

COBRA Proposed Regulations Contain Helpful Guidance in the Form of Model Notices But Impose New Notice Requirements

Six years after soliciting comments from the public concerning the need to clarify the disclosure requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), as amended, the Department of Labor, through the Employee Benefits Security Administration (EBSA), has issued proposed regulations that clarify existing notice requirements, but also would impose new requirements. 68 Fed. Reg. 31832 (May 28, 2003). The proposed regulations contain two proposed model notices- (1) a general notice that may be used by plan administrators to inform participants and beneficiaries upon enrollment in a group health plan about their rights to COBRA benefits, and (2) an election notice that a participant or beneficiary may use to exercise his right to elect to receive COBRA benefits.¹

In addition, the proposed regulations impose the following new requirements upon group health plans (discussed in more detail below):

- Plans must provide notice to an individual who is not eligible for COBRA, if the individual notifies the plan of the occurrence of certain events such as divorce, legal separation, and dependents ceasing to satisfy eligibility requirements. The notice must explain why the individual is not eligible, and must be furnished within the time frame that would apply if the individual was entitled to elect continuation coverage;
- Plans must provide notice of termination of COBRA coverage to any qualified beneficiary whose COBRA coverage terminates before the maximum COBRA period. The notice must explain the reason the coverage has terminated, the date of termination, and any rights the qualified beneficiary may have under the plan to elect alternative group or individual coverage, such as a conversion right.
- Plans must establish reasonable notification procedures for covered employees and qualified beneficiaries to follow in circumstances such as divorce, or a

¹ The election notice contains language that a plan can use to inform participants about their COBRA rights upon becoming eligible for trade adjustment assistance under the Trade Act of 2002, Public Law 107-210 (August 6, 2002), which generally applies to individuals who lose their jobs due to international trade. The Trade Act of 2002 includes a new entitlement to a second COBRA election period for TAA-eligible individuals and a new tax credit of 65% of the premiums paid for COBRA continuation coverage or other qualified health coverage.

dependent ceasing to satisfy eligibility requirements. In the absence of such procedures, any written or oral notice provided by covered employees and qualified beneficiaries may be deemed to satisfy the notice requirement, triggering the plan's notice requirements.

- Plans must provide the initial COBRA notice that generally explains a participant's COBRA rights to plan participants within 90 days of the participant becoming covered by the plan.

Discussion of New Requirements

Although the Internal Revenue Service (IRS) issued COBRA regulations that cover substantive COBRA rights (Treas. Reg. § 54.4980B), the Department of Labor (DOL) has interpretive authority over the notice and disclosure provisions of COBRA. No guidance has been issued since DOL published Technical Release 86-2 in 1986, which provided guidance on the general notice as well as a model general notice, but has since become outdated because of amendments to COBRA.² In the absence of formal guidance on COBRA notice procedures, Plan sponsors have largely been left to develop notices and administrative processes on their own. Many plan sponsors likely already provide the type of new communications that that the proposed regulations would require. However, in making these requirements mandatory, as explained below, DOL will increase the potential that a group health plan will be subject to excise tax and statutory penalties, and enhance a Participant's ability to prevail in a claim for coverage.³ Because these notices are not specifically required by the COBRA statute, DOL would arguably exceed its authority by imposing such requirements.

1. Qualified Beneficiary's Notices

COBRA requires qualified beneficiaries to provide notice to the plan within 60 days of a qualifying event if there is (i) a divorce or legal separation, (ii) if dependents

² The proposed regulations state that, effective immediately, DOL will no longer consider use of the model general notice in Technical Release 86-2 to be good faith compliance with the COBRA statute.

³ Specifically, failure to satisfy requirements under COBRA can lead to the following adverse consequences: (i) IRS excise tax (the basic tax is \$100 per day per qualified individual, not more than \$200 per family, subject to maximum and minimum limitations) (I.R.C. § 4980B(b)(2)); (ii) ERISA \$110 per day statutory penalties for failure to provide required notices (ERISA § 502(a)(1)(A); (c)(1)(A)); and (iii) Lawsuits to compel coverage (which can create liability for attorneys fees as well) (ERISA § 502(a)(1)(B)).

cease to satisfy the eligibility requirements under the plan, or (iii) within 60 days of when a determination of disability has been made by the Social Security Administration. ERISA § 606(a)(3). The proposed regulations (29 C.F.R. § 2590.606-3) require that if a plan administrator receives this notice from a participant or beneficiary who is not eligible to receive COBRA, the administrator must provide a notice to the individual explaining why he or she is not entitled to such coverage. (29 C.F.R. § 2590.606-4(c)). This notice is subject to the same timing requirements as those applicable to election notices.⁴ Thus, if the plan fails to provide such notice, or does not provide such notice timely, a participant who was not entitled to COBRA would presumably have a claim, either for statutory penalties or to recover the cost of claims incurred during the period at issue. If the plan is insured and the insurer refuses to pay these claims, the employer may be required to do so.

