



Flashpoint: Dealing with the Pandemic: IRS and DOL Authorized Delays

Both the Internal Revenue Service (IRS) and the Employee Benefits Security Administration (EBSA) (the section of the U.S. Department of Labor (DOL) with jurisdiction over employee benefit plans) recently issued guidance delaying certain plan-related deadlines while the COVID pandemic is ongoing. Some of these delays apply to the participants, generally giving them more time to perfect benefit claims, and some apply to plan sponsors and administrators. This FlashPoint will outline what deadlines have been extended and for how long.

Both the Coronavirus Aid, Relief and Economic Security Act (CARES Act), which was enacted on March 27, 2020, and earlier IRS guidance extended deadlines during the COVID pandemic. See earlier **FlashPoints** for our discussion of those earlier actions.

The Guidance

The written guidance relating to these delayed deadlines includes EBSA Disaster Relief Notice 2020-01 (EBSA Notice), a Final Rule jointly issued by EBSA and the IRS on April 28, 2020 (Final Rule), and IRS Notices 2020-18 (Notice 2020-18) and 2020-23 (Notice 2020-23) (which we shall refer to collectively as the "Guidance"). The Guidance was motivated by President Trump's declaration of a federal emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act on March 13, 2020, and has been eagerly awaited.

The EBSA Notice and Final Rule both extend deadlines that occur between March 1, 2020, and 60 days after the federal government declares an end to the COVID-19 National Emergency. This period is referred to in the Final Rule as the "Outbreak Period," and we will use this term in this FlashPoint.

While parts of the Guidance (particularly the EBSA Notice) affect a variety of types of employee benefit plans, this FlashPoint will concentrate on the impact on qualified retirement plans.

EBSA Notice

Form 5500 Not Further Extended by the Notice

Earlier guidance extended the deadline for filing Form 5500 for forms that were due between April 1 and July 15 to July 15, 2020. The Notice provided no additional delay (although it provided the same relief for Form M-1, which applies to multiple employer health plans). It did, however, establish that the IRS extensions of Form 5500 deadlines are acceptable to the DOL, including additional extensions that the IRS may post later on its website.

Plan Loans and Distributions

CARES offered special tax relief for coronavirus-related loans and distributions, but did not address the labor-related impact of these provisions. The EBSA Notice provides that relief, clarifying that the DOL will not consider a loan or distribution to be improperly made due to a failure to strictly follow the plans' and DOL's procedural requirements 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 the procedures; and
- The plan administrator makes a reasonable attempt to correct any procedural deficiencies as soon as administratively practicable.

The Notice does not give relief from obtaining any necessary spousal consent for the loan or distribution, or from any IRS-related requirements (but see below regarding those obligations).

ERISA and Labor regulations normally provide that a loan to a participant is a prohibited transaction if it does not meet certain requirements. Relevant here are the requirements that the loan be provided pursuant to specific plan terms or procedures, that loans are available to all participants on a reasonably equivalent basis, and that no more than 50% of the participant's vested interest be used to secure the loan. Most practitioners have assumed that a loan that complies with CARES would ultimately be deemed to be acceptable to the DOL, notwithstanding the larger permitted loan limits and the delay in amending the plan to permit these loans.

The Notice provides the relief that many have been anticipating. The DOL confirmed that a loan will not be considered to be a prohibited transaction or other ERISA violation if it conforms to CARES. Further, the Notice further provides that loans will be considered in compliance with the DOL rules if a plan amendment to document the CARES-related changes is adopted before the end of the 2022 plan year. This is consistent with the amendment provisions in CARES.

Participant Contributions and Loan Payments

DOL rules require amounts withheld from participant paychecks for salary deferrals and loan repayments to be deposited rapidly – generally within a day or two of the payroll date (extended to seven business days for plans with fewer than 100 participants). The DOL states in the EBSA Notice that it will not penalize employers for later deposits if the delay is due to the COVID-19 outbreak, if the employer and the plan's service providers act reasonably, prudently, and in the interests of the employees, and make the deposits as soon as administratively practicable under the circumstances.

Notices to Participants and Beneficiaries

Generally, the Notice provides that any notice or disclosure due to participants, beneficiaries, or others during the Outbreak Period is subject to an obligation by the fiduciary to furnish the notice as soon as administratively practicable under the circumstances. The Notice pointedly provides

that good faith includes the use of electronic means of communication, such as emails, texts, and continuous access websites. This may reflect that the DOL is expected to issue its final e-disclosure rules later this month, making the distribution of notices both easier and less expensive in the future, but is more generous than the proposed regulations.

