



Cobra Bites Again — The New Cobra Notice Regulations

By **Kenneth B. Tillou**

The Consolidated Omnibus Budget Reconciliation Act of 1985 and later congressional edicts, collectively known as “COBRA,” impose on most group health plans and their sponsoring employers the burden of offering health plan continuation coverage to plan participants and beneficiaries. (The COBRA requirements for private-sector group health plans are codified in Sections 601 through 608 of Title I of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) and in Section 4980B of the Internal Revenue Code of 1986 (the Code). Generally, the COBRA rules apply to any employer sponsoring a group health plan (eg, medical or dental insurance, medical expense reimbursement, self-insured medical, etc.) if that employer and all other employers within the same commonly controlled group employed 20 or more employees on a typical day in the prior year.) Specifically, COBRA permits group health plan participants and their covered beneficiaries (collectively, “qualified beneficiaries”) who would otherwise lose group health plan coverage as a result of termination of employment or other enumerated events (“qualifying events”) to temporarily extend such coverage.

On May 28, 2003, the United States Department of Labor (DOL) issued proposed regulations with respect to the timing, content and handling of various COBRA notices. *See* 68 Fed.Reg. 31832-58 (May 28, 2003) (Proposing 29 CFR §2590.606-1 to 2590.606-4). The proposed regulations also include “safe harbor” model COBRA notices. As proposed, the regulations would not become final until plan years beginning in 2004. Nevertheless, group health plans must make a “good faith” effort to comply with COBRA in the interim and the proposed regulations represent the latest official interpretation of various COBRA notice requirements. Therefore, prudent plan sponsors will want to compare the proposed regulations to their current COBRA procedures and notices and, if significant differences exist, conform their procedures and notices to the new guidance now, even though further modifications may be required when the regulations become final.

Highlights of the proposed regulations are as follows:

1. Initial COBRA Notice. Section 606(a)(1) of ERISA requires the administrator of a group health plan to provide an initial (“general”) notice of COBRA rights to each covered employee and spouse at the time they commence coverage. Normally, the sponsoring employer is the administrator responsible for this notice. With respect to the initial COBRA notice, Proposed Regulation Section 2590.606-1:

a. Confirms that an administrator and plan are not acting in “good faith” as required by COBRA if they are still using the model COBRA general notice issued in ERISA Technical Release 86-2. Employers still using the 1986 model COBRA notice must update their COBRA general notice immediately.

b. Confirms that a single general notice can be provided jointly to the employee and spouse if they commence plan coverage simultaneously. Hand delivery of the initial COBRA notice to an employee at work does not constitute notice to the spouse. It is safer to mail a jointly addressed notice to the employee’s and spouse’s residence.

c. Specifies a deadline by which the general notice is due - generally 90 days after the employee becomes covered (and if the spouse becomes eligible at a later date, again within 90 days after the spouse becomes covered).

d. Describes the required content of the general notice.

e. Confirms that the general notice may be incorporated in a summary plan description (SPD) delivered to the employee and spouse within the applicable 90-day window.

f. Contains a model, safe harbor form of COBRA general notice that employers may rely on. Employers should consider conforming their existing COBRA general notice to the new model notice.

2. Required Notices from Employers of Certain Qualifying Events. DOL Proposed Regulation Section 2590.606-2 reiterates the ERISA Section 606(a)(2) requirement that the sponsoring employer notify the plan administrator of the occurrence of a COBRA qualifying event if that event is the death, termination of employment (other than for gross misconduct), reduction in hours of service, Medicare entitlement of an employee or employer bankruptcy. The employer’s notice is due 30 days after the qualifying event (or 30 days after the later loss of coverage if the plan permits

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continuation coverage to run from that date).

3. Required Notices from Qualified Beneficiaries of Certain Qualifying Events.

In the case of divorce, cessation of dependent status or a determination of Social Security disability, ERISA Section 606(a)(3) requires the affected employee or beneficiary to notify the plan administrator of the qualifying event or Social Security determination in order to preserve COBRA rights. Group health plans may impose a 60-day deadline for employees or other qualified beneficiaries to submit such notices. In that regard, DOL Proposed Regulation Section 2590.606-3:

a. Requires plans to establish and communicate reasonable procedures under which qualified beneficiaries can furnish required COBRA notices. These procedures must be described in the plan's SPD.

b. Bars plans from rejecting incomplete notices received from qualified beneficiaries if certain minimal information is provided.

c. Requires plans to disclose in advance (eg, through the initial COBRA notice and later COBRA election form) the adverse COBRA consequences of failing to provide timely notices to the plan.

