

DOL Provides COVID-19 Relief for Retirement Plans

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On April 28th, the Employee Benefits Security Administration (“EBSA”) of the Department of Labor (“DOL”), together with the Department of the Treasury, issued helpful guidance for retirement plans that extends certain deadlines and provides other relief in light of the national coronavirus outbreak. The guidance is set forth in three separate pieces –

- EBSA Disaster Relief Notice 2020-01 (“EBSA Notice 2020-01”),
- A final rule for publication in the Federal Register that contains a joint notice issued by both the DOL and the Department of the Treasury (the “Joint Notice”), and
- A list of FAQs entitled COVID-19 FAQs for Participants and Beneficiaries (“COVID-19 FAQs”).

The guidance will significantly affect ERISA-covered retirement plans, plan sponsors, fiduciaries, plan participants and beneficiaries and plan service providers. The guidance comes in the aftermath of the CARES Act’s amendment to section 518 of ERISA, which expressly permits the DOL to postpone for up to one year (by notice or otherwise) any deadline for any action that is required or permitted to be completed under ERISA where the plan, sponsor, participant or other person is affected by a Presidentially declared disaster or public health emergency. The guidance specifically notes that both DOL and the Treasury Department are monitoring the COVID-19 outbreak and could provide additional relief in the future.

EBSA Notice 2020-01

EBSA Notice 2020-01 provides important relief on deadlines for providing certain participant-level notices and disclosures, authorizing and implementing plan loans and distributions, making participant contributions to a plan, and providing blackout notices. Notably, there was no further extension of the annual Form 5500 deadline. In addition, the Notice

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announces apparently relaxed DOL enforcement efforts during the COVID-19 pandemic. The relief provided by DOL in connection with each of these areas is described more specifically below.

Participant Disclosures and Notices. First, EBSA Notice 2020-01 provides good faith relief from the deadlines for furnishing certain required notices or disclosures to plan participants, beneficiaries and other persons that are due to be provided between March 1, 2020, and 60 days following the announcement of the end of the COVID-19 national emergency (“Outbreak Period”). This relief applies to any notice or disclosure required to be provided to plan participants, beneficiaries, or other persons by Title I of ERISA over which the DOL has interpretive jurisdiction, except for notices addressed in the separate Joint Notice issued by DOL and the Treasury Department. In order to qualify for this relief, the plan and responsible fiduciary must have acted in good faith to furnish the notice or disclosure as soon as administratively practicable under the circumstances. The guidance specifically identifies “good faith” acts including using electronic means of communicating with participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic media, including via email, text message, and continuous access websites.

To name a few, this relief extends to the following ERISA disclosures to the extent they are due to be provided during the Outbreak Period —

- Annual Funding Notices required by ERISA section 101(f)
- Summary Annual Reports (SARs)
- Summary Plan Descriptions (SPDs) and Summaries of Material Modifications (SMMs)
- QDRO notices
- Periodic pension benefit statements required by ERISA section 105
- Participant Disclosures in Connection with a Participant-Directed Retirement Plan including General Plan Information, Plan Fee Information and Comparative Designated Investment Alternative Information
- Qualified Default Investment Alternative (QDIA) Notices
- Mapping Notices
- Notices of Adverse Benefit Determinations and Appeals
- Blackout Notices required by ERISA section 101(i). With respect to blackout notices, DOL provided specific additional guidance described below.

Plan Loans and Distributions. EBSA Notice 2020-01 announces important relief for plan fiduciaries in connection with authorizing plan loans and distributions and related retroactive plan amendments.

Specifically, the guidance provides that if an ERISA-covered retirement plan fails to follow procedural requirements for plan loans or distributions under the terms of the plan, DOL will not treat it as a failure if —

- The failure is solely attributable to the COVID-19 outbreak;
- The plan administrator makes a good faith, diligent effort under the circumstances to comply with those requirements; and

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- The plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling documentation, as soon as practicable.

Importantly, this relief for verification procedures is limited to those procedures required under provisions of Title I of ERISA that are within the interpretive jurisdiction of the DOL. For example, a failure to strictly follow the plan's loan procedures could qualify for relief, but the relief would not extend to spousal consent or other statutory/regulatory requirements under the jurisdiction of the IRS.

In addition, the guidance provides important relief from ERISA's fiduciary requirements in connection with participant loans granted under the CARES Act. Under the CARES Act, plans are permitted to authorize participant loans to certain qualified individuals between March 27, 2020 and September 22, 2020 in an amount of up to \$100,000 (up from \$50,000) and up to 100% of the employee's vested accrued benefit (up from 50%). Moreover, the CARES Act permits plans to extend loan repayments for any participant loan previously granted to an affected individual for up to one year, provided subsequent repayments are re-amortized appropriately.

