



## WE HAVE REACHED THE END OF THE NATIONAL EMERGENCY!

**Charlotte, NC -- May 11, 2023 -- After three long years, today marks the end of the COVID-19 National Emergency! As a consequence, 60 days from today, on July 10, 2023, the Outbreak Period will come to an end.** [This is the case despite the fact that President Biden signed H.R. Res. 7 into law on April 10, 2023, thereby ending the National Emergency immediately for purposes other than the Outbreak Period relief addressed below.]

**Outbreak Period History:** As you may recall, the Department of Labor (DOL), the Department of Health and Human Services (HHS) and the Department of Treasury (collectively, the “Agencies”) first announced the Outbreak Period relief in a Joint Notice issued in early 2020. The Joint Notice requires ERISA-governed plans to disregard the period beginning March 1, 2020, and continuing until 60 days after the announced end of the National Emergency (i.e., the “Outbreak Period”), in determining the deadlines for certain plan-related actions. In a subsequent Notice issued in early 2021, the Agencies clarified that the relief applies on an individual-by-individual basis and that the disregarded period is limited to (i.e., no greater than) a period of one year from the date the plan-related action would otherwise have been required or permitted.

**In other words, during the Outbreak Period, the passage of time is paused until the earlier of (a) one year after the original plan-related deadline, or (b) July 10, 2023.**

**Application of Outbreak Period Relief:** As Flores has previously noted, the Outbreak Period relief provisions effectively extend the time periods for taking certain actions under ERISA-governed plans. The relief provisions impact the following administrative services furnished by Flores:

Applicable Time Periods	Applicable Flores Administrative Services
The 30-day (or 60-day) period to request special enrollment under HIPAA	Integrated HRA and Section 125/Cafeteria Plan*
The 60-day period to elect COBRA continuation coverage The 60-day period for notifying the plan of a COBRA qualifying event or second qualifying event (i.e., divorce or legal separation, a dependent child ceasing to be a dependent, death or Medicare entitlement) The 60-day period for notifying the plan of a qualified beneficiary’s disability determination by the Social Security Administration The 45-day period to make the first COBRA premium payment The 30-day grace period for making subsequent COBRA premium payments	COBRA Administrative Services
The period for filing a claim under the plan’s claims procedures (which, in turn, extends the plan’s run-out period) The 180-day period for filing an appeal of a denied claim under the plan’s claims procedures	Health FSA and HRA Administrative Services

\* Although Section 125/cafeteria plans are not subject to ERISA, employees exercising their HIPAA special enrollment rights (to gain coverage under an employer’s group health plan) will generally pay for such coverage with pre-tax dollars under the employer’s cafeteria plan.

When the Outbreak Period ends on July 10, 2023, any of the time periods identified above that have not yet been triggered with respect to an individual will be unaffected. In such cases, there will be no extension of time for taking the required action, and plans will return to their pre-COVID-19 practices. However, if any time period identified above was triggered during the Outbreak Period with respect to a particular individual, no further extension will apply. Instead, the applicable time period for taking action (e.g., the 30-day, 60-day, 45-day, 90-day, 180-day, etc. period) will begin to run on July 11, 2023. The resulting deadline will apply, unless the one-year anniversary of the original deadline is/was sooner reached.

Although the Outbreak Period is ending, the mind-bending exercises are not! However, knowing that the Outbreak Period ends on July 10, 2023, allows for the application of the following three rules:

**1. If a time period identified above is triggered before July 11, 2022, the one-year rule will apply (i.e., the deadline for taking action is one year after the original deadline).**

For example:

- Employee W is eligible to participate in her employer's group health plan, but previously declined coverage under such plan.
- The open enrollment period for the plan does not begin until November 15, 2022.
- Employee W gives birth on June 15, 2022.
- Employee W would like to enroll herself and her newborn baby in the health plan.

Under the standard special enrollment rules, Employee W would have had 30 days from the date of birth (i.e., until July 15, 2022) to enroll herself and her baby in the employer's group health plan and make a corresponding election change under the employer's cafeteria plan (to pay for such coverage with pre-tax dollars). If the health plan is linked to an HRA that reimburses medical expenses of employees and their dependents, Employee W could have also enrolled herself and her baby in the HRA.

Under the Outbreak Period rules, Employee W has until July 15, 2023 (one year after the original deadline) to enroll herself and her baby in the employer's group health plan and make a corresponding election change under the employer's cafeteria plan (to pay for such coverage with pre-tax dollars). If the health plan is linked to an HRA that reimburses medical expenses of employees and their dependents, Employee W may also enroll herself and her baby in the HRA.

**2. If a time period identified above is triggered during the period of July 11, 2022 – July 10, 2023, start counting that time period on July 11, 2023.**

For example:

- Employee W is eligible to participate in her employer's group health plan, but previously declined coverage under such plan.
- The open enrollment period for the plan does not begin until November 15, 2022.
- Employee W gives birth on September 15, 2022.
- Employee W would like to enroll herself and her newborn baby in the health plan.

Under the standard special enrollment rules, Employee W would have had 30 days from the date of birth (i.e., until October 15, 2022) to enroll herself and her baby in the employer's group health plan and make a corresponding election change under the employer's cafeteria plan (to pay for such coverage with pre-tax dollars). If the health plan is linked to an HRA that reimburses medical expenses of employees and their dependents, Employee W could have also enrolled herself and her baby in the HRA.

Under the Outbreak Period rules, Employee W has until August 9, 2023 (30 days after July 10, 2023), to enroll herself and her baby in the employer's group health plan and make a corresponding election change under the employer's cafeteria plan (to pay for such coverage with pre-tax dollars). If the health plan is linked to an HRA that reimburses medical expenses of employees and their dependents, Employee W may also enroll herself and her baby in the HRA.

