

## DOL Issues Relief for Plan Fiduciaries

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The DOL's Employee Benefits Security Administration (the "EBSA") recently issued EBSA Disaster Relief Notice 2020-01. Notice 2020-01 applies to employee benefit plans, employers, labor organizations, and other plan sponsors, plan fiduciaries, participants and beneficiaries, and service providers subject to ERISA. Notice 2020-01 remains in effect from March 1, 2020 until 60 days after the announcement of the end of the presidentially declared national emergency due to COVID-19 (the "National Emergency").

### Untimely Notice Relief

Fiduciaries of ERISA plans generally have an obligation to provide notices and disclosures in accordance with the timing requirements of ERISA. However, under Notice 2020-01, the employee benefit plan and the responsible plan fiduciary will not be considered to violate ERISA for failing to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020 and 60 days after the announced end of the National Emergency, *if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances*. Some of the documents and notices this relief would apply to include annual funding notices, QDIA notices, summary annual reports, blackout notices, summary plan descriptions, and summaries of material modifications.

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 relief in Notice 2020-01 does not apply to notices and disclosures relating to group health plans (e.g., deadlines affecting COBRA continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims, and external review of certain claims) that were addressed in a separate joint notice issued by the DOL and the Treasury Department.

### Procedural Loan Requirements Relief

Under ERISA Section 404(a)(1)(D), plan fiduciaries generally have an obligation to follow the terms of the plan. However, under Notice 2020-01, the plan administrator will not be considered to violate ERISA if the plan administrator fails to follow procedural requirements for plan loans or distributions imposed by the terms of the plan if (i) the failure is solely attributable to the COVID-19 outbreak and (ii) the plan administrator makes both a good-faith, diligent effort to comply with the requirements and a reasonable attempt to correct any deficiencies as soon as administratively practicable. However, this relief does not include the failure to obtain spousal consent or failure to comply with other statutory or regulatory requirements under the jurisdiction of the Treasury Department.

### Relief from the Adequate Security and Reasonably Equivalent Basis Requirements for Loans to Qualified Individuals under the CARES Act

Under ERISA Section 408(b)(1), plan fiduciaries generally have an obligation to ensure there is adequate security for any loan issued by the plan and that plan loans must be available to all participants on a reasonably equivalent basis. The CARES Act provides that from March 27, 2020

through September 22, 2020, the aggregate limit for plan loans to a "qualified individual" (as defined in the CARES Act) is increased to the lesser of \$100,000 and 100% of the participant's vested account balance or other accrued benefit. Furthermore, under the CARES Act, repayments due under a plan loan made to a qualified individual may be delayed for up to one year.

Fiduciaries were concerned that (i) allowing a loan of up to 100% of a participant's vested accrued benefit could result in the loan not being adequately secured and (ii) permitting enhanced plan loans and extended loan repayment periods to only qualified individuals could violate the "reasonably equivalent" requirement. In Notice 2020-01, the DOL assuaged these concerns by announcing it will not treat any person as having violated the provisions of Title I of ERISA, including the adequate security and reasonably equivalent requirements in ERISA Section 408(b) (1), solely because (x) the person made a plan loan to a qualified individual during the loan relief period in compliance with the CARES Act or (y) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act.

In addition, the DOL announced it will treat the plan as being operated in accordance with the terms of a CARES Act amendment (*i.e.*, permitting enhanced loans and delayed loan repayments for qualified individuals) before the amendment's adoption if the amendment is made on or before the amendment deadline provided in the CARES Act (*i.e.*, the last day of the first plan year beginning on or after January 1, 2022, or such later date prescribed by the Secretary of the Treasury).

### Relief for Participant Contributions and Loan Repayments

Under 29 C.F.R. § 2510.3-102, amounts that a participant or beneficiary pays to an employer, or amounts withheld from a participant's wages by an employer, for contribution or repayment of a participant loan to a 401(k) plan or other type of employee pension benefit plan constitute plan assets that must be forwarded to the plan's trust on the earliest date on which the amounts can be segregated from the employer's general assets. In Notice 2020-01, the DOL announced it will not take enforcement action with respect to a temporary delay in forwarding participant payments and withholdings to an employee pension benefit plan during the National Emergency if the timeliness failure is solely attributable to the COVID-19 outbreak. For the relief to apply, employers and service providers must act reasonably, prudently, and in the best interests of employees to comply as soon as administratively practicable under the circumstances.

### Additional Blackout Notice Relief

Under 29 C.F.R. 2520.101-3, the plan administrator of an individual account plan (such as a 401(k) plan) must provide a blackout notice 30 days in advance of a blackout period. There is a limited exception to this requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing. For blackout notices delayed due to the COVID-19 outbreak, the DOL will not require a written determination by a fiduciary because pandemics are, by definition, beyond a plan administrator's reasonable control.

### Form 5500 and Form M-1 Filing Relief

In Notice 2020-01, the DOL announced it is providing filing relief for Form 5500 in accordance with guidance published in IRS Notice 2020-23 and extending the same relief to Form M-1 filings for multiple employer welfare arrangements ("MEWAs") and certain entities claiming exception. This relief extends the filing due date to July 15, 2020 for a Form 5500 or Form M-1 that

is otherwise due between April 1, 2020 and July 14, 2020. *Importantly, this relief does not affect the Form 5500 filing deadline for calendar year plans.*

### General ERISA Fiduciary Compliance Guidance

In Notice 2020-01, the DOL provided additional catch-all guidance that during the COVID-19 outbreak, the guiding principle for plans must be to act reasonably, prudently, and in the best interests of the covered workers and their families. Plan fiduciaries should (i) make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments and (ii) attempt to minimize the possibility of individuals losing benefits due to a failure to comply with pre-established timeframes. The DOL explained that during the COVID-19 outbreak, there may be instances when plans and service providers are unable to achieve full and timely compliance with claims processing and other ERISA requirements, and the DOL's approach to enforcement in such instances will emphasize compliance assistance and include grace periods and other relief where appropriate. This relief includes when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims decisions or disclosures impossible.

Notice 2020-01 is available [here](#).