The relief provides that DOL will not treat any person as violating Title I of ERISA, including the "adequate security" and "reasonably equivalent" basis requirements of ERISA section 408(b)(1) solely because –

- The person made a loan to a qualified individual during the loan relief period in compliance with the CARES Act and related guidance, or
- A qualified individual delayed making a loan repayment in compliance with the CARES Act and related guidance.

Retroactive Plan Amendments. EBSA Notice 2020-01 provides that if a plan is amended retroactively to allow plan loans and distributions consistent with the CARES Act, the DOL will treat the plan as being operated in accordance with the terms of such amendment prior to its adoption if (1) the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2022 (or such later date as permitted by the Treasury Department), and (2) the amendment meets the conditions of the CARES Act. (This is consistent with IRS amendment relief.)

Participant Contribution Relief for Retirement Plans. ERISA imposes strict deadlines on the time within which participant contributions and participant loan repayments must be forwarded to the plan's trust. Generally, DOL takes the position that participant contributions and loan repayments must be forwarded to the trust within a few days of payroll (or receipt by the employer). Failure to meet these deadlines can result in prohibited transactions under ERISA and the Code as well as breaches of ERISA's general fiduciary conduct standards. The EBSA Notice 2020-01 provides that DOL will not take enforcement action in connection with a temporary delay in forwarding loan repayments or participant contributions to the plan that would normally be due to the plan during the Outbreak Period, if the failure is solely attributable to the COVID-19 outbreak. The guidance further cautions that employers and service providers must act reasonably to comply as soon as administratively feasible. While EBSA's non-enforcement relief technically cannot cover the potential excise tax liability under

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the Code that typically arises in connection with late contributions, we are hopeful the IRS would take a similar approach.

Blackout Notice Relief. The guidance provides two forms of relief in connection with so-called “blackout notices” under an individual account plan. ERISA generally requires a plan administrator to provide 30-days’ advance notice of any temporary “blackout period” in which participants will be unable to exercise rights normally available to them under an individual account plan. However, DOL regulations specify that the requirement to provide at least 30 days’ advance notice does not apply when the inability to provide such notice is beyond the control of the plan administrator and a plan fiduciary so determines in writing. First, the DOL made clear that the “good faith” relief applicable to participant and beneficiary notices applies to blackout notices, including any notice required during or following a blackout period. Accordingly, to the extent that any notice required in connection with a blackout period is due during the Outbreak Period, the failure to meet such deadline will not be treated as a violation of ERISA to the extent that the plan administrator acts in good faith to distribute the notice as soon as practicable. Moreover, DOL clarified that a pandemic qualifies as a circumstance beyond the control of the plan administrator and that the DOL will not enforce the requirement to make a written determination that the COVID-19 emergency qualifies as a circumstance beyond the plan’s reasonable control.

Form 5500 Filing Relief. Apparently DOL has declined thus far to extend the due date for 2019 Form 5500 filings for calendar year plans. With respect to Form 5500 filing relief, the DOL merely referred to the Form 5500 relief already granted under IRS Notice 2020-23 and IRS Rev. Proc. 2018-58. Under IRS Notice 2020-23, the due date to file a Form 5500 that is otherwise due between April 1, 2020 and July 14, 2020, has been extended to July 15, 2020. Because the 2019 Form 5500 filing deadline for a calendar year plan falls on July 31, 2020, the due date for calendar year plans has NOT been extended at this point. No doubt, the DOL has declined to extend the normal Form 5500 due date for calendar year plans because plans have an option to extend the Form 5500 deadline until October 15th by filing IRS Form 5558 with the IRS prior to the plan’s normal deadline. The guidance also indicates that the DOL is continuing to monitor the COVID-19 outbreak and may issue further guidance as appropriate in the future.

General ERISA Fiduciary Compliance Guidance. Finally, the DOL guidance acknowledges that compliance with ERISA, including claims processing and other ERISA requirements, may be difficult during the COVID-19 outbreak and appears to articulate a relaxed enforcement policy. The guidance indicates that DOL enforcement efforts during this time will emphasize compliance assistance and include grace periods and other forms of appropriate relief.

Finally, it is worth noting that EBSA Notice 2020-01 addressed only DOL’s enforcement positions on certain technical violations of ERISA during the COVID-19 outbreak. The Notice does not affect a participant, beneficiary or plan fiduciary’s enforcement rights under ERISA.

