



# COVID-19 Related Relief for Cafeteria Plans and COBRA



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# ➤ Presented by



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# COVID-19 Background

COVID-19 Related Relief



# ➤ Background

- President Trump declared national emergency on March 13, 2020
- While there was no official end date, people were hopeful that the virus would die down in the summer with warmer temperatures, like other respiratory illnesses, such as colds and influenza
- However, there was a substantial spike in the summer, and dramatic increases are being reported in the colder months
- Because the transmission cycle is so long, it takes 6-8 weeks after a policy change to see an impact in case numbers
  - It can take up to two weeks before someone becomes sick enough to get tested after exposure
  - But it can take another two weeks (4 weeks from initial exposure) for additional people to become ill after catching it from this person
  - It takes even more time to show that additional groups of people become ill after being exposed to the primary group



# Relief for Health and Dependent Care FSAs

COVID-19 Related Relief



# ➤ Which Laws Apply To a Health FSA?

- Internal Revenue Code § 105, 106, 125, and 213
  - Requires a properly adopted written document (same for DCAP)
  - Can be offered under a cafeteria plan (same for DCAP)
  - Can reimburse only certain medical expenses as defined under § 213(d)
- ERISA, COBRA, HIPAA, FMLA, USERRA, ACA, and others



# ➤ Which Laws Apply To a Health FSA?

- Prop. Treas. Reg. § 1.125-5 and -6
  - Must offer uniform coverage throughout coverage period
  - Coverage period must be 12 months generally
  - Expenses must have been incurred during coverage period
  - Long-term care expenses and insurance premiums cannot be reimbursed
  - Claim substantiation must be provided, including a statement from the participant and an independent third party (like a physician)
- The IRS released two Notices on May 12, 2020 that alter some health FSA regulations to provide relief to participants

# ➤ Elections

- Under the cafeteria plan, eligible employees will make a prospective (not retroactive) election of benefits and salary reduction amounts, including amount contributed to the health FSA
  - At each annual open enrollment for all eligible employees
  - Within 30 days of hire for new employees
- Generally, elections are **irrevocable** for the coverage period

# ➤ Mid-year Election Changes Pre-COVID

- Under ordinary circumstances, there are several exceptions to the irrevocable rule that allow participants to make a change to their election (Prop. Treas. Reg. § 1.125-4):
  - Change in marital status of the employee
  - Change in number of employee's dependents
  - Change in employment status
  - Change in place of residence
  - And many more...
- Need to always administer in accordance with the consistency rule
  - Does the requested change match the event?

# ➤ IRS Notice 2020-29 Mid-year Election Changes

- An employer **may** allow employees to make **prospective** election changes during calendar year 2020
  - An employer may limit the time period during which participants can make election changes
- The following are permitted election changes for both health FSAs and DCAPs:
  - To make a new election and enroll in the health FSA for the first time
  - To revoke an election
  - To decrease or increase an existing election

# ➤ IRS Notice 2020-29 Mid-year Election Changes

- These mid-year election changes only apply to 2020
  - An employer may adopt all, some, or none
- If any changes are to be applied, there must be an amendment to the plan on or before December 31, 2021
  - However, an employer must inform employees of any changes to be adopted as soon as possible
  - Follow SMM distribution rules and but also notify immediately electronically

# ➤ Use-or-Lose Rule

- The Rule: contributions that have not been used to reimburse expenses incurred during a coverage period must be forfeited
- Exceptions:
  - Carryover – the IRS allows health FSAs to offer carryovers of up to \$500 at the end of one plan year to be used for reimbursements in the following plan year
  - Carryovers are not permitted for DCAPs
  - Grace period – plans may offer a grace period of up to two months and 15 days following the end of the plan year during which participants may access unused amounts to pay or reimburse expenses for qualified benefits – may not have a grace period and a carryover

