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FINAL COBRA REGULATIONS PUBLISHED MAY 26, 2004: HEALTH PLAN SPONSORS MUST ACT

On May 26, 2004, the U.S. Department of Labor published final COBRA regulations. The final regulations vary only slightly from the proposed regulations published in May 2003. They provide safe-harbor model notices for the two most common COBRA notices and require health plan sponsors to develop two new types of notices. *In addition to developing the two new notices, health plan sponsors likely will have to revise existing COBRA notices to comply with the new regulations.* The final regulations apply to notice obligations arising on or after the first day of the first plan year beginning on or after November 26, 2004 (i.e., the applicability date is **January 1, 2005**, for calendar year plans).

Structure of Regulations

The regulations are divided into four sections:

1. General COBRA notice requirements—This section addresses the requirements for the initial notice that participants receive when they first become covered under a group health plan.
2. Notice requirements for employers—This section addresses the requirements for the notice the employer is required give to the plan administrator of the following qualifying events: termination of employment, reduction in hours, death of the covered employee, Medicare entitlement, and the employer's bankruptcy filing (this last event only applies if the employer provides retiree medical coverage).
3. Notice requirements for covered employees and qualified beneficiaries—This section addresses the requirements for the notice the covered employee or a qualified beneficiary is required to give to the plan administrator of the following qualifying events: divorce or legal separation, loss of eligibility of a dependent child, notice of a second qualifying event after a termination of employment or reduction in hours, notice of determination of disability by the Social Security Administration, notice of determination by Social Security Administration that an individual is no longer disabled.
4. Notice requirements for plan administrators—This section addresses the requirements for the notice of the right to elect COBRA continuation coverage, notice of the unavailability of COBRA continuation coverage, and notice of termination of COBRA continuation coverage.

Key Points

The final regulations include a number of key points, which plan sponsors and administrators should factor into their COBRA procedures. These include:

- Model Notice Safe Harbor: The model general (initial) and election notices, when appropriately modified to fit the plan, are deemed to comply with COBRA's notice requirements (i.e., the text provided in the final regulations is a safe harbor).
- Notice to Spouse: The general notice can be delivered in a single mailing to the participant and his or her spouse, provided that the plan's records show that they live at the same address. (Overlooking the obligation to notify the spouse is frequent COBRA compliance problem.)
- Reasonable Notice Procedures: A plan must establish, and include in its summary plan description, reasonable procedures that qualified beneficiaries must use to furnish notices to the plan administrator. To be reasonable, the procedures must at least specify who is designated to receive notices, the method that must be used to furnish the notice, and the required content of the notice.
- Effect of Not Having Procedures: If the plan fails to establish reasonable procedures, generally the qualified beneficiary satisfies his or her notice obligation by giving notice to the person or department that customarily handles employee benefits matters for the employer. The DOL deleted the controversial provision in the proposed regulations that the qualified beneficiary could give notice to any officer of the plan sponsor. (Special rules apply for multiemployer and insured plans.)
- Forms: Plans are permitted to require qualified beneficiaries to use specific forms to provide notice, as long as the forms are readily available without cost.
- Importance of General Notice: Generally, the timelines for qualified beneficiaries to provide required notices do not start until the qualified beneficiary has received the general (initial) COBRA notice—which contains an explanation of the qualified beneficiaries' notice obligations. This requirement highlights the importance of sending the general notice and retaining proof that it was sent.
- Incomplete Notices: A plan administrator cannot reject an incomplete notice from a qualified beneficiary if it identifies the plan, the covered employee and qualified beneficiaries, the qualifying event or disability determination, and the date of the event or determination. Plan administrators can, however, require the qualified beneficiary to supply the missing information.
- 44 Day Rule: Where the employer and the plan administrator are the same (as is the case with most single-employer health plans), the plan administrator has 44 days to provide a COBRA election notice. (Some courts had held previously that this deadline was as short as 14 days.)
- Unavailability Notice: The plan administrator must provide the COBRA unavailability notice within 14 days after receiving notice of a purported qualifying event. The unavailability notice must be sent regardless of the basis for the denial of COBRA and regardless of whether the notice involves a first qualifying event, a second qualifying event, or a request for a disability extension. The DOL did not provide a model for this notice and does not intend to, so plan sponsors and administrators will have to develop their own notices.
- Termination Notice: The early termination notice must be provided as soon as reasonably practicable. It is not mandatory for the early termination notice to be sent before coverage actually terminates. The DOL did not provide a model for this notice

and does not intend to, so plan sponsors and administrators will have to develop their own notices.

- Date Notice Furnished: If the plan administrator sends COBRA notices by first class mail, certified mail, or Express Mail, the notice is deemed to be furnished on the date of mailing.

What This Means for Employers

Given the cost and difficulty of obtaining health insurance outside of group health plans, many employees and their family members depend on, and are well informed about, their COBRA rights. Failure to provide the proper notices and follow proper procedures can lead to significant exposure for health plan sponsors.

Therefore, health plan sponsors should review the content of their COBRA notices and their COBRA procedures in light of these final regulations. It's especially important to ensure that the general (initial) COBRA notice is provided to the right people at the right time. Also, the model election notice contains a significant amount of information that typically has not been included in most COBRA notices up to now, so it is likely that revisions will be called for.

We would be happy to assist in preparation of revised notices and in reviewing COBRA procedures.

Because of the changing nature of this area of the law and the importance of individual facts, this information is not meant to provide legal opinions and is not a substitute for the advice of legal counsel. For more information, please contact the Employee Benefits Department at Lane Powell Spears Lubersky:

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