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Guidance Issued on Emergency Period Expiration

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This Compliance Bulletin contains guidance released in FAQ 58; however, President Joe Biden subsequently signed a House Bill on April 10, 2023 immediately ending the National Emergency, which may change certain dates referenced below. It is possible that FAQ 58 will be updated to reflect new dates. The signed Bill did not change the end of the Public Health Emergency, which remains May 11, 2023.

On March 29, 2023, the Departments of Labor, the Treasury, and Health and Human Services (collectively, “the Departments”) released FAQ 58, answering certain frequently asked questions regarding the announced end of the National Emergency and the Public Health Emergency (“PHE”) on May 11, 2023.

Diagnostic Tests

During the PHE, plans and issuers are required to cover COVID-19 diagnostic tests without any cost sharing, whether in-network or out-of-network. The Departments indicated that, although the plan or issuer may exclude or may require cost sharing of COVID-19 diagnostic tests following the end of the PHE, including over-the-counter (“OTC”) testing, they encourage plans to continue to cover COVID-19 testing.

Advance Notice

Plans or issuers that make material modifications to any of the plan or coverage terms that affect the most recently issued Summary of Benefits and Coverage (“SBC”) outside of a renewal must provide 60 days advanced notice. However, to the

extent the changes are only with respect to cost-sharing and coverage for diagnosis and treatment of COVID-19, or for telehealth or other remote care services in connection with the end of the PHE, the Departments will consider the plan or issuer's notice requirements satisfied if it:

- Previously notified the participant, beneficiary, or enrollee of the general duration of the additional benefits coverage or reduced cost sharing (such as, that the increased coverage applies only during the PHE); or
- Notifies the participant, beneficiary, or enrollee of the general duration of the additional benefits coverage or reduced cost sharing within a reasonable timeframe in advance of the reversal of the changes.

However, notices that were issued regarding coverage during previous plan years will not meet the notice relief described above.

It should be noted that for plans that utilize the standard SBC template, changes to COVID-19 coverage will not materially affect the disclosure and would not require the advanced notice. It is unclear whether these changes would be considered "material."

Although the FAQs did not address this issue, under ERISA, for health plans, a summary of material reduction should be distributed automatically to participants within 60 days of adoption of the material reduction in services or benefits or at regular intervals of not more than 90 days. Although somewhat of a gray area, this should mean that employees hear about the change at least 60 days in advance. It's unclear whether these changes would be considered "material." Regardless, it is recommended to provide advance notice.

A sample employee notice could be:

Please be advised that in connection with the federal government's announced end of the Public Health Emergency, the **[HEALTH PLAN NAME]** will **[no longer cover or cover subject to regular cost-sharing]** COVID-19 testing (both over-the-counter and in-person). This change will take effect May 12, 2023. All claims incurred before then will be covered in accordance with the requirements of the Public Health Emergency and any relevant federal guidance. Should you have any questions, please contact **[NAME OF CONTACT]** at **[CONTACT INFORMATION]**.

HDHP Coverage Before Minimum Deductible

Normally, for individuals to make or receive health savings account ("HSA") contributions, with limited exceptions, high deductible health plans ("HDHPs") cannot offer any coverage to participants before they satisfy a minimum statutory deductible. While the IRS previously provided guidance that plans will not fail to be considered HDHPs because they cover COVID-19 testing and treatment before the deductible, that guidance was due to the PHE. The FAQs state that the same relief will remain in effect following the PHE until the IRS and Treasury release additional guidance, which will not require HDHPs to make any mid-plan year changes.

Outbreak Period

Certain time periods and deadlines for HIPAA special enrollments, COBRA continuation, and plan claims and appeals must be extended until the earlier of: 1) a period of one year or 2) the end of the Outbreak Period. The FAQs provide some examples illustrating the application of the end of the Outbreak Period (assuming a July 10, 2023

date), as summarized below. It should be noted that, as a result of President Biden's signed Bill, the Outbreak Period may end earlier than July 10, 2023.

Example 1: Electing COBRA

Facts: Individual A works for Employer X and participates in Employer X's group health plan. Individual A experiences a qualifying event for COBRA purposes and loses coverage on April 1, 2023. Individual A is eligible to elect COBRA coverage under Employer X's plan and is provided a COBRA election notice on May 1, 2023. What is the deadline for Individual A to elect COBRA?

Conclusion: The last day of Individual A's COBRA election period is 60 days after July 10, 2023 (the end of the Outbreak Period), which is September 8, 2023.

Example 2: Paying COBRA Premiums

Facts: Individual B participates in Employer Y's group health plan. Individual B has a qualifying event and receives a COBRA election notice on October 1, 2022. Individual B elects COBRA continuation coverage on October 15, 2022, retroactive to October 1, 2022. When must Individual B make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

Conclusion: Individual B has until 45 days after July 10, 2023 (the end of the Outbreak Period), which is August 24, 2023, to make the initial COBRA premium payment. The initial COBRA premium payment would include the monthly premium payments for October 2022 through July 2023. The premium payment for August 2023 must be paid by August 30, 2023 (the last day of the 30-day grace period for the August 2023 premium payment). Subsequent monthly COBRA premium payments would be due the first of each month, subject to a 30-day grace period.

Example 3: Special Enrollment Period

Facts: Individual C works for Employer Z. Individual C is eligible for Employer Z's group health plan, but previously declined participation. On April 1, 2023, Individual C gave birth and would like to enroll herself and the child in Employer Z's plan. However, open enrollment does not begin until November 15, 2023. When may Individual C exercise her special enrollment rights?

Conclusion: Individual C and her child qualify for special enrollment in Employer Z's plan as early as the date of the child's birth, April 1, 2023. Individual C may exercise her special enrollment rights for herself and her child until 30 days after July 10, 2023 (the end of the Outbreak Period), which is August 9, 2023, as long as she pays the premiums for the period of coverage after the birth.

Employer Action

Employers should:

- Discuss benefit plan design changes with carriers and TPAs as they relate to the coverage for COVID-19 testing and treatment.
- Consider providing advance notice of the change to plan participants.
- Reach out to COBRA TPAs regarding sending out the notices.
- Await further guidance on the end date of the Outbreak Period.
- Be prepared for deadlines to begin to run earlier than expected.