REGULATORY RECAP: COVID-19 & THE ONGOING IMPACT ON SELF-FUNDED PLANS

Written by Kelly E. Dempsey

The self-funded industry, and the insurance industry in general, has always been subject to constant change and 2022 is not proving to be any different. From the Consolidated Appropriations Act of 2021 (CAA) (which includes the NQTL Comparative Analysis requirement, the No Surprises Act (NSA), and the Transparency Rules, there are a lot of regulations to keep our eyes on.

And of course, we cannot forget about the ongoing implications COVID-19 have on group health plans, and those implications continue to compound.

There has been no shortage of government regulations and mandates in terms of this virus; to do it all justice, it makes sense to start with a quick summary of the many rules and regulations that are still in existence.

From a review of the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) long COVID guidance, to the United States Equal Opportunity Commission (EEOC) guidance that many have overlooked, it is worth reviewing ongoing requirements.

PUBLIC HEALTH EMERGENCY (PHE) AND THE NATIONAL EMERGENCY PERIODS

These periods are often conflated, but the distinction is an important one, since some health plan requirements hinge on the PHE, while others hinge on the National Emergency.

The PHE (declared by the HHS Secretary) was extended in April 2022 and set to expire in mid-July 2022; however, the Biden administration noted there will be 60 days advance notice before the PHE will expire.

No such notice has been given as of the date of this article was written, thus the PHE is likely ongoing, potentially for at least 60 more days. The coverage mandates related to COVID-19 testing and the vaccine are tied to the status of the PHE.

The "Extensions of Certain Timeframes" – often referred to as the "tolling of deadlines" – such as HIPAA special enrollment rights, COBRA election periods, and, most daunting of all for many, claims and appeals submission timeframes – hinge on the National Emergency and especially the so-called Outbreak Period.

The Outbreak Period ends 60 days after the announced end of the National Emergency, which to date is also still ongoing. President Biden last extended the National Emergency in February 2022 this year.

TOLLING OF DEADLINES UNDER COVID-19 RELIEF

Due to the COVID-19 pandemic, the DOL and IRS issued a Joint Rule extending certain deadlines for most group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans.[1]

This rule defines an "Outbreak Period" from March 1, 2020 until 60 days after the end of the declared state of the National Emergency, and states that this Outbreak Period must be disregarded for the calculation of any applicable deadlines, including:

1. With respect to plan participants, beneficiaries, qualified beneficiaries, and claimants:

- the 30- or 60-day period to request Health Insurance Portability and Accountability Act special enrollment;
- the 60-day election period for Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage;
- the date by which COBRA premium payments must be made;
- the date by which individuals must notify the plan of a COBRA qualifying event or determination of disability;
- the date by which individuals may file a benefit claim or appeal under the plan's claims and appeals procedures; and
- the date by which individuals may file a request for an external review or file information to perfect an incomplete request for external review.

2. With respect to group health plans and their sponsors and administrators, the date by which a COBRA election notice must be provided.

On February 26, 2021, the Agencies released EBSA Disaster Relief Notice 2021-01, which clarified that there is a one-year limitation on the "Outbreak Period" tolling relief outlined above. To summarize the notice, there are three key points:

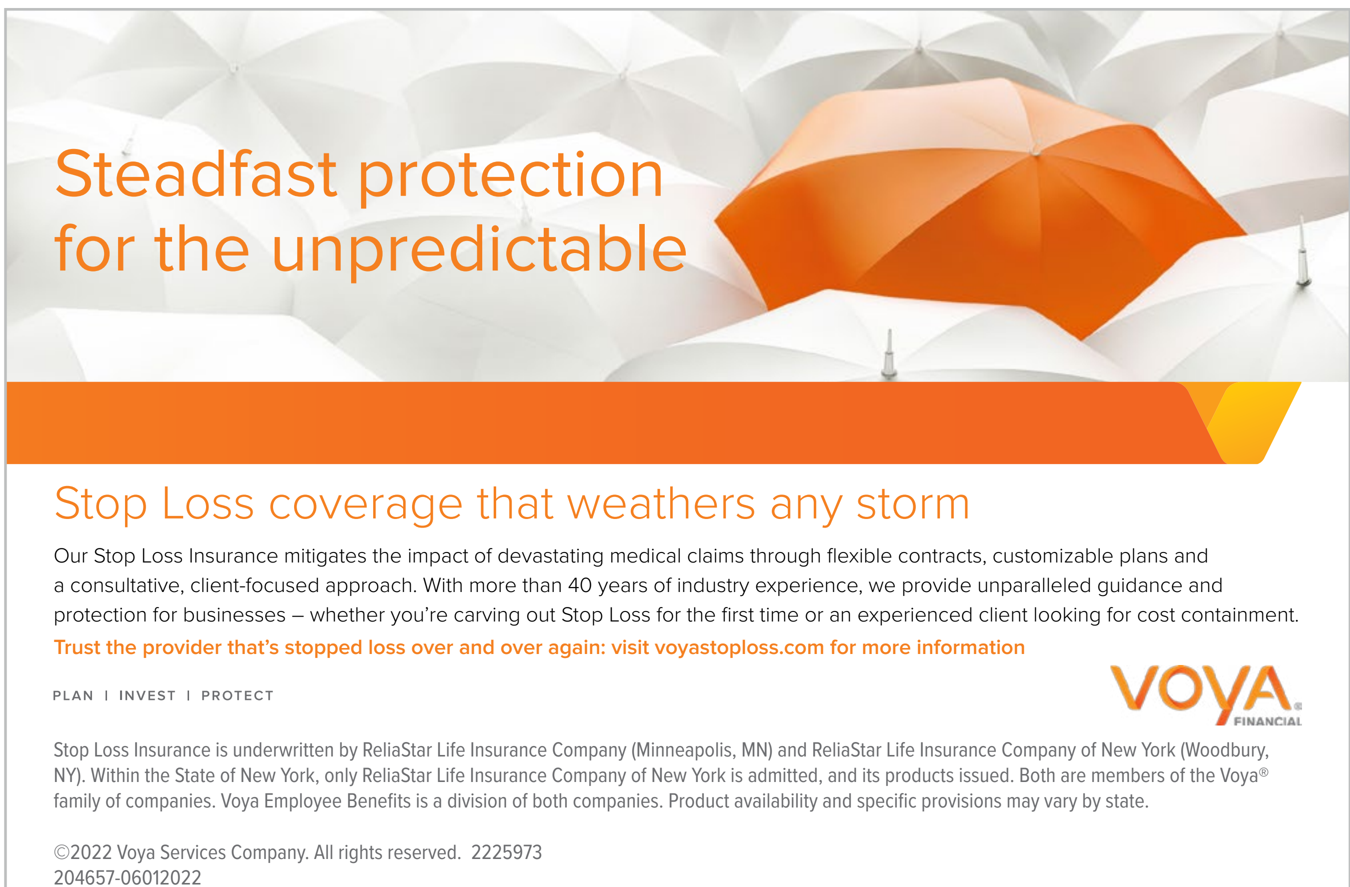
- The DOL interprets this one-year limit to apply to each individual event tolled, not the relief as a whole or the Outbreak Period.
- The period disregarded under the Final Rule above will end after one year, or at the end of the Outbreak Period as originally outlined, whichever comes first.
- This relief notice does not end the Outbreak Period.

The crucial takeaway for Notice 2021-01 is that in no case will the disregarded period with respect to any of the events outlined above exceed one calendar year.

To illustrate an example of that guidance, a claim that ordinarily must be submitted on or before March 1, 2020 would now still be considered timely filed until March 1, 2021.

Obviously, this causes self-funded plans and their claims administrators a great deal of grief; from the administrative headache to potential stop-loss denials (since stop-loss carriers are not bound to this same requirement!), the ongoing tolling period has proven problematic for many.

To summarize the above, the extension of timeframes to submit special enrollment information, appeals, and COBRA elections are all ongoing, as well as the requirement for group health plans to cover COVID-19 testing and the vaccine. Now that we have been living with COVID-19 for over two years, there is more developing guidance on those who suffer from longer term effects of COVID-19, so let's switch gears.



GUIDANCE ON "LONG COVID" AS A DISABILITY UNDER THE ADA, SECTION 504, AND SECTION 1557

In July 2021, HHS and the DOJ issued guidance on "long COVID" as a disability.[2] The Centers for Disease Control and Prevention (CDC) defines long COVID as a condition where an individual who has been infected with the COVID-19 virus experiences long-term effects from the infection. Long COVID symptoms can occur for months after the initial infection and can include new or recurring symptoms at a later point in time.

One might think that long COVID automatically qualifies as a disability, but the guidance indicates otherwise. An individual's condition and any of the symptoms must substantially limit a major life activity in order to rise to the level of a disability.

When assessing the individual's situation, the impact to a major life activity must be reviewed without the benefit of medications, treatments, and other measures used to reduce or compensate for symptoms.

This guidance is not earth-shattering; it simply draws attention to those who suffer from long COVID and gives a high-level summary of the symptoms and impairments an individual with long COVID may experience. It also stresses the importance of determining whether these symptoms rise to the level of a disability on a case-by-case basis, which is also referenced by the EEOC.

EEOC COVID-19 TECHNICAL ASSISTANCE

The EEOC has updated its guidance on COVID-19 and employment considerations approximately 20 times since March of 2020.

In December 2021, the EEOC updated its COVID-19 technical assistance (again) to clarify when COVID-19 may be considered a disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Both Acts address employment discrimination and assist employers with balancing their rights and responsibilities with respect to individuals who have been diagnosed with a disability.

