

Final COBRA Notice Regulations

The Department of Labor issued final regulations relating to the notice requirements under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") on May 26, 2004 (for this discussion called the "new regulations"). These new regulations are effective as of the first day of the first plan year that occurs on or after November 26, 2004. For calendar year plans, this means operation in compliance with the final regulations no later than January 1, 2005.

The final regulations affect four areas of notice obligations: (i) the initial notice of the right to continuation coverage; (ii) the employer's notice to the plan administrator of a qualifying event; (iii) the qualified beneficiary's notice to the plan administrator of a qualifying event and disability determinations; and (iv) plan administrator notices to qualified beneficiaries of the right to elect continuation coverage and other determinations.

Below is a brief summary of the notice obligations under COBRA as they are affected by the new regulations.

Initial Notice of Right to Continuation Coverage

Employees and spouses must be notified of their right to COBRA coverage upon initial enrollment in the group health plan. This means that a spouse who is enrolled at a later date, such as a spouse who is added later due to special enrollment rights under HIPAA or a spouse who is added during open enrollment must be provided with an initial notice at that time.

The new regulations provide minimum timing and content requirements for the initial notice (now called the "general notice" under the new regulations).

- The general notice must be provided within 90 days from the date on which the employee or spouse first becomes covered under the plan. However, if a qualifying event occurs in the first 90 days of coverage, the election notice (discussed below) will be considered sufficient notice of continuation coverage rights.
- The general notice may be provided in a summary plan description. Note that the summary plan description must be mailed and addressed to both the covered employee and the covered spouse to be valid notice to all qualified beneficiaries, and only if coverage for all qualified beneficiaries begins at the same time.

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- The general notice may be delivered electronically if standards for electronic delivery are met.
- There are minimum content requirements for the general notice which may be met by providing a customized version of the model general notice provided with the proposed regulations. Note that provision of the model notice previously published in ERISA Technical Release 86-2 (June 26, 1986) will not longer be considered to be good faith compliance with the requirements of the regulations.

Employer Notice to Plan Administrator of Qualifying Event

The employer must notify the plan administrator within 30 days of the following qualifying events: (i) termination or reduction in hours of employment; (ii) death of employee; (iii) employee entitlement to Medicare; and (iv) employer bankruptcy.

The new regulations specify that:

- If the plan provides for continuation coverage to begin with the date of loss of coverage, then the 30-day period in which the employer must notify the plan administrator must also begin with the date of the loss of coverage.
- The employer must provide the plan administrator with enough information to determine the identity of the plan, the covered employee, the qualifying event and the date of the qualifying event.

Qualified Beneficiary Notice to Plan Administrator of Qualifying Event and Disability Determinations

The qualified beneficiary must notify the plan administrator of a qualifying event that is a (i) divorce or legal separation, or (ii) child's loss of dependent status.

In connection with the election of a extension of continuation coverage beyond the initial 18-month period, the qualified beneficiary must also notify the plan administrator if: (i) a second qualifying event occurs; (ii) the Social Security Administration determines that a qualified beneficiary is disabled; or (iii) the Social Security Administration determines that a qualified beneficiary is no longer disabled.

The new regulations make several changes and clarifications to these notice obligations:

- The new regulations clarify that the qualified beneficiary must notify the plan administrator within 60 days of the later of (i) the occurrence of one of the events described above; (ii) the date of the loss of coverage; (iii) the date the qualified beneficiary is informed of his or her obligation to provide the notice; or (iv) in the

case of a determination of disability, the date of the determination by the Social Security Administration. The notice of a determination of disability by the Social Security Administration must still be made before the end of the initial 18-month period of continuation coverage. The new regulations also clarify that the 60-day notice period is a minimum notice period and that the plan may allow for longer notice periods.

