
The End Is Near—And It's Going to Be Confusing!

A Post-Pandemic Guide for Employers After the COVID-19 Emergency Ends and Things Finally Get Back to Normal

March 2023

President Biden announced that the COVID-19 Public Health Emergency (PHE) and the National Emergency Declaration (NED) will end on May 11, 2023, allowing for plan design and administration to revert to pre-pandemic terms.

This Aon bulletin will discuss:

- The End of the PHE: Options for plan sponsors after the PHE ends on May 11, 2023;
- The End of the NED: Examples of the impact on COBRA elections, HIPAA Special Enrollment Rights, and Claims Administration;
- State Coverage Requirements; and
- Action Steps for Employers.

Note: Before May 11, the Treasury Department and the Department of Labor will likely issue guidance addressing health plan operation and administration post-pandemic. In that event, the Legal Consulting Group will publish a revised bulletin incorporating that advice.

The End of the PHE

For COVID-19 relief and coverage offered by group health plans under federal law, May 11, 2023, will mark changes to the following items.

Coverage of COVID-19 Testing Will No Longer Be Mandatory. Mandatory coverage of COVID-19 diagnostic testing and testing-related services—including over-the-counter tests both in-network and out-of-network without cost-sharing or prior authorization—will no longer be required. Moreover, a high-deductible health plan (HDHP) that pays for such testing before meeting the deductible could again jeopardize health savings account (HSA) eligibility if Internal Revenue Service (IRS) guidance evolves to reflect the PHE.

Employers have the following options for coverage of COVID-19 testing:

- Continue COVID-19 coverage at pandemic levels, while monitoring IRS guidance for the end of HSA/HDHP relief;
- Maintain coverage in-network for COVID-19 testing, but discontinue coverage out-of-network;
- Impose cost-sharing and prior authorization requirements, whether in- or out-of-network;
- Discontinue coverage for COVID-19 testing;

- Discontinue coverage for over-the-counter testing; or
- Apply one or multiple approaches with respect to various plan options.

As employers consider their options, they should keep in mind that any reduction in covered services requires 60 days' notice to participants under ERISA. Moreover, if a plan sponsor chose to cover COVID-19 testing under an employee assistance plan (EAP), the end of the PHE and NED is likely to jeopardize the EAP's HIPAA excepted benefit status. Notification to plan participants should be made in advance.

Coverage of COVID-19 Vaccinations Will Still Be Preventive Care. Even with the end of the PHE, COVID-19 vaccinations that receive an "A" or "B" rating from the United States Preventive Services Task Force or the Centers for Disease Control and Prevention will still have to be covered in-network as preventive care. But the end of the PHE means an end to the broader requirement that non-grandfathered plans cover COVID-19 vaccination and related administration in-network and out-of-network with no cost-sharing. Moreover, federal subsidies of vaccines and vaccine administration will also be exhausted, so plan costs per covered vaccine will also increase.

Employers can either:

- Discontinue coverage for out-of-network COVID-19 vaccinations; or
- Impose cost-sharing and prior authorization requirements for out-of-network COVID-19 vaccinations.

Coverage of Telehealth Permitted for HDHPs, but Not Stand-Alone Coverage. Large employers were permitted to extend stand-alone telehealth coverage to employees and dependents not otherwise eligible for an Affordable Care Act-governed group health plan of the employer for the plan years of the PHE. Employers that adopted this arrangement must cease to offer it at the end of the current plan year. However, HDHPs that offered telehealth during the pandemic have a reprieve. An HDHP can continue to cover telehealth without a deductible or deductible below the minimum without affecting HSA eligibility until the end of plan years starting in 2024.

Pre-Deductible Coverage of COVID-19 Treatment May Jeopardize HSA Eligibility. During the PHE, employers were permitted to cover pre-deductible COVID-19 treatment under an HDHP without jeopardizing HSA eligibility. It is unclear whether such relief will remain available beyond the PHE, so employers should either consider discontinuing such HDHP coverage at the end of the PHE or monitor pending guidance for relief.

The End of the NED

With the end of the NED now set for May 11, 2023, certain unknown dates are now known. During the NED, the Departments paused the standard deadlines under ERISA, COBRA, and HIPAA until the earlier of:

- **One year** from the standard deadline when individual action would have been required or permitted; or

- **The end of the Outbreak Period (July 10, 2023)**, 60 days after the announced end of the NED.