2. Notice of Termination of Continuation Coverage

Currently, if COBRA coverage terminates before the end of its maximum duration, a plan administrator is not required to notify the participant that coverage has terminated. Of course, to eliminate confusion on the part of participants, many plan administrators do provide such a notice. However, under the proposed regulations, a plan would have an obligation to notify the participants (29 C.F.R. § 2590.606-4(d)). The notice must explain the reason that COBRA coverage has terminated earlier than the end of the maximum period of coverage, the date of termination of coverage, and any rights the qualified beneficiary may have under the plan or under applicable law to elect an alternative group or individual coverage such as a conversion right. The time for providing this notice is "as soon as practicable" following the administrator's determination that continuation coverage shall terminate. In making this requirement mandatory, and in specifying the contents of the notice of termination, DOL proposes to increase the exposure for statutory penalties, excise taxes, and claims by participants. An inadvertent error on the part of the plan, such as failure to provide such notice, or providing a notice that does not contain the required information, could result in such adverse consequences.

3. Reasonable Procedures

⁴ For plan administrators, this period is 14 days after receipt of a notice of qualifying event from the employer. For employers who also act as plan administrators, this period is 44 days from the date of the date of loss of coverage, or from the date of the qualifying event.

With respect to Qualified Beneficiary's notices (described in 1 above), the proposed regulations require a plan to establish reasonable procedures that participants can follow in providing this notice. (29 C.F.R. § 2590.606-3(b)). A procedure is deemed "reasonable" if it satisfies four requirements: (i) is described in the summary plan description, (ii) specifies who is designated to receive notices, (iii) specifies how the qualified beneficiaries must give notice, and (iv) specifies the required content of the notice. However, under the proposed regulations, the participant need not follow all of these procedures in order to preserve his right to coverage. Rather, as long as a qualified beneficiary provides a notice within the plan's time limits that 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 it occurs, the plan may not reject the notice as untimely. (29 C.F.R. § 2590.606-3(d)). A plan may, however require that the additional information be provided before the qualified beneficiary's notice requirement is deemed satisfied.

If a plan fails to adopt reasonable procedures, the proposed regulations provide that a qualified beneficiary's notice will be deemed to have been provided when any written or oral communication identifying a specific qualifying event is made in a manner reasonably calculated to bring the information to the attention of the appropriate individuals, as defined in the regulation (e.g., for a single employer plan, either the organizational unit that has customarily handled employee benefits matters of the employer, or any officer of the employer).

The standard for what constitutes a valid qualified beneficiary notice, even if a plan has adopted reasonable procedures, weighs heavily in a participant's favor. If there are reasonable procedures, the participant is not required to follow those procedures precisely (at least with respect to content of the notice), and if there are not reasonable procedures, almost any communication on the part of the participant would appear to satisfy the rule. If a plan fails to process a communication by a qualified beneficiary, the COBRA election period will remain open, increasing the potential for adverse selection.

4. 90-Day Notice Period

The proposed regulations give plan administrators a 90-day period from the date the covered employee or spouse first becomes covered under the plan to provide the general COBRA notice, required under ERISA § 606(a)(1), which contains information about COBRA rights. (29 C.F.R. § 2590.606-1(b)(1)). This time period is reduced if a plan provides an election notice within that time. In that case, the general notice and the election notice are provided together. (29 C.F.R. § 2590.606-1(b)(2)). The 90-day period clarifies the statute, which merely provides that the plan shall provide written notice of COBRA rights "at the commencement of coverage." ERISA § 606(a)(1).

The 90-day period corresponds with the statutory period that an administrator is given to furnish each participant with a copy of the summary plan description (ERISA § 104(b)(1)(A)). The proposed regulations provide that a plan may satisfy the general COBRA notice requirement by including required COBRA information in the summary plan description. However, since the general COBRA notice must be provided to both a covered employee and that employee's spouse, the plan administrator who combines the general COBRA notice and the summary plan description would have to distribute the summary plan description to both the employee and his or her spouse. The proposed regulations note that in-hand furnishing of the general notice at the workplace to a covered employee is deemed to be adequate delivery to the employee, but would not constitute adequate delivery to the spouse.

Effective Date & Request for Comments

The proposed regulations state that DOL proposes to make these regulations, in their final form, effective and applicable as of the first day of the first plan year that occurs on or after January 1, 2004. However, it is not clear when final regulations will be published. Accordingly, employers may have only a short time to come into compliance with the new requirements. In the absence of final regulations, employers are required to operate in good faith compliance with a reasonable interpretation of the substantive continuation coverage provisions and the notice provisions of the COBRA statute. Comments on the proposed regulations are specifically requested on changes that should be made to the model notices to adequately reflect current practice and meet the needs of plan administrators, participants, and beneficiaries. All comments are due by July 28, 2003.

Conclusion

The proposed regulations contain helpful clarifications with respect to many of the notice and disclosure requirements under COBRA. In particular, the model notices will provide certainty in an area that has been unclear for a number of years.

However, the proposed regulations also add requirements that are not mandated by the COBRA statute. These new requirements will increase a plan's potential liability for excise taxes, statutory penalties or claims involving COBRA. In addition, it would appear that the costs associated with implementing the new requirements (e.g., drafting new notices, modifying administrative procedures and systems, and educating staff) could be significant. Finally, it appears that calendar year plans will have only a short time (i.e., the first day of the first plan year that occurs on or after January 1, 2004) to become familiar with and implement these changes.