



ALERT: Department of Labor Proposes New COBRA Notice Requirements

The Department of Labor (“DOL”) recently issued proposed regulations clarifying and expanding the notice requirements applicable to group health plans under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”). While the regulations assist group health plans in complying with existing notice requirements by providing new model “safe harbor” notices and forms, they also require group health plans to comply with two new notice requirements for which no model notices are provided.

The major provisions of the new regulations, which are slated to become effective for plan years beginning on or after January 1, 2004, are summarized below.

New Model Initial COBRA Notice

An employer who sponsors a group health plan must provide an initial COBRA notice to each covered employee and his or her spouse within 90 days after the start of coverage under the group health plan. In certain circumstances, the employer must take special care to notify the spouse separately (e.g., if the spouse’s coverage under the plan begins at a different time).

In 1986, shortly after COBRA was enacted, the DOL published a model safe harbor initial notice to be provided to employees when they first became covered under an employer’s group health plan. Use of the model notice was not mandatory, but when used, it was deemed to satisfy the initial notice content requirements of COBRA. Many group health plans have used this model notice for their initial COBRA notices. The revised “safe harbor” initial notice in the proposed regulations officially replaces the 1986 notice—the new regulations specifically provide that use of the 1986 notice will no longer constitute good faith compliance with COBRA’s notice requirements. Employers that sponsor a group health plan and use the old notice should implement the new notice as soon as possible.

Many employers outsource the administrative and notification obligations COBRA imposes. In many cases, the initial COBRA notices provided by outside administrators have been updated over the years to keep pace with COBRA changes. However, unless an employer’s outside administrator can provide assurances that the initial COBRA notice has been revised and updated to reflect current law, the employer should review the notice and consider implementing the revised safe harbor notice as soon as possible.

New Model COBRA Election Notice and Form

The proposed regulations also supply a new model safe harbor COBRA election notice and form to be given to employees and other qualified

beneficiaries who become eligible for COBRA coverage. Generally, once the administrator of a group health plan receives notice of a “qualifying event” that causes an employee or qualified dependent to lose group health plan coverage (e.g., the employee’s death, termination of employment, reduction in work hours, divorce or legal separation), it has 14 days to give the individual the COBRA election notice and form. Group health plans that use the new model notice and form will be deemed to have satisfied the regulations’ election notice content requirements. Supplemental guidance from the DOL indicates that employers who serve as plan administrators will have an extra 30 days, for a total of 44 days, to provide the election notice and form.

New Requirement: Establishment of “Reasonable Procedures” for Qualified Beneficiaries to Give Notice to a Group Health Plan of a Qualifying Event

Where the qualifying event is reasonably within the employer’s knowledge—such as when an employee dies, terminates employment, suffers a reduction in the number of hours worked, or becomes entitled to Medicare—the proposed regulations require the employer to give notice to the administrator of the group health plan within 30 days. For certain other qualifying events, such as divorce, legal separation, or a dependent child ceasing to be classified as a dependent, the covered employees and qualified beneficiaries generally have more accurate information than employers. When these qualifying events occur, the notice obligation shifts to the covered employee or qualified beneficiary, who must provide notice to the administrator of a group health plan within 60 days of the event or the date coverage is lost (although a group health plan may adopt a more generous time frame).

Under the new proposed regulations, group health plans must establish “reasonable procedures” so that when one of these events occurs, qualified beneficiaries know whom they should notify, what information to provide, and how and by when to provide notice. To be deemed reasonable, the procedures must be described in the group health plan’s summary plan description. Failure to establish such reasonable procedures could cause employers an administrative nightmare. Written or oral notice by a qualified beneficiary given to almost anyone in the employer’s benefits department, or, if benefits are provided through an insurance company, to anyone in the insurance company’s claims unit, would be deemed sufficient notice to trigger the plan’s obligation to offer COBRA coverage.

New Notice Requirement: Notice of Unavailability of Continuation Coverage

The proposed regulations also impose a new notice requirement on administrators of group health plans when they determine COBRA coverage is not available. If an individual notifies the group health

plan of a qualifying event, but it turns out the individual is not actually entitled to elect COBRA coverage, the administrator must provide the individual written notice within 14 days to explain why COBRA coverage is not available.

New Notice Requirement: Early Termination of COBRA Coverage

Another notice requirement in the proposed regulations arises when the administrator of a group health plan must terminate a qualified beneficiary's COBRA coverage early, before the maximum coverage period ends. Such early termination could occur, for example, if the employer ceases to offer group health coverage to its employees, if the qualified beneficiary becomes covered under another group health plan, or if the required premium payment is not timely paid. In such a case, as soon as administratively practicable, the administrator must give the qualified beneficiary a notice that states the reason for the early termination, the termination date, and the beneficiary's rights (if any) to elect alternative coverage under the plan or applicable law.

Additional Requirements for Summary Plan Descriptions Under the Trade Act of 2002

The preamble to the proposed regulations also mentions a separate requirement that group health plans amend their summary plan descriptions to include information about a new tax credit created by the Trade Act of 2002. Since 1974, certain individuals who lose their jobs because of import competition or a shift in production to other countries have been entitled to receive trade adjustment assistance (TAA), consisting primarily of career counseling, training, income support during training, job search assistance, and relocation allowances. Under the new tax provisions, these eligible individuals also get an option to receive an advance government payment of 65% of premiums paid for qualified health insurance, including COBRA continuation coverage. To give eligible individuals who initially did not elect COBRA another chance to elect COBRA after becoming eligible for the new tax credit, the Trade Act of 2002 creates a new, second 60-day COBRA election period for eligible individuals. This election period begins the first day of the month in which the eligible individual begins to receive TAA, but only if the election is made within six months after the initial loss of coverage under the group health plan.

What Employers Should Do

The DOL has requested public comment on the regulations and model notices. Accordingly, the regulations still could be supplemented or revised before they are finalized. However, the proposed regulations present an ideal opportunity for employers to review their overall compliance with COBRA and make any necessary corrections. Sponsors of group health plans should begin reviewing their COBRA notices as soon as possible. Employers should replace any obsolete 1986 model "safe harbor" initial notices and should consider implementing the model election form and notices. Group health plan sponsors should also prepare and evaluate drafts of the unavailability and early termination notices and begin providing them effective January 1, 2004. Finally, employers should update their summary plan descriptions to include the reasonable procedures for employees and qualified beneficiaries to notify the plan administrator of a qualifying event, as well as the information required by the Trade Act of 2002. Should the DOL make any significant changes to the proposed regulations, we will report that action in a future **W.E.B. Update**.