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Sent: Monday, July 28, 2003 2:25 PM
To: e-ORI@dol.gov
Subject: COBRA Notice Regulations Comments



COBRA Notice
Comments Final wi..
Attached.

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July 25, 2003

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Also submitted electronically at: e-ORI@EBSA.dol.gov

Attn: COBRA Notice Regulations

On behalf of the undersigned organizations representing the interests of consumers covered by ERISA group health plans, the Health Assistance Partnership, a Project of Families USA, the National Partnership for Women & Families, and the Center for Medicare Advocacy submit the attached comments on the Health Care Continuation Coverage Proposed Rule published by the Department of Labor on May 28, 2003. This rule represents a critical step forward for the 131 million Americans now covered by ERISA group health plans, providing American workers and their families with more complete and timely notice of their rights to COBRA continuation coverage. By requiring plans to provide specific notices, suggesting model notices plans can use, and more clearly establishing COBRA's requirements relating to the notice and disclosure requirements, the rule will help plans and consumers better understand their rights and obligations and will help more Americans take advantage of this important benefit when they need it.

While we applaud the Department's efforts in proposing and advancing this important rule, there are a number of areas where the proposed rule should be improved to better meet the needs of plan participants and beneficiaries. The attached comments outline our specific concerns, which fall into three categories. First, there are a number of areas where more substantive information is needed in the rules and model notices to ensure the notices will be meaningful to participants and beneficiaries. Second, there are some changes to the rules and notices that are needed to ensure they conform with current statutory requirements. Finally, changes to the style and form of the notices are needed to ensure these notices will be received and understood by all participants and beneficiaries.

We thank you for your consideration of these comments and would be glad to meet with you as you consider changes to the proposed rule to discuss our concerns in greater detail. Any specific questions or concerns you would like to discuss with us should be directed to Sonya Schwartz, the Private Insurance Coordinator at the Health Assistance Partnership, at (202) 737-6340 or at sschwartz@healthassistancepartnership.org.

Sincerely,

The Health Assistance Partnership, a Project of Families USA
National Partnership for Women and Families

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Center for Medicare Advocacy
American Federation of State, County, and Municipal Employees (AFSCME)
International Union, UAW
Health Rights Hotline (Sacramento, CA)
The Health Law Project, (Madison, WI)
City of Chicago Department of Public Health, Office of Managed Care

Enc: COBRA Notice Regulations – Comments from Consumer Organizations

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I. More Information Needed in Rule and Model Notices:

1. The model general notice and model election notice should include clearer information about how failing to elect COBRA may limit future coverage choices.

Individuals are often unaware of the consequences of not electing COBRA and are surprised when they are subject to preexisting condition exclusions or are unable to purchase individual health insurance after they have turned down COBRA coverage. Choosing not to elect and exhaust COBRA in most states means that individuals can lose the right to purchase individual insurance. Many people who have even minor health conditions may not be able to purchase individual coverage at any price. See, *How Accessible is Health Insurance for People in Less than Perfect Health*, Henry J. Kaiser Family Foundation (July 2001). In order to be meaningful for consumers, the notices should provide more complete information to ensure that consumers fully understand the potential consequences of turning down COBRA coverage.

Very specific examples, as well as more detailed explanations, would help qualified beneficiaries better understand issues. We propose the following changes:

Page 31857: The examples about election of other health insurance coverage offered that is not COBRA need to be clarified. For example, notice should be provided that the benefits offered through alternative group coverage may be very different from the benefits offered under COBRA. Notice should also be provided that conversion coverage is an individual policy and may be subject to annual rate increases. To the greatest extent possible, plans should also be encouraged to customize this information based on the choices actually available to the beneficiary and the relevant state law.

Page 31855: The model general notice warns beneficiaries that they might be subject to preexisting condition exclusions if they do not elect COBRA. Examples should be provided in the language discussing the ramifications of not electing COBRA with respect to preexisting conditions. For example, the model notice could state: "For example, if you suffer from diabetes but decline COBRA coverage and choose an individual policy instead, your individual policy might not pay for medical services related to your diabetes."

Page 31855: The model notice should explain the specific consequences of turning down COBRA or pursuing other coverage options, including the risk of pre-existing exclusions where there is a break in coverage or where the individual chooses to purchase individual coverage instead. The notice might include a statement advising beneficiaries that "1) if you enroll in another group plan, but have had a gap in coverage of more than 63 days, you may be subject to preexisting condition exclusions, and 2) if you try to purchase individual insurance, even right away, you may not be able to purchase a plan and you may be subject to preexisting condition exclusions." (In states where there is a legal right to guaranteed issue in the individual market, such as New York, this statement should reflect this fact.)

2. The model general notice and model election notice should include more information about the cost of COBRA and options for paying for it.

We strongly suggest that the notices include language offering guidance to enrollees about how they can pay for COBRA or other coverage. Cost of coverage is usually the most significant issue for beneficiaries and the one for which they need the most help. For example, notices could include some language about other potential sources of reimbursement for the cost of COBRA, including Medicaid, the TAARA tax credit, or other mechanisms (such as a state subsidy program).

Page 31856: Information on the TAARA health insurance tax credit information should be phrased more positively. For example, consumers could be advised: “You might be eligible for a subsidy that will pay 65 percent of your COBRA costs...” This notice should also include information that individuals between the ages of 55 and 65 who receive a pension from the Pension Benefit Guarantee Corporation might be eligible.

As employees are unlikely to understand what their COBRA payment encompasses and why it is so expensive, the notice should also include more information about COBRA’s costs and what they mean. Examples provide a unique opportunity to educate beneficiaries about the total cost of coverage, both how much the employer and the employees contribute each month in premiums. For example, the notice could read:

Before your qualifying event, your health insurance premiums were paid each month in the following manner:

Employer contribution: