

# Client Alert

A report  
for clients  
and friends  
of the firm     June 2004

## U.S. Department of Labor Issues Final COBRA Regulations: Group Health Plan Sponsors Required to Take Action

On May 26, 2004, the U.S. Department of Labor (DOL) issued final COBRA regulations intended to clarify the rules and standards applicable to the COBRA notification process for group health plans. These regulations had been issued in proposed form one year ago (on May 28, 2003). (See our Client Alert dated October 2003 for a summary of the proposed regulations.) Although the final regulations do not differ substantially from the proposed regulations, the rules have been modified in many respects to take into account various comments submitted to the DOL in response to the proposed regulations, and also to clarify certain rules.<sup>1</sup>

The purpose of this Client Alert is to provide you with a summary of the most significant provisions of the final COBRA regulations, particularly where the provisions modify or amplify the current rules relating to COBRA administration, or where the DOL has made an important change or clarification to the rules contained in the proposed regulations issued last year. If you would like more detailed guidance with regard to the application of the final regulations to your

group health plan, please contact your employee benefits attorney at Proskauer.

### Overview of the Final Regulations

The final regulations set forth detailed rules for administering the COBRA notice process, and they establish minimum timing and content requirements for the various required notices.<sup>2</sup> As a result of these new regulations, group health plan sponsors will be required to:

- modify their internal COBRA administration processes;
- update their existing COBRA notices;
- create 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.

As noted, there are two *new* notice requirements with which plan sponsors must comply. These requirements, which are not contained in the COBRA statute, have been retained from the proposed regulations. The 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.

The final regulations include model notices to assist plan sponsors in complying with the content requirements relating to the Initial COBRA Notice and the COBRA Election Notices. Although the

<sup>1</sup> 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 the issuance of proposed regulations in May of last year.

<sup>2</sup> Some of the requirements contained in the final 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.

<sup>3</sup> The model notices are designed for use by single employer plans and, thus, they should be modified when used by other types of plans, such as multiemployer plans.

regulations state that use of the model notices is not mandatory, plans that use these notices will be deemed to satisfy the content requirements contained in the regulations.<sup>3</sup> Plan sponsors that choose not to use the model notices should ensure that their notices include all of the required information listed in the regulations, and that the notices are "written in a manner calculated to be understood by the average plan participant." It is noteworthy that the model notices that were included in the proposed regulations have been modified to account for the various changes made to the regulations and also to include a number of editorial changes made by the DOL in order to improve, clarify and simplify the notices.

## Effective Date

The regulations apply to notice obligations that arise on or after the first day of the first plan year beginning on or after November 26, 2004. Thus, calendar year plans are required to comply with the regulations as of January 1, 2005. The DOL has stated that, in the interim, it will view compliance with either the proposed rules or the final rules as constituting good faith compliance with COBRA's notification requirements.

## Initial COBRA Notice

### Timing

The COBRA statute requires that an 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 final regulations address this issue by stating 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 becomes subject to COBRA). The regulations clarify that if the individual is entitled to a COBRA Election Notice within the 90-day period, then the plan administrator may satisfy the Initial COBRA Notice requirement by furnishing an Election Notice within the required time period; it is not necessary to also send an Initial COBRA Notice to the individual.

### Content

The final regulations state that the Initial COBRA Notice must include:<sup>4</sup>

- The name of the plan and the contact information for the party or parties from whom additional information about the plan and continuation coverage can be obtained. This represents a change from the language that appeared in the proposed regulations, which required that the notice include contact information for

the "party responsible ... for the administration of 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 qualified beneficiaries' notification obligations with regard to certain qualifying events (*i.e.*, divorce, legal separation, or a child ceasing to be a dependent under the terms of the plan) and disability determinations, and the plan's procedures for providing such notices. The final regulations have eliminated the requirement contained in the proposed regulations that the Initial COBRA Notice must describe how qualified beneficiaries must provide notice of a *second* qualifying event, since that information will be included in both the COBRA Election Notice and the summary plan description;
- 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.

The final regulations expressly provide that the Initial COBRA Notice requirement may be satisfied by including the required language in the plan's SPD, provided that the SPD is furnished (to the covered employee and covered spouse) in the manner prescribed within the required time period.

## COBRA Election Notice

### Timing

The final regulations reiterate the statutory 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.<sup>5</sup> If the employer is also the administrator of the plan, then the Election Notice may be provided within 44 days of the event (or within 44 days of the date of the loss of coverage, if the plan provides that continuation

<sup>4</sup> The DOL's model Initial COBRA Notice includes all of the following information.

