



Administering COBRA in the Electronic Age

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August 1, 2012 — Electronic administration of employee benefit plans continues to grow at a very fast pace. Why? In the current environment of difficult economic times and rising plan costs, plan administrators are looking to streamline administration and save costs anywhere they can. One typical way to achieve cost savings for group health plans involves using electronic means to collect employee elections and disseminate the many legally required notifications. When it comes to COBRA administration; however, should such methods be used, and if so, how?

In considering these issues, we'll discuss two types of notification processes:

1. notifications and election forms provided by a plan administrator to covered employees and qualified beneficiaries (such as COBRA qualifying event notices); and
2. notifications from covered employees and qualified beneficiaries (and employers) to plan administrators (such as COBRA elections).

Electronic Dissemination of COBRA Notices

When it comes to plan administrators disseminating information to covered employees and qualified beneficiaries, regulations from the U.S. Department of Labor specifically allow for electronic means of distributing information, including COBRA-related notices. Generally, depending on the type of documents in question and the availability of electronic media, ERISA documents can be furnished via email, a company's website, CD, DVD or similar media.

The key to using these electronic distribution means, however, is that the distribution method must be designed to ensure *actual receipt* of the information by the intended recipients. Under DOL regulations, it is not enough simply to make notices available (for example via the equivalent of a computer kiosk). Instead, some steps must be taken to affirmatively distribute notices.

In the electronic environment, many different types of distribution methods are used that have many variations. But generally, the methods fall into two broad categories:

1. Distribution of notices via electronic means under which plan participants can effectively access electronic documents at any location where they are reasonably expected to perform job duties and for whom access to the employer's electronic information system is an integral part of those duties.
2. Electronic distribution of notices when participants and beneficiaries consent to the distribution methods.

Significantly, under DOL's consent requirements (if that method of distribution is used), participants, beneficiaries and other persons entitled to ERISA documents through electronic distribution media must provide an address for receiving electronic documents and consent to receiving those documents electronically. But before consent is provided, individuals must receive a "clear and conspicuous" statement on five points (see sidebar).

For the reasons described below, it is unclear how useful DOL's electronic distribution rules are as a practical matter for COBRA purposes.

Five Points Required in Consent Statement for Electronic Distribution

Before individuals consent to receiving documents electronically, they must receive a "clear and conspicuous" statement that:

- 1. identifies the documents that the consent will apply to;*
- 2. explains that consent may be withdrawn at any time without charge;*
- 3. describes procedures for withdrawing consent or updating address or other information;*
- 4. explains an individual's right to request and obtain a paper version of the documents and whether that version will be provided at no charge; and*
- 5. identifies any software and hardware requirements needed to access the information.*

If these requirements change in a way that may affect access, individuals must be informed of those changes, be given the right to withdraw consent without charge and must again consent before documents can be provided electronically

Initial COBRA Notices

Under COBRA, a plan administrator must notify covered employees and their spouses of their COBRA rights when they first become covered by a group health plan. Here, the electronic distribution rules could help disseminate this initial notice to employees.

Example. *An employer could include the COBRA notice as part of an electronically distributed summary plan description and fulfill the both the SPD disclosure and initial COBRA notice requirements, at least regarding employees.*

However, the COBRA notice requirement for covered spouses is not met by notifying covered employees; therefore, the electronic distribution method becomes more problematic. Here, the spouse must consent to the electronic delivery method for the COBRA notice. In the context of an initial COBRA notice, this consent method may not work too well.

Example. *If a single employee gets married, the spouse must receive an initial notice. To comply with the consent method of electronic delivery, the plan administrator would have to provide a notice explaining that the spouse would receive the COBRA notice electronically. Then, the spouse would have to be provided with the initial notice.*

This two-step process (notice of consent and then provide the initial notice) does not always make sense. If the administrator could provide the notice of electronic distribution, it could just as easily have provided the initial notice by first class mail to the last known address in one step and fulfilled the requirements.

Where obtaining electronic consent might make some sense is when the administrator wants to provide future COBRA qualifying event notices electronically (subject to consent). In that case, the administrator could obtain the spouse's consent to all future COBRA related notifications (or other ERISA notifications), which could include future qualifying event notices. This is discussed more fully below.

However, be aware of this key administrative issue: The individual spouse who provided consent to the electronic distribution initially may not be the correct qualified beneficiary down the road. In other words, as family members are added or dropped in an employee's family, potentially new consents would have to be obtained for each of those other family members.

