
A Return to "Normal" – Preparing Your Benefit Plan for the End of the COVID-19 Emergencies

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Employee Benefits Academy
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In corporate transactions, Jessica negotiates employee benefits representations and covenants, conducts due diligence review of employee benefit plan documentation, and advises clients on executive compensation issues arising under Section 409A and Section 280G



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What We'll Cover

- Background
- National Emergency v. Public Health Emergency
- National Emergency – Impact and Action Items
- Public Health Emergency – Impact and Action Items
- Other COVID-19 Considerations

- The PHE was initially declared on January 31, 2020, by HHS Secretary Azar, pursuant to Section 319 of the Public Services Act
 - Terminates upon HHS Secretary declaration or upon expiration of a 90-day period
 - The most recent renewal of the PHE was February 9, 2023
 - 90 days from February 9, 2023 was May 10, 2023

- On March 13, 2020, by Proclamation 9994 under the National Emergencies Act, President Trump declared a NE concerning the COVID-19 pandemic beginning March 1, 2020
- Under the National Emergencies Act, NEs terminate:
 - On the anniversary of the NE (unless continued), OR
 - By joint resolution of Congress by a specified date
- On January 30, the Biden Administration announced that they intend to end the NE on May 11, 2023
- House Joint Resolution was signed by President Biden on April 10, 2023 ending the NE immediately (April 10, 2023)

Question: So...when did the Public Health Emergency and National Emergency end?

- May 10?
- May 11?
- April 10?

Answer: May 11, 2023 (pending any guidance to the contrary)

- PHE ended May 11
 - Despite the automatic termination of the PHE 90 days from most recent renewal on February 9, 2023 (i.e., May 10, 2023), the consensus is that the PHE ended May 11, 2023
 - CMS and HHS websites state that the PHE ended May 11, 2023
 - March 29, 2023 - Departments issue FAQs using assumptions that PHE will end May 11, 2023

- NE ended May 11
 - Guidance issued by the Departments regarding the tolling of certain plan deadlines during the “Outbreak Period” stated the basis for these rules: (1) Proclamation 9994 and (2) Section 501(b) of the Stafford Act
 - The joint resolution signed on April 10 ended the NE under Proclamation 9994
 - It did not change the NE determination under the Stafford Act
 - February 9, 2023 - FEMA announced all Disaster Declaration Incident Periods will end May 11, 2023
 - March 29, 2023 - Departments issue FAQs using assumptions that NE will end May 11, 2023

National Emergency v. Public Health Emergency

- The NE temporarily extended certain plan deadlines, including the deadlines for:
 - requesting HIPAA special enrollment,
 - electing COBRA continuation coverage,
 - paying COBRA premiums,
 - filing claims and appeals, and
 - requesting an external review.
- The extended plan deadlines apply for the duration of the Outbreak Period, which is a defined period that began on March 1, 2020 (the start of the COVID-19 NE) and ends 60 days after the end of the NE (i.e., July 10, 2023).

National Emergency v. Public Health Emergency

- The PHE mandated certain coronavirus-related care and relief, including:
 - COVID-19 Testing
 - COVID-19 Vaccines
 - Stand-Alone Telehealth
 - Relief from certain Mental Health Parity rules
 - Excepted Benefit Status for EAPs

National Emergency – Effect on Benefit Plans

In 2020, the U.S. Departments of Labor and Treasury issued relief temporarily extending certain plan deadlines, including the deadlines for the following:

- HIPAA special enrollment
- Electing COBRA continuation coverage
- Paying COBRA premiums
- Filing claims and appeals
- Requesting an external review

Additional guidance issued in 2021 indicated that the extension would be limited to the shorter of (a) 12 months from the relevant date (e.g., date of the special enrollment event or COBRA qualifying event), or (b) the end of the Outbreak Period.

The “Outbreak Period” ends **July 10, 2023**.