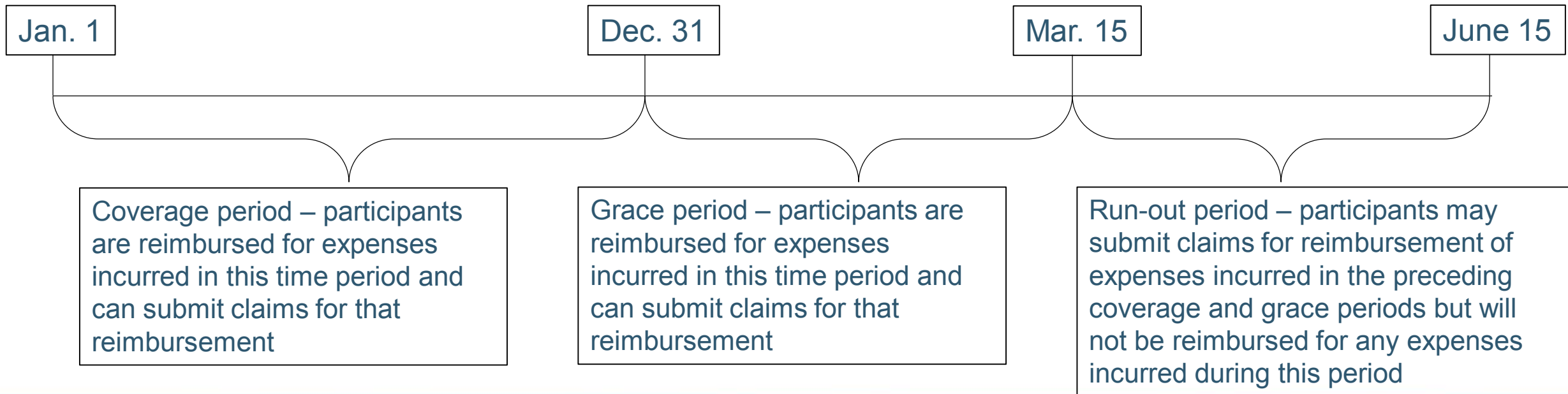
## ➤ Run-out Period

- Plans may provide a run-out period after a grace period during which expenses incurred during the preceding plan year and grace period may still be paid or reimbursed
- Run-out period allows for extra time to submit a claim, a grace period allows for extra time to incur an expense
- May have a run-out period with a carryover
- A run-out period can last for any length of time
- May have both a run-out period and grace period



# ➤ Timeline Pre-COVID

- Below is a timeline demonstrating how different periods relate in a plan with a calendar-year, 12-month coverage period, 2.5-month grace period, and 3-month run-out period

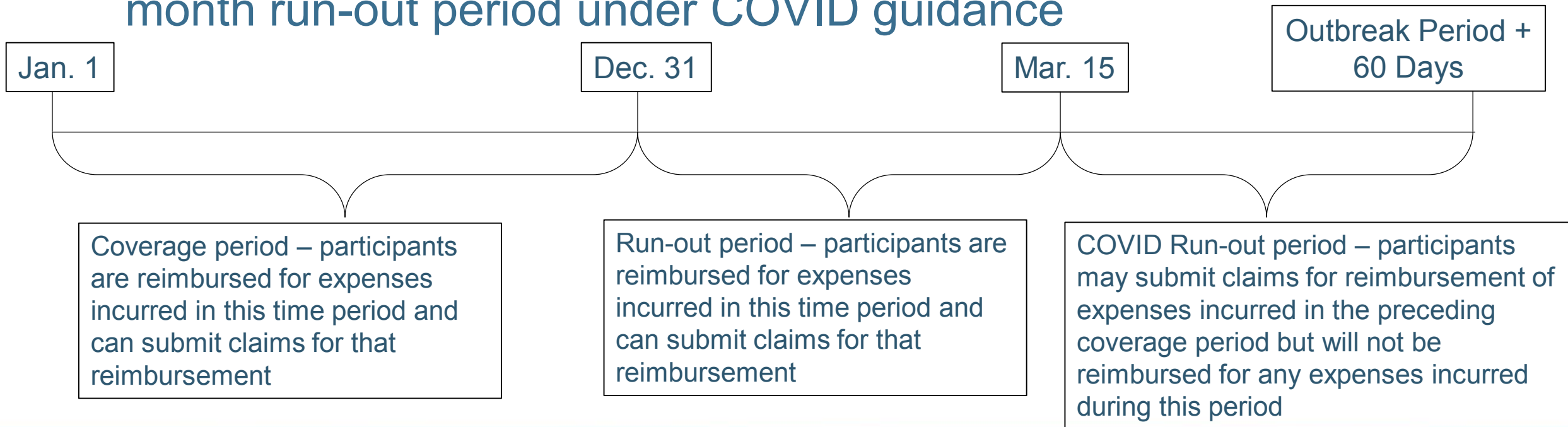


# ➤ Regulations Issued Extending Claims Submission Deadline – Claims Runout

- The regulations issued on May 4<sup>th</sup> require ERISA plans to “disregard” the period from March 1, 2020 through the date that is (60 days) after the end of the “Outbreak Period” for claim submission
- Allows an Employer to extend the deadline in which to submit the claim (NOT to incur the claim); essentially, a limited run-out period is added
- Left many unanswered questions

