all group health plans, disability and other employee welfare benefit plans and employee pension benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code:

- the 14-day deadline for plan administrators to provide COBRA election notices to qualified beneficiaries;
- the 30-day period (or 60-day period, in some cases) to exercise HIPAA special enrollment rights in a group health plan following birth, adoption, or placement for adoption of a child; marriage, loss of other health coverage; or eligibility for a state premium assistance subsidy;
- the 60-day deadline by which a participant or qualified beneficiary must provide notice of divorce or legal separation, a dependent child that ceases to be an eligible dependent under the terms of the plan), or a Social Security disability determination used to extend COBRA coverage;
- the 60-day deadline in which to elect COBRA coverage;
- Individuals electing COBRA outside of the initial 60-day election period (as referenced above) generally have one year and 105 days after the election notice is provided to make the initial premium payment; and individuals electing COBRA within the generally applicable 60-day election period have one year and 45 days after the date of their election to make the initial payment;⁶
- the date by which monthly COBRA premium payments are due; and
- the deadline under the plan by which participants may file a benefit claim (under the terms of the plan) and the deadlines for appealing an adverse benefit determination or requesting an external review, including Healthcare Flexible Spending Accounts (Health FSAs) and Health Reimbursement Arrangements (HRAs)⁷.

In addition, the relief guidance suspended the deadline for the plan administrator to provide the COBRA election notice (that is, the 14-day deadline [44 days where the employer is the plan administrator]) to qualified beneficiaries.

Agencies Confirm Anticipated End of Outbreak Period as July 10, 2023 for ERISA Plan Deadline Relief

In the FAQs, Part 58, the DOL wrote, "For the events or circumstances listed below, the relief generally continues until 60 days after the announced end of the COVID-19 National Emergency or another date announced by DOL, the Treasury Department, and the IRS (the 'Outbreak Period')." The FAQs continue

⁵ <https://www.federalregister.gov/d/2020-09399/p-24>

⁶ <https://www.irs.gov/pub/irs-drop/n-21-58.pdf>

⁷ These extensions do not apply to expense reimbursement requests under a non-group health plan such as a Dependent Care FSA nor does this relief apply to Health Savings Account (HSA).

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to state that the Agencies “anticipate that the Outbreak Period will end July 10, 2023 (60 days after the anticipated end of the COVID-19 National Emergency)”⁸

The FAQs, Part 58 then provides a number of situational examples intended to clarify how the requirements under the emergency relief notices related to disregarded periods for individual actions will change after the COVID-19 National Emergency ends using a July 10, 2023 end-date for the Outbreak Period.

The End of the National Emergency and the End of Tax-Free Qualified Disaster Relief Payments for COVID-19

The White House’s declaration ending the COVID-19 National Emergency effective April 10, 2023 *does*, however, impact an employer’s ability to rely on Code § 139 to make tax-free reimbursements or payments to employees of personal, family, living, or funeral expenses as “qualified disaster payments” related to COVID-19 as of April 10, 2023.

With respect to COVID-19 circumstances, employers could pay for or reimburse benefits reasonably believed by the employer to result from the COVID-19 National Emergency that were not covered by insurance. For example, expenses eligible for reimbursement or payment could include unreimbursed medical costs, childcare (e.g., due to school closings), or telecommuting expenses (e.g., increased utilities expenses, higher Internet service provider costs, printers, cell phones). Substantiation for these expenses were not required, but employers were permitted to enforce reasonable guidelines to ensure the expenses submitted for payment or reimbursement were the result of the COVID-19 National Emergency.

As a result of the termination of the COVID-19 National Emergency effective April 10, 2023, COVID-19 can no longer be the reason used to make such tax-free “qualified disaster relief payments” to employees under Code § 139 for expenses incurred on or after April 10.

Employers currently relying on Code § 139 to treat these expenses as nontaxable under Code § 139 due to COVID-19 will no longer be able to do so as of April 10, 2023. Such employers should consider whether an expense might qualify as a nontaxable reimbursement under other existing Internal Revenue Code provisions. However, employers considering this route should also take note that tax-free payment or reimbursement of these expenses that are not “qualified disaster relief payments” and are reimbursed under another section of the Internal Revenue Code will likely require substantiation to be treated as tax-free. Otherwise, employers who are currently using Code § 139 to exclude these COVID-19-related payments/reimbursements from taxable wages should revise their policies and procedures to begin taxing these payments as of April 10, 2023 (unless another Internal Revenue Code provision would allow the employer to treat the payments as tax-free).

A Note About the Public Health Emergency

The Public Health Emergency is *not* tied to the National Emergency; H.J. Res. 7 does not impact the scheduled end of the PHE period. During the PHE, group health plans are required to cover the cost of COVID-19 tests and testing-related services without cost-sharing or prior authorization or other medical management requirements. Effective January 15, 2022⁹, this was expanded to include over-the-counter (OTC) home COVID-19 tests.

Because current HHS Secretary Xavier Becerra most recently¹⁰ renewed the PHE effective February 11, 2023 for another 90 days (or until HHS declares that the emergency no longer exists, whichever comes first). With this 90-day period ending May 11, 2023, employer plans will no longer be required to cover such

⁸ “FAQs about Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58,” Q&A-5

⁹ <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-51.pdf>

¹⁰ <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-9Feb2023.aspx>

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tests and services with no cost sharing after May 11, 2023, though the FAQ states that plans and issuers “are encouraged to continue to provide this coverage, without imposing cost sharing or medical management requirements, after the PHE ends.”

Health Savings Account (HSA)-Compatible High Deductible Health Plans (HDHPs) and COVID-19 Testing and Treatment

On March 11, 2020, the Internal Revenue Service (IRS), in response to the PHE, published IRS Notice 2020-15¹¹ allowing HDHPs to provide benefits associated with testing for and treatment of COVID-19 either without a deductible or with one that is below the otherwise required minimum annual deductible; therefore, an HDHP that provided such care on a no- or low-cost basis would not fail to qualify as an HDHP. As a result, employees’ eligibility to make contributions to their HSAs would not be jeopardized, even if medical expenses related to COVID-19 testing or treatment were paid by the HDHP. Notice 2020-15 also provided that this relief would continue until further guidance is issued.

As the April 10, 2023 termination of the National Emergency period does *not* impact relief tied to the PHE, an HDHP can continue to provide such treatment and testing on a pre-deductible basis without affecting an employee’s eligibility to make contributions to an HSA until further guidance is issued.¹²

If an employer decides to continue covering testing at no cost, they should consider how this affects any employer sponsored HDHP. IRS Notice 2020-15 permitted HDHP coverage of COVID-19 testing with no cost-sharing without conflicting with HSA eligibility, we believe this relief continues until further guidance is issued.

Conclusion

Now that the National Emergency has ended, the Agencies have confirmed the end of the Outbreak Period is July 10, 2023 (the date that is 60 days from May 11, 2023) with the FAQs, Part 58. This means that, as of July 11, 2023, the above deadlines are still expected to resume pre-COVID relief calculations.

We will continue to monitor this and provide further updates should additional guidance from the Agencies be released.

As always, we strongly encourage employers and plan sponsors to consult competent legal or benefits counsel for all guidance on how the actions apply in their circumstances.

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¹¹ <https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

¹² “FAQs about Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58,” Q&A-8