

March 2021

Department of Labor Clarifies Relief Afforded to ERISA Plans Impacted by the COVID-19 National Emergency

On February 26, 2021, the Department of Labor (DOL), via its Employee Benefits Security Administration (EBSA), released Disaster Relief Notice 2021-01 (the Notice) to address further relief for plans subject to the Employee Retirement Income Security Act (ERISA) due to the COVID-19 pandemic.

Background

In accordance with both ERISA and the internal Revenue Code, the Secretaries of Labor and the Treasury have the authority to prescribe relief for a presidentially declared disaster for a period of up to one year for individual actions that would otherwise have been required or permitted. On March 13, 2020, the President issued a proclamation declaring the COVID-19 pandemic to be a national emergency and separately determined a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act effective March 1, 2020. Accordingly, the DOL relief issued under EBSA Disaster Relief Notice 2020-01 covered the period from March 1, 2020 to February 28, 2021.

Retirement Plans Covered by the Notice

An “employee benefit pension plan” is subject to Title I of ERISA unless it meets one of the following exceptions:

- A 401(a), 401(k), 403(b) or 457(b) plan of a governmental employer (including a public school);
- A Top hat 457(b) plan of a nonprofit organization;
- A 401(a), 401(k), and 403(b) plans of a church or church-related entity unless the plan administrator has irrevocably elected into ERISA for that plan;
- A 403(b) plan of a nongovernmental/non-church 501(c)(3) organization that meets the non-ERISA regulatory safe harbor rules; and
- IRAs that do not have employer contributions or employer active involvement.

The DOL notes that the relief in the Notice has been coordinated with and reviewed by the Department of the Treasury, the Internal Revenue Service, and Health and Human Services, all of which have advised the DOL of their concurring with the guidance provided regarding the continuation of relief and the application of the laws under their jurisdiction.

Extension of Relief for Certain Transactions under ERISA Plans

Since the one-year period in the 2020 guidance has expired, the DOL has issued the Notice to extend relief to transactions by individuals and ERISA plans until the *earlier of*:

- One year from the date the party was first eligible for relief. Since the earliest date possible date for relief was March 1, 2020, the earliest date for this extended relief would be March 1, 2021 (including periods during which an action is required or permitted to be completed that began before March 1, 2020).

or

- 60 days after the announced end of the COVID-19 national emergency (which, to date, is ongoing).

The Notice provides relief within the above timeframe for the following transactions impacted *solely due to the COVID-19 outbreak*, as previously noted in EBSA Disaster Relief Notice 2020-01:

- Verification procedures for loans and distributions from ERISA plans, provided that the plan administrator makes:
 - a good-faith diligent effort under the circumstances to comply with those requirements; and
 - a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

- Remittance of participant contributions and loan repayments beyond the ERISA deadline, provided that affected employers and service providers remain obligated to act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.
- Provision of blackout notices to participants and beneficiaries under an ERISA defined contribution plan, (which otherwise should be provided 30 days in advance).

Following the end date of this extended relief, the applicable ERISA timeframes for individuals and ERISA plans with periods that were previously disregarded under DOL guidance will resume once again. The DOL notes that in no case may a disregarded period exceed one year.

Fiduciaries Must Act in Good Faith

The relief afforded in the Notice to ERISA plans requires that the responsible fiduciary act in good faith and furnish any notice, disclosure, or document (as applicable) as soon as administratively practicable under the circumstances. Good 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.

The DOL also acknowledges that there may be instances when full and timely compliance with ERISA's disclosure and claims processing requirements by plans and service providers may not be possible, including when pandemic or natural disaster-related disruption to a plan or service provider's principal place of business makes compliance with pre-established time frames for certain claims' decisions or disclosures impossible. In such circumstances, the DOL will look to whether the plan fiduciaries acted in good faith and with reasonable diligence under the circumstances in determining the DOL approach to enforcement.

The DOL clarifies that notices and disclosures properly furnished without relying on the relief in EBSA Disaster Relief Notice 2020-01 do not need to be re-furnished. Similarly, to the extent the plan can demonstrate that a notice or disclosure was actually received, it would not need to be refurnished even if it was initially furnished in reliance on the relief provided in EBSA Disaster Relief Notice 2020-01.

Fiduciaries Must Take Reasonable Steps to Minimize Loss or Undue Delay

Plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames. Toward that end, if a plan administrator or other responsible plan fiduciary knows or should reasonably know that the end of the relief period would expose a plan participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, that administrator or other fiduciary should consider affirmatively sending a notice alerting the plan participant or beneficiary of the implications of the end of the relief period. The DOL also cautions that plan disclosures issued prior to or during the COVID-19 pandemic may need to be reissued or amended if those disclosures do not provide currently accurate information regarding the time in which participants and beneficiaries were required to take action.

Voya will continue to monitor closely any additional IRS and DOL guidance.

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