<sup>5</sup> Multiemployer plans may apply a different time period set forth in the plan.

coverage and the notice period begins on the date of the loss of coverage), since COBRA allows the employer 30 days to notify the plan administrator of the qualifying event. However, the regulations clarify that this special 44-day rule applies only in those cases where the employer is required to provide notice of a qualifying event to the plan administrator pursuant to COBRA's requirements.

## Content

Unlike the COBRA statute, the final regulations set forth the detailed information that must be included in the Election Notice, as follows:<sup>6</sup>

- The name of the plan and the contact information for the party responsible for administering continuation coverage;
- Identification of the qualifying event;
- Identification, by status or name, of the qualified beneficiaries who are entitled to elect COBRA coverage with respect to the qualifying event,<sup>7</sup> 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 HIPAA, 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;
- 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;
- 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.

Importantly, the final regulations have eliminated the requirement set forth in the proposed regulations that the Election Notice must include a description of any other health coverage for which the qualified beneficiary may be eligible (such as alternative coverage or conversion rights). However, it is important to note that the COBRA statute still requires plans to provide, during the 180-day period ending on the date COBRA coverage expires, a conversion option to

<sup>6</sup> The DOL's model Election Notice includes all of the following information.

<sup>7</sup> This represents a change from the proposed regulations, which required identification of each qualified beneficiary *by name*.

qualified beneficiaries who exhaust COBRA coverage, if such an option is otherwise generally available under the plan.

### **The Trade Act of 2002**

Like the model Election Notice contained in the proposed regulations, the final model notice includes an optional paragraph regarding the tax credit that may be available to employees under the Trade Act of 2002. The language in the final notice differs only slightly from the proposed model notice.

In general, the Trade Act provides 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).

The Trade Act amended the COBRA statute to provide a second 60-day election period for certain employees who lose group health coverage and are eligible for assistance under the Act. Individuals who are eligible for assistance under the 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 six months after the date of the loss of coverage.

Although a plan is not required to include information regarding the possible availability of this second COBRA election period in the COBRA Election Notice, the DOL has stated that this information should be included in the SPD.

### **To Whom the Initial COBRA Notice and Election Notice Must Be Furnished And How These Notices May Be Furnished**

The final regulations clarify the circumstances in which separate COBRA notices must be furnished to employees, spouses and dependent children. Like the proposed regulations, the final regulations generally state that plan administrators may satisfy the Initial COBRA Notice requirement by providing a single notice addressed to both the covered employee and the covered spouse if, on the basis of the most recent information available to the plan, the spouse resides at the same location as the employee. However, a single notice may not be provided if the spouse's coverage begins later than the employee's coverage, unless the spouse's coverage begins before the date on which the Initial Notice must be provided to the employee. The Election Notice may also be provided in a single notice addressed to 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.

With regard to dependent children, the final regulations clarify that a plan administrator is not required to provide an Initial COBRA Notice to a dependent child. With regard to the Election Notice, the regulations state that notice to a spouse or employee will constitute notice to a dependent child who is a qualified beneficiary entitled to continuation coverage 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 regulations also provide guidance as to the manner in which COBRA notices may be furnished to employees, spouses and dependent children. Specifically, the regulations state that the required 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).

The preamble to the final COBRA regulations provides guidance as to when the required notices will be considered to be "furnished" (for purposes of determining whether a plan administrator is in compliance with the required time periods). Specifically, the DOL states that a notice will be considered to be furnished as of the date of mailing (if sent by first class mail, certified mail or Express Mail), the date of electronic transmission (if sent electronically), or the date of receipt (if hand-delivered).

### **Notice Requirements Applicable To Employers**

The final 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.

### **Timing**

Both the statute and the 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.

### **Content**

The COBRA statute does not require that any specific information be included in the employer's notice to the plan



administrator. However, the final 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 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 Social Security disability determinations and second qualifying events that occur after the beneficiary becomes entitled to continuation coverage. With regard to second qualifying events, the model notices make clear that an event such as an employee's divorce, separation or Medicare entitlement, or a dependent child's cessation of eligibility under a plan, will only constitute a second qualifying event (for purposes of extending an initial continuation coverage period) if the event would have caused the qualified beneficiary to lose coverage under the plan if the first qualifying event had not occurred, as was recently clarified by the IRS in Revenue Ruling 2004-22.

