

Client
Advisory

**Final Department of Labor Regulations
On COBRA Requirements**

June 14, 2004

The Department of Labor (the “DOL”) recently issued final regulations (the “Regulations”) setting forth new notice requirements for the health care continuation coverage (“COBRA”) provisions of ERISA. Because the proposed regulations released on May 28, 2003 made extensive changes to the COBRA notice and disclosure requirements originally issued in 1986, the DOL had delayed the effective date of the proposed Regulations, originally scheduled to be effective as of January 1, 2004, in order to adequately address the many concerns raised during the public comment period. As a result, the final Regulations provide revised model general and election notices intended to be more clear and concise than the model notices provided with the 2003 proposed regulations.

The Regulations are effective for COBRA notices required to be given on or after the first day of the first plan year beginning on or after November 26, 2004. The Regulations set minimum standards for the timing and content of the notices required under COBRA and establish standards for administering the four general types of COBRA notice obligations:

- **General Notice** – Plan administrators must provide a general notice of COBRA rights to employees and spouses when health coverage begins;
- **Employer-Provided Notice of Qualifying Event** – Employers must notify plan administrators of the occurrence of qualifying events;
- **Notice Requirements of Qualified Beneficiaries** - Qualified beneficiaries must provide the plan with notice of a divorce, legal separation, child losing dependent status, second qualifying event, or Social Security disability determination; and
- **Election Notices and Other Notices Plan Administrators Must Provide** - Plan administrators must notify qualified beneficiaries of COBRA rights when a qualifying event has occurred.

Plan sponsors and administrators should consider these new Regulations as soon as possible to ensure that all required procedures and changes in COBRA notices and administration are in place before the Regulations’ effective date, which, for calendar year plans, will be January 1, 2005.

General Notice Requirements

- **Timing.** A plan administrator has an obligation to provide a general notice of COBRA rights to each covered employee and spouse “at the time of commencement of coverage” under the plan. The new Regulations clarify that a notice furnished within 90 days from the date health coverage begins is deemed to be provided “at the time of commencement of coverage” under the plan. However, if an employee elects single coverage and subsequently adds a spouse to the coverage, the plan must provide the spouse with a new initial COBRA notice within 90 days after the spouse becomes covered by the plan. If the employee, spouse or any dependent child has a COBRA qualifying event and must be furnished with a COBRA notice within the 90-day period for furnishing general notices, the plan administrator may satisfy its general notice obligation by furnishing an election notice.
- **Distribution.** Under the Regulations, employers may elect not to provide a separate general notice of the COBRA provisions, but to instead incorporate the provisions of the notice into the summary plan description (“SPD”) for the plan. In such event, the SPD must be delivered within the 90-day period referred to in a. above.

With respect to the requirement to provide spouses with a general notice, COBRA permits delivery of a single notice (or copy of the SPD) to a covered employee and spouse at their joint residence, but in-hand delivery at the workplace to a covered employee would not constitute delivery to the spouse. However, a separate general notice (or copy of the SPD) does not have to be furnished to dependent children who live with the covered employee or spouse.

While incorporating the general notice information into the SPD may appear to be administratively simpler, employers should note that this approach will require that a copy of the SPD be mailed to the home of the covered employee and spouse.

- **Model General Notice.** The Regulations include a model general notice which is not required to be used, but will, with appropriate modifications to add plan-specific information, be deemed to satisfy the Regulations’ requirements for form and content of such notice. Plan-specific information may be placed at the end of the notice to minimize the difficulty of customizing the model general notice. The general notice must contain the name, address and telephone number of a party or parties who will provide information about the plan and COBRA upon request, and a statement that more complete information about continuation coverage and other rights under the plan is available from the plan administrator and (where the notice is not part of the plan’s SPD) the plan’s SPD. *Plan administrators should note that they can no longer rely on the model general notice issued in 1986 as a good faith interpretation of COBRA’s general notice requirements.*

Employer's Notice of Qualifying Event

- **Timing.** An employer must notify the plan administrator of a qualifying event within 30 days after it occurs, or after the plan participant notifies the employer that a qualifying event occurred. However, for a plan under which COBRA is measured from a later date of loss of coverage, the 30-day period for providing the notice of qualifying event must also begin with the date of loss of coverage, rather than the date of the earlier qualifying event.
- **Content.** The new Regulations do not make any notable changes in the current requirements regarding what information must be included in the COBRA qualifying event notice.