Qualifying Event Notices from Plan Administrators

Once a plan administrator is notified of a qualifying event, it must notify the affected qualified beneficiaries of their COBRA rights within 14 days. Here again, several practical limitations will affect the feasibility of using the electronic distribution rules:

1. **Because non-employee qualified beneficiaries who need to receive these notices (such as divorced spouses and dependent children who no longer qualify as dependents) will not be working at the employer's worksite, qualified beneficiaries must consent to the electronic delivery of qualifying event notices.** If all the qualified beneficiaries reside at one mailing address, COBRA regulations allow a single qualifying event notice to be used. However, if consent is provided to use a single email address, that does not mean that all potential qualified beneficiaries reside at the same mailing address. Therefore, it is possible that the administrator would need consent from each covered spouse and child.
2. **If the consent to electronic distribution is obtained when the individuals are all covered under the group health plan and before any qualifying events have occurred, the administrator needs to be sure that any new family members are also covered by a new consent; the earlier consent would not necessarily apply.** For example, assume that an employee and spouse divorce and the spouse consented to receiving all COBRA notices electronically. Although that spouse could receive an electronic COBRA notice (assuming the electronic consent rules were met), that would not mean that any future spouse could receive notices electronically without a separate consent. Similar issues could occur with newly added children.
3. **If an administrator uses electronic consent and then changes administration to a new COBRA service provider, the new provider might not be able to administer electronic distribution of COBRA notices.** That will force the plan administrator to adjust the system and all communications of the electronic consent and distribution methods otherwise provided in plan documentation and summaries. Alternatively, if the new administrator uses a different electronic method, all the previously obtained consents would need to be updated for the new requirements.
4. **The feasibility of electronic distribution of COBRA notices to employees who terminate employment can be more complicated.** Many employers will provide electronic notices to active employees in reliance on the rule governing the required use of computers in the workplace. However, if the employee terminates employment, he or she will no longer have access to the work computer and probably will not have access to work-related email. In that case, unless the plan administrator obtains consent from the former employee for electronic distribution, paper notices will be required.
5. **Even if all the consent issues could be resolved, electronic distribution methods still may not be as good from a proof perspective as first class mail to the last known address.** For example, electronic systems (servers, etc.) can crash on the sending or receiving end, in which case, the plan administrator will know that the notice was not delivered. If that happens, what is the administrator's obligation? For regular mail returned as undeliverable, the administrator's obligation is fulfilled if it relied on the last known mailing address. For an undelivered electronic notice, it is unclear whether an administrator would be forced (perhaps through court decisions) to re-send the notice to the last known mailing address and perhaps pay late notice penalties.

Given these practical difficulties, using electronic delivery means for COBRA qualifying event notices currently is impractical and not widely used. (See sidebar.) In fact, perhaps for these practical reasons, the preamble to the DOL electronic distribution regulations suggests that administrators probably will not use the electronic distribution regulations for distribution of COBRA notices.

Five Reasons Why Electronic Distribution of QE Notices Is Impractical

1. *Because non-employee qualified beneficiaries who need to receive these notices (such as divorced spouses and dependent children who no longer qualify as dependents) will not be working at the employer's worksite, qualified beneficiaries must consent to the electronic delivery of qualifying event notices.*
2. *If the consent to electronic distribution is obtained when the individuals are all covered under the group health plan and before any qualifying events have occurred, the administrator needs to be*

- sure that any new family members are also covered by a new consent; the earlier consent would not necessarily apply.*
3. *If an administrator uses electronic consent and then changes administration to a new COBRA service provider, the new provider might not be able to administer electronic distribution of COBRA notices.*
 4. *The feasibility of electronic distribution of COBRA notices to employees who terminate employment can be more complicated.*
 5. *Even if all the consent issues could be resolved, electronic distribution methods still may not be as good from a proof perspective as first class mail to the last known address.*

Electronic Procedures for Administering Qualifying Event Elections

Separately from the notices that a plan administrator has to provide to qualified beneficiaries, several notifications and elections need to be made by covered employees and qualified beneficiaries to the plan administrator. For example, each covered employee or qualified beneficiary is responsible for notifying the plan administrator of a qualifying event that is:

1. a divorce, legal separation or cessation of dependent status;
2. an occurrence of a second qualifying event; or
3. related to a Social Security Administration determination regarding disability or cessation of disability.

In addition, employers have to advise plan administrators of events like a covered employee's termination or reduction in hours of employment or death. Then, once a qualified beneficiary has been notified by the plan administrator of the right to elect COBRA coverage due to a reported qualifying event, he or she generally has 60 days to make that election.