The 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.

### **Procedures for Furnishing These Notices**

The 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 organizational unit that customarily handles employee benefits matters for the plan (or, in the case of multiemployer plans, plans maintained by employee organizations and insured plans, certain other persons and entities).

### **Timing**

As part of a plan's reasonable procedures for furnishing these notices, the plan may require that the notices must be furnished within certain time periods. However, such time periods may not be shorter than the limits set forth in the regulations. In this regard, the regulations affirm the general rule set forth in the IRS's final COBRA regulations to the effect that notice of the occurrence of a qualifying event 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 under the plan as a result of the event. However, the DOL 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 of the responsibility to so notify the administrator and of the plan's procedures governing the provision of such notice.

The final regulations include similar rules applicable to the time periods for furnishing notice of a Social Security disability determination and a determination that a qualified beneficiary is no longer disabled. Moreover, the final rules (unlike the proposed regulations) specifically address the situation where a qualified beneficiary is determined to be disabled *before* the qualifying event occurs. In this regard, the regulations state that the required time period for providing notice of a disability determination may not end before the date that is 60 days after *the latest of*: (i) the date of the Social Security disability determination; (ii) the date on which the qualifying event occurs; (iii) the date on which the qualified beneficiary loses (or would lose) coverage as a result of the qualifying event; or (iv) the date on which the qualified beneficiary is informed of the responsibility to provide this notice and of the plan's procedures for providing the notice.

### **Content**

A plan may 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.

The final regulations state that a plan may not reject an incomplete notice as untimely if the notice is provided within the plan's time limits and contains sufficient 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 such event or determination occurred. However, if a timely notice fails to include all of the information required by the plan, the administrator can require the qualified beneficiary to provide the missing information necessary to meet the plan's reasonable content requirements in order for notice to be deemed provided. Moreover, the preamble to the regulations states that nothing in the regulations is intended to suggest that a plan cannot reject a notice when an employee or qualified beneficiary fails to provide

requested information within a reasonable period of time. In this event, however, the plan administrator must notify the individual in writing that COBRA coverage is not available, as discussed below.

## New Notice Requirements For Plan Administrators

As noted above, the final regulations include two new notification requirements, which also appeared in the proposed regulations. However, the DOL has not provided model notices with respect to these notification requirements.

### Notice of Unavailability

The first new notice is the Notice of Unavailability. The regulations provide that if a plan administrator receives from an employee or other qualified beneficiary notice of a qualifying event, second qualifying event or determination of disability by the Social Security Administration, and 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 continuation coverage. As stated in the preamble to the final regulations, the regulations have been modified to clarify that this notice must be provided regardless of the basis for the denial of continuation coverage and regardless of whether the notice involves a first qualifying event, a second qualifying event or a request for a disability extension.<sup>8</sup>

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 had the administrator received a notice of qualifying event and determined that the individual was entitled to continuation coverage (*i.e.*, generally within 14 days of receipt of the notice of qualifying event).

### Notice of Termination

The second new notice 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 due to one of the permissible terminating events set forth in the statute (*i.e.*, failure to timely pay the required premium, the employer's cessation of group health coverage, the qualified beneficiary obtaining other coverage or Medicare entitlement, or a determination

<sup>8</sup> It is noteworthy that, in the preamble to the final regulations, the DOL states that a determination regarding eligibility for COBRA coverage is not governed by ERISA's claims procedure regulations unless the determination relates to a specific claim for benefits.

that the qualified beneficiary is no longer disabled). The notice 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 the preamble to the final regulations, the DOL states that nothing in the regulations is intended to prevent a plan administrator from sending this notice along with the Certificate of Creditable Coverage required by HIPAA.

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In summary, the final DOL regulations require group health plans to modify their internal COBRA administration processes, update their existing COBRA notices, furnish two new COBRA-related notices, and revise their SPDs to include certain additional language. Plans sponsors that have already implemented updated procedures and new notices based on the proposed regulations issued last year will need to modify those procedures and notices in certain respects due to changes made to the proposed regulations.

Since the new rules become applicable as early as January 1, 2005 (for calendar year plans), we recommend that you begin taking the appropriate steps toward compliance with the final rules as soon as possible. We encourage you to contact your employee benefits attorneys at Proskauer for guidance regarding the rules set forth in the final regulations (particularly those rules that modify or amplify existing law) and the modifications that should be made to your processes, notices and plan documents in order to achieve compliance with the regulations.

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#### Client Alert

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