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New DOL COBRA Regulations Require Employers to Revise COBRA Procedures, Notices, and Forms

After many years of providing only minimal guidance, the Department of Labor (the "DOL") released on May 26, 2004, new regulations that set forth the minimum standards for compliance with the notice requirements imposed under the health care continuation coverage provisions of ERISA (commonly referred to as "COBRA"). The new regulations, which address the timing, content and administration of COBRA's notice obligations, are substantially similar to proposed regulations made available for public comment by the DOL a year ago, although a number of important clarifications and modifications were added to the final regulations, including significant revisions to model notices and election forms issued by the DOL.

The new regulations are effective for plan years beginning on or after November 26, 2004, meaning that for calendar year plans, employers will need to start complying with the new regulations at least as of January 1, 2005.

Because of the comprehensive scope of the new regulations, all employers subject to COBRA will need to review and revise their COBRA procedures, notices and forms. An overview of the changes required by the new regulations is provided below.

General Notice

COBRA requires a plan administrator of a group health plan to provide a plan participant with an initial explanation of his or her COBRA rights at the time the participant becomes covered by the plan. The new DOL regulations provide specific and detailed requirements for the timing and content of this notice, which is referred to in the regulations as the "general" notice.

Timing. For the first time, a specific time period is imposed for the delivery of the general notice. Under the new regulations, the general notice must be provided to a covered employee within 90 days of the date the covered employee first becomes covered under the group health plan. The general notice must also be provided to the spouse of a covered employee within 90 days of the date the spouse becomes covered under the plan.

If the covered employee and his or her spouse become covered under the plan at the same time, a single notice addressed to both the covered employee and the spouse will be sufficient as long as, based on the most recent information available to the plan, the covered employee and the spouse reside at the same location. If the covered employee's spouse becomes covered under the plan subsequent to the time the covered employee becomes covered by the plan, a separate general notice must be provided to the spouse. The new

regulations make clear that a separate notice need not be provided for dependent children who are covered under the plan.

The new regulations clarify that a summary plan description (“SPD”) may be used to satisfy the general notice requirement as long as the SPD is provided within the requisite 90-day period for delivery and includes all the information required to be included in the general notice.

Content. Under the new regulations, the general notice must provide the following information:

- Identification of the plan and plan administrator;
- General description of continuation coverage under the plan, including a description of qualified beneficiaries, qualifying events, notice obligations, maximum coverage, extensions of maximum coverage, and requirements for premium payments;
- Plan's requirements for qualified beneficiary to provide notice of certain qualifying events such as divorce, separation, or a dependent no longer being eligible for coverage;
- Plan's requirements for qualified beneficiaries to provide notice of a disability determination;
- Explanation of the importance of keeping plan administrator informed of current addresses; and
- Statement that the notice does not fully describe continuation coverage and that more information is available from the plan administrator and in the SPD.

Model General Notice. The new regulations provide a model general notice that employers may rely on to establish compliance with the content requirements of the new regulations.

Election Notice

COBRA requires a plan administrator of a group health plan to provide each qualified beneficiary notice of his or her rights to elect coverage under COBRA after a qualifying event occurs. As with the general notice, the new DOL regulations provide specific and detailed requirements for the timing and content of the election notice.

Timing. The plan administrator must provide a qualified beneficiary an election notice describing the qualified beneficiary's rights to elect COBRA within 14 days of the date the plan administrator is notified of the qualifying event by the employer or the qualified beneficiary, as the case may be.

The new regulations clarify that if the employer is also the plan administrator (this is often the case), the election notice need not be provided by the employer to the qualified beneficiary until 44 days after the date of the qualifying event in the case of a qualifying event other than divorce, legal separation or a dependent child losing eligibility status under the plan. Requirements for the content and delivery of the election notice are discussed below.

The election notice must be provided to each qualified beneficiary. Under the new regulations it is clear that a single notice addressed to both the covered employee and the spouse will be sufficient so long as, based on the most recent information available to the plan, the covered employee and the spouse reside at the same location. Also, notice may be provided to a dependent child by a single notice to the covered employee or the covered employee's spouse, so long as, based on the most recent information available to the plan, the dependent child resides at the same location as the individual to whom such notice is sent.