4. Required Election Notices from Administrators to Qualified Beneficiaries.

Once an employer or qualified beneficiary notifies the administrator of the occurrence of a COBRA qualifying event, the administrator must notify each affected COBRA qualified beneficiary of his or her right to elect COBRA continuation coverage. That notice is due

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within 14 days after the administrator's receipt of notice of the qualifying event. Section 2590.606-4 of the Proposed Regulations, dealing with the COBRA election notice:

a. Confirms DOL's prior position that if the sponsoring employer also serves as administrator, the employer/administrator has 44 days (30+14) from the date of termination of employment, reduction of hours, or any other qualifying event as to which the employer is required to notify the administrator to provide the COBRA election notice. Some courts have rejected the DOL's 44-day deadline position in favor of a 14-day rule, and it remains to be seen whether the regulations, once finalized, will definitively resolve the 44-day versus 14-day issue. Thus, prudent employers that serve as plan administrator should still send COBRA election notices out within 14 days after termination of employment, etc.

b. Requires that COBRA election notices be in writing, a result not expressly required by statute but almost universally followed in practice.

c. Contains 15 paragraphs of specific content items that COBRA election notices must now include.

d. Provides a model, safe harbor form of COBRA election notice that employers may use. Again, employers should consider conforming their COBRA election forms to the model election form.

5. Other Required Election Notices from Administrators to Qualified Beneficiaries.

Section 2590.606-4 of the Proposed Regulations also requires plan administrators to provide two "new" types of COBRA notices.

First, if pursuant to the plan's COBRA notification procedures, a qualified beneficiary notifies the plan of a divorce, loss of dependent status, Social Security disability, etc. and COBRA coverage is not available, the administrator must notify the qualified beneficiaries in writing that COBRA is unavailable. The notice of unavailability is due within 14 days and must specify the reason(s) COBRA is unavailable.

Second, administrators must notify qualified beneficiaries receiving COBRA coverage that their coverage is being terminated if such termination occurs before the end of the maximum COBRA coverage period. Notice of termination is due as soon as practicable following the plan's determination that COBRA coverage will terminate. The notice must state the reasons COBRA coverage is terminating and the effective date of termination. The notice must also describe any rights to other coverage that the qualified beneficiaries may have under the plan or applicable law.

The COBRA statutes do not explicitly require these "new" notices, so there is some question as to DOL's authority to require them under COBRA. That said, most plans already communicate most of the information required by the "new" notices. To be safe, employers will want to make sure they give the new "unavailability" and "early termination" notices where applicable.

6. Disclosures Regarding the Trade Adjustment Act.

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<p>THE COMPLIANCE & REGULATORY NEWSLETTER</p>
<p>PUBLISHERMarjorie A. Weiner ASSOCIATE PUBLISHERSofia Pables EDITOR-IN-CHIEFAdam Schlagman, Esq. MANAGING EDITORWendy Kaplan Ampolsk ART DIRECTORClaire C. O'Neill-Burke GRAPHIC DESIGNERLouis F. Bartella</p>
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<p>The Compliance & Regulatory Newsletter Periodicals Postage Pending at Philadelphia, PA POSTMASTER: Send address changes to: American Lawyer Media 1617 JFK Boulevard, Suite 1750 Philadelphia, PA 19103</p>
<p>Published by: Law Journal Newsletters 1617 JFK Boulevard, Suite 1750, Philadelphia, Pa 19103</p>

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ble to the Proposed Regulations also addresses the effect on COBRA rights of the Trade Act of 2002, P.L. 107-210. Under that legislation, displaced workers who become entitled to trade adjustment assistance (TAA) from the federal government have certain additional COBRA rights. ERISA Section 605(b) grants such persons a second, 60-day COBRA election period during which they may elect COBRA, commencing on the first day of the month the federal government determines the worker is TAA-eligible. The worker's election of COBRA coverage during that sec-

ond election period, however, must occur not later than six months after the initial TAA-related loss of group health plan coverage. Under Code Section 35, such persons are also entitled to a tax credit equal to 65% of their COBRA premiums.

The preamble to the DOL's proposed regulations states that group health plan SPDs must discuss the possible availability of TAA-related COBRA rights. Accordingly, employers should update their group health plan SPDs to include a brief discussion of the possible availability of TAA-related COBRA benefits. (DOL's model COBRA notices do not mention the TAA-related second 60-day COBRA election period. The model

COBRA election form does, however, mention the TAA tax credit for COBRA premiums. The final regulations may require further disclosures in COBRA forms regarding TAA-related COBRA rights. In the meanwhile, employers with employees potentially entitled to TAA benefits should consider adding TAA-related information to their COBRA election forms.)



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