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COBRA: Updated Model Notices and Extended Timing Rules

Despite being close to 35 years old, COBRA continues to create challenges for employers. All of these challenges notwithstanding, it is incumbent upon employers to ensure their best efforts in COBRA compliance.

To review, COBRA applies to employers employing 20 or more employees on at least 50% of the business days in the preceding calendar year. An employer-sponsored plan subject to COBRA includes any comprehensive group health plan, whether insured or self-funded, dental, vision and prescription drug plans, health reimbursement arrangements, medical FSA plans, and any other plan providing medical benefits.

The right to COBRA continuation coverage arises when two events occur: 1) a qualifying event, such as termination or reduction in hours of employment; and 2) a related loss of coverage. One event without the other will not give rise to COBRA.

One of the areas that has been historically challenging relates to the interaction between COBRA and Medicare entitlement. Generally, Medicare entitlement, i.e., actual coverage, that occurs *prior* to the date COBRA is elected, will not negate eligibility for COBRA. Conversely, Medicare entitlement that arises *after* the date COBRA is elected can terminate the right to COBRA.

In making a decision about whether to elect COBRA or to enroll in Medicare, it is important for individuals to be aware that the special enrollment window to enroll in Medicare Part B arises at the time coverage as a current employee ends. An individual who fails to timely enroll would be subject to Medicare Part B's general enrollment period which is available from January 1 through March 31, with coverage effective on July 1 of the year the individual enrolls. Unlike Medicare Part B, Medicare Part D does provide a special enrollment opportunity upon exhaustion of COBRA.



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On May 1, 2020, the Department of Labor's Employee Benefits Security Administration (EBSA) released updated model COBRA notices, together with a [set of FAQs](#) to assist employees in making an informed COBRA decision.

Application of MSP rules

The [FAQs](#) provide further explanation of how the Medicare secondary payor rules (MSP) apply. Generally, with the exception of end-stage renal disease, if the individual does not have current employment status, or is not a dependent of individual with current employment status, Medicare pays primary to the group health plan. An individual deciding between Medicare and COBRA needs to be aware that a plan may be written that it will pay secondary, without regard to whether the individual has enrolled in Medicare.

Updated Model COBRA Notices

The verbiage contained in both the revised model initial general notice and revised model election notice attempts to better explain the Medicare vs. COBRA issue. Both of the updated notices are available from EBSA's website:

- ◆ COBRA Model General Notice ([English](#) or [Spanish](#))
- ◆ COBRA Model Election Notice ([English](#) or [Spanish](#))

While an employer is not obligated to use these model notices, they are, at minimum, a starting place for customizing its COBRA notices. As employers are reviewing and updating their COBRA documentation, it is important to ensure that all of the required information contained in these notices is included in the employer's documents. There is a plethora of litigation going on at this time challenging the voracity of COBRA documentation. Claimants are challenging that documentation is at best, incomplete, and at worse, misleading.

Given the current coronavirus-related situation with many employees being furloughed or laid off, the need to offer COBRA is paramount. Employers should take time to review and update their COBRA documentation and processes; this would be a good defense to a later challenge.

COBRA Timeframes Extended

In separate guidance released on April 28, 2020, the Departments of Labor and Treasury announced certain timing relief for plans and participant actions (see [Benefit Plan Regulatory Relief](#), CBIZ COVID-19 Resources, 5/4/20).

Generally, this guidance applies for the "outbreak period" from March 1, 2020 (the beginning of the national emergency declared by the President) until 60 days following the end of the national emergency period. At this point, the termination date of the national emergency outbreak period is not known. Further, the governing agencies reserved the right to change the ending date of the outbreak period either by broad application or specific to a region.

Among the different types of benefit plan extended timeframes addressed in this guidance, several COBRA deadlines are extended until after the emergency period ends, including:

- ✓ The employer's 30-day deadline to notify the plan administrator of a qualifying event such as termination or reduction in hours, death, Medicare entitlement, or the employer commencing a bankruptcy proceeding;
- ✓ A qualified beneficiary's 60-day deadline to notify the plan administrator of a divorce or legal separation, loss of dependent child status under the plan, or second qualifying event;
- ✓ The 60-day deadline for individuals to notify the plan of a determination of disability;
- ✓ The 14-day deadline for plan administrators to furnish COBRA election notices;
- ✓ The 60-day deadline for participants to elect COBRA; and
- ✓ A COBRA continuee's 45-day deadline in which to make a first premium payment, as well as the 30-day deadline for subsequent premium payments.