# ➤ Timeline COVID

- Below is a timeline demonstrating how different periods relate in a plan with a calendar-year, 12-month coverage period and 2½ - month run-out period under COVID guidance

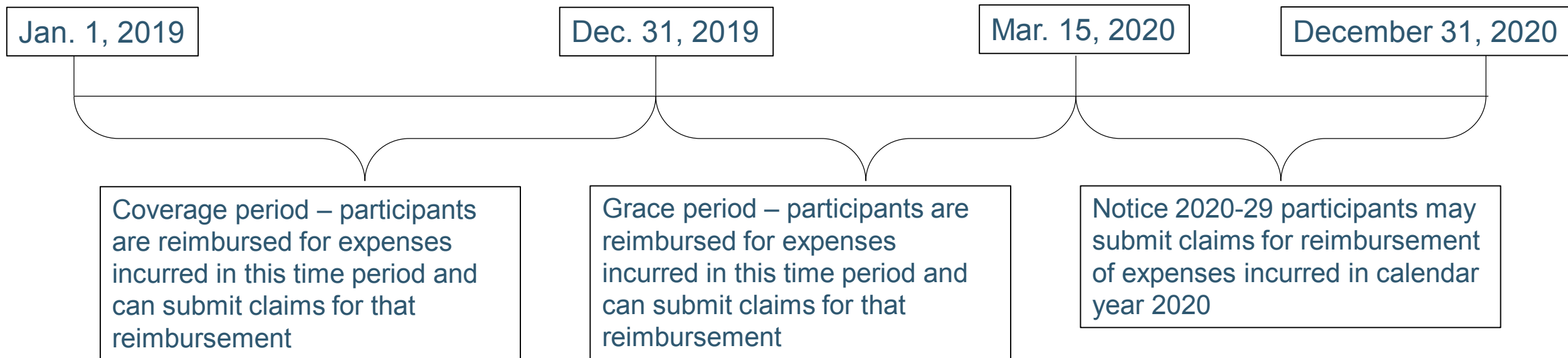


## ➤ Notice 2020-29 – Grace Periods

- Employers may allow employees to use amounts from their 2019 health FSAs and dependent care FSAs to pay for or reimburse medical or dependent care expenses, respectively, incurred through December 31, 2020
- This applies for any cafeteria plan that has a grace period or plan year ending in 2020
- Does not apply to 2019 calendar year plans that do not have a grace period
- Applies to health FSAs and DCAPs

# ➤ IRS Notice 2020-29 Extended Claims Period – Grace Period

- Looking at our Timeline: after the grace period ends (or coverage period if no grace period) in 2020, participants may still submit claims for expenses incurred during the coverage period in 2020



## ➤ IRS Notice 2020-33; Carryover Increase

- Provides a permanent increase to the maximum carryover amount for health FSAs from \$500 to an amount equal to 20% of the maximum salary reduction contribution under 125(i) – currently \$2,750
  - 20% of \$2,750 = \$550
  - For carryovers from 2020 plan years, the maximum carryover amount is \$550
- Effective beginning with carryovers from 2020 to 2021, and the amount will be increased each year, just like the max FSA elective contribution amount

# ➤ Other Rule Changes

- The CARES Act:
  - Removed the prescription requirement for over-the-counter drug reimbursements effective for expense incurred after December 31, 2019
  - Included menstrual care products as qualifying medical expenses for tax-free distribution for expenses incurred after December 31, 2019
- Employer contributions made to health FSAs (and HRAs and ICHRAs) are considered health plan expenses for the purposes of determining refundable payroll tax credits under FFCRA
- Salary reduction changes may be taken from qualified sick or family leave wages when the employee has a salary reduction agreement in place with the employer



## ➤ FAQs

- **Do these changes require an amendment?**
  - Yes, an amendment that adopts any, or all, of these changes must be adopted by December 31, 2021.
- **When does an employer have to decide whether to apply these changes?**
  - Technically, until December 31, 2021, when the amendment is due. Practically, employers need to notify participants ASAP of any coming changes.

## ➤ FAQs Cont.

- **What restrictions can be put on election changes?**
  - Employers may adopt the changes with any restrictions, including time limits and number of change limits, so long as the restrictions are nondiscriminatory and remain compliant with other applicable laws.
- **Can a participant elect to decrease their contribution lower than what has already been paid out to them?**
  - In order to minimize potential financial exposure, it is advised that an employer limit decreases in elections to an amount no less than the amount that has already been reimbursed this year.

