

Department of Labor Details New COBRA Notice Requirements for Employers

The U.S. Department of Labor (the “DOL”) issued final regulations detailing when, how, and what type of information must be provided to employees and their families in the event they lose coverage under an employer’s group health plan. This continuation of health coverage is commonly referred to as COBRA continuation coverage. The information detailed in the final regulations must be provided to employees and their families eligible for COBRA coverage in the form of various COBRA notices. The required notices include:

- ? Initial Notice/General Notice;
- ? Election Notice;
- ? Notice of Early Termination of Coverage; and
- ? Notice of Unavailability of Coverage.

The new rules apply to employers (with 20 or more employees) sponsoring insured or self-funded group health plans. The new requirements will be effective on the first day of the first plan year beginning after November 26, 2004. Thus, calendar year group health plans must comply with the new rules beginning January 1, 2005.

What Should Employers Do In Response to the Final Regulations?

Federal law currently requires group health plans to notify employees and their families of the availability of COBRA coverage, including statements on how and when they may elect COBRA coverage. The final regulations further expand and clarify these requirements, detailing when, how, and what type of information must be provided in such notices. The final regulations also provide model notices “for the purpose of facilitating compliance with the new rules.” In 2003, the DOL issued similar requirements in proposed form, including model notices. Because the final regulations streamline and clarify the proposed rules and model notices, employers are advised to adopt the requirements articulated in the final regulations by:

1. Revising your existing COBRA notices to comply with the new requirements;
2. Customizing the model notices to fit your plan’s administration; and
3. Developing COBRA “procedures” in accordance with the new rules and updating your plan’s summary plan description (“SPD”).

The attorneys in our Tax Section, and in our Labor and Employment Section, are available to assist you in drafting and customizing the required COBRA notices.

Initial Notice/General Notice Under the Final Regulations

Under current law, group health plans are required to provide employees and their families with an explanation of their rights under COBRA “at the time coverage under the plan begins” (the “Initial Notice”). The final regulations clarify that this Initial Notice must be provided to employees and their families within 90 days after they begin coverage under the plan. The Initial Notice may be sent as a single, separate notice addressed to both the employee and his or her spouse. The Initial Notice may also be provided in the plan’s SPD. However, the DOL has indicated that if the SPD is merely hand-delivered to the employee, such delivery does not satisfy

the notice requirement. Rather, the SPD must be mailed to the employee's last known address in order to provide proper notice to the spouse (it is recommended that the notice (provided in the SPD or a single, separate notice) be mailed to the employee's last known address, as the Initial Notice is sometimes the only notice informing a spouse of his or her responsibility for informing the Administrator of a divorce or legal separation). The final regulations set forth a detailed list of information that must be included in the Initial Notice, and also provide employers with a model notice.

Election Notice

Under current law, the Administrator is required to provide employees and their families who have lost health coverage a COBRA election notice (the "Election Notice") within 14 days after the Administrator is notified of the qualifying event. The final regulations provide that in the event the employer is also the Administrator (a common arrangement), such Election Notice must be sent no later than 44 days after the date of a qualifying event for which the employer is required to provide notice (e.g., termination of employment, reduction of hours, or Medicare entitlement). The final regulations set forth a detailed list of information that must be included in the Election Notice, and also provide employers with a model notice.

Please note that the use of the Initial and Election Model Notices is not mandatory. Employers are advised, however, to modify and customize their current notices in accordance with the new rules and to reflect their plan's current administration.

Reasonable Procedures for Employees and Family Members to Notify the Administrator

Currently, employees and their family members are responsible for informing the Administrator of a divorce, legal separation, or a dependent child losing eligibility for coverage (i.e., certain qualifying events) within 60 days after the event occurs. The final regulations require that a plan establish "reasonable procedures" for employees and their family members to follow when notifying the Administrator of these types of qualifying events. A procedure is deemed "reasonable" if it:

- ? Is described in the SPD;
- ? Specifies who is designated to receive the notices;
- ? Specifies how the qualified beneficiaries must give notice; and
- ? Specifies the required content of the notice.

The final regulations do not provide model "procedures."

Early Termination of Coverage and Unavailability of Coverage Notice

Early Termination of Coverage Notice

The final regulations require two additional notices that are not explicitly provided for under current law. The first notice must be provided in the event an employee or his or her family's COBRA coverage terminates prior to the expiration of the statutory coverage period (e.g., divorce, death, loss of a dependent child status, or Medicare eligibility calls for 36 months of coverage, whereas termination and reduction of hours calls for 18 months of coverage). The notice must be given "as soon as practicable" following the Administrator's determination that the COBRA coverage will terminate early. The final regulations do not set forth a model "early

termination” notice, but the DOL has provided that the notice may be combined with the HIPAA certificate of creditable coverage required at termination of group health coverage (i.e., COBRA coverage).

Unavailability of Coverage

Under certain circumstances an Administrator may deny COBRA coverage because it determines that no qualifying event occurred, or because notice of a qualifying event was not timely received. In the event the Administrator determines that coverage is not available, the final regulations provide that the Administrator must notify the employee or family member of such a denial within 14 days of receiving notice of the qualifying event. The final regulations do not set forth a model “unavailability of coverage” notice.

Action Plan

The final regulations are generally effective beginning January 1, 2005 (for calendar year plans). However, before the effective date of the final regulations, employers must satisfy the COBRA statutory notice requirements under a reasonable, good faith compliance standard. In order to encourage early compliance with the final regulations (i.e., before 2005 for calendar year plans), the DOL has indicated that compliance with either the 2003 proposed regulations or the 2004 final regulations will be deemed to be reasonable, good faith compliance with the statutory notice requirements during the transition period. Therefore, employers may want to consider revising and updating their plan’s COBRA notices and administration prior to the effective date of the final regulations.