This guidance leaves many unanswered questions, particularly as it relates to the delay in the COBRA election periods. Employers should closely work with their third party administrators, insurers, and stop loss carriers (if applicable) to determine how best to manage the potential eventuality of long periods of time lapsing without a COBRA election, and perhaps even more challenging, a potential lengthy period of time without a COBRA premium payment.

Further, it is unclear to what extent employers and plans are obligated to communicate these changes to plan participants. It is also uncertain how plans will manage claim payments during extended periods without premiums. The regulations suggest that plans can treat claims similar to the way they are treated during a traditional COBRA election period. Effectively, claims can be treated as pending during the period of unpaid premium.



EEO Reports: Delay of Data Collection

On May 8, 2020, the Equal Employment Opportunity Commission (EEOC) **announced** a delay in collecting data used for certain EEO-1 reporting obligations. As previously discussed in last year's *Benefit Beat* articles in the [May](#), [August](#) and [October](#) editions, the **EEO-1 Report** is a compliance survey mandated by federal law that requires affected entities to report employment data by race or ethnicity, gender and job category, referred to as Component 1 data. Due to the impact of the COVID-19 situation on employer workplaces, the EEOC is delaying the collection of both 2019 and 2020 EEO-1 Component 1 data until March 2021.

Similarly, the EEOC is delaying the collection of the 2020 EEO-3 data, which is collected from Local Referral Unions, and the 2020 EEO-5 data, which is collected from public elementary and secondary school districts, until January 2021. The EEO-3 and EEO-5 reports apply to entities employing 100 or more employees who are located within the United States.

The agency indicates that it will notify filers of the exact date the surveys will open.

Individual Mandate Reporting Updates

A handful of states enacted individual mandate laws that require residents to be covered by minimum essential coverage or pay a state tax. These states are California, District of Columbia, Massachusetts, New Jersey, Rhode Island and Vermont. Further, certain states require entities who provide MEC to file information returns to the relevant state revenue departments. Most of these states accept the Form 1094 and 1095 series used for federal MEC filing purposes.

Recently, the state revenue departments in California, District of Columbia and New Jersey issued updates relating to these reporting obligations.

California

As discussed in our prior *Benefit Beat* article, beginning January 1, 2020, California residents and their dependents (including spouse or domestic partner, and tax dependents) are required to obtain and maintain minimum essential coverage (MEC) on a monthly basis, unless they qualify for an exemption.

The law requires entities providing MEC to file an information return to the California Franchise Tax Board (FTB) by March 31 each year. Entities required to report

include employer/plan sponsors, licensed insurers, state health and welfare departments, and Covered California.

The FTB provides MEC reporting materials on its dedicated **MEC information reporting webpage**. MEC providers are required to send to the FTB the same forms used for their IRS reporting. Later this year, these forms will be able to be submitted electronically to the FTB. Additional **technical specifications** including drafts of the California instructions for filing the Forms 1094 and 1095 series are also available.

District of Columbia

The District of Columbia's individual mandate took effect in 2020 (see our prior *Benefit Beat* article). The DC Office of Tax and Revenue (OTR) issued **updated health insurance reporting guidance** for MEC providers.

The District does not require applicable entities to furnish an additional annual statement of health coverage to employees and covered individuals in addition to the forms already required by federal law; compliance with the IRS requirement to furnish an annual statement of health coverage to employees or covered individuals (Form 1095-B or Form 1095-C) is sufficient. These entities should file the same information returns to the OTR that they file with the IRS.

All information returns must be filed electronically with the OTR by uploading files through **MyTax.DC.gov**, using the OTR's prescribed layouts and file formats. Third-party service providers may file information returns on behalf of applicable entities.