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Joint Notice

The Joint Notice extends the timeframe during which certain actions must take place in connection with the plan's claims procedures maintained under ERISA section 503.

As relevant here, ERISA requires that every employee benefit plan must maintain reasonable claims procedures, and must provide participants with a reasonable opportunity for a full and fair review of any denied claim. Pursuant to guidance issued by the DOL, a plan's claims procedures may provide a reasonable period of time within which initial claims for benefits must be submitted. In addition, a retirement plan must allow a participant at least 60 days following receipt of a notice of an adverse benefit decision in which to file an appeal.

Specifically, the Joint Notice provides that all ERISA-covered plans (including retirement plans) must disregard the Outbreak Period (the period from March 1, 2020 until 60 days following the announced end of the COVID-19 national emergency) for all plan participants, beneficiaries and claimants in determining –

- The date within which an individual must file a claim for benefits under the plan's claims procedures, and
- The date within which a claimant must file an appeal of an adverse benefit determination under the plan's claims procedures.

Example: Assume that the COVID-19 national emergency ends on April 30, 2020 and the Outbreak Period ends on June 29, 2020 (the 60th day following the end of the national emergency). John received a notice of adverse benefit determination from his 401(k) plan on April 15, 2020. The notification advised John that he has 60 days within which to file an appeal. In determining the 60-day period in which John must file an appeal, the Outbreak Period is disregarded. Accordingly, the last day on which John's appeal may be filed is 60 days after June 29, 2020, which is August 28, 2020.

Although the Joint Notice does not address the timing requirements for plans to send notices of adverse benefit decisions and appeals, those notice deadlines may be extended in connection with the "good faith" participant notice relief described in EBSA Notice 2020-01.

COVID-19 FAQs

Issued by the DOL, the COVID-19 FAQs are intended to help employee benefit plan participants, beneficiaries and employers understand their rights under ERISA in connection with the COVID-19 outbreak. The FAQs provide no substantive legal interpretations, instead they provide information for participants and employers in connection with receiving distributions or in the event of problems or delays in exercising plan rights. For example, where participants experience problems filing claims or receiving information or distributions from a plan, the FAQs provide information on who to contact. In addition, the FAQs generally describe the relaxed participant loan and distribution rules under the CARES Act as a possible way of receiving financial assistance from a retirement plan. The FAQs also

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explain that certain plan disclosures (such as 401(k) benefit statements) may be delayed during in the COVID-19 outbreak.

Next Steps

This relief provides much needed flexibility in meeting DOL participant notice and disclosure requirements, addressing claims, making plan contributions, and meeting DOL filing deadlines. Along with the added flexibility of relaxed electronic delivery rules, this good faith compliance measure makes plan administration in these very difficult times more manageable. In general, plan sponsors and plan fiduciaries should take comfort in the DOL and joint agency guidance. However, there are a few important things to keep in mind:

- Plan fiduciary committees should continue to meet by phone or video conference if possible, and plan sponsors should continue to support plan activities even when HR and finance departments may be stretched thin. The guidance provides no relief from litigation risk to plan fiduciaries from third party and participant lawsuits.
- Some of the relief in the guidance requires that a compliance failure be “solely attributable” to COVID-19. Where a plan decides to take advantage of the relief, it would be helpful to document the events around the compliance failure and the specific link to COVID-19.
- Providing notices and disclosures to participants continues to be important and plans should consider sending notices by email, text and/or continuous access website in accordance with the guidance.
- Unless there is further guidance, plans must continue to prepare to file the Form 5500 in July (or in October with the regularly available extension). This includes preparing for the plan’s annual audit. In this regard, it is not clear that DOL’s good faith disclosure relief operates to relax deadlines for service providers and insurers to provide documentation needed to complete the Form 5500, including certifications necessary to support plan audits and Schedules A and C.
- Relief in the guidance for delays in participant contributions may be helpful in limited circumstances, but plans should continue to make every effort to avoid such delays and to remedy them quickly. The relief available in the guidance applies solely to participant contributions and not to any required employer contributions.
- The relief for processing of claims is primarily aimed at providing participants greater flexibility in perfecting a claim, however DOL acknowledged that deadlines for claims processing may be challenging during the COVID-19 crisis. Claims reviewers should make good faith efforts to comply with claims procedures as much as practicable during the crisis and may take advantage of the “good faith” relief with respect to the timing of claims denial and appeal notices.

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