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DOL Revises COBRA Regulations

The burden for persons responsible for administering the health care continuation rules of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) just got heavier.

The rules require plan administrators to adopt new model “general” and “election” notices (or conform existing notices to satisfy current requirements), to add “reasonable procedures” to summary plan descriptions (your SPD), and to develop two new notices to inform persons that COBRA is unavailable or has terminated early. All of these rules are very similar to the previously proposed regulations. The new model “general” and “election” notices are available on the DOL website at www.dol.gov/ebsa/modelgeneralnotice.doc and www.dol.gov/ebsa/modelectionnotice.doc.

Effective Date

On May 26, 2004, the Department of Labor (DOL) issued final regulations setting forth requirements for the timing and content of COBRA notices. The deadline for compliance with the final rules is the first day of the first plan year beginning on or after November 26, 2004. This means that group health plans following a calendar year must comply with these final rules beginning January 1, 2005. Earliest application is December 1, 2004.

New COBRA Rules

The rules for the four safe-harbor model notices (general, election, unavailability, and termination) have some common requirements:

Use of the model general notice and election notice is optional. This means you can create your own. However, all notices must be written in a manner to be understood by the average plan participant. The DOL says, “the furnishing of appropriately and accurately completed model notices...will be considered to constitute compliance with the requirements of the applicable notice regulation.”

The use of the model general and election notices requires plan administrators to add relevant information in certain places, select among alternative language and supplement the general notice to reflect plan provisions. For example, the general notice must describe procedures

that qualified beneficiaries (QBs) must follow to provide notice; and in the case of the election notice, a description of available coverage options available under the plan.

A required notice generally should be considered “furnished” by a plan administrator as of the date of the mailing, if mailed first class, certified mail, or express mail; or as of the date of electronic transmission, if transmitted electronically. Hand delivered notices are considered “furnished” when given to qualified QBs in appropriate circumstances (e.g., single participant).

Where a notice is required to be sent to both an employee and a spouse, the plan administrator may satisfy the notice obligation by sending a single notice addressed to both employee and spouse as long as the plan has information indicating that the two reside at the same location. If the plan is required to provide a notice to a dependent child, the plan administrator may satisfy this requirement by delivering a single notice to the employee or spouse as long as the dependent child lives at the same location as the person to whom the notice is provided.

General Notice to Participant(s)(90 days)

Format

The final rules set out the requirements that the general notice must contain. Despite a plea from many that the document be generic in nature, the rule requires that the general notice address the plan’s name, contact for further information, general description of COBRA, QBs responsibility to notify the plan administrator of events and notification procedures, explanation of importance of keeping addresses current, and that the general notice is not complete and additional information is available from the SPD or plan administrator. The form does not have to identify the plan or COBRA administrator by name, include information about second qualifying events, or include COBRA coverage start dates.

The general notice may be a stand-alone document or be incorporated into the SPD.

A general notice is not required if the QB becomes entitled to an election notice before becoming eligible for coverage and thus an general notice. In this case, both notice obligations can be satisfied by providing an election notice.

Timing

A plan administrator has 90 days from the date an employee first becomes covered under the plan to provide the general notice of COBRA rights to the employee and spouse.

Required Recipients

A plan administrator must provide a general notice to both a covered employee and spouse. The plan administrator may satisfy this obligation by sending a single notice addressed to both the employee and the spouse as long as: (1) the plan has information indicating that the employee and spouse live at the same location and (2) the spouse’s coverage does not start on a different date from which the covered employee’s coverage starts (e.g., if the covered employee gets married and enrolls her spouse for coverage after the marriage, a separate

initial notice must be provided to the covered spouse, generally within 90 days after coverage begins). The plan administrator need not deliver a separate general COBRA notice to dependent children living with an employee or spouse.

The initial notice may be delivered in a number of ways, for example via the SPD or electronically on computer. However, a recipient of an electronic notice has to give his or her permission to send it in this manner. If the SPD is the sole means of providing the initial notice, care must be taken to ensure that the SPD is delivered both to the covered employee and covered spouse. From a practical standpoint, sending it via first class mail to the covered employee and spouse may be the best way.

Employer Notice of Qualifying Event to Employee (30 days)

Qualifying Events Requiring Notice From Employer to Plan Administrator

Employers are required to notify the plan administrator generally within 30 days after the qualifying event (QE). QEs include: (1) termination of employment or reduction of hours, (2) employee's death, (3) employee's entitlement to Medicare, and (4) bankruptcy proceedings. The employer and plan administrator may or may not be one and the same. It depends on who has accepted this responsibility. In many cases the employer will be the plan administrator. It is important to clarify that understanding with insurance carriers and/or third party administrators (TPAs).

The notice must provide the plan administrator with sufficient information to determine: (1) identity of plan, (2) covered employee, (3) qualifying event, (4) date of qualifying event.

There are no requirements governing how notice must be provided.

Election Notice (14 – 44 days)

Required information

The final rules provide a model COBRA Continuation Coverage Election Notice to ensure that the election notice to qualified beneficiaries complies with the new regulations.

The rules require that the election notice be in writing and be understood by the average plan participant. The election notice must contain many items noted in the final rules. It does not have to contain information about alternative coverage available to QBs in lieu of COBRA or conversion options available after exhaustion of COBRA coverage. But COBRA still requires that a conversion option otherwise generally available under the plan must be made available within 180 days of the end of the COBRA maximum coverage period to QBs who exhaust their coverage.