As a technical matter, DOL electronic distribution regulatory requirements do not apply to these types of notices and election practices. Instead, the COBRA regulations simply indicate that plan administrators are supposed to develop reasonable procedures to handle COBRA administration.

Notice of Qualifying Events

When a qualifying event occurs for which an employer must notify the plan administrator, many COBRA administrators (third-party administrators) require that the employer provide notice of that event electronically. The advantage of this type of system is that it will quickly generate a COBRA qualifying event notice. Also, these systems create clear records of notification dates and allow the plan administrator to track the timeliness of all notifications.

When it comes to processing employee or qualified beneficiary notices and elections, there is also a lot of room for an electronic process.

Example. *Some plan administrators (and COBRA TPAs) require that notifications of qualifying events be done electronically through the Internet or email. That way, a record can be recorded, stored and retrieved for compliance purposes (for example to make sure elections were made on time) in a cost-effective manner. An electronic system for providing notices also can increase accuracy as administrators do not have to interpret handwritten information on paper forms or second-guess timing based on postmarks.*

A key to using electronic notification and election systems for this purpose, however, is to make sure qualified beneficiaries and covered employees understand how to access and use the system. DOL regulations require that COBRA procedures be explained in the COBRA initial notices and the summary plan description otherwise provided to participants. However, the tricky part is making non-employees aware of all the process rules (for notifying of events and/or electing COBRA coverage). Remember that qualified beneficiaries are often non-employees (such as spouses and/or dependent children); therefore, work email addresses are not available as a means of notification.

Also, some qualified beneficiaries may not have or understand computer-based electronic systems.

Therefore, to be most effective, qualified beneficiaries should have clear accessible information on how to access and use the COBRA notification and election system. (See sidebar.) Administrators also should make sure that other non-electronic means are available under which elections and notifications may be made. It is unusual for an administrator to limit COBRA elections and notifications from individuals to through computer-based electronic systems. Typically, there are other alternatives (such as providing telephonic notifications or elections or paper notifications or elections).

Tips for Administering QE Elections Electronically

1. *Make sure qualified beneficiaries and covered employees understand how to access and use the electronic notification and election systems system.*
2. *Give qualified beneficiaries clear accessible information on how to access and use the system.*
3. *Ensure elections and notifications also can be made by non-electronic means.*
4. *Consider pitfalls such as what happens if an electronic notice about a qualifying event or an election form is not received. One could argue whether a notification or election was really made.*
5. *Consider the size of the participant population relative to the administrative staff needed in deciding on the type of electronic system.*
6. *Consider the employer's human resources "culture."*
7. *Look to practical points in DOL's electronic notice regulations.*

Another potential pitfall of an electronic notification system is that questions could be raised about whether a notification or election was really made when a plan administrator does not receive an electronic notice about a qualifying event or a qualified beneficiary's election form.

Example. *Notice of a qualifying event might not be received because of a computer or Internet failure on either the qualified beneficiary's end or the administrator's end. If that happens and a qualified beneficiary failed to receive COBRA coverage, questions could be raised on whether notice was properly provided on a timely basis.*

It is likely that the situation in the example would have to be resolved through litigation to determine if the qualified beneficiary actually sent the notice and whether the delivery method was appropriate based on the particular facts.

Another important factor in deciding on the type of electronic system to be used is the size of the participant population relative to the administrative staff needed to respond to the information.

Example. *If one or two individuals handle COBRA compliance for a large employer, allowing telephone notification to those individuals may not make sense — they might not be able to staff the calls appropriately. In that case, email or Internet systems may work better.*

Also, is the employer's human resources "culture" already used to distributing paper forms for other purposes or does the "culture" use electronic means for all other notifications? If COBRA notification procedures are developed consistently, employees will not be surprised by having to follow these same procedures, even when they are no longer employees.

Finally, if electronic means of election and notification are to be the primary means of notifying administrators of qualifying events, consideration should be given to the factors in DOL's electronic notice regulations. Although those regulations apply only to notices *provided by* plan administrators and not necessarily *to them*, the regulations suggest several good practical points.

For example, as part of communicating the electronic process, COBRA procedures should explain to employees and qualified beneficiaries how to access the website or electronic system, as well as any specific

system requirements he or she needs. Of course, if telephonic systems are used, the proper telephone number and any specific prompts should be provided in the statement of procedures.

Riding the Wave

It is undeniable that electronic plan administration is the wave of the future. Several technical hurdles and regulatory matters must be addressed in the present, but the movement to more electronic administration cannot be ignored. As plan administrators consider implementing or expanding electronic COBRA administration, they should proceed carefully and consult with benefits counsel to ensure the systems work from a practical and technical perspective.

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