

Client Alert

A report
for clients
and friends
of the firm **October 2003**

Group Health Plan Sponsors Required To Take Action Due To Proposed COBRA Regulations Issued By The U.S. Department Of Labor

On May 28, 2003, the U.S. Department of Labor (DOL) issued proposed COBRA regulations intended to clarify the rules and standards applicable with respect to the COBRA notification process under group health plans. The regulations set forth general rules for administering the notice process, and they establish minimum timing and content requirements for the various required notices.¹ The DOL has proposed to make the regulations effective six months after they are issued in final form.

In addition to setting forth detailed rules regarding COBRA administration and the information that must be included in the various COBRA notices, the proposed regulations include a model Initial COBRA Notice, which is required to be provided upon the commencement of coverage under a group health plan. The DOL has specifically stated that the model initial COBRA notice it previously issued (in ERISA Technical Release 86-2) is no longer acceptable for COBRA compliance. In addition, the proposed regulations include a model COBRA Election Notice, which is required to be provided upon the occurrence of a COBRA qualifying event.

Importantly, the regulations also contain two *new* notice requirements relating to COBRA coverage.

These notices must be provided under certain circumstances when a plan administrator determines that COBRA coverage is not available and when COBRA coverage terminates prior to expiration of the maximum required coverage period.

If finalized in its present form, the new DOL guidance will require group health plan sponsors to:

- modify their internal COBRA administration processes;
- update their COBRA notices;
- provide the two new COBRA notices that must be furnished to employees and other qualified beneficiaries; and
- revise their Summary Plan Descriptions (SPDs) to include certain additional language.

The purpose of this Client Alert is to provide you with an overview of the most significant provisions of the proposed COBRA regulations, particularly where the provisions modify or amplify the current rules relating to COBRA administration. If you would like more detailed guidance with regard to the application of the proposed regulations to your group health plan, please contact your employee benefits attorney at Proskauer.

Initial COBRA Notice

Timing

Since COBRA's enactment, the statute has required that the initial notice of COBRA rights must be furnished to covered employees and spouses "at the time of commencement of coverage" under the plan, but the statute does not include a specific time period within which the notice must be provided. The proposed regulations address this issue by stating specifically that this notice must be furnished no later than 90 days after the date that coverage begins (or, if later, 90 days after the date on which the plan first

¹ Some of the requirements contained in the proposed DOL regulations are new, and others are merely a reiteration of the rules already contained in the COBRA statute and the IRS's final COBRA regulations.

becomes subject to COBRA). If the individual is entitled to a COBRA election notice within the 90-day period, then the initial notice must be provided by the date that the plan is required to provide the election notice.

Content

In addition to providing a model Initial COBRA Notice, the proposed regulations state that the notice must include:

- The name of the plan and the contact information for the party responsible for administering continuation coverage;
- A general description of the continuation coverage, including identification of the classes of individuals who may become qualified beneficiaries, the types of qualifying events that give rise to COBRA rights, the notice obligations of the employer, the maximum coverage period, when and under what circumstances the maximum period of continuation coverage can be extended, and the plan's requirements with respect to premium payments;
- An explanation of the qualified beneficiaries' notification obligations and the plan's procedures for providing such notices;
- An explanation of the importance of keeping the administrator informed of the participants' and beneficiaries' current addresses; and
- A statement that the notice does not fully describe continuation coverage or other rights under the plan, and that more complete information is available from the plan administrator and in the SPD.

COBRA Election Notice

Timing

The proposed regulations reiterate the current rule that the plan administrator must furnish the second COBRA notice (*i.e.*, the Election Notice) to qualified beneficiaries within 14 days of the date that the administrator is notified of the qualifying event. If the administrator is also the employer, then the Election Notice may be provided within 44 days of the event, since COBRA allows the employer 30 days to notify the plan administrator of the qualifying event.

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Unlike the COBRA statute and the final COBRA regulations previously issued by the IRS,² the DOL's proposed regula-

tions set forth the detailed information that must be included in the Election Notice, as follows:

- The name of the plan and the contact information for the party responsible for administering continuation coverage;
- Identification of the qualifying event;
- Identification of each qualified beneficiary entitled to elect COBRA coverage with respect to the qualifying event and the date that plan coverage will terminate (or has terminated) unless continuation coverage is elected;
- A statement that each qualified beneficiary has an independent right to elect continuation coverage, that a covered employee or spouse may elect coverage on behalf of all other qualified beneficiaries, and that a parent or legal guardian may elect COBRA coverage on behalf of a minor child;
- An explanation of the plan's procedures for electing continuation coverage, including the time period during which the election must be made and the specific date by which the election must be made;
- An explanation of the consequences of failing to elect or waiving continuation coverage, including an explanation that a decision whether to elect such coverage will affect the future rights of qualified beneficiaries to portability of group health coverage, guaranteed access to individual health coverage and special enrollment under ERISA, with a reference to where a qualified beneficiary may obtain additional information about such rights and a description of the plan's procedures for revoking a waiver of the right to continuation coverage before expiration of the election period;
- A description of the continuation coverage that will be available under the plan, including the date on which such coverage will begin (if elected), either by providing a description of the coverage or by reference to the SPD;
- An explanation of the maximum period of continuation coverage, the coverage termination date and the events that might cause coverage to be terminated earlier than the end of the maximum period;
- A description of the circumstances, if any, under which the maximum period of COBRA coverage may be extended due to either a second qualifying event or a Social Security disability determination, and the length of any such extension;