For the tax year ending December 31, 2019, the deadline for uploading the information returns is June 30, 2020. For tax years beginning after December 31, 2019, the deadline is 30 days after the IRS deadline for submitting 1095-B or 1095-C forms, including any extensions granted by the IRS.

New Jersey

The New Jersey Department of Treasury issued **updated reporting guidance** for health coverage filings on March 19, 2020. Of particular note, the deadline for MEC providers to file their Form 1095s with the NJ Division of Taxation has been extended to May 15, 2020. Filers of 100 or more forms can use the Division of Revenue and Enterprise Services' (DORES) MFT SecureTransport service for submitting their forms. Those entities filing fewer than 100 forms can utilize a fillable Form NJ-1095 to file one form at a time.



Massachusetts: PFML Private Plan Exemption Process

The Massachusetts Paid Family and Medical Leave (PFML) law provides paid leave to eligible employees for one’s own illness beginning January 1, 2021, and for baby bonding, to care for a family member with a serious illness, and for certain military considerations beginning July 1, 2021. Generally, it is funded by premiums paid by employers and employees but that a private plan can be used in lieu of the state plan. For summaries of this law, see our prior *Benefit Beat* articles from [July](#), [May](#) and [April, 2019](#).

Massachusetts’ Department of Family and Medical Leave recently issued guidance regarding Paid Family and Medical Leave (PFML) private plan exemptions. The Department developed [checklists](#) to assist insurance carriers and employers in ensuring that policy forms are in compliance with applicable statutes, regulations and bulletins.

Insurance carriers are to submit their policy forms to the Department of Insurance (DOI) on or before June 3, 2020. The DOI provides a PFML [policy form checklist](#) for an insurance carrier’s use which outlines the standard provisions that PFML private insurance policies must contain in order to meet the exemption requirements. After the DOI reviews the policy forms, insurance carriers will issue policies to their employer policyholders.

Employers that have secured PFML private insurance coverage but have not filed an application for an exemption must complete a [Request for Exemption](#) using the Department of Revenue’s web-based filing system, MassTaxConnect. Specific deadlines and timelines are explained further on the Department of Family and Medical Leave [website](#).

The DOI does not regulate self-insured employers. Employers seeking a self-insured exemption may use the standards listed in the PFML policy form checklist to ensure that their self-administered PFML private plans comply with the PFML statute and regulations.

Illinois: Sexual Harassment Training

In August 2019, Illinois enacted the Workplace Transparency Act which amended the Illinois Human Rights Act to increase employee protections by combating discrimination and harassment in the workplace. Beginning January 1, 2020, the Act requires Illinois employers to train employees on sexual harassment prevention by December 31, 2020, and

annually thereafter. This requirement applies to all employers with employees working in Illinois.

The Illinois Department of Human Rights has released a model [Sexual Harassment Prevention training program](#) for an employer’s use in complying with the Act. An employer may develop their own sexual harassment prevention training program as long as it equals or exceeds the minimum standards for sexual harassment prevention training required in the Act.

Employers that fail to follow the new training requirements will be subject to civil penalties imposed by the Illinois Department of Human Rights.

New Jersey Amends Four Leave Laws

New Jersey has amended its leave laws to make them available in the event of state designated emergencies arising out of an epidemic of a communicable disease (hereinafter referred to as, “epidemic”). As a reminder, New Jersey provides four different leave laws. They are: the Earned Sick Leave law, Family Leave Act, Family Leave Insurance, and State Temporary Disability. Beginning March 25, 2020, individuals can take expanded leave, as more fully described below:

Earned Sick Leave

New Jersey’s [earned sick leave law](#) provides that employees earn one hour of sick leave for every 30 hours worked up to 40 hours per year.

Current law allows an employee to take earned sick leave for one’s own needs, or to attend to the needs of a family member, for the diagnosis or treatment of a physical or mental condition, including preventive care services; to obtain psychological or physical services, or to attend to legal matters as a result of domestic or sexual violence; due to a closure of the employee’s worksite, or closure of his/her child’s school or childcare provider as a result of a declared public health emergency; or to attend a school-related conference.

