

The DOL Provides Limited Relief to Retirement Plans and Their Fiduciaries in Dealing with the COVID-19 Pandemic

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MAY 2020

In response to the COVID-19 pandemic (the "Pandemic"), on April 28, 2020, the Employee Benefits Security Administration (EBSA) issued Disaster Relief Notice 2020-01 (the "Notice"). The Notice addresses the following issues as impacted by the Pandemic: (i) deadlines for providing participant disclosures and notices; (ii) procedures for plan fiduciaries to authorize loans and distributions, and the timing for adopting amendments under the CARES Act; (iii) delays in making deposits of participant contributions and loan repayments; (iv) failures to provide advance notice of a blackout period; (v) extension of certain Form 5500 filing deadlines, and; (6) relaxed enforcement of compliance with ERISA's fiduciary standards.

Trucker Huss has previously analyzed the effect of the Notice and other guidance on health and welfare plans.¹ This article will focus on the impact of the Notice on retirement plans and the relief it provides to plan fiduciaries and their advisers.

Participant Disclosures and Notices

The Notice provides relief from the deadlines for issuing disclosures and notices to plan participants that are due during the period from March 1, 2020 until 60 days after the announcement of the end of the COVID-19 National Emergency (the "Outbreak Period").² The authority for the extended deadline is the CARES Act's amendment to Section 518 of ERISA, which allows the DOL



to postpone for up to one year any ERISA-mandated deadlines in situations where a plan, its fiduciaries, its participants and/or beneficiaries are affected by a Presidentially declared disaster or public health emergency. This relief applies to notices or disclosures required to be provided under Title I of ERISA, and over which the DOL has interpretive authority (with limited exceptions),³ such as summary plan descriptions, summary material modifications, and claims and blackout notices.

To qualify for the relief, the plan and the responsible fiduciary must “act in good faith and furnish the notice, disclosure or document as soon as administratively practicable under the circumstances.” The Notice explains that “[g]ood faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites [(e.g., an intranet)].”

Procedural and Amendment Requirements for Plan Loans and Distributions

The Notice provides plan fiduciaries with important relief when it comes to making CARES Act plan loans and distributions, and related plan amendments.

Under ERISA, retirement plan loans and distributions must be made in accordance with the terms of the plan (that is, the plan’s written procedural requirements). The failure of plan fiduciaries to strictly follow plan procedures in this regard puts them at risk for a fiduciary breach. The Notice addresses this issue by providing that deviations from plan terms and procedures in making loans and distributions will not be treated as a failure if:

- The failure is due solely to the Pandemic;
- The plan administrator makes a “good faith, diligent effort under the circumstances” to follow the plan requirements; and
- The plan administrator makes a “reasonable attempt to correct” procedural deficiencies (e.g., putting together any missing documentation), as soon as “administratively practicable.”

It is important to note that this relief is limited to those procedural requirements that fall within the interpretive jurisdiction of the DOL; therefore, it does not extend to requirements that fall within the jurisdiction of the IRS, such as the need for spousal consent for loans and distributions.

Under the CARES Act, plans are permitted to make participant loans to certain qualified individuals in an amount up to \$100,000 and up to 100% of the participant’s vested accrued benefit. This is an increase from the normal limits of \$50,000 and up to 50% of the vested accrued benefit. The CARES Act also permits the extension of loan repayments for up to one year, provided the loan is properly re-amortized. Under normal rules, a participant loan is considered a prohibited transaction under ERISA and the Internal Revenue Code (the “Code”) if the loan is not, among other requirements, made available to all participants on a “reasonably equivalent basis,” in accordance with specific provisions set forth in the plan document (or a loan policy incorporated by reference

into the plan document), and “adequately secured.” And, under ERISA, plan fiduciaries are subject to fiduciary breach claims by the DOL if plan loans are not made in accordance with these requirements.

The Notice provides relief with respect to the *reasonably equivalent basis* and *adequate security* requirements, by confirming that a participant loan made in accordance with the CARES Act’s greater limits and extended repayment period will not be considered a prohibited transaction and/or fiduciary breach. In addition, the Notice confirms that if a plan is amended to provide for CARES Act loans, it will be considered to have operated in accordance with its written terms, notwithstanding a delay in amending the plan in this regard. Specifically, and consistent with relief previously provided by the IRS, the Notice provides that the amendment to provide for the greater loan limits and extended repayment period will be considered timely if it is adopted by the last day of the plan year beginning on or after January 1, 2022.