Content. The new regulations include a laundry list of items that must be included in the election notice. Among other things, the following information must be included in the election notice:

- Identification of the qualifying event, each qualified beneficiary, and the date on which plan coverage will or has terminated;
- Statement that each qualified beneficiary has an independent right to elect continuation coverage and that a parent or legal guardian may elect continuation coverage on behalf of minor children;
- Explanation of the time and manner in which an election must be made, including the date by which such election must be made, the consequences of failing to elect continuation coverage, including the impact on rights provided under HIPAA, and procedures for revoking a waiver of COBRA coverage before the election period expires;
- Description of the coverage that will be provided if COBRA is elected (or a cross-reference to the SPD) and the date coverage will start;
- Explanation of the maximum period for which continuation coverage is available, and an explanation of any events that would cause the maximum period to end early;
- Description of the events that could cause the maximum period to be extended, such as a second qualifying event or disability, and the length of any such extension;
- Description of the plan's requirements regarding the responsibility of qualified beneficiaries to provide notice of a second qualifying event or Social Security disability, including procedures and time limits for providing such notice;
- Amount of the premium payment for continuation coverage, the due dates for premiums, any grace periods, the address to which payment is to be sent and the consequences of late payment;
- Explanation of the importance of keeping the administrator informed of the current addresses of the participant and beneficiaries under the plan; and
- Statement that the notice does not fully describe continuation coverage and that more information is available from the plan administrator and the SPD.

Model Election Notice and Election Form. The new regulations provide a model election notice and a model election form that employers may rely on to establish compliance with the content requirements of the new regulations.

Two New Notice Requirements

The new DOL regulations create two new notice requirements that are not found in the COBRA statute: a notice of unavailability of COBRA coverage and a notice of early termination of COBRA coverage.

Notice of Unavailability of COBRA Coverage. Under the new regulations, a plan administrator is required to notify a plan participant or beneficiary that COBRA continuation coverage is not available if the plan administrator receives a notice from the participant or beneficiary that a qualifying event has occurred and the plan administrator determines that the participant or beneficiary is mistaken about his or her right to COBRA. This notice must be provided within 14 days of the plan administrator's receipt of notice from the participant or beneficiary.

Notice of Early Termination of COBRA Coverage. Also, under the new regulations, the plan administrator is required to notify a qualified beneficiary, as soon as administratively practicable, if the plan administrator determines that the qualified beneficiary's COBRA coverage will be terminated earlier than the maximum period, for example, for failure to pay premiums timely.

New "Reasonable Procedure" Requirement for Notice by Qualified Beneficiaries

Under COBRA, a qualified beneficiary has the responsibility of notifying the plan administrator of a qualifying event in the case of divorce, legal separation or a dependent child losing eligibility status under the plan. Additionally, qualified beneficiaries must provide notice of disability or a second qualifying event. Notice must generally be provided within 60 days of the qualifying event, determination of disability or loss of coverage. The new regulations require a plan to establish "reasonable procedures" for a qualified beneficiary to follow in making this notification.

A plan's procedures will be deemed reasonable if they are described in the SPD and specify who shall receive the notice, the means for giving notice, and the required content of the notice. A plan may require qualified beneficiaries to provide notice on a specific form if the form is easily available to qualified beneficiaries without cost.

If a plan does not provide reasonable procedures, then under the new regulations any written or oral communication reasonably calculated to bring information to the attention of the person or organizational unit that handles employee benefits may be deemed sufficient notice.

Under the new regulations the 60-day notice period does not begin until the qualified beneficiary has been informed of the plan's notice procedures. Accordingly, employers should be aware that if they do not establish reasonable notice procedures as required under the new regulations and advise qualified beneficiaries of those procedures, effectively no time limits may apply to a qualified beneficiary's right to elect or extend COBRA coverage.

Clarification of Right to Extend COBRA Coverage for Disability

The new regulations clarify the DOL's position regarding when a qualified beneficiary must provide a notice of Social Security disability to extend COBRA coverage. A qualified beneficiary must provide disability notice within 60 days after the latest of: (1) the date of the Social Security Administration disability determination; (2) the date on which the qualifying event occurs; (3) the date on which the qualified beneficiary loses coverage; or (4) the date on which the qualified beneficiary is informed of the obligation to provide disability notice.

Thus, the new regulations clarify that, at least according to the DOL, when an employee is determined to be **disabled prior to a qualifying event**, the qualified beneficiary may receive an 11-month COBRA extension, even if the Social Security Administration determination of disability occurred more than 60 days prior to the qualifying event. This result is not clear from the language of the COBRA statute and arguably, the DOL regulation goes beyond the intent of the law.

The full text of the final COBRA regulations is available on the DOL website at: <http://www.dol.gov/ebsa/regs/fedreg>.

Saul Ewing's Labor, Employment and Employee Benefits attorneys are available to assist you in navigating through the new COBRA regulations and addressing all of your labor, employment, and employment benefit needs. If you have speak with one of our attorneys, please feel free to contact any of the attorneys listed below:

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