### **3. If a time period identified above is triggered after July 10, 2023, the standard (pre-COVID-19) deadlines apply.**

For example:

- Employee W is eligible to participate in her employer's group health plan, but previously declined coverage under such plan.
- The open enrollment period for the plan does not begin until November 15, 2023.
- Employee W gives birth on September 30, 2023.
- Employee W would like to enroll herself and her newborn baby in the health plan.

The standard special enrollment rules apply, and Employee W has 30 days from the date of birth (i.e., until October 30, 2023) to enroll herself and her baby in the employer's group health plan and make a corresponding election change under the employer's cafeteria plan (to pay for such coverage with pre-tax dollars). If the health plan is linked to an HRA that reimburses medical expenses of employees and their dependents, Employee W may also enroll herself and her baby in the HRA.

**General Action Items for Employers:** Generally, employers are considered to be acting as ERISA fiduciaries when they communicate with employees and plan participants about employer-sponsored benefit plans. Furthermore, employers, in their capacity as Plan Administrators, have a fiduciary obligation to make certain disclosures to employees and plan participants, including disclosures of key deadlines, in advance of the application of such deadlines. As such, employers will want to ensure that any materials previously distributed and communications previously made to employees and plan participants regarding the Outbreak Period relief provisions are now updated to identify the end of the National Emergency and the end of the Outbreak Period. Employers will also want to describe the corresponding impact of those events on employees and plan participants (as outlined in the examples above). Employers are encouraged to review the **Extension of Certain Timeframes for Employee Benefit Plans subject to ERISA and the Code, Participants, and Beneficiaries Affected by the COVID-19 Outbreak** section and corresponding examples set forth in the FAQs issued by the Agencies on March 29, 2023, which can be found here:

<https://files.constantcontact.com/44e3e335601/6da9fe85-fbde-4aab-b6a5-812e41e273f5.pdf>

**Flores Action Items Relating to SPD Provisions for Former ProBenefits Clients:** If you previously received a Summary Plan Description (SPD) from ProBenefits, that document likely (a) includes references to the relief associated with the Outbreak Period, and (b) states that the timing of the end of the National Emergency is unknown. If that is the case, the SPD will need to be updated to include the applicable ending date of the National Emergency. To assist you in updating the SPD, Flores is providing a form Summary of Material Modifications (SMM) document which may be downloaded here:

<https://files.constantcontact.com/44e3e335601/cde7e734-8ddb-4836-bb85-9675721b845c.docx>

Flores encourages employers to do the following:

- (i) Complete the form SMM by identifying the date on which the SMM is adopted, the name of the plan and the effective date of the plan's most recent SPD;
- (ii) Take the requisite corporate action necessary to adopt the SMM; and
- (iii) Promptly distribute the SMM in accordance with the procedures applicable to the distribution of SPDs.

Please note that the SMM is being furnished as part of the administrative services provided by Flores and is not intended to provide your organization with legal or tax advice. Accordingly, you may wish to have this document reviewed by the organization's legal counsel and/or tax advisers.

**Flores Action Items Relating to Employers Receiving COBRA Administrative Services:** Flores is prepared to assist employers in notifying COBRA qualified beneficiaries of the end of the Outbreak Period and explaining the significance of that event. Although the Agencies have not released an Outbreak Period model notice or issued specific guidance on the notice-related obligations stemming from the Outbreak Period's end, various comments made by the Agencies point to the Plan Administrator's fiduciary obligation to send affirmative notification of the end of the Outbreak Period relief. The need for such notification is bolstered by the fact that most participants and beneficiaries are likely to be unaware of the end to the Outbreak Period; and those participants and beneficiaries who *are* aware, have likely received conflicting information as a result of the H.R. Res. 7 legislation. In light of these factors, Flores intends to take the following actions on behalf of each customer receiving COBRA Administrative Services:

- Step One: Send a notification to all qualified beneficiaries who have elected and/or are currently enrolled in COBRA coverage with their monthly invoice (at no charge).
- Step Two: Mail a notification to all qualified beneficiaries who are still within their COBRA election period (i.e., those who received or should have received an election notice on or after July 11, 2022).
- Step Three: Post a notification on the participant website, <https://www.flores247.com/>.

However, Flores recognizes that some employers may disagree with its conclusion that an employer (in its capacity as the Plan Administrator) has a fiduciary obligation to ensure that the qualified beneficiaries identified in Step Two above receive notification of the end of the Outbreak Period. **AS SUCH, FLORES WILL COMPLETE STEP TWO ABOVE ONLY IF THE EMPLOYER OPTS IN NO LATER THAN JUNE 1, 2023.** Please note that Flores will impose a nominal fee of \$3.50 for each Step Two notification that is mailed. **OPT IN HERE:** <https://lp.constantcontactpages.com/sv/YJ6dsG0/optin>

**Action Items for Employers Receiving COBRA Administrative Services:** As you may recall, the Outbreak Period provisions also afford relief to employers in meeting their own COBRA-related deadlines. At this time, employers will want to notify Flores immediately of any COBRA qualifying events that have not been previously (i.e., timely) reported. Furthermore, Flores would like to remind employers of the following:

- ❖ As noted above, employers will want to ensure that any materials previously distributed and communications previously made to current employees and plan participants regarding the Outbreak Period relief provisions (and their impact on COBRA) are appropriately updated.
- ❖ Employers should also keep in mind that Flores will soon be required to resume strict enforcement of the standard COBRA timelines. Late elections and payments will result in a denial or termination of COBRA coverage.
- ❖ As always, employers should promptly review the Friday change reports and reconcile the information provided by Flores with their own records and their carrier reports.
- ❖ **Employers requesting Flores to send the notification identified in Step Two above must opt in no later than June 1, 2023.**