² When COBRA was originally enacted, Congress granted to the DOL and the Treasury Department joint interpretive authority over the law's requirements. Specifically, the DOL was granted the authority to issue regulations implementing COBRA's notice and disclosure requirements, and the Treasury Department was granted authority to issue regulations defining the required continuation coverage. Although the Treasury Department initially issued proposed regulations in 1987, followed by final regulations in 1999 and 2001, the DOL did not issue any regulations until it issued the proposed regulations in May of this year.

- In the case of a notice that offers COBRA coverage for less than 36 months, a description of the plan's requirements with regard to a qualified beneficiary's responsibility to notify the plan of a second qualifying event and a Social Security disability determination (or subsequent determination that he is no longer disabled), along with a description of the plan's procedures for providing such notices, including the time periods within which the notices must be provided and the consequences of failing to provide them;
- A description of the amount, if any, that qualified beneficiaries are required to pay for COBRA coverage, the due dates for such payments, the qualified beneficiaries' right to pay on a monthly basis, the grace periods for payment, the address to which such payments should be sent, and the consequences of delayed payment and non-payment;
- A description of any opportunity provided under the plan for other health coverage for which the qualified beneficiary may be eligible, either as an alternative to COBRA coverage or in addition to such coverage, including an explanation of how election of such other coverage would affect the individual's COBRA rights and rights to guaranteed access to individual health coverage;
- An explanation of the importance of keeping the plan administrator informed of participants' and beneficiaries' current addresses; and
- A statement that the notice does not fully describe COBRA coverage or other rights under the plan, and that more complete information regarding such rights is available in the SPD or from the plan administrator.

The Trade Act of 2002

The DOL's model Election Notice includes language regarding the tax credit that may be available to employees under the Trade Act of 2002 (the "Trade Act"), which was enacted on August 6, 2003. The Trade Act amended COBRA to provide a second 60-day election period for certain employees who lose group health coverage and are eligible for assistance under the Trade Act. In general, the Trade Act provides trade adjustment assistance to employees whose employment has been adversely affected (e.g., terminated) by increased imports or a shift in production to another country. Importantly, one of the benefits that the Trade Act provides is a tax credit of up to 65% of the premiums paid for qualified health insurance (including COBRA coverage).

In accordance with the Trade Act's amendment to COBRA, individuals who are eligible for assistance under the Trade Act (and who did not elect COBRA coverage during the initial 60-day election period) have another opportunity to elect COBRA coverage during a 60-day period that begins on the first day of the month in which the individual is determined

to be eligible for trade assistance benefits. However, the COBRA coverage (if elected) is not required to begin until the first day of this second election period, and elections may not be made later than 6 months after the date of the loss of coverage. The DOL has stated (in the preamble to the proposed regulations) that information regarding the possible availability of the second COBRA election period should be included in the SPD.

To Whom COBRA Notices Must Be Provided And How They May Be Furnished

The proposed regulations clarify the circumstances in which *separate* COBRA notices must be furnished to employees, spouses and dependent children. Pursuant to the proposed regulations, COBRA notices may be provided to a covered employee and his spouse by furnishing a single notice addressed to both the employee and spouse if, on the basis of the most recent information available to the plan, the spouse resides at the same location as the employee. The regulations further state that notice to a spouse or employee will constitute notice to a dependent child of the employee or spouse if, on the basis of the most recent information available to the plan, the child resides at the same location as the individual to whom the notice is provided.

The proposed regulations also provide specific guidance on the manner in which COBRA notices may be provided to employees, spouses and dependent children, by stating that such notices may be furnished in any manner consistent with the requirements of DOL Regulation §2520.104b-1, including the section relating to the use of electronic media. That DOL regulation states that, when furnishing required material, the plan administrator "shall use measures reasonably calculated to ensure actual receipt of the material," and the regulation specifically sanctions the use of first class mail (among other methods).