The Notice also specifically addresses the 30-day advance notice of a blackout period (i.e., a period of three or more days during which employees may not make investment changes or obtain loans or distributions) and subsequent blackout notices. The advance notice requirement is waived due to the pandemic. While the plan administrator must still give notice of the blackout, it need not be given in advance. Normally, this waiver is available only if the plan administrator provides a written determination that the notice delay was due to circumstances beyond its control. The DOL has waived this determination requirement, finding that the COVID breakout is, by definition, out of the plan administrator's control.

General Fiduciary Compliance

The DOL further notes that there may be other difficulties that participants and beneficiaries experience due to the outbreak (such as, in relation to claims processing). The DOL cautions fiduciaries that their guiding principle should be to be reasonable, prudent, and to act in participants' interest, providing reasonable accommodations to prevent or minimize a loss or delay in benefits.

The Final Rule

The Final Rule addresses many of the deadlines affecting participant action, particularly with regard to claims and elections. It generally provides that the Outbreak Period should be disregarded when calculating the time frames for various purposes, such as COBRA elections and premium payments, health care enrollment, qualifying event notifications, or the filing or perfection of claims or appeals. The last of these applies to retirement benefit claims, as well.

IRS Notices

The IRS has now issued two notices relating to retirement plans. A review of these notices without a deeper dive, however, will not reveal the breadth of the extensions offered.

Notice 2020-18 extended the deadline for income taxes due by individuals, trusts, estates, partnerships, associations, companies, or corporations between April 1, 2020, and July 15, 2020, to July 15, 2020. Among other things, this extended the April 15th personal tax return due date to mid-July.

Notice 2020-23 went a big step further, specifying that the items addressed in Rev. Proc. 2018-58 due between April 1 and July 15, 2020, are also extended. That Rev. Proc. uncovers a goldmine of items that have been extended. In general, the extension is to July 15, but when the due date for something is a number of days after an action by another and that action is extended, the due date for the subsequent action is extended by an equivalent period of time. For example, if X has to happen by a given date, and then the participant has 60 days thereafter to act, the participant will have 60 days after July 15 to take his or her dependent action.

The employee benefits-related items include:

Rule	Code Section	Comment
Participant loan payments to avoid deemed distribution	72(p)	Payments extended to July 15; applies for all loans (CARES extension applies only for Qualified Individuals)
IRA contributions normally due by 4/15 to be deductible in prior year	219(f)(3)	
Required Minimum Distributions	401(a)(9)	DB plans, tax-exempt 457(b) plans (RMDs for other plans extended by CARES)
Qualified Longevity Annuity Contract distributions, return of excess premiums	401(a)(9), 403(b)(10), 408(a)(6), 408(b)(3), 457(d)(2)	
Refund of deferrals in excess of limit (including contributions in excess of catch-up contribution limit)	401(a)(3), 402(g); notice by participant to plan administrator of excess by March 1	
Distribution of 401(k) deferrals to HCEs that cause the ADP test to fail (i.e., “excess contributions”), forfeiture or distribution excess matching contributions that cause the ACP test to fail (i.e., excess aggregate contributions”); inapplicability of excise tax if distribution is within 2½ months	401(k)(8), 401(m)(6), 4979	Only for excesses occurring between 4/15/2020, and 7/15/2020 – extended to 7/15/2020 Note: no excise tax relief for refunds/ distribution/ forfeiture for calendar year 2019, because refund was due <i>before</i> 4/15/2020
Rollover of eligible rollover distribution within 60 days of receipt	402(c)	Rollover deadline for distributions after January 31 is extended to July 15
Requirement that the employer must fund retirement plan contributions by its tax return due date to deduct the contributions on the return	404	Extended to deadline for the return (generally July 15)
Distribution of excess IRA contributions by tax return due date	408(d)(4)	
Employees in an EACA may request permissible withdrawal within 90 days of first contribution	414(w)	
Distribution of nondeductible contributions to avoid 10% excise tax	4972(c)(3)	
Distribution of excess IRA contributions to avoid 6% excise tax	4973	

Filing of Form 5500 and Form 990-BE 7 months after year end		July 15 (note: 2019 calendar year returns not extended)
2-year self-correction period for qualification failures; extended period for transferred assets in relation to corporate transaction; use of only transferred assets in recalculation of closing agreement sanction	Rev. Proc. 2019-19	.

For those of you who administer ESOPs, several of the deadlines relating to your pet plans were also extended, including the timing for both put notices and put elections, diversification elections and compliance with the elections, and the reinvestment of qualified replacement property.

All of us at FBLC continue to wish you and yours the best during this difficult time. We are all working, either in the office or remotely, and are here to help you. Take care and stay well.



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