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Compliance Connection

October 2021 Part I

Federal Compliance Update

Next Step Taken: OSHA Submits Draft of COVID-19 Vaccine Mandate ETS to the OMB

Recently, the Occupational Safety and Health Administration (OSHA) announced that it submitted a draft of its emergency temporary standard (ETS) for private employers requiring mandatory COVID-19 testing or vaccination to the Office of Management and Budget (OMB).

This submission to the OMB for review is a standard part of the regulatory process for an ETS. Once the OMB finishes its review and the rule is published in the Federal Register, the ETS will go into effect.

It's currently unclear how long this process will take. The OMB's review process for the most recent COVID-19-related OSHA ETS lasted more than six weeks. However, this ETS could have a different timeline, as President Biden has called for an expedited process on this rule.

While this announcement does not provide any new details on the contents of the ETS, it signals that the rule is moving forward as expected and could be in effect as soon as the coming weeks. While the OMB reviews the rule, large employers with over 100 employees should begin preparing to comply.

FAQs Address COVID-19 Vaccine Coverage and Premium Discounts

On Oct. 4, 2021, the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Departments) issued [FAQs](#) addressing rules regarding premium incentives for COVID-19 vaccinations and rapid coverage of preventive services for COVID-19.

Premium Incentives for COVID-19 Vaccinations

The FAQs clarify that a group health plan (or health insurance issuer offering coverage in connection with a group health plan) may offer participants a premium discount for receiving a COVID-19 vaccination. However, plans generally may not condition eligibility for benefits or coverage on vaccination status, and any discount must comply with the [final wellness program rules](#).

Under these rules, a premium discount that requires an individual to obtain a COVID-19 vaccination would be considered an activity-only wellness program, which is a type of health-contingent wellness program. These programs must comply with the regulations' five nondiscrimination criteria, including an

incentive limit and a requirement to offer a reasonable alternative standard in some cases.

The maximum permissible reward (or penalty) under a health-contingent wellness program that is part of a group health plan (and is not related to tobacco use) is 30% of the cost of coverage.

Rapid Coverage of Preventive Services for COVID-19

According to the FAQs, effective Jan. 5, 2021, plans and issuers must cover, without cost sharing, any COVID-19 vaccines and their administration immediately once the particular vaccine becomes authorized under an emergency use authorization (EUA) or approved under a biologics license application (BLA). This coverage must be provided consistent with the scope of the EUA or BLA, including any amendment, such as to allow for an additional dose to certain individuals, booster doses or the expansion of the age demographic for whom the vaccine is authorized or approved.

Clarifying Guidance on COBRA Deadline Extension Relief

IRS [Notice 2021-58](#) clarifies the application of certain COBRA deadline extensions for **electing COBRA coverage** and **paying COBRA premiums** under prior relief that was issued as a result of the COVID-19 outbreak (“Emergency Relief”). Under the Emergency Relief, up to one year must be disregarded in determining the due dates for individuals to elect COBRA coverage and pay COBRA premiums during the Outbreak Period (i.e., 60 days after the announced end of the National Emergency).

Notice 2021-58 clarifies that the disregarded periods to elect COBRA coverage and make initial and subsequent COBRA premium payments **generally run concurrently**. The guidance provides the following rules to illustrate the applicable time frames:

- If an individual elected COBRA coverage within the initial 60-day COBRA election time frame, they will have **one year and 45 days after the date of the election** to make their initial COBRA premium payment.
- If an individual elected COBRA coverage outside of the initial 60-day COBRA election time frame, they generally will have **one year and 105 days after the date the COBRA notice was provided** to make the initial COBRA premium payment (subject to transition relief).

The guidance also addresses the interaction of the Emergency Relief with the COBRA subsidies that were made available for certain eligible individuals under the American Rescue Plan Act (ARPA).

Employers should carefully review the guidance and consult benefits counsel to ensure their ongoing compliance with the Emergency Relief, as clarified by Notice 2021-58.

Application of Emergency Relief to COBRA Elections and Paying COBRA Premiums

Individuals must make the initial COBRA election by the earlier of:

- One year and 60 days after the individual’s receipt of the COBRA election notice; or
- The end of the Outbreak Period.

Applying the disregarded periods in this way means that individuals who delay electing COBRA may not have more than one year of total disregarded time for the COBRA election and initial COBRA payment. For example, an individual generally may not delay electing COBRA coverage for six months and then add another full year to the disregarded period for purposes of determining the deadline for making the initial COBRA premium payment (resulting in a total of 18 months of disregarded time for

both the COBRA election and initial COBRA payment). Instead, the maximum disregarded period of one year is applied concurrently to the timeframe for the COBRA election and initial COBRA premium payment. However, these timeframes are **subject to the transition relief provided below**.

For each subsequent COBRA premium payment, the maximum time an individual has to make a payment while the Outbreak Period continues is one year from the date the payment originally would have been due in the absence of the Emergency Relief (including the mandatory 30-day grace period), but **subject to the transition relief provided below**.

Notice 2021-58 Transition Relief

Because some individuals may have assumed that the disregarded period for making the initial premium payment begins on the date of the COBRA election, individuals who made elections more than 60 days after receipt of the election notice may have less time than they anticipated to make their initial premium payment. Thus, Notice 2021-58 provides that **in no event will an initial COBRA premium payment be due before Nov. 1, 2021 (even if Nov. 1, 2021 is more than one year and 105 days after the date the election notice was received), as long as the individual makes the initial COBRA premium payment within one year and 45 days after the election date**.

This transition relief is an exception to the general rule that disregarded periods for COBRA elections and initial COBRA payments run concurrently with respect to each individual.

Interaction with ARPA COBRA Premium Subsidy

The extensions under the Emergency Relief **do not apply** to the timeframes for electing COBRA coverage with ARPA premium subsidies, or for providing the required notice of the ARPA extended election period. An individual who has a disregarded period under the Emergency Relief may elect retroactive COBRA coverage, subject to the clarifying guidance in Notice 2021-58, and may elect COBRA coverage with ARPA premium subsidies for any period for which the individual is eligible for premium assistance. However, the disregarded periods under the Emergency Relief continue to apply to payments of COBRA premiums after the end of the ARPA premium subsidy period, to the extent that the individual is still eligible for COBRA coverage and the Outbreak Period has not ended.

Examples

Notice 2021-58 provides 10 comprehensive examples to illustrate how COBRA elections and premium payments are treated under Notice 2021-58, including how to apply the ARPA premium subsidies. All of the examples assume that the group health plans have calendar month coverage periods, with premium payments due by the first of the month, and that the plans provide that qualified beneficiaries must make COBRA premium payments within the statutory 30-day grace period.

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