Notice Requirements Applicable To Employers

Timing

The proposed regulations reiterate the statutory requirement that employers must notify the plan administrator of a qualifying event that is the covered employee's death, termination of employment, reduction in hours of employment or Medicare entitlement (*i.e.*, enrollment in Part A, Part B, or both), and the employer's bankruptcy under title 11 of the U.S. Code. Both the statute and the proposed regulations provide that this notice must be furnished within 30 days of the event (or within 30 days of the loss of coverage due to such event, if the plan provides that continuation coverage and the notice period begin on the date of the loss of coverage). Multiemployer plans may have a longer notice period pursuant to the terms of the plan.

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The statute does not require that any specific information be included in the employer's notice to the plan administrator. However, the proposed regulations state that the notice must include sufficient information to enable the administrator to determine: (i) the plan; (ii) the covered employee; (iii) the qualifying event; and (iv) the date of the qualifying event.

Notice Requirements Applicable To Employees And Other Qualified Beneficiaries

The proposed regulations restate the statutory requirement that qualified beneficiaries must notify the plan administrator of qualifying events that are the employee's divorce or legal separation or a dependent child ceasing to qualify as a dependent under the plan's eligibility rules. The regulations also reiterate that qualified beneficiaries must notify the plan administrator of a second qualifying event that occurs after the beneficiary becomes entitled to continuation coverage.

The proposed regulations expressly provide that these notification requirements may be satisfied by any individual who is either the covered employee, a qualified beneficiary or any representative acting on behalf of such person, and the provision of notice by one individual will satisfy the notice obligation for all related qualified beneficiaries with respect to the qualifying event.

Timing

The proposed regulations affirm the general rule set forth in the IRS's final COBRA regulations to the effect that this notice is timely if it is provided within 60 days after *the later* of the date the qualifying event occurs or the date coverage would be lost as a result of the event (if the plan provides that the coverage period and certain notice periods begin on the date of the loss of coverage). However, unlike the IRS regulations, the proposed regulations further state that the notice period may not end before the date that is 60 days after the date on which the qualified beneficiary is informed (through the SPD or an initial COBRA notice) of the responsibility to so notify the administrator and of the plan's procedures governing the provision of such notice. The proposed regulations also indicate that a plan may allow longer periods of time for furnishing these notices.

The proposed regulations include similar rules applicable to the time periods for furnishing notice of a Social Security disability determination and notice that a qualified beneficiary is no longer disabled.

Procedures for Furnishing These Notices

The proposed regulations state that plans must establish reasonable procedures for the furnishing of these notices by

employees and qualified beneficiaries. According to the regulations, notice procedures generally will be deemed reasonable only if they: (i) are described in the SPD; (ii) specify the individual or entity designated to receive the required notices; (iii) specify the means by which notice may be given; and (iv) describe the information concerning the qualifying event that the plan deems necessary in order to provide continuation coverage. The regulations further state that if a plan has not established reasonable procedures for providing the required notices, then notice will be deemed to have been provided when either a written or oral communication identifying the qualifying event is provided to the person or entity that handles employee benefits matters for the plan. The regulations contain a detailed rule identifying the appropriate entity in the case of single employer plans, multiemployer plans and insured plans.

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A plan may (but is not required to) establish reasonable requirements for the content of these notices, and plans may require the use of a specific form of notice, provided that the form is easily available without cost to qualified beneficiaries.

New Notice Requirements For Plan Administrators

As noted above, the proposed regulations include two new notification requirements. First, if a plan administrator receives notice of a qualifying event (i.e., divorce or legal separation, or a child's loss of dependent status) from an employee or family member, but the administrator determines that the individual is not entitled to COBRA coverage, then the administrator must provide the individual with an explanation as to why he is not entitled to elect COBRA coverage. This notice must be provided within the same period of time that the administrator would have been required to notify the individual of his right to elect COBRA coverage.

The second new requirement is that the plan administrator must notify qualified beneficiaries of the termination of their continuation coverage if such termination is going to take effect before the end of the maximum applicable period of continuation coverage. This notice must be furnished as soon as practicable following the administrator's determination that continuation coverage will terminate early, and it must include: (i) the reason for the early termination; (ii) the date of the termination; and (iii) an explanation of the qualified beneficiary's rights under the plan or applicable law to elect alternative coverage (e.g., conversion rights).

In summary, the new DOL regulations, once finalized, will require group health plans to modify their internal COBRA administration processes, update their written COBRA notices, furnish two new COBRA-related notices, and revise their SPDs to include certain additional language. Plan

sponsors should contact their employee benefits attorneys at Proskauer for guidance regarding the rules set forth in the proposed regulations (particularly those rules that modify or amplify existing law) and the modifications that should be made to their COBRA administration processes, notices and plan documents in order to achieve compliance with the regulations. Although the possibility exists that the final version of the regulations (and model notices) will differ in some respects from the proposed regulations, it is our view that plan sponsors should begin taking the appropriate steps toward compliance with the proposed rules.

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