Qualified Beneficiaries' Notices

- **Timing.** COBRA requires qualified beneficiaries to provide notice to the plan administrator of a divorce, legal separation, child losing dependent status, second qualifying event, or Social Security disability determination. A plan must allow an employee or qualified beneficiary at least 60 days to provide notice of one of these qualifying events. The 60-day period begins to run from the latest of: (1) the date of the qualifying event, (2) the date on which there is a loss of coverage, (3) the date on which the qualified beneficiary is informed, through the plan's SPD or the general COBRA notice, of his or her obligation to provide notice and the procedures for providing such notice, or (4) if the required notice is a disability notice, the date of the Social Security disability determination. Note that these 60-day periods are only minimum requirements; plans may opt to provide participants with longer notice periods instead.
- **Procedures.** The new Regulations require all plans to "establish reasonable procedures for the furnishing of notices." Procedures will be deemed reasonable if they (1) are described in the plan's SPD, (2) specify the means by which qualified beneficiaries must give these notices, and may require the use of specific forms if they are easily available without cost, and (3) specify the required content of the notices. If no procedures are provided, a written or oral communication from the qualified beneficiary will be deemed to provide the required notice if it identifies the specific qualifying event and is made in a manner reasonably calculated to bring the information to the attention of the employer's unit that customarily handles employee benefits matters. The Regulations are intended to ensure that qualified beneficiaries will not be adversely affected in efforts to exercise their COBRA rights by a plan's failure to provide adequate disclosure or information.
- **Rejection of Notice.** A plan may not reject an incomplete notice if the notice is provided within the plan's time limits and contains enough information to enable the plan administrator to identify the plan, the covered employee and qualified beneficiaries, the qualifying event or disability determination, and the date on which such event of determination occurred. However, the plan administrator can require qualified beneficiaries to supply any missing information that is required under the plan's procedures, and if the

qualified beneficiary fails to provide the requested information within a reasonable period of time, the Regulations do not preclude the plan administrator from then rejecting the notice.

Plan Administrator's Election Notice and Other Notice Obligations

- **Timing of Election Notice.** COBRA requires plan administrators to notify qualified beneficiaries of their COBRA election rights within 14 days of receiving notice of a qualifying event. Prior rules were not clear on how to apply the employer 30-day notice period described in 2.a. above where the employer is also the plan administrator; the new Regulations clarify that where the employer is also the administrator of the plan, an election notice must be furnished not later than 44 days after the date of the qualifying event, or, if the plan provides that COBRA coverage starts on the later date of loss of coverage, the date the qualified beneficiary loses coverage under the plan.
- **Model Election Notice.** The Regulations include a model election notice satisfying the Regulations' requirements for form and content of the notice. Plan administrators are not required to use the model; if the model election notice is not used, the election notice must contain, among other information:
 - Plan contact information;
 - Identification of qualified beneficiaries, either by reference to their status (e.g., employee, spouse, dependent child) or by name. The identification by status must be sufficiently detailed to permit the affected individuals to determine whether they are qualified beneficiaries;
 - The election procedures and election period;
 - A description of the consequences of failing to elect or waive COBRA, including effects on HIPAA portability or special enrollment rights;
 - A description of the qualified beneficiary's duty to provide notice of a second qualifying event;
 - The cost of COBRA coverage and the procedures for paying premiums;
 - A statement that a full description of COBRA and more information is available in the SPD or from the plan administrator; and
 - An optional paragraph has also been added to the model election notice regarding certain tax credits and rights that may be available under the Trade Act of 2002 in limited circumstances.

In addition to clarifying aspects of the election notice requirement, the new Regulations impose two new notice obligations on plan administrators:

- **Notice of Unavailability of COBRA Coverage.** If a plan administrator receives notice of a qualifying event, and the affected individual is not entitled to elect COBRA coverage, the plan administrator must give the individual a notice explaining why he or she is not entitled to elect COBRA coverage. The unavailability notice must be furnished when the plan administrator denies COBRA coverage, regardless of the basis of the denial and regardless of whether the notice involves a first qualifying event, a second qualifying event, or a request for a disability extension. For example, the unavailability notice would be provided when a plan administrator denies continuation coverage because it has been determined that no qualifying event had occurred or because the qualified beneficiary did not furnish the notice of qualifying event notice in a timely manner or did not provide complete information.
- **Notice of Early Termination of COBRA Coverage.** If a qualified beneficiary's COBRA coverage terminates before the end of the applicable maximum coverage period (for example, for failure to pay for the coverage), the plan administrator must provide a termination notice that, among other things, explains why coverage is terminating. The notice must be given as soon as practicable after the plan administrator determines that coverage will terminate, but no specific time frame is set forth in the Regulations. The Regulations also do not prevent a plan administrator from combining the furnishing of an early termination notice with the furnishing of the certificate of creditable coverage required by HIPAA.

Standards for Giving Notices

General notices, election notices, unavailability notices, and early termination notices are “furnished” by a plan administrator as of the date of mailing, if mailed by first class mail, certified mail, or Express Mail, or as of the date of electronic transmission, if transmitted electronically. Hand delivery of a required notice would not be considered furnished until actually received by the individual to whom the notice is directed. In the absence of written plan procedures to the contrary that are communicated to participants and beneficiaries, the same standards would apply to a notice of qualifying event furnished by an employer to the plan administrator and to COBRA notices provided by covered employees, qualified beneficiaries, and other person acting on their behalf to plan administrators. However, the 14-day time limit applicable to plan administrators for furnishing an election notice will not begin to run until a plan administrator actually receives a notice furnished in accordance with COBRA requirements.

If you have any questions about how the new Regulations affect your group health plan, need assistance in putting together COBRA procedures or notices or revising your plan SPD, or wish to discuss any aspects of the new Regulations, please contact:

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