

June 2004

## New COBRA Notice Procedures Will Soon Apply

### Final COBRA Rules Released

On Wednesday, May 26, 2004, the Department of Labor (the "DOL") published final regulations (the "Final Regulations") implementing updated notice and disclosure requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). These Final Regulations are a follow up to the proposed regulations that were published on May 28, 2003 (the "Proposed Regulations"), which we addressed in a *Management Alert* last June. (See *Time to Review COBRA Notices for New Regs*). Plans do not have a great deal of time to comply with these new rules. The Final Regulations will apply to notice obligations arising on or after the first day of the first plan year beginning on or after November 26, 2004. ***For calendar year plans, this means that changes must be in place by January 1, 2005.***

### What This Means for Plan Administrators

With the issuance of the Final Regulations, plan administrators of group health plans must now review and, in many cases, revise their initial COBRA notices and COBRA election notices, take steps to prepare two new notices that will be used in cases of unavailability of coverage and early termination of coverage, and ensure that their plan documents and summary plan descriptions, as well as administrative procedures, are modified to reflect the final rules. Even plan administrators who adopted changes based on the Proposed Regulations will need to take another look at their COBRA notices and practices.

### Changes Required by Final Regulations

COBRA allows employees and dependents to continue coverage for a period of time if they lose coverage under a group health plan for certain reasons (e.g., divorce, death, termination of employment other than for gross misconduct, etc.). The Final Regulations address several aspects of COBRA administration involving the timing and content of required notices, establish certain new notice requirements and provide two model COBRA notices.

### Notice Requirements

The Final Regulations require the following notices under COBRA:

- **Initial Notice:** This notice describes COBRA rights to employees and dependents. Such notice must: (a) include specified plan information, as provided in the Final Regulations; and (b) be provided within 90 days after the date on which an individual's coverage begins. Such notice may be provided in a plan's summary plan description ("SPD") or as a stand alone document. If a covered individual experiences a qualifying event within the first 90 days of coverage, this requirement may be met by timely providing an Election Notice (described below). The Final Regulations provide a model notice that plan administrators may tailor to fit their plan documents and use to satisfy the Initial Notice requirements. Note that this model notice has been slightly modified from the version contained in the Proposed Regulations to provide that: (i) plan-specific information, such as the name of the plan and a plan contact, may be placed at the end of the notice; (ii) the notice must provide the name, address and phone number of a party who will provide additional information about the plan and COBRA, not of the plan administrator and COBRA administrator; and (iii) the notice need not specify the date that COBRA coverage will commence.
- **Employer's Notice of a Qualifying Event:** An employer must notify the plan administrator of the covered employee's death, termination of employment (other than for gross misconduct), reduction in hours of employment, entitlement to Medicare or of a bankruptcy proceeding under title 11 involving the employer. For plans that commence COBRA coverage upon the loss of coverage, the employer must provide the plan administrator such notice within 30 days after the loss. In most other cases, the employer must provide the notice within 30 days of the qualifying event.

- **Notice from a Covered Employee and Qualified Beneficiary:** A covered individual must provide notice to a plan administrator upon certain qualifying events (divorce, legal separation, a child ceasing to be a dependent under the plan), second qualifying events and disability determinations. The Final Regulations: (a) set forth modified timing and content requirements for such notices; and (b) require plans to have reasonable procedures in place which describe how the covered individual is to furnish such notice. A plan can meet the “reasonable procedures” requirement by including a description in the plan’s SPD which specifies who is to provide the notice, the required content of the notice and the method for delivering the notice. If a plan fails to adopt and communicate specific procedures to the covered individual, the Final Regulations provide a “default” rule under which notice will be deemed to have been given if the covered individual identifies a specific event in a written or oral communication to individuals or entities who customarily would be considered to be responsible for the plan. If desired, the plan may require qualified beneficiaries to provide qualifying event notice on a specific form provided by the plan, although the form must be easily available to the covered individual and provided at no cost. Under the Final Regulations, a qualifying event notice must generally be provided to the plan administrator within 60 days after the later of the qualifying event or loss of coverage. With respect to disability determinations, the notice must generally be provided within 60 days of the latest of (i) the date the Social Security Administration reaches its determination, (ii) the date of the qualifying event, and (iii) the date the qualified beneficiary loses coverage. The Final Regulations clarified that where an individual is determined to be disabled before a qualifying event, the individual will still have 60 days from the qualifying event in which to inform the plan administrator of the determination.
- **Election Notice:** This notice describes a covered individual’s right to elect COBRA coverage, as well as the procedures that must be followed to do so. A plan administrator must provide an Election Notice within 14 days of the date it receives notice of a qualifying event. If an employer is the plan administrator, the Final Regulations require the plan administrator to provide the Election Notice no later than 44 days after the date the qualified beneficiary loses coverage or the date of the qualifying event (depending upon the plan’s provisions). The Final Regulations clarify that the 44-day rule applies only where the employer is required to provide the plan administrator notice of the qualifying event. The Final Regulations also modified the required content of the Election Notice. A new model notice has been provided that plan administrators may tailor to satisfy the Election Notice requirements.

- **Unavailability of COBRA Coverage Notice:** The Final Regulations adopt a new “Unavailability of COBRA Coverage” Notice (introduced in the Proposed Regulations). If a plan administrator determines that an individual is not eligible for COBRA coverage (after receiving notice of a qualifying event from such individual), the plan administrator must provide the individual with an explanation of why such coverage is unavailable within the time frames for providing the Election Notice. This notice is also required upon the receipt of a notice of a second qualifying event. No model form was provided for this new notice.
- **Early Termination Notice:** The Final Regulations also adopt the new “Early Termination” Notice (introduced in the Proposed Regulations). If a covered individual’s COBRA coverage will end before the end of the maximum period for the applicable qualifying event, the plan administrator must notify such individual as soon as the plan administrator determines that coverage will end. Again, no model form was provided in the Final Regulations with respect to this new notice requirement. However, the Preamble to the Final Regulations does state that plans may combine furnishing the Early Termination Notice with the HIPAA Certificate of Creditable Coverage.

### Implementation Date Fast Approaching

As mentioned above, changes required by the Final Regulations must be implemented by the first day of the first plan year beginning on or after November 26, 2004. **For calendar year plans, this means that changes must be in place by January 1, 2005.** Because the end of a plan year is often a busy time, plan administrators should start reviewing their COBRA notices and procedures now.

We recommend that plan sponsors:

- ♦ Review and modify existing COBRA notices to ensure that they reflect the Final Regulations and prepare new Unavailability of Coverage Notice and Early Termination Notice.
- ♦ Consider using the model notices to satisfy the Initial Notice and Election Notice requirements. Use of the model notices may be advantageous because they reflect the requirements of the Final Regulations and will be deemed to satisfy the content requirements of the respective notices. (Please note, however, that the model notices are intended to be used by single-employer plans and that they must be tailored to reflect the terms of the plan.)
- ♦ Update and amend other plan materials (SPDs, plan documents, etc.) to reflect any changes. In particular, the SPD may need to be modified to specify the procedures for a qualified beneficiary to use to report a qualifying event. The plan may also want to provide a specific form to use for such purpose.

- ◆ Ask outside COBRA vendors, if any, when notices and procedures which reflect the Final Regulations will be ready to review and when the vendor will be ready to implement the new administrative requirements.

Please contact the Seyfarth Shaw LLP employee benefits group attorney with whom you work or any employee benefits attorney listed on the website at [www.seyfarth.com](http://www.seyfarth.com) if you have any questions about the Final Regulations or need assistance in preparing or reviewing your COBRA notices or your COBRA procedures.

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