



# Compliance Services Alert

Updated March 5, 2021

## One for your sins: Feds’ “outbreak period” guidance creates migraines for plan sponsors

We've updated this alert to reflect an emerging interpretation by federal authorities of their guidance from last week. Specifically, it appears federal authorities may intend that, in the COBRA context particularly, the maximum 12-month suspension periods described below tack end-to-end for each event, such as each premium payment in a stream of payments.

So for example, under this interpretation, if the beginning of a 60-day COBRA election period is suspended from April 1, 2020, to April 1, 2021, and COBRA is elected, say, May 1, 2021, the first premium is due *not* 45 days after the delayed COBRA election, but 45 days *plus* 12 months, or June 14, 2022. The Department of Labor, the principal author of last week's guidance, has not confirmed this interpretation, and whether such an interpretation is enforceable is questionable, but we have updated this alert to reflect how that interpretation would play out if that turns out to be the correct and an enforceable interpretation..

Federal officials weighed in late last week on the lingering question of the duration of the suspension, first announced last spring, of the running of various benefit plan-related action periods, such as the periods for COBRA and HIPAA special enrollment elections, COBRA premium payments, and claims and appeals submissions. The suspensions were intended to apply during what that earlier announcement called the COVID-19 “outbreak period,” a period that began March 1, 2020, and runs through the 60<sup>th</sup> day following the rescission of the national emergency declared by the president. See our alert on last spring's announcement.

What nobody last spring foresaw was that the emergency declaration would still be in effect a year later. In fact, the Biden administration just renewed the declaration for up to another year. The lingering declaration matters because under federal law, a suspension of these plan-related action periods cannot exceed 12 months. The suspensions first began March 1, 2020, so plan sponsors were hoping the curtain came down on *all* suspensions on Feb. 28, 2021, and life – at last for plan administrators – could return to normal.

But last week's guidance, issued less than one business day before the one-year anniversary of the day the suspensions first began, delivered bad news. The guidance requires the maximum 12-month period of suspension to be calculated on an *individual-by-individual*, and for each individual, on an *action-by-action*,

basis, perhaps with these 12-month suspension periods tacked end-to-end, where applicable. For plan sponsors it is a requirement fraught with steep administrative challenges and potential liability.

**Lockton comment:** This means that plan sponsors must determine each affected individual's *personal* maximum period of suspension for each affected action and, in many cases, reissue COBRA notices reflecting how that personal suspension affects the individual's COBRA election and premium payment deadlines.

Moreover, last week's guidance tells us that this individualized approach to 12-month suspension periods continues to apply not only for action periods currently suspended, but for any *new* action periods (e.g., COBRA election periods, COBRA premium payment deadlines, etc.) that arise in the future. The suspension of the running of these current and future action periods will last until 60 days after the president rescinds the national emergency declaration, whenever that might occur.

As noted in additional detail below, plan sponsors may want to address the consequences of last week's guidance with their COBRA vendors to make sure COBRA notices are reissued to affected individuals, e.g., notices reflecting affected qualified beneficiaries' individualized 12-month suspension periods for electing COBRA and paying premiums. Extensions of *other* deadlines, such as the deadlines for HIPAA special enrollment, and claims and appeals submissions, likely also warrant an updated notice of sorts, but we think that notice can be more generic, such as a Lockton model notice available from your Lockton account service team.

## The impact of individual 12-month maximum suspension periods

The continuing individual-by-individual, and action-by-action, approach to the maximum 12-month suspension period has the greatest impact on plan sponsors and plan administration with respect to COBRA coverage. This is best illustrated with some examples.

### Example 1

Assume a covered employee's employment terminated on Feb. 5, 2020, and the employee lost coverage at the end of that month (or immediately, depending on the plan terms). The plan timely sent a COBRA notice on the day employment terminated. The employee would typically have had until April 5, 2020, or 60 days after the sending of the COBRA notice, to make a COBRA election and an additional 45 days after the election to make the first premium payment.