COBRA Election and Payment

The following COBRA deadlines were tolled during the National Emergency:

- 60-day deadline for qualified beneficiaries (QBs) to elect COBRA continuation coverage
- 45-day and 30-day deadlines for QBs to pay COBRA premiums (for initial and subsequent payments, respectively)
- 60-day deadline for individuals to notify the plan of a COBRA-qualifying event or a new Social Security disability determination
- The deadline for plan sponsors and administrators to provide a COBRA election or disability extension notice (typically 30 days for the employer to provide notice to the plan administrator and 14 days for the plan administrator to provide the election notice to the qualified beneficiary)

Example: A qualified beneficiary is provided a COBRA election notice on March 1, 2023.

- The 60-day election period begins the *earlier of* (1) one year from the date the QB received the COBRA election notice (i.e., February 29, 2024), or (2) the end of the Outbreak Period (i.e., July 10, 2023).
- The QB has until September 8, 2023 (60 days after the end of the Outbreak Period) to make their COBRA election.

The following HIPAA special enrollment deadlines were tolled during the National Emergency:

- 30-day deadline to request enrollment in a health plan upon:
 - loss of eligibility for group health coverage or individual health insurance coverage
 - acquiring a new spouse or dependent by marriage, birth, adoption, or placement for adoption.
- 60-day deadline to request enrollment in a health plan upon experiencing a loss of Medicaid/CHIP eligibility or becoming eligible for a state premium assistance subsidy under Medicaid/CHIP.

HIPAA Special Enrollment (cont.)

Example: A plan participant has a child on March 11, 2023, and would like to enroll the child in health coverage.

- The participant may exercise the special enrollment rights for the child up to 30 days after the earlier of (1) one year from the date from the date of the HIPAA special enrollment event (i.e., March 10, 2024), or (2) the end of the Outbreak Period (i.e., July 10, 2023).
- The participant has until August 9, 2023 (i.e., 30 days after the end of the Outbreak Period) to request special enrollment.

The following deadlines were tolled during the National Emergency:

- The deadline to file a benefit claim under an ERISA plan's claims procedures
- The deadline to file an appeal of the plan's adverse benefit determination
- The deadline to request an external review
- The deadline to submit additional information related to the external review request

Claims, Appeals, and External Review (cont.)

Example: On April 10, 2023, a participant receives an adverse determination on a claim under his employer's 401(k) plan.

- Under the terms of the 401(k) plan, the participant has 60 days to appeal an adverse determination.
- Due to the COVID-19 relief, the participant can delay his appeal up to 60 days after the earlier of (1) one year from the date of the adverse determination (i.e., April 9, 2024), or (2) the end of the Outbreak Period (i.e., July 10, 2023).
- The participant has until September 8, 2023 (i.e., 60 days after the termination of the Outbreak Period) to file an appeal.

Next Steps: Documents and Communications

- Update the plan document(s), summary plan description(s) and related notices (e.g., COBRA notices) as necessary, to reflect the return to regular deadlines
 - Any changes to SPD content should be reflected in a summary of material modifications (SMM) or updated SPD by 210 days after the end of the current plan year
- Communicate with all affected COBRA qualified beneficiaries and with plan participants more broadly about these upcoming deadline changes
 - Consider what communications were issued at the time the extensions took effect in 2020, and whether a similar approach should be used now
 - Consider combining with communications regarding the end of the Public Health Emergency and corresponding changes to coverage

Next Steps: Administration

- Contact the plan's third party administrator and COBRA administrator to ensure that procedures and systems will be updated accordingly to reflect the end of the Outbreak Period
- Ensure that the COBRA administrator or plan administrator (as applicable) is prepared to track the various deadlines for affected qualified beneficiaries whose deadlines for elections, notices or payments may have been tolled during the Outbreak Period
 - The regular deadlines will apply after the end of the Outbreak Period – so, tracking will need to continue after July 10
- Work with COBRA vendors to identify any participants who may have incurred claims during the tolling period but have not elected or paid for COBRA coverage