## ➤ FAQs Cont.

- **How are participants made aware of these changes?**
  - Not only participants, but all employees eligible to participate in the plan should be informed of any changes. Per ERISA regulations, one or more methods of delivery likely to result in full distribution must be used. For most employers, this means using first class mail.
- **Will the plan year dates be extended?**
  - Plan year dates are not affected.
- **Can an election change be back-dated?**
  - No. The IRS has restricted these mid-year election changes to prospective-only.

## ➤ FAQs Cont.

- **The 2 ½ month Extended Grace Period for my 2019 FSA plan year ended on March 15, 2020. Does this mean I can amend my plan to allow my employees to spend funds remaining in the 2019 FSA plan year until December 31, 2020?**
  - Yes, but proceed with caution if you offer a high-deductible medical plan and health savings account (HSA). As you may be aware, the IRS does not allow participation in a general-purpose health FSA and HSA at the same time. If an employee had any general-purpose health FSA funds remaining on December 31st, they are not eligible to make HSA contributions (both employee and employer) until the end of the grace period (typically April 1st). If you allow participants to incur healthcare expenses through 12/31/20 to be paid from the 2019 plan year, no HSA contributions can be made until 2021. This may be a challenge, given that some participants may have already made HSA contributions in April and May. One option is to exclude current HSA participants from the election change enhancements.
- **How do I inform my participants of these changes?**
  - Not only participants, but all employees eligible to participate in the plan should be informed of any changes. Per ERISA regulations, one or more methods of delivery likely to result in full distribution must be used. For most employers, this means using first class mail. However, the DOL has indicated that if the employees are notified timely via electronic communications, no penalties will be assessed.

## ➤ FAQs Cont.

- **Will the plan year dates be extended?**
  - Plan year dates are not affected.
- **Can an election change be back-dated?**
  - No. The IRS has restricted these mid-year election changes to prospective-only.
- **Are the election changes in Notice 2020-29 limited to COVID?**
  - No. They apply to all participants.

# Relief Under COBRA

COBRA Deadline Extensions



# ➤ What Is COBRA?

- “COBRA” is the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended
- Provides for continuation of existing group health plan coverage for qualifying employees, covered spouses and covered dependents
- Legally protected right under the Internal Revenue Code, Employee Retirement Income Security Act of 1974, and the Public Health Service Act



# ➤ Qualifying Events

- Voluntary Termination
- Involuntary Termination
  - Gross misconduct exception
- Reduction of Employee's Hours
  - Change in premium arrangement
- Death of Employee
- Divorce or Legal Separation
  - Removals in anticipation of the event
- Medicare Entitlement (in extremely rare circumstances)
- Dependent Child ceasing to be a dependent

## ➤ FMLA Leave of Absence

- Beginning of FMLA leave *is not* a qualifying event
- End of FMLA leave *is* a qualifying event *if* employee does not return to work
  - Even if employee did not maintain coverage during FMLA leave
  - Even if employee doesn't repay premiums in arrears during leave

# ➤ Events During COVID-19?

- What is considered a qualifying event?
  - Termination from employment due to COVID - yes
  - Temporary business closures where group health plan still offered - yes
  - Furlough resulting in reduction of hours
    - Yes, if below the requirement in group health plan document
    - If not, can amend to allow during the short term but must offer to everyone, must verify action is permitted by insurer and provide requisite ERISA notices
  - COVID related paid sick or family leave – no, if does not result in loss of benefits – if taken under emergency paid sick or expanded FMLA provisions, employer is mandated by law to maintain
  - Permanent business shut down with termination of group health plan - no

# ➤ Notices – Most Notable

- **Initial/General Notice** – Informs employees of their COBRA rights and responsibilities (generally within 90 days of commencement of plan coverage) QB
- **Election/Qualifying Event Notice** – Plan administrator informs all QBs of their right to continue health insurance under COBRA with reference to a specific Qualifying Event
  - Clock starts with triggering event, unless delayed employer rule is adopted and reflected in procedures (COBRA maximum period and notification period begins with loss of coverage)
  - Employer notice to plan administrator within 30 days, plan administrator to QB within 14 days (or 44 days total where employer and plan administrator are same)
- **Notice from QB to the plan administrator** – Divorce, Dependent ceasing to be a Dependent, Secondary Event, Disability Determination, or no longer deemed disabled

