

# COMPLIANCE RECAP

What every HR leader should know about compliance.

FEBRUARY 2021



## February was a relatively busy month in the employee benefits world.

The Department of Labor (DOL) issued EBSA Disaster Relief Notice 2021-01 regarding the end of the COVID-19 outbreak period. The Internal Revenue Service (IRS) issued Notice 2021-15 providing guidance on health flexible spending arrangements (FSAs), dependent care flexible spending arrangements (DCAPs), and cafeteria plan relief.

The DOL, the Department of Health and Human Services (HHS), and the Department of the Treasury (Treasury) (collectively, the Departments) issued additional FAQs regarding coverage of COVID-19 testing and vaccines. The Department of Justice (DOJ) sent a letter to the U.S. Supreme Court (Supreme Court) regarding its position in the court case challenging the constitutionality of the Patient Protection and Affordable Care Act (ACA).

The Equal Employment Opportunity Commission (EEOC) withdrew its previously released proposed wellness program rules. The District of Columbia Circuit Court of Appeals agreed to a delay in the association health plans (AHPs) court case.

The IRS noted that the processing of Form 5500 extensions was delayed in 2020. The DOL and EEOC released summaries of their enforcement activity for fiscal year 2020.

## IN THIS ISSUE

**DOL Issues EBSA Disaster Relief Notice 2021-01**

**IRS Issues Guidance on Health FSA, DCAP, and Cafeteria Plan Relief**

**The Departments Issue Additional FAQs Regarding Coverage of COVID-19 Testing and Vaccines**

**DOJ Reverses Position in the Court Case Challenging the Constitutionality of the ACA**

**EEOC Withdraws Proposed Wellness Program Rules**

**D.C. Circuit Court of Appeals Agrees to Delay in Association Health Plans Case**

**IRS Delayed in Mailing Notice CP 216F**

**DOL and EEOC Release Summaries of Enforcement Activity for Fiscal Year 2020**

**Question of the Month**

### **DOL Issues EBSA Disaster Relief Notice 2021-01**

As background, on March 13, 2020, former President Trump issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak and by separate letter made a determination, under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, that a national emergency exists nationwide beginning March 1, 2020, as the result of the COVID-19 outbreak. The DOL and Treasury issued a [joint notice](#) that extends certain timeframes under ERISA and Internal Revenue Code (IRC) for group health plans, disability, and other welfare plans, pension plans, and participants and beneficiaries of these plans during the COVID-19 national emergency through the end of the outbreak period (60 days after the announced end of the public health emergency). The DOL's Employee Benefits Security Administration (EBSA) issued [EBSA Disaster Relief Notice 2020-01](#) (2020 EBSA Notice) that applies to employee benefit plans, employers, labor organizations, and other plan sponsors, plan fiduciaries, participants, beneficiaries, and covered service providers. The 2020 EBSA Notice supplements the extended timeframes joint notice issued by the DOL and Treasury.

The DOL has issued [EBSA Disaster Relief Notice 2021-01](#) providing that the outbreak period relief provided under the joint notice and the 2020 EBSA Notice ends on the earlier of one year from the date an individual or plan was first eligible for relief or 60 days after the announced end of the COVID-19 National Emergency. As of the date of this writing, the COVID-19 National Emergency has not ended.

Read more about the relief in our "[Final Rule on the Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Due to COVID-19](#)" and "[EBSA Disaster Relief Notice 2021-01](#)" Advisors.

### **IRS Issues Guidance on Health FSA, DCAP, and Cafeteria Plan Relief**

As background, the Consolidated Appropriations Act, 2021 (Appropriations Act) enacted on December 27, 2020, contained certain relief for health FSAs and DCAPs that employers are permitted to implement. The relief permits employers to implement unlimited carryovers for health FSAs and DCAPs, 12-month grace periods for health FSAs and DCAPs, post-termination spend-downs for health FSAs, extension of the minimum age for eligible dependents from 12 to 13 for DCAPs, and mid-year election changes for health FSAs and DCAPs.

The IRS issued [Notice 2021-15](#) (Notice) clarifying how employers can implement the relief contained in the Appropriations Act and what limits employers can place on the relief. The Notice also describes how the health FSA relief affects employer obligations to offer COBRA and HSA eligibility.

The Notice also goes beyond the relief contained in the Appropriations Act and permits employers to allow employees to make certain mid-year election changes under cafeteria plans during the 2021 calendar year without experiencing a permitted election change event. Finally, the Notice provides that health FSAs and health reimbursement arrangements (HRAs) may be amended to provide for reimbursement of expenses for menstrual care products and over-the-counter drugs without prescriptions incurred on or after January 1, 2020.

[Read more](#) about the Notice.

## **The Departments Issue Additional FAQs Regarding Coverage of COVID-19 Testing and Vaccines**

The Departments, issued [frequently asked questions \(FAQs\)](#) regarding implementation of the Families First Coronavirus Response Act (FFCRA), the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), and other health coverage issues related to Coronavirus Disease 2019 (COVID-19). These FAQs are in addition to the FAQs the Departments previously released regarding health plan coverage under the FFCRA and CARES Act.

[Read more](#) about the new FAQs.

## **DOJ Reverses Position in the Court Case Challenging the Constitutionality of the ACA**

The DOJ sent the Supreme Court a [letter](#) noting that due to the change from the prior Trump Administration to the current Biden Administration, it is no longer the position of the administration that the individual mandate is unconstitutional. Additionally, the letter noted that even if the Supreme Court holds that the individual mandate is unconstitutional, the mandate is severable from the remainder of the ACA so that the remainder of the ACA will remain valid.

The letter recognizes that oral arguments have already been held on the case in the Supreme Court and is not asking the Supreme Court to allow the DOJ to file a supplemental brief.

## **EEOC Withdraws Proposed Wellness Program Rules**

As background, in January the EEOC released proposed rules for wellness programs subject to the Americans with Disabilities Act (ADA) and for wellness programs subject to the Genetic Information Nondiscrimination Act (GINA). The proposed rules, if finalized, would have amended the current ADA and GINA wellness program rules, with the most anticipated change being the proposed establishment of the level of incentive (or penalty) that employers may provide under wellness programs subject to the ADA or GINA.

The proposed have been [withdrawn](#) by the EEOC pursuant to the Biden Administration [regulatory freeze](#). Until further action is taken, the current final rules on wellness programs remain in effect.

[Read more](#) about the withdrawn rules.

## **D.C. Circuit Court of Appeals Agrees to Delay in Association Health Plans Case**

As background, in June 2018, the DOL issued a final rule on association health plans (AHPs). On March 28, 2019, the U.S. District Court for the District of Columbia (Court) [found](#) that the DOL's final rule exceeded the statutory authority delegated by Congress under ERISA and that the final rule unlawfully expands ERISA's scope. In particular, the Court found the final rule's provisions – defining "employer" to include associations of disparate employers and expanding membership in these associations to include working owners without employees – are unlawful and must be set aside. On April 26, 2019, the DOJ filed an appeal. *(continued)*

Under the Biden Administration, the DOJ requested a 60-day delay from the Court of Appeals for the District of Columbia Circuit (Court of Appeals) to review the case and determine how to proceed. On February 8, 2021, the Court of Appeals agreed to the DOJ's unopposed request. The parties are to update the court again on April 9, 2021, and every 60 days thereafter.

[Read more](#) about the status of the AHP final rule.

### **IRS Delayed in Mailing Notice CP 216F**

The IRS issued a bulletin noting the plan sponsors do not need to take further action if they receive Notice CP 216F, Approval of Extension to file Form 5500 Series Return, for calendar year 2019 Forms 5500 series returns after the plan sponsor has submitted the final return for 2019. The IRS stated that the processing of Form 5500 extensions was delayed in 2020.

### **DOL and EEOC Release Summaries of Enforcement Activity for Fiscal Year 2020**

The DOL issued its fiscal year 2020 enforcement [Fact Sheet](#) highlighting the recovery of over \$3.1 billion to employee benefit plans, participants and beneficiaries. The DOL and the Centers for Medicare & Medicaid Services (CMS) also released their fiscal year [2020 Mental Health Parity and Addiction Equity Act \(MHPAEA\) Enforcement Fact Sheet](#) summarizing investigations and public inquiries related to the Mental Health Parity and Addiction Equity Act (MHPAEA) during fiscal year 2020. The MHPAEA Enforcement Fact Sheet also has an [Introduction](#) and [Appendix](#) that provide additional information on enforcement priorities and where guidance can be found.

The EEOC issued a detailed breakdown of charges of workplace discrimination the agency received in fiscal year 2020.

## QUESTION OF THE MONTH

**Q: Has an end date been announced for the COVID-19 outbreak period for purposes of the extension of certain timeframes (such as COBRA deadlines, HIPAA special enrollment periods, and claims procedures) under the Department of Labor (DOL) and the Internal Revenue Service (IRS) joint notice and the relief provided to plan fiduciaries and plan sponsors for furnishing notices, disclosures, and other documents required by provisions of Title I of ERISA under EBSA Disaster Relief Notice 2020-01?**

**A:** Yes, The DOL issued [EBSA Disaster Relief Notice 2021-01](#) providing that the outbreak period ends on the earlier of one year from the date an individual or plan was first eligible for relief (extension period) or the original outbreak period of 60 days after the announced end of the COVID-19 National Emergency. As of the date of this writing, the COVID-19 National Emergency has not ended. Note, this outbreak period end date does not affect the period for which group health plans and issuers must provide coverage for COVID-19 diagnostic testing and qualifying coronavirus preventive services.

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