Public Health Emergency – COVID-19

Testing & Vaccines

- Through the Families First Coronavirus Relief Act (FFCRA) and CARES Act, employer-sponsored group health plans were required to cover COVID-19 testing expenses (including over-the-counter testing), preventative services and vaccines – all without any cost sharing mechanisms
 - No co-pays, coinsurance, or other out of pocket expenses
- After May 11, 2023, these COVID-specific coverage mandates, with respect to testing, no longer apply

Public Health Emergency – COVID-19

Testing & Vaccines

- The CARES Act requires non-grandfathered health plans to offer in-network COVID-19 vaccines without any cost-sharing mechanisms.
- Vaccines are considered preventive care and therefore will continue to be covered in-network with no cost sharing even after the PHE is over.
- COVID-19 Testing (both over the counter (“OTC”) and laboratory testing) are not considered preventative care under the Affordable Care Act.
- The requirement for group health plans to cover these COVID-19 tests without cost sharing, will end at the expiration of the PHE. However, coverage may continue if plans choose to do so.

Public Health Emergency – COVID-19

Testing & Vaccines

- Plan sponsors should re-evaluate whether Plans will continue offering these services at no cost, and should amend plans accordingly
- **Next Step:** amending the Plan will require the same statutory distribution of updates to participants (i.e., a Summary of Material Modification, or an updated SPD should be prepared to distribute to participants)
- **Next Step:** Plan sponsors should work with insurance carriers for insured plans, or their administrator, to ensure that the language in the SBC aligns with any Plan updates

Public Health Emergency – Employee Assistance Programs (EAP)

- During the PHE period, some Plans expanded their Employee Assistance Programs (EAPs) to offer COVID-19 diagnoses, testing and preventive care
- This was permitted on a temporary basis during the PHE, under guidance that provided these would not be “significant benefits” and would not disqualify the EAP from being an excepted benefit
- **Next Steps:** Plan sponsors should re-evaluate whether Plans will continue offering these EAP benefits after May 11, 2023, and whether this will affect the EAP’s status as an “excepted benefit” for compliance purposes

- Pre-Deductible COVID-19 Diagnosis and Treatment
 - In IRS Notice 2020-15, the IRS provided that a health plan will not fail to be a HDHP because it provides benefits associated with COVID-19 testing and treatment prior to satisfying the applicable minimum deductible
 - The relief lasts “until further guidance is issued”
 - In recently issued FAQs, the IRS said it was reviewing the continuation of this relief and it anticipates guidance soon
 - For the time being, participants who receive coverage of COVID-19 testing and/or treatment without incurring a deductible will not lose their HSA eligibility
 - The FAQs also stated that any future modifications to the guidance provided in Notice 2020-15 will not require HDHPs to make mid-year changes for covered individuals to remain HSA eligible

- HSA Telehealth Relief
 - Recent legislation passed before the end of 2022 extended the HSA relief permitting HDHPs to provide first dollar coverage of telehealth services without impacting HSA eligibility
 - This relief continues to apply for the 2023 and 2024 plan years

- Mental Health Parity Considerations
 - MHPAEA requires that the financial requirements (such as coinsurance and copays) and quantitative treatment limits (such as visit limits) imposed on MH/SUD benefits cannot be more restrictive than the financial requirements and treatment limitations that apply to medical/surgical benefits
 - During the PHE, plans were permitted to disregard certain items and services related to COVID-19 testing, when performing certain mental health parity testing
 - This relief likely ended with the end of the PHE because plans are no longer required to cover COVID-19 testing without cost-sharing
 - Plan sponsors should review how mental health parity tests were performed to determine if this change impacts testing

Executive Compensation Academy

- Title: Equity Awards & Employment Taxes: Design Considerations
- When: June 8, 2023
- Time: 10:00 am – 11:00 am CT
11:00 am – 12:00 pm ET

Employee Benefits Academy

- Title: TBD
- When: July 27, 2023
- Time: 10:00 am – 11:00 am CT
11:00 am – 12:00 pm ET