Deadlines Regarding Participant Contributions and Loan Repayments

The Notice provides fiduciaries some relief from the strict rules that apply to the deadline for depositing participant contributions and loan repayments into a plan’s trust. The normal rule is that such amounts must be forwarded to the trust as soon as reasonably possible. The DOL describes the deadline as the earliest date on which the funds can be “reasonably segregated” from the employer’s assets. Failure to deposit these funds timely may result in fiduciary breaches and are deemed prohibited transactions under both ERISA and the Code.

The Notice provides that it will not take enforcement action against plan fiduciaries for delayed deposits of participant contributions and loan repayments that occur during the Outbreak Period if such delay is temporary and solely attributable to the Pandemic – provided plan sponsors and fiduciaries act “reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.”

It should be noted that the Notice does not provide relief from IRS enforcement of the Code’s provisions applicable to the timely deposit of participant contributions and loan repayments. Therefore, there remains the potential for a prohibited transaction under the Code in this circumstance, for with the IRS can assess excise tax penalties.

Blackout Notices

Under ERISA, a blackout is a period of time during which plan participants will be temporarily unable to exercise their rights under the plan to make investment changes, take out loans or receive distributions (a “blackout period”). ERISA requires the plan administrator of any individual account plan (e.g., 401(k) plans) to give 30 days’ advance written notice of a blackout period to participants and beneficiaries. Administrators do not have to provide advance notice when they make a written determination that such notice is not possible because of events beyond their control.

The Notice provides relief from the blackout rules in two ways. First, it clarifies that the extension of time under ERISA Section 518 for good faith delays in providing participant notices due to a

declared national emergency applies to these blackout notices. And second, the Notice provides that plan administrators are not required to make a written determination regarding their inability to give advanced notice of the blackout, because a pandemic is, by definition, an event beyond the administrator's control.

The Form 5500 Filing Deadline

Pursuant to IRS Notice 2020-23, the due date to file forms 5500 that were originally due between April 1 and July 14, 2020 was extended to July 15, 2020. The Notice does not further extend this deadline. It does, however, provide the same relief for Form M-1 filings, which are required for multiple employer welfare arrangements (MEWAs). The Notice also confirms that the IRS filing extensions for Form 5500 are acceptable to the DOL, while indicating that additional extensions will be considered as appropriate.

General Fiduciary Compliance

The Notice specifically acknowledges that the Pandemic may cause problems for plan participants and beneficiaries, as well as difficulties for plans and service providers in complying with ERISA requirements. The DOL states that the "guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families." And, the Notice directs fiduciaries to "make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments . . . to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes."

The DOL also indicates that its approach during the Pandemic will be to emphasize compliance assistance and grace periods, and "other relief where appropriate."

Conclusion

The Notice recognizes that plan and fiduciary compliance with ERISA during the Pandemic is a challenge, and strict compliance with the normal rules and standards will not always be achievable. The Notice, therefore, grants much needed relief to plans and fiduciaries that act in good faith and with reasonable diligence under the relevant circumstances.

While the Notice delays a number of retirement plan deadlines and relaxes certain plan procedures, and related DOL enforcement policies, plan fiduciaries must understand that the relief is limited in time and scope. Specifically, the relief is limited to the Outbreak Period and it is available only where the plan and plan fiduciaries have acted reasonably and in good faith. This highlights the need for plan fiduciaries to continue to do the best they can to operate plans in accordance with their terms and normal procedures, pursuant to law. To this end, plan committees should continue to meet on a regular basis, and by phone and/or video conference as may be necessary. Participant notices and disclosures should be prepared and delivered as timely as reasonably possible. Similarly, loan and distribution applications, and benefit claims, should be processed without unnecessary delay.

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Yes, through issuance of the Notice the DOL has recognized that these are unprecedented times, and noncompliance may be unavoidable in certain circumstances. However, the relief being afforded is far from a “free pass” on fiduciary compliance during the Pandemic.

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¹ See Elizabeth Loh, [COBRA, HIPAA Special Enrollment, Claims and Appeals, and ERISA Notice Related Deadlines Extended](#), TRUCKER HUSS APC (May 2020).

² The COVID-19 National Emergency was declared pursuant to the National Emergencies Act. The activation of the powers of the National Emergencies Act ends when either the President expressly terminates the emergency, or does not renew the emergency annually. The national emergency will also end if both houses of Congress pass a joint resolution terminating the emergency.

³ See Loh, *supra* note 1. The DOL and the Department of the Treasury issued a joint notice regarding when notice of an adverse benefit decision or appeal must be made. This Joint Notice requires ERISA plans to disregard the Outbreak Period when determining the date an individual must file a claim for benefits, or the date when a claimant must file an appeal.