This technical assistance intentionally broadly addresses COVID-19 related to employment, while the DOJ/HHS guidance focuses on long COVID specifically. Each plays an important part in the regulatory oversight, and generally there is no meaningful overlap between the two.

The addition to the technical assistance added a new set questions and answers to assist employers with the application of the rules to individuals with COVID-19 or a post-COVID-19 condition that is classified as a disability.

In general, individuals diagnosed with a disability are protected from employment discrimination, and these individuals may also be eligible for reasonable accommodations; with COVID-19 being so pervasive, this creates issues that are novel for many employers, or at least that occur on a larger scale than many employers are used to.

The December 2021 technical assistance included a few key pieces of information which can be summarized as follows:

1. Even if COVID-19 does not constitute a disability, an individual may have impairments that arose from COVID-19 that will constitute a disability.
2. An individual who had COVID-19 that resulted in only mild symptoms, resolved in a few weeks, and had no other issues, will likely not be considered to have ADA disability and thus will not be eligible for reasonable accommodations.
3. The ADA is a floor for employers – meaning employers can always offer greater benefits than the ADA requires.
4. Individuals are only entitled to a reasonable accommodation if their disability requires it and that accommodation is not an undue hardship for the employer.
5. Employers are cautioned to rely on medical professionals and guidance related to determining when an employee can return to work (i.e., the person is medically able and does not pose a threat of exposing other workers to COVID-19). Employers should be careful to distinguish fact from assumptions and/or fear.

The ADA, like most regulating authority, requires that the definition of "disability" is broadly construed in favor of the more expansive coverage. In other words, the rules are generally construed in favor of the individual with the disability; however, even with COVID-19, an individual must meet one of the three definitions of "Disability" under the ADA:

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1. **"Actual" Disability:** The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning, or operation of a major bodily function);
2. **"Record of" a Disability:** The person has a history or "record of" an actual disability (such as cancer that is in remission); or
3. **"Regarded as" an Individual with a Disability:** The person is subject to an adverse action because of an individual's impairment or an impairment the employer believes the individual has, whether or not the impairment limits or is perceived to limit a major life activity, unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.[3]

To determine whether an individual meets any of the three definitions of "disability," ultimately the ADA requires the dreaded *case-by-case analysis* based on the facts and circumstances surrounding the individual person.

Those tend to be some of the most difficult analyses to make, given the complexities involved in any given case. However, since COVID-19 has only been around for two years (despite seeming like a lifetime), the application and guidance will likely continue to evolve as medical professionals gather more data and information and continue to assess those with long-lasting COVID-19 effects, and the case-by-case analysis may get easier.

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HEALTH BENEFIT PLAN DYNAMICS

Self-funded health plans have been on high alert for quite some time with all the aforementioned rules and regulations that have gone or will be going into effect in the near future. Employers should regularly review their summary plan descriptions and plan documents (SPD/PDs) to ensure that current regulatory requirements are accurately reflected.

Additionally, employers may choose to address continuations of coverage related to short-term and long-term disabilities as the prevalence of COVID long-haulers will increase over time.

Unfortunately, COVID-19 long-haulers raise a lot of additional unknowns. How long will they need treatment? What side effects will be permanent? Will the permanent side effects need continuing care? It is a sure bet that the regulators will continue to modify and evolve their guidance and the number of COVID-19 cases found to be a disability will increase over time.

Aside from potential claims costs and the timeline extensions, employers need to be aware of their leave of absence and continuation of coverage provisions.

Questions for employers include: How long should these ill individuals stay on the health plan? Does plan language support the continuation of coverage? Is stop-loss on the same page? These and other related questions need to be addressed based on the mindset of a particular employer.

CONCLUSION

Despite the various rules, pieces of guidance, and bits of technical assistance, there will always be more unknowns.

In fact, year-old HHS and DOJ guidance provides that "The CDC and health experts are working to better understand long COVID."[4]

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As the experts' understanding evolves, so will the rules and regulations applicable to self-funded plans and the employers that sponsor them. Employers will need to keep a watchful eye on these as the Public Health Emergency and Public Health Emergency Periods continues to be in effect.

Above all else, a best practice is that when in doubt, ask for help from your trusted self-funded health plan compliance gurus. ■

Kelly E. Dempsey is an attorney with The Phia Group, LLC. As the Vice President of Phia Group Consulting, Kelly's specialization is an interesting mix of compliance matters impacting self-funded plans (such as issues relating to ERISA, ACA, COBRA, FMLA, MHPAEA, and MSP) and "outside-the-box thinking," finding creative and innovative ways to help plans, brokers, and TPAs achieve their various self-funding goals. Kelly is admitted to the Bar of the State of Ohio and the United States District Court, Northern District of Ohio.

References:

1 View the Joint Rule here: https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected

2 See https://www.ada.gov/long_covid_joint_guidance.pdf?

3 See N.1. at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=#N

4 See page 4, Section 3 at https://www.ada.gov/long_covid_joint_guidance.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

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