

April 12, 2023

President signs resolution on April 10 ending COVID-19 national emergency early – how this affects employee benefit plans

COVID-19 national emergency ends on April 10

On April 10, 2023, President Biden signed a resolution ending the National Emergency (NE) as of that date. While the NE has ended early, the presidential action does not affect the Public Health Emergency (PHE), which is still set to expire on May 11.

How does this affect employee benefit plans?

Based on informal guidance from the Department of Labor (DOL), it does not.

The NE and PHE affect different aspects of employee benefit plans. As you may recall, the NE sets forth the tolling of deadlines for purposes of COBRA, HIPAA special enrollment, claims submission, claim appeals, and independent third-party review of denied claims. This tolling of deadlines is called the Outbreak Period, which ends the earlier of (1) one year after the individual was first entitled to relief; or (2) 60 days after the expiration of the NE (or another date announced by DOL, the Treasury Department, and the IRS). Once the Outbreak Period ends, regular deadlines are back in effect.

Although the NE ended on April 10, the DOL maintains that the Outbreak Period will continue to run through July 10, 2023 (60 days after the anticipated NE end of May 11).

The PHE, on the other hand, is still set to expire on May 11 and affects COVID-related benefits offered under health plans.

The government recently released frequently asked questions (FAQs) to provide clarification and additional guidance regarding the end of both the NE and PHE.

Key Takeaways

- The COVID-19 NE ends on April 10, 2023. However, per informal DOL guidance, this will not impact the Outbreak Period.
- The tolling of deadlines under the Outbreak Period will not extend beyond July 10, 2023 (60 days after the initial May 11 anticipated end to the NE).

- The COVID-19 PHE is set to expire on May 11, 2023.
- New FAQs were issued, which further explain the impact of the ending of NE and PHE on employee benefit plans.
- COVID-19 testing and treatment will no longer be required free of charge after the PHE expires; however, continuing to provide these services without cost-sharing will not affect HDHP/HSA status until further government notice.
- COVID-19 vaccines must still be provided in-network without cost-sharing by non-grandfathered plans (or out-of-network if no in-network provider can provide the service).
- Employee notice and communication are required for material modification in plan benefits.

Departments issue FAQs on end of COVID-19 emergencies and what it means for employee benefit plans

The Departments of Labor, Treasury/IRS, and Health and Human Services (Departments) recently issued [FAQs on the end of the pandemic emergency periods](#).

Lockton Comment: The end of both the COVID-19 National and Public Health Emergencies are discussed in our [Alert on Feb. 3, 2023](#).

Although the guidance largely verifies what we already know, there is new information in the FAQs.

National Emergency (NE) Expiration

As discussed above, the NE expired on April 10, which could affect the tolling of specific ERISA plan deadlines under the Outbreak Period. However, pursuant to previously issued guidance, the Departments can set another date. The NE and its companion Outbreak Period guidance require ERISA plans to extend specific participant action periods for up to (a) 1 year or (b) 60 days after the NE is declared ended or another date as announced by the Departments, whichever comes first. The DOL has indicated that it will continue to use the May 11 date, meaning the Outbreak Period ends on July 10, 2023 (60 days after that date).

Lockton Comment: It is unclear whether the Departments will issue formal, written guidance to confirm the end of the Outbreak Period. The FAQs do not definitively state that May 11 is the designated date and instead refer to the end of the NE, which of course was moved up to April 10. We are continuing discussions with the Departments and will provide notification if the Outbreak Period should end on any date other than July 10, 2023.

Calculating the applicable periods requires an individual-by-individual assessment for each event subject to the rules.

The Outbreak Period guidance applies to COBRA deadlines, HIPAA special enrollment requests to enroll in the group health plan midyear, claims submission and appeals, and requests for a third-party review of adverse claim determinations. The end of the Outbreak Period means plans should revert to the pre-NE rules. The FAQs provide examples that clarify how this works.

Outbreak Period Deadlines

The FAQ guidance clarifies that the 60-day runout period at the end of the national emergency must also be disregarded. For example, in a typical 30-day HIPAA special enrollment situation, when adding a spouse onto group health plan coverage due to marriage, that deadline will not occur until 90 days after May 11 (60-day runout plus 30-day deadline).

- Example 1 (Electing COBRA)
 - Facts:

- Betty works for Company A and participates in Company A's group health plan.
 - Betty experiences a COBRA qualifying event and loses coverage on April 1, 2023 (before the May 11 designated date and before the Outbreak Period ends).
 - Betty (who is eligible to elect COBRA coverage under Company A's plan) is provided a COBRA election notice on May 1, 2023.
 - What is the deadline for Betty to elect COBRA?
- Conclusion:
- The last day of Betty's COBRA election period is 60 days after July 10, 2023 (the end of the Outbreak Period), which is Sept. 8, 2023.
- Example 2 (Electing COBRA)
 - Facts:
 - Same facts as Example 1, except the qualifying event and loss of coverage occur on May 12, 2023 (after the May 11 designated date but before the Outbreak Period ends), and Betty is provided a COBRA election notice on May 15, 2023.
 - What is the deadline for Betty to elect COBRA?
 - Conclusion:
 - Because the qualifying event occurred on May 12, 2023, after the end of the May 11 designated date but during the Outbreak Period, the extensions under the emergency relief notices still apply. The last day of Betty's COBRA election period is 60 days after July 10, 2023 (the end of the Outbreak Period), which is Sept. 8, 2023.
 - Example 3 (Electing COBRA)
 - Facts:
 - Same facts as Example 1, except the qualifying event and loss of coverage occur on July 12, 2023 (after the Outbreak Period ends), and Betty is provided a COBRA election notice on July 15, 2023.
 - What is the deadline for Betty to elect COBRA?
 - Conclusion:
 - Because the qualifying event occurred on July 12, 2023, after the end of the COVID-19 NE and the Outbreak Period, the extensions under the emergency relief notices do not apply. The last day of Betty's COBRA election period is 60 days after July 15, 2023 (the date she was provided the election notice), which is Sept. 13, 2023.