This use of leave has been expanded to include the following reasons:

- A closure of the employee's workplace, or the school or place of care of a child of the employee by order of a public official, or because of a state of emergency declared by the Governor.
- The declaration of a state of emergency by the Governor, or the issuance by a health care provider or the Commissioner of Health or other public health authority of a determination that the presence in the community of the employee, or a



member of the employee's family in need of care by the employee, would jeopardize the health of others.

- During a state of emergency declared by the Governor, or upon the recommendation, direction, or order of a healthcare provider or the Commissioner of Health or other authorized public official, the employee undergoes isolation or quarantine, or cares for a family member in quarantine, as a result of suspected exposure to a communicable disease and a finding by the provider or authority that the presence in the community of the employee or family member would jeopardize the health of others.

Family Leave Act

The Family Leave Act provides 12 weeks of unpaid, job protected leave in a 24-month period for the birth of a child, adoption or placement of child into foster care, or to care for a family member with a serious health condition (for a summary of the Family Leave Act, see our prior [Benefit Beat article](#)). This law applies to employers with 30 or more employees.

The reason for leave has been expanded to include the event of a state of emergency declared by the Governor, or when indicated to be needed by the Commissioner of Health or other public health authority, an epidemic, which:

- Requires in-home care or treatment of a child due to the closure of the school or place of care of the child of the employee, by order of a public official due to the epidemic or other public health emergency;
- Prompts the issuance by a public health authority of a determination, including by mandatory quarantine, requiring or imposing responsive or prophylactic measures as a result of illness caused by an epidemic of a communicable disease or known or suspected exposure to the communicable disease because the presence in the community of a family member in need of care by the employee, would jeopardize the health of others; or
- Results in the recommendation of a health care provider or public health authority, that a family member in need of care by the employee voluntarily undergo self-quarantine as a result of suspected exposure to a communicable disease because the presence in the community of that family member in need of care by the employee, would jeopardize the health of others.

Certification. An employer may require that any period of family leave be supported by certification issued by a duly licensed health care provider. Where the certification is epidemic-related, the certification is deemed sufficient if it includes leave taken due to:

- Closure of the school or place of care of the child, the date on which the closure of the school or place of care of the child of the employee commenced, and the reason for such closure;
- A public health authority's issuance of a determination requiring or imposing responsive or prophylactic measures as a result of illness caused by an epidemic, the date of issuance of the determination and the probable duration of the determination; or
- A health care provider or public health authority recommends that a family member in need of care by the employee voluntarily undergo self-quarantine, the date of the recommendation, the probable duration of the condition, and the medical or other facts within the health care provider or public health authority's knowledge regarding the condition.

Intermittent leave. Leave taken due to an epidemic may be taken intermittently if the covered individual:

1. Provides the employer with prior notice of the leave as soon as practicable; and
2. Makes a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer and, if possible, provide the employer, prior to the commencement of the intermittent leave, with a regular schedule of the day(s) of the week on which the intermittent leave will be taken.

Denial of leave. The key employee exemption, otherwise applicable to the family leave law, does not apply in the event the leave is taken for an epidemic.

Family Leave Insurance and Temporary Disability Benefits

Family leave insurance is a wage replacement benefit available for baby bonding, to care for a seriously ill family member, or to attend to matters related to domestic violence (see our prior [Benefit Beat article](#) for a summary of this program). The temporary disability law provides an individual with temporary benefits for a disability caused by non-occupational sickness or accident.

Under both laws, the reasons for leave has been expanded to include the event of a state of emergency declared by the Governor, or when indicated to be needed by the Commissioner of Health or other public health authority, an epidemic, which requires in-home



care or treatment of the employee, or to provide in-home care or treatment of the family member of the employee required due to:

1. The issuance by a healthcare provider or the commissioner or other public health authority of a determination that the presence in the community of the employee or employee's family member may jeopardize the health of others; and
2. The recommendation, direction, or order of the provider or authority that the employee or employee's family member be isolated or quarantined as a result of suspected exposure to a communicable disease.

State temporary disability is payable on the first day rather than the eighth day for leave that is taken for an epidemic.

Additional information about the Family Insurance Program and Temporary Disability Benefits is available from the New Jersey Department of Labor and Workforce Development [website](#).

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