

Employee Benefits Briefing

A bulletin designed to keep clients and other friends informed on employee benefits law matters

December 2003

COBRA NOTICE REQUIREMENT CHANGES NECESSITATE ACTION

Earlier this year, the Department of Labor (“DOL”) issued proposed regulations relating to the timing and notice requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”). This guidance is the first issued by DOL on this topic since 1986. This Bulletin reviews the highlights of the proposed regulations and recommends actions that plan administrators should take in light of this new guidance.

- **Effective Date.** The proposed regulations are likely to be finalized in early 2004. Once DOL releases the final regulations, plan administrators will have six months to comply.
- **1986 Model Notice.** The DOL no longer considers the 1986 model notice to be in good faith compliance. Accordingly, plan administrators still using the 1986 DOL model notice should stop doing so and instead use notices that have been modified to reflect current law. Due to the numerous changes in COBRA since 1986, it is not likely that many plan administrators are still using the original notice.
- **Timing Requirements for the General Notice.** The proposed regulations require that plan administrators provide an initial notice (referred to as the “General Notice” in the regulations and as the “in-the-door notice” by some administrators) to a covered employee, his/her spouse and dependents within 90 days after the individual becomes covered under the health plan. This General Notice may be given through a summary plan description (“SPD”). However, because the covered employee’s spouse and dependents must receive the General Notice, it may still be necessary to send such notice separate from the SPD to the employee’s home.
- **Timing Requirements for the Election Notice.** COBRA requires an employer to notify the plan administrator within 30 days of certain qualifying events such as termination of employment or reduction in hours. A plan administrator must then provide an “Election Notice” (referred to as the “out-the-door notice” by some administrators) to the covered employee and any qualified beneficiaries with 14 days after receiving notice of the qualifying event from the employer. Under the proposed regulations, if the employer is also the plan administrator, the Election Notice must be furnished to all appropriate parties within 44 days after the qualifying event or the date coverage is lost. In any event, the time period for electing COBRA does not begin to run until the Election Notice is received by the employee or beneficiary.
- **Model Notices.** The proposed regulations provide model General and Election Notices. The DOL has stated that plan administrators who choose to use the model notices prior to the effective date of the final regulations will satisfy their COBRA notice obligations. The model notices, however, will need to be revised for use by multi-employer plans.
- **Procedures for Notices from Covered Employees and Qualified Beneficiaries.** Covered employees and qualified beneficiaries have an obligation to inform the plan administrator within 60 days of certain qualified events such as a divorce or a dependent losing dependent status. The proposed regulations require health plans to have reasonable procedures in their SPDs that inform covered employees and qualified beneficiaries how to notify the plan administrator of such qualifying events. The procedures should specify (i) who should receive the notice; (ii) how notice may be given (i.e., in writing); and (iii) the information concerning the qualifying event that should be provided. If reasonable procedures do not appear in the SPD, any

communication from a participant to an employee considered in charge of the plan will trigger COBRA obligations.

- **SPD Revisions.** The proposed regulations will require a number of revisions to health plan SPDs. SPDs should include: (i) COBRA notice procedures; (ii) a summary of the right to continuation coverage; (iii) a summary of the second 60-day COBRA election period that must be provided for certain trade adjustment assistance eligible individuals under the Trade Act of 2002; and (iv) procedures by which participants and qualified beneficiaries can give notice to the plan administrator of certain qualifying events. A revised SPD or a Summary of Material Modification should be prepared once the regulations are finalized.

NEW TYPES OF NOTICES REQUIRED

- **Notice of Unavailability of Continuation Coverage.** The proposed regulations require a plan administrator who receives notice of a qualifying event from a covered employee or qualified beneficiary and determines the individual is not entitled to COBRA continuation coverage must provide the individual

with notice stating the reason continuation coverage is not available. Such notice must be provided within 14 days (or 44 days if the employer is also the plan administrator) of receiving notice of the qualifying event from a covered employee or qualified beneficiary. This is an entirely new requirement.

- **Notice of Termination of COBRA Continuation Coverage.** If COBRA coverage will cease anytime before the maximum period of coverage (generally 18 months), the proposed regulations require the plan administrator to notify the qualified beneficiary of such termination. This notice should be given as soon as administratively practicable after the plan administrator determines that coverage will terminate. This also is a new requirement.

In light of this new guidance, plan administrators should review their COBRA practices and forms and notices to determine what changes will be required to comply with the new regulations. This process will include developing notices and procedures to address the regulation's two new types of notices. Plan administrators also should update their health plan SPDs.

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