The same methodology applies with regard to other affected deadlines, such as paying COBRA premiums (45 days for initial premium and 30-day grace period thereafter) and HIPAA special enrollment periods (30 or 60 days depending on the event).

Lockton Comment: Remember, the Outbreak Period could end sooner than July 10 if 12 months have run since the individual was first eligible for relief. For example, if an individual was married on Feb. 1, 2022, 12 months have already passed, and the HIPAA special enrollment right would have ended in March of 2023.

HIPAA special enrollments

The FAQs remind us that state Medicaid agencies have not terminated anyone's Medicaid or CHIP coverage for the last three years. However, as discussed in our [alert](#), states have begun to redetermine eligibility for Medicaid. Eligible employees who lose Medicaid or CHIP have up to 60 days after the end of the Outbreak Period (July 10, 2023) to request enrollment under their employer's health plan.

Public Health Emergency (PHE) Expiration

COVID testing and treatment

Once the PHE ends (again, set to expire on May 11), plans will no longer be required to offer cost-free items and services related to COVID-19 testing (whether over the counter (OTC) or ordered by a physician). This means plans may again impose cost-sharing, prior authorization, and medical management criteria. The FAQs clarified that an item or service is furnished on the date it was rendered (or the date an OTC test was purchased) and not the date that the claim is submitted. If the item/service is furnished during the PHE (even though it may be processed later), it still must be cost-free.

COVID vaccines

Vaccines, however, still must be covered by non-grandfathered health plans. Non-grandfathered plans must *continue* to cover, without cost-sharing, COVID-related preventive care (e.g., a vaccine) designated as such by the U.S. Preventive Services Task Force or CDC. Specifically:

- In-network COVID-19 vaccines still required.
- Out-of-network (OON) provider COVID-19 vaccine requirement lapses (unless there's no in-network provider, in which OON vaccine must be provided without cost sharing). This means that group health plans will not need to offer vaccines out-of-network, and if they do, cost-sharing can be imposed.

Effect on HDHPs/HSAs

First-dollar coverage of COVID testing and treatment is still OK under HSA-compatible high-deductible plans (HDHPs).

- Beginning in 2020, IRS allowed HDHPs to provide free or reduced-cost COVID-19 testing and treatment. Notwithstanding the end of the emergency periods, these FAQs set forth that first-dollar COVID-19 testing, and treatment will still be allowed for HDHPs without jeopardizing HSA eligibility until IRS informs us otherwise.

Notification requirements to employees

Generally, the agencies encourage plan sponsors to communicate plan coverage changes on account of the emergency periods ending. However, material modifications that would affect the content of the summary of benefits and coverage (SBC) and do not occur in connection with a renewal of coverage *must* be disclosed no later than 60 days before the modification's effective date. Plans that increased benefits or reduced cost-sharing for the diagnosis or treatment of COVID-19 or for telehealth or remote care services and revoke these changes when the PHE expires will be deemed to have satisfied their obligation to provide advance notice of the material modification *if*:

- They previously notified participants of the general duration of the increased benefits (such as, that they applied only during the emergency period), or
- They notify participants reasonably in advance of the reversal.

Next Steps

This is welcome clarity for group health plans; however, it does require some action.

1. Plan sponsors must first decide whether some NE/PHE accommodations will continue. Will the plan extend deadlines beyond the Outbreak Period? Will the plan continue to allow first-dollar coverage of items and services for COVID-19 testing after the PHE expires? How will changes be communicated to employees?

2. If deadlines extend beyond the Outbreak Period, plan sponsors need to work with carriers, TPAs and stop loss vendors to ensure these changes are approved. Once these decisions are made, plan sponsors should review their plan documents, procedures, policies, COBRA notices, and other employee communications to ensure they align with the pre-pandemic rules once the PHE and NE end and/or are adjusted for additional modifications. Many plan sponsors amended their ERISA plans to adopt the PHE mandates and NE/outbreak period accommodations when they were implemented in 2020. These should be reviewed to ensure they automatically terminate with the end of the NE/PHE. If they do not, the plans must be amended once again to remove the NE/PHE provisions which will not be continued. If the plan will extend deadlines beyond the Outbreak Period, that too must be included within a written amendment and clearly define the length of these deadlines and when the accommodation will no longer apply.
3. Similarly, vaccine and testing mandates may have also been adopted through plan amendment. Any changes the plan sponsor wishes to make to these benefits will likely require a plan amendment. If you decide to make changes to the benefits offered, you must notify plan participants of those material changes. Additionally, if a non-renewal change affects the information included in the SBC, the notice must come 60 days prior to implementing the change.
4. All participant communications must be updated to reflect changes, including summary plan descriptions, summary of materials modifications and SBCs.
5. Plans sponsors must coordinate with COBRA administrators and other applicable vendors to reflect proper handling upon the PHE/NE expiration.
6. Finally, plan sponsors should keep and safeguard records of their compliance with these rules over the past three years as federal regulators and state agencies may still have interest in auditing plans for compliance with ongoing or expiring rules.

Beth Latchana, J.D.
SVP, Director
Compliance Consulting

Mark Holloway, J.D.
SVP, Director
Compliance Consulting

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Lockton People Solutions | 444 West 47th Street | Suite 900 | Kansas City | MO | 64112