# ➤ Recent Regulatory Changes Impacting COBRA Administration

- On April 29, 2020, the DOL and IRS released regulations addressing COVID <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>
- Defines the “Outbreak Period”
  - Runs retroactively from March 1, 2020, to 60 days after yet-to be announced end of National Emergency (or other date announced by the Agencies in future notifications)
- Extends COBRA deadlines for employers and QBs
- HHS indicated that it “concur[s]” with the relief and will adopt a non-enforcement policy for non-federal government plans

# ➤ Recent COBRA Regulation Changes

- **Extends notification periods for employers**
  - Provide employers with additional time to provide a COBRA election notice after a qualifying event occurs and permit notices to be furnished electronically
- **Extends payment grace periods for QBs**
  - QB will still be required to pay premiums
    - Will not be due until at least 60 days following the end of the Outbreak Period
    - Nonpayment will likely result in an interruption of coverage; however, coverage will be reinstated retroactively to prevent a gap in coverage once payments are made
- **Extends election periods for all QBs**
  - 60-day deadline to make election will not start running until the end of the Outbreak Period
- **Does not address need to furnish revised election notice or extended time frame**

# COBRA Timeframes Impacted by COVID Regulations

	General	During Outbreak Period
Employer Qualifying Event Notification To QB	44 days to send notification	<b>14 days after end of Outbreak Period</b>
COBRA Election by Participant	60 days from postmark date	<b>60 days after end of Outbreak Period</b>
Premium Grace Period for Coverage	Initial 45 days after election of coverage; 30 days after first day of each month	<b>60 days after end of Outbreak Period to bring all payments current</b>
Notification of Qualifying Events by Participant (divorce, loss of dependency status, etc.)	60 days after the date of the event	<b>60 days after the end of the Outbreak Period</b>

# ➤ COBRA Premiums During Outbreak Period

- Call for Congress to provide subsidies like ARRA, but nothing yet
- Employers are not required to pay some or all the premiums during Outbreak Period
- Employers may choose to pay some or all the premiums for terminated or furloughed employees, but...
  - Arrangement may provide a discriminatory benefit to HCE
  - May complicate later access to individual coverage through the Exchange (voluntary termination of COBRA before maximum period ends does not trigger special enrollment right under the Exchange – should be allowed for the cessation of employer subsidy but easy for employee to be confused in process)
  - May be better to provide cash payment and allow employee to determine best option for themselves



# ➤ COBRA Premiums During Outbreak Period

- Should encourage individuals to pay monthly
- Monthly payments must be allowed
- Premium payments will not be due until at least 60 days following the end of the yet-to-be determined Outbreak Period
- Plan may pend claims until election and payment received
  - Coverage may be suspended due to nonpayment during Outbreak Period
  - Will be reinstated retroactively once payment has been received
- Need to work with insurers to determine how best to proceed

# ➤ Practical Application

- In Q&A sessions held after the regulations were issued, the DOL provided clarification regarding permissible COBRA administration strategies during the Outbreak Period
  - The DOL agreed that group health plans retain the right to terminate coverage if payment is not received by the established due date
  - The agency further acknowledged that while the language issued in the published regulations does not explicitly permit such action, the regulations also do not revoke an employer's right to suspend coverage, pending payment of premiums
  - As a result, the DOL opined that if this practice was permissible under the established plan rules prior to the issued rules, it may remain in effect

# ➤ HIPAA Special Enrollment Rights & Claims Deadlines During COVID-19

- HIPAA Special Enrollment Deadlines

- *HIPAA Special Enrollment Period* – The 30-day (in some instances, 60-day) deadline to request enrollment in a group health plan following a special enrollment event (e.g., birth, adoption or placement for adoption of a child, marriage, loss of other health coverage, or eligibility for a state premium assistance subsidy)
- Deadline is pended during the Outbreak Period – may have to retroactively cover once employee elects coverage - back to March 1, 2020