The "election notice" must include: (1) plan name, (2) name, address, phone of party administering COBRA coverage, (3) identification of the qualifying event, (4) identification of each QB by name or status, (5) date coverage terminated/terminates, (6) statement that each QB has an independent right to elect, (7) statement that covered employee or spouse QB can elect on behalf of all QBs, (8) parent or guardian can elect on behalf of minor child QB, (9) plan's procedures for electing COBRA, including election period and election deadline,

(10) consequences of not electing, (11) plan's procedures for waiving coverage, (12) description of coverage that will be made available and coverage start date, (13) maximum coverage period and events causing early termination, (14) how to extend coverage period, (15) QB's responsibility to notify of second QE and disability determination or termination and description of notice procedures, (16) amount QB must pay for COBRA, (17) payment due dates, monthly payment basis, address for payments, consequences of late payment or nonpayment, (18) importance of keeping plan administrator informed of QB's current addresses, and (19) statement that notice does not fully describe COBRA and information is available in the SPD or from the plan administrator.

Timing

A plan administrator generally must provide an election notice to each QB who is entitled to elect continuation coverage within 14 days after he or she receives notice of a qualifying event. If the employer is the plan administrator, the employer may have 44 days to provide the election notice (per DOL opinion letter). However, it is suggested that the 14-day window is the more prudent approach.

Required Recipients

Election notices must be furnished to each QB, except that a single notice may be provided (1) to a covered employee and spouse residing at the same address; or (2) to the covered employee or spouse for each dependent child residing at the same address.

Employee or QB Notice of Qualifying Event to Employer (30 - 60 days)

Qualifying Events Requiring Notice From Employee or QB to Plan Administrator

The new rules require that plans establish "reasonable procedures" for QBs to use in notifying the plan administrator.

Notice requirements for Covered Employees & Qualified Beneficiaries

The rules require QBs to notify their plan administrator in the event of: (1) a divorce or legal separation, (2) a dependent child who ceases to satisfy plan eligibility requirements, (3) a determination of disability or change in disability made by the Social Security Administration, entitling QBs to an 11-month extension of the COBRA maximum coverage period to up to 29 months or the end of such an extension; and (4) a second qualifying event, entitling certain QBs to an extension of the COBRA maximum coverage period to up to 36 months.

If a plan administrator has specific procedures for participants to follow, it must be clearly spelled out in written form. Otherwise, failure to establish such procedures increases the chance that any notice provided by a QB will be valid if notice is given to individuals that ordinarily handle benefits matters for the plan. **Notice to any officer of employer is not acceptable under the final rules.** However, notice to any officer of the insurer or third party administrator is sufficient notice. Because oral notice is acceptable and it may be difficult for plan administrators to refute QBs' assertions that they provided proper notice, providing

clear written procedures to participants of their COBRA rights and obligations is important. The bottom-line is that no plan will want to be without “reasonable procedures.”

Required Content and Form

Under the new rules, a procedure is “reasonable” if it satisfies all of the following requirements: (1) it is described in the SPD; (2) it specifies the person or entity who is designated to receive notices; (3) it addresses the manner in which QBs must give notice (e.g., written notice); (4) it specifies the required content of the notice.

Notice is deemed timely if received within 60 days or the later of: (1) the date of the qualifying event, (2) the date that the QB loses coverage under the plan, or **(3) the date that the QB receives notice (via SPD or general COBRA notice) of his obligation to furnish a notice of qualifying event and the procedures for providing that notice.**

Under the final rules, the covered employee, QB, or any representative acting on behalf of the covered employee or QB can give notice to the plan administrator.

QBs may receive an additional 11-month disability extension of an 18-month period of COBRA coverage if he or she is determined to be disabled by the Social Security Administration. QBs may be required to provide such notice within 60 days after the latest of the following: (1) the SSA disability determination date; (2) the qualifying event date; (3) the date on which the QB loses coverage; or (4) the date on which the QB is notified of the obligation to provide the notice through the plans SPD or initial notice. The employee or QB must notify the plan administrator within 30 days of termination of disabled status.

Plans may require covered employees and QBs to use certain forms as part of their “reasonable procedures,” if these forms are easily available and at no cost.

Basic information is: (1) plan name, (2) covered employee and QBs, (3) qualifying event (QE), and (4) date of qualifying event. The plan may require additional information before acting on the notice.

Two New Notice Requirements

The new notices of unavailability and termination of COBRA coverage are required. However, DOL has not provided safe-harbor model notices.

Notice of Unavailability of Continuation Coverage

A plan administrator must provide a notice of Unavailability of Continuation Coverage within 14 days when coverage is denied after receiving a notice from a participant, QB or other individual concerning divorce or legal separation, a dependent child ceasing to be eligible, a second qualifying event, or a request for a disability extension. The notice must be written and understandable by the average plan participant, and explain the reason for the denial and be sent to the individual whose coverage has been denied.

Notice of Termination of Continuation Coverage

A plan administrator has a general fiduciary duty to notify QBs of early termination of COBRA or before the end of the maximum coverage period. A notice of early termination must be made “as soon as reasonably practical.” The notice must explain the reason coverage has terminated, provide the date of termination and describe any rights the QB may have to elect alternative group or individual coverage, such as a conversion option.

This notice may be provided with the Certificate of Creditable Coverage required at the termination of group health plan coverage.

Failure to Comply

Failure to comply with the new COBRA regulations can lead to: (1) an excise tax of \$100 per day per QB, not more than \$200 a day per family, subject to maximum and minimum limitations; (2) ERISA penalties of \$110 per day; and (3) lawsuits filed to mandate coverage.

The potential for penalties should be taken seriously as COBRA lawsuits are common and awards can be significant. The prudent administrator will exercise care in timely providing well put together notices to the right individuals.

This article is intended as general information and is not a substitute for legal or other professional advice.

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