- Plans must establish reasonable procedures for qualified beneficiaries to provide these notices. Procedures will be deemed reasonable if provided in the summary plan description, specify who is designated to receive notices and specify the means qualified beneficiaries must use for giving notice and the required content of the notice. *If the plan does not have reasonable procedures, the qualified beneficiary will be deemed to have provided the notice if written or oral notice of a specified event is given in a manner reasonably calculated to bring the information to the attention of parties customarily in charge of the plan.*
- The plan may require a form to be used for notices if the form is easily available to qualified beneficiaries without cost, and may require that specific information be provided.
- An incomplete notice that is otherwise timely cannot be rejected if it contains specified minimum information (identity of plan, the qualified beneficiaries, the qualifying event or disability determination, and the date on which it occurred), however the plan administrator can require that the missing information be provided.
- The qualified beneficiary's notice period does not begin to run unless and until the plan has satisfied the general (initial) notice requirements. Note that it is through the provision of the general notice that qualified beneficiaries learn of their notice obligations, and if the plan administrator fails to provide the general notice, the qualified beneficiary cannot be expected to know what circumstances require him or her to give notice to the plan administrator, the time period during which the notice must be provided and the consequences of not providing timely notice.
- Plans cannot decline to provide the disability extension due to failure to provide a timely disability notice unless the affected qualified beneficiaries were adequately notified, in advance, of the notice obligation.
- If the plan provides for continuation coverage to begin with the date of the loss of coverage, then the 60-day period in which the qualified beneficiary must notify the plan administrator must also begin with the date of the loss of coverage

Plan Administrator Notice to Qualified Beneficiary of Right to Elect COBRA and Other Determinations

The plan administrator must provide notice of the qualified beneficiaries' right to COBRA coverage within 14 days of receiving notice of a qualifying event. If the employer and the plan administrator are the same entity, there is a question as to whether the 14-day period or a combined 44-day period apply. Several courts and the DOL have applied the 44-day rule, but it is recommended that the notice be provided as soon as reasonably practicable. Note that this is only for qualifying events where the employer is obligated to notify the plan administrator. Where notice is provided by the qualified beneficiary, the plan administrator only has 14 days to notify the qualified beneficiary of his or her right to elect COBRA, even if the employer and plan administrator are the same entity.

Under the new regulations there are minimum content requirements for the election notice which may be met by providing a customized version of the model election notice provided with the new regulations.

The new regulations provide for two new required notices:

- Notice of Adverse Eligibility Determination. Under the new regulations, the plan administrator must notify the qualified beneficiary within 14 days of receiving a notice of a qualifying event, second qualifying event or a disability determination by the Social Security Administration, from a participant or beneficiary and there is a determination that he or she is not eligible for continuation coverage.
- Notice of Termination of Continuation Coverage. Under the new regulations, a specific notice must be provided to qualified beneficiaries in the event that the plan administrator terminates a period of continuation coverage before the end of its maximum duration. The notice must be provided as soon as administratively practicable after the termination decision is made, must explain why and when the continuation coverage is being terminated, and must describe any rights to other coverage the qualified beneficiaries will have upon termination.

When Is a Notice "Furnished"?

For purposes of the various time limits, the new regulations clarify that a notice is considered "furnished" as follows:

Method of Delivery	Considered Furnished On:
First Class, Certified, or Express Mail	Date Mailed
Electronic Transmission	Date of Electronic Transmission
Hand-Delivery	Date Received by individual to whom it is directed
<i>Exception: The 14-day period during which the plan administrator must provide the election notice does not begin until the date the plan administrator actually receives notice of a qualifying event.</i>	

How To Get Into Compliance

Employers subject to COBRA should verify the plan year of their group health plans to determine the date by which they must be in compliance with these new regulations. Then they should review their existing COBRA forms, notices and procedures and group health plan summary plan descriptions. These documents should be updated and in some cases new notices and procedures must be drafted.

If you would like assistance with the review or drafting of compliant COBRA materials, or if you have questions regarding your obligations under COBRA, please contact Kathleen Bass at (949) 660-0486 or Alison Fay at (949) 660-0482.