For employers, the only unknown is when the **one-year period** ends. Unfortunately, that answer will vary for each individual, whether it's an ERISA claim, a COBRA election or COBRA payment, or a HIPAA Special Enrollment. And as of July 10, 2023, the Departments will offer no further "good faith" fiduciary relief for failure to timely comply with disclosure and other obligations (Summary Plan Descriptions, Summary of Benefits and Coverage (SBCs), and Summary of Material Modifications).

The following examples illustrate how the end of the NED will determine deadlines.

NED Example 1: COBRA Election for Terminated Employee—One-Year Period Determines Deadline

- Date employee received a COBRA notice—May 1, 2022
- Standard deadline to elect COBRA—July 1, 2022
- NED Deadline to elect COBRA—Earlier of July 1, 2023 (one year from standard deadline) or July 10, 2023 (end of the Outbreak Period)
- New Deadline to elect COBRA—July 1, 2023

NED Example 2: COBRA Election for Terminated Employee—End of Outbreak Period Determines Deadline

- Date employee received COBRA notice—February 1, 2023
- Standard deadline to elect COBRA—April 3, 2023
- NED Deadline to elect COBRA—Earlier of April 3, 2024 (one year from the standard deadline) or July 10, 2023 (end of the Outbreak Period)
- New Deadline to elect COBRA—July 10, 2023

NED Example 3: HIPAA Special Enrollment Rights—One-Year Period Determines Deadline

- Date employee's baby was born—February 1, 2022
- Plan's HIPAA Special Enrollment deadline—March 3, 2022
- Standard deadline to add baby—March 3, 2022
- NED Deadline to add baby—earlier of March 3, 2023 (one year from the standard deadline) or July 10, 2023 (end of the Outbreak Period)
- New Deadline to enroll baby—March 3, 2023

NED Example 4: HIPAA Special Enrollment Rights—End of Outbreak Period Determines Deadline

- Date employee's baby was born—October 1, 2022
- Plan's HIPAA Special Enrollment deadline—October 31, 2022
- Standard deadline to add baby—October 31, 2022
- NED Deadline to add baby—earlier of October 31, 2023 (one year from the standard deadline) or July 10, 2023 (end of the Outbreak Period)
- New Deadline to add baby—July 10, 2023

NED Example 5: ERISA Claims Administration—One-Year Period Controls Deadline

- Date claim incurred—January 1, 2021
- Plan deadline to file claim—January 1, 2022
- Standard deadline to file claim—January 1, 2022
- NED Deadline to file claim—earlier of January 1, 2023 (one year from the standard deadline) or July 10, 2023 (the end of the Outbreak Period)
- New Deadline to file claim—January 1, 2023

As noted above, once the NED ends many filing and election deadlines will have expired. Employers will have to determine how to communicate this to employees, including whether or not to adopt a grace period for deadlines that have expired.

State Coverage Requirements

States may impose additional requirements on insurers and insured plans regulated by state law for coverage of diagnosis and treatment of COVID-19, provided such requirements do not contradict federal law. For example, in 2021, California adopted requirements for fully insured and governmental plans subject to California law to provide in-network and out-of-network coverage of COVID-19 testing, vaccination, and therapeutics without cost-sharing during the PHE, then for an additional six months, with such in-network coverages continuing for an unstated duration. California has not clarified these requirements since the announcement of the end of the PHE and NED.

Action Steps for Employers

- Monitor the Departments for guidance clarifying administration of the end of the PHE and NED;
- Review written plan documents and amend if necessary to reflect the end of the PHE and the Outbreak Period (deadline extensions during the Outbreak Period are unlikely to have been addressed in plan documents, so amendments may be unnecessary);

- Confirm vendors and service providers will administer plans in accordance with plan sponsor's intent following the end of the PHE;
- Confirm vendors and service providers will accurately calculate deadlines following the end of the Outbreak Period and will use updated communication materials;
- Review and update employee communication materials. Notification to plan participants is required within 60 days following the adoption of a reduction in coverage. If the change impacts the SBC, notification is required 60 days in advance of the change;
- As noted above, any reduction in benefits triggers the ERISA 60 day notice period; and
- Even if not legally required to provide a new notice, plan sponsors should consider providing new communications that summarize reversion to typical coverage terms, administration, and regular deadlines to prevent participant confusion.



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