

More Disaster Relief for Employee Benefit Plans Due to COVID-19

Working Together

05.04.2020

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On April 28, 2020, the Employee Benefits Security Administration (“EBSA”) issued three documents related to COVID-19 relief: (i) EBSA Disaster Relief Notice 2020-20 (EBSA Notice 2020-01); (ii) the text of a final rule developed by EBSA and the Internal Revenue Service (“IRS”) entitled “Extension of Certain Timeframes for Employee Benefit Plans, Participants and Beneficiaries Affected by the COVID-19 Outbreak” (Final Rule); and (iii) COVID-19 FAQs for Participants and Beneficiaries (COVID-19 EBSA FAQs).

The date for the publication of the Final Rule in the Federal Register is not yet known. This article focuses on Notice 2020-01 (the “Notice”)

Under the Notice, an employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency (the “Outbreak Period”), provided that the plan and responsible fiduciary act in good faith and furnish the notice, disclosure or document as soon as administratively feasible under the circumstances. Further guidance regarding the end of the Outbreak Period will be issued if the COVID-19 National Emergency ends at different times for different regions of the country.

The Notice focuses particularly on Plan Loans and Distributions, Participant Contributions and Loan Repayments, Blackout Notices, Form 5500 and Form M-1 Filing Relief and General ERISA Fiduciary Compliance Guidance.

Plan Loans and Distributions

If Plan loan procedures are not followed during the Outbreak Period, the Department of Labor (the “DOL”) will not treat the lapse as a failure if:

- The failure is solely attributable to the COVID-19 outbreak;

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SPRINGFIELD
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WAKEFIELD
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WATERBURY
203.573.9700

WESTPORT
203.254.5000

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- The plan administrator makes a good-faith effort under the circumstances to comply with those requirements; and
- The plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation as soon as administratively practicable.

The key takeaway: if there is an issue with initiating, distributing or repaying loans, document the problem and correct it as soon as you can. Make sure the documentation makes clear that the correction was done “as soon as administratively practicable.”

Participant Contributions and Loan Repayments

The DOL has been a stickler for timely deposit of participant contributions and loan repayments into a Plan’s trust fund. The rule sets an outside date for such deposits (the 15th business day of the month following the month in which the participant contribution or loan repayment was made to or withheld by the Employer), but the DOL has consistently stated that if such amounts can be deposited sooner they must be deposited as soon as possible.

The Notice creates a limited reprieve for enforcement of the timely deposit rule for untimely deposits made during the Outbreak Period. The untimely deposits must have been delayed solely due to the COVID-19 outbreak. Employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.

The key takeaway: document the reasons for the delay in making the deposits. Make sure the documentation shows that the delay is due to the COVID-19 outbreak and describes your efforts to comply as soon as administratively practicable under the circumstances.

Blackout Notices

Blackout Notices generally must be provided at least 30 days prior to temporarily suspending participants’ ability to take loans, request distributions or change investment instructions for their account balances under a retirement plan. There is an exception to the 30 day rule if the notice is due to events beyond the reasonable control of the plan administrator, and a fiduciary so determines in writing. The DOL recognizes that the COVID-19 outbreak is “by definition” beyond a plan administrator’s control. During the Outbreak Period, Blackout Notices should be provided as soon as administratively feasible under the circumstances. No fiduciary written determination is required during the Outbreak Period.

Form 5500 and Form M-1 Filing Relief

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The Notice provides the same relief on filing deadlines as was provided under IRS Notice 2020-23. Any Form 5500 or Form M-1 required to be filed between April 1 and July 14, 2020 has an automatic extended filing date of July 15, 2020. Calendar year plans whose Form 5500 filings are due on July 31, 2020 have no COVID-19 related extended filing date. Calendar year plans can request an extended filing date using Form 5558.

General ERISA Fiduciary Compliance Guidance

The Notice provides the following guiding principle for plan fiduciaries during the Outbreak Period:

“Act reasonably, prudently and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments in such cases and attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.”

Plan Fiduciaries should take note of the FAQs issued on the same day as the Notice. The questions, generally asked in the voice of a participant, address how to get benefits the participant believes s/he is entitled to under an employer’s employee benefit plans. In many of the answers the DOL states that if the participant cannot get the information from the plan administrator, the plan sponsor, or other plan official, s/he should contact the DOL. If an employee contacts the DOL because they cannot get an answer from you, the DOL will likely be contacting you.

The key takeaway: be thoughtful about the decisions that you are making regarding the operation of your employee benefit plans, and document your reasons for making those decisions. When possible and reasonable, communicate with your employees/plan participants to reduce the likelihood of future complaints or visits from the DOL.

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