- Claims and Appeal Deadlines

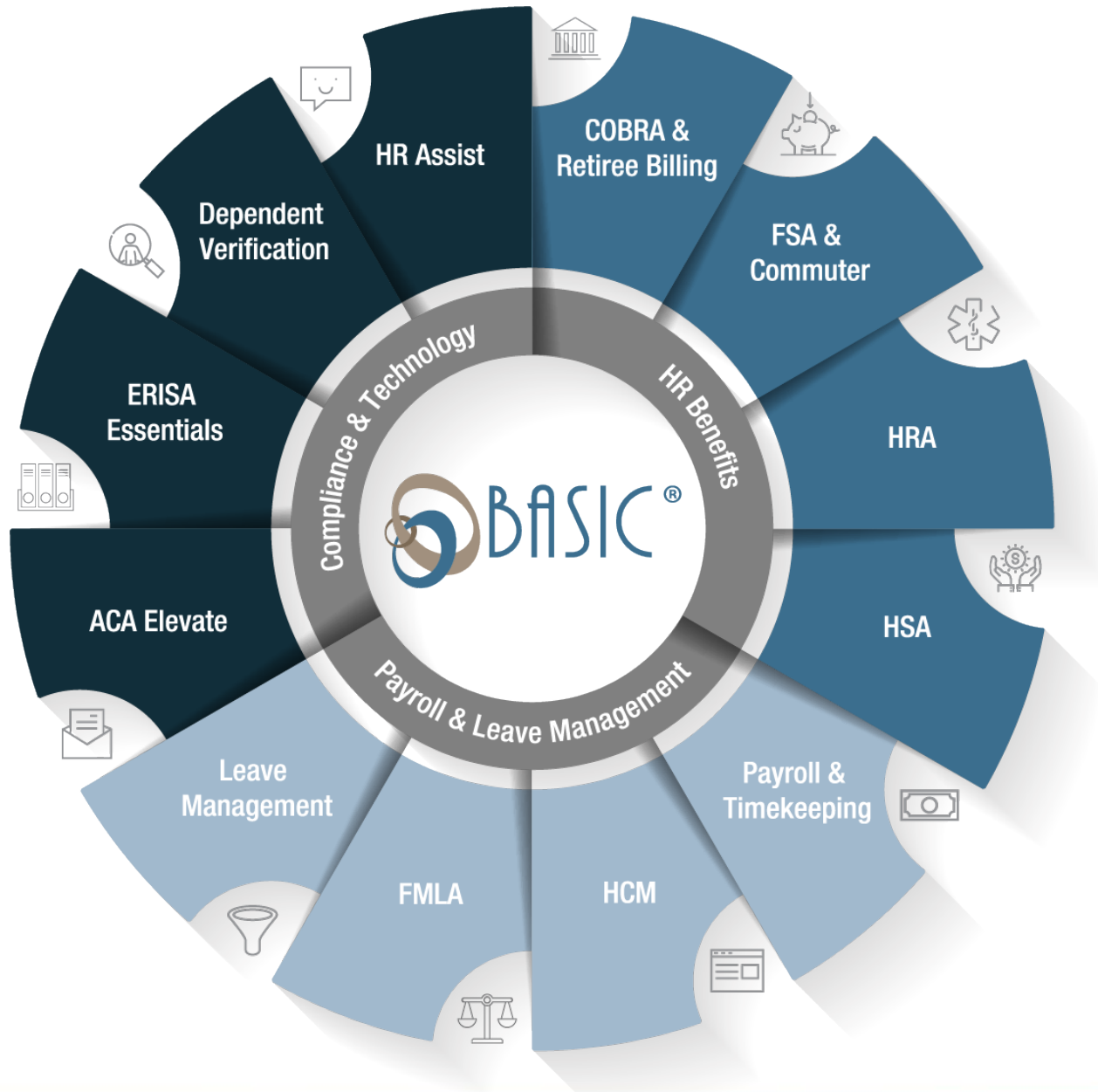
- The deadline under the plan by which participants may file a benefit claim (under the terms of the plan) and the 180-day (for group health plans), 60-day (for other welfare benefit plans) deadlines for appealing an adverse benefit determination, 4-month deadline for requesting federal external review process, deadline for perfecting an external review request
- Deadlines are pended during the Outbreak Period – unclear whether responsibility is on plan or participant to reach out for denied claims on or after March 1, 2020
- No pended deadlines for **plans to adjudicate claims and appeals – relief only applies to participants**

# ➤ Updated Model Notices for Medicare

- Released May 1, 2020, with a set of FAQs
  - <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-model-notices.pdf>
- Did not address COVID-19
- Provide additional information to address COBRA's interaction with Medicare
  - Explain that there may be advantages to enrolling in Medicare before, or instead of, electing COBRA
  - Highlights that if an individual is eligible for both COBRA and Medicare, electing COBRA coverage may impact enrollment into Medicare as well as certain out-of-pocket costs

QUESTIONS





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