The suspension of plan-related deadlines under last spring's guidance stopped the COBRA election period clock for this former employee on March 1, 2020, 25 days into the 60-day election period. By Feb. 28, 2021, the former employee will have had the maximum 12-month period of suspension. Therefore, the 60-day COBRA election period clock will begin to run again on March 1, 2021, giving the former employee the remaining 35 days of the 60-day election period, or until April 5, 2021, to elect COBRA. Normally, the initial premium payment would be due 45 days later, but under the emerging interpretation described at the top of the alert, unless the 45-day clock begins ticking earlier, beginning after the 60<sup>th</sup> day following rescission of the presidential national emergency declaration, the initial premium payment would be due *12 months plus 45 days after the election*. The next payment would then be due 12 months plus 30 days after that.

**Lockton comment:** This is why the interpretation described at the top of this alert seems outlandish to us. It extends each additional payment deadline *another* full 12 months, pushing some premium payment deadlines late into this decade and beyond (but for the fact that the president will rescind the national emergency and bring the curtain down on all these suspensions

long before that). In fact, assuming the president rescinds the emergency this year, under the interpretation described above no COBRA premium payment, for any qualifying event occurring on or after March 1, 2020, need come due before the premium payment clock begins ticking again, 60 days after that rescission.

### **Example 2**

If the employee had instead been terminated on June 30, 2020, lost coverage effective July 1, and the plan sent the COBRA notice that day, typically the former employee would have had 60 days from July 1, 2020, to elect COBRA, or to Aug. 29, 2020. The suspension of the COBRA election deadline prevented the 60-day COBRA election period clock from beginning to run. It will not begin to run until the end of the former employee's individualized 12-month maximum suspension period, or not until July 1, 2021, assuming the presidential national emergency is not rescinded earlier. The former employee would need to elect COBRA by Aug. 29, 2021. Normally, the initial premium payment would be due 45 days after the election (Oct. 12, 2021, if COBRA were elected on the last day of the election period) for the months of July, August, and September 2020. If federal authorities confirm the interpretation described at the top of this alert, however, that premium payment would not be due until Oct. 12, 2022.

**Lockton comment:** These suspensions, and particularly the potentially end-to-end aspect of how they apply to COBRA premium payments, has the capacity to cause havoc with employer plans due to limitations of eligibility management systems and the increased potential for adverse selection of COBRA coverage. In this Example 2, for instance, the former employee has the luxury of waiting a year to see if COBRA coverage is worth the expense, and isn't going to elect retroactive COBRA coverage unless they (or a dependent who lost coverage at the same time) incurs a significant claim somewhere during the deferred election period and any deferred initial premium payment period (i.e., if the employee has no large claims in the deferred *election* period, they may as well go ahead and elect COBRA and see what happens over any deferred initial premium payment period too).

If the employee incurs such a large claim, the claims administrator is likely to simply deny the claim, believing the former employee has no coverage. If the former employee then *does* elect retroactive COBRA, the administrator needs to reinstitute coverage and reprocess the claim. Meanwhile the former employee's premium payments for the retroactive coverage are also deferred, potentially for an additional 12 months *each*.

For example, say the former employee incurred a large healthcare claim under a self-funded medical plan in November 2020, more than two months after the former employee would normally have had to elect COBRA. Due to the suspension of the COBRA election deadline, however, the former employee had not yet, at the time the claim was incurred, elected COBRA. Presumably, that claim was either contingently denied or pended by the claims administrator because at the time it was submitted for payment the former employee had not elected COBRA (didn't have to, of course, because of the suspended election deadline) and it would have appeared to the administrator that the former employee had no coverage.

It makes sense for the former employee (or a healthcare provider on the former employee's behalf) to decide to pay COBRA premiums at least through that month of November 2020, to get that large claim paid. To accomplish that, the former employee (or the provider on their behalf) elects COBRA, the claims administrator must then reinstitute coverage and, assuming the retroactive COBRA premiums are timely paid, reprocess the claim.

## No effect on maximum COBRA coverage period

As we mentioned above, in Example 1, the 12-month maximum suspension period for COBRA elections and monthly premium payments does not defer the timing of the 18-, 29-, or 36-month COBRA coverage period. The maximum COBRA coverage still begins to run on the loss of coverage due to the qualifying event (in our examples, the first of the month following employment termination); only the *election and premium payment deadlines* are deferred.

## And if all this were not bad enough...

The most challenging aspect of the recent guidance is that it admonishes plan sponsors to *reissue* notices, like COBRA notices, that when first issued were not entirely accurate (as to election and premium payment deadlines) on account of the recent guidance. Spoiler alert: The notices will almost certainly not have been accurate because last spring few people – if any – expected the presidential national emergency to last 12 months.

The recent guidance states:

Moreover, plan disclosures issued prior to or during the pandemic may need to be reissued or amended if such disclosures failed to provide accurate information regarding the time in which participants and beneficiaries were required to take action, e.g., COBRA election notices and claims procedure notices.

**Lockton comment:** If a COBRA qualified beneficiary has already *elected* COBRA, we think the plan sponsor can simply send a stand-alone notice (Lockton clients may obtain a model notice from their account team) describing generally how the beneficiary's personalized 12-month maximum suspension period operates to defer premium payment deadlines. But if an individual who received an earlier COBRA election notice (during their personalized 12-month maximum suspension period relating to that notice) has not yet elected COBRA, prudence dictates that the plan reissue the election notice and ensure it accurately reflects the effect of the 12-month suspension period on the deadline for the COBRA election and premium payments. That, of course, will require an overhaul of the plan's standard COBRA election notice format.

The recent guidance also provides:

Further, in the case of ERISA group health plans, plans should consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including the opportunity to obtain coverage through the Health Insurance Marketplace in their state.

**Lockton comment:** The Lockton model notice mentioned above includes a statement regarding potential marketplace coverage. We recommend the plan sponsor attach a copy of the [standard marketplace notice](#) to the Lockton model notice.

## The COBRA hassles are the most difficult, but not the only hassles

We reiterate that the recent guidance, with its maximum 12-month personalized suspension periods on an action-by-action basis, affects deadlines for HIPAA special enrollment requests, claims and appeals submissions, and requests for third-party review of denied healthcare claims.

For example, in the context of a HIPAA special enrollment request to add a new spouse or new baby acquired or born, say, in May 2020, the typical 30-day window to request special enrollment would not begin until 12 months after the marriage or birth.

We do not believe that all these other situations will require any sort of individualized notice like the individualized, revised COBRA notices referred to in last week's guidance and mentioned above, as there is no way an employer will know the individual circumstances. Arguably, however, to comply with last week's guidance, employers should issue to plan participants a *generic* notice reflecting the impact of that guidance *generally* on HIPAA special enrollment application deadlines, and on deadlines to submit claims, appeals and requests for third-party review. The model Lockton notice accomplishes this.

## Is there a back end to all these suspensions, or do they roll on forever?

While there *is* an ultimate back end to these individual, action-by-action, 12-month periods of suspension, we do not yet know when that will be. The curtain comes down on them all 60 days after the presidential national emergency declaration is rescinded, whenever that occurs. The end of that 60-day tail would accelerate the commencement or re-commencement of the action period clock, for any action described in this alert, still bumping along within its 12-month suspension period.

For example, let's say the president rescinds the national emergency on Dec. 31, 2021. The 60-day tail on that rescission expires March 1, 2022. An individual had experienced a COBRA-qualifying event, and the plan had issued a COBRA election notice on Sept. 1, 2021. The 60-day clock to elect COBRA coverage commences on March 1, 2022 – 60 days after the rescission of the national emergency – not Sept. 1, 2022, 12 months after the issuance of the election notice.

If it is the COBRA premium payment deadlines that are bumping along within individual 12-month suspension periods when the rescission occurs on Dec. 31, 2021, the 30-day grace period clock for all previously suspended monthly premium payment deadlines will begin to run on March 1, 2022.

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