



# National Compliance Update

## USI EMPLOYEE BENEFITS

April 6, 2023

## Guidance Issued on Emergency Period Expiration

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.<sup>1</sup>

**USI Note.** The day after the Departments issued FAQ 58, the Senate passed a House resolution that would end the National Emergency earlier than May 11, 2023.<sup>2</sup> The White House has indicated the President will sign the bill into law, in which case the National Emergency could end earlier than the PHE. At the time of publication, it has not become law. However, if this happens, the end date of the Outbreak Period (described below) will be earlier than the July 10, 2023, as the Outbreak Period ends 60 days following the end of the National Emergency. If enacted, the Departments would need to update the guidance in FAQ 58 to reflect the new end date. USI is monitoring the status of this resolution and will provide an update if/when it is signed into law.

### VOLUNTARINESS

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

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<sup>1</sup> For background, please see USI’s Compliance Update, [Emergency Periods Related to COVID-19 to End May 11, 2023](#) (February 2, 2023).

<sup>2</sup> H.J. Res. 7 – Relating to a national emergency declared by the President on March 13, 2020. <https://www.congress.gov/bills/118th-congress/house-joint-resolution/7>.

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.

**USI Note:** 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."<sup>3</sup>

Note that, 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."<sup>4</sup> 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, your health plan 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 Benefits at [Benefits@Tracesystems.com](mailto:Benefits@Tracesystems.com).

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<sup>3</sup> Any modification to the coverage offered under a plan that, independently or in conjunction with other contemporaneous modifications or changes, would be considered by an average plan participant to be an important change in covered benefits or other terms of coverage under the plan or policy.

<sup>4</sup> A "material reduction" means any modification to the plan or change in the information required to be included in the summary plan description that, independently or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important reduction in covered services or benefits under the plan. Subject to a facts and circumstances test. DOL final regulations provide several examples of what qualifies as a material reduction in covered services or benefits:

- an elimination of benefits payable under the plan;
- a reduction of benefits payable under the plan (including a reduction that occurs as a result of a change in formulas, methodologies, or schedules that serve as the basis for making benefit determinations);
- an increase in premiums, deductibles, co-insurance, co-payments, or other amounts to be paid by a participant or beneficiary;
- a reduction in the service area covered by an HMO; and
- an imposition of new conditions or requirements (i.e., preauthorization requirements or a new referral requirement) to obtaining services or benefits under the plan.

## 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.<sup>5</sup> 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 (July 10, 2023). The FAQs provide some examples illustrating the application of the end of the Outbreak Period, as summarized below:

**USI Note:** As previously discussed, the Outbreak Period may end earlier than July 10, 2023. These examples assume a July 10, 2023, end date.

### Example: 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: 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.

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<sup>5</sup> The HDHP minimum is \$1,500 for self-only and \$3,000 for family for plan years beginning on or after January 1, 2023. The exception to the minimum deductible is for certain preventive services, as well as telehealth and remote care for plan years beginning before January 1, 2025. See USI’s Compliance Update, [Telehealth Relief for HSAs Extended in Last Minute Funding Package](#) (December 23, 2022).

### Example: 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 NEXT STEPS

Employers should:

- Discuss benefit plan design changes with carriers and TPAs as they relate to the coverage for COVID-19 testing and treatment. See USI's Employer Checklist summarizing possible design changes, starting on page 5 of [Emergency Periods Related to COVID-19 to End May 11, 2023](#) (February 2, 2023).
- Consider providing advance notice of the change to plan participants.
- Await further guidance on the end date of the Outbreak Period should the President sign an earlier end date into law.
- Be prepared for deadlines to begin to run earlier than expected.

## RESOURCE

For the FAQs, visit: <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-58>

**USI** [usi.com/about-us/locations](https://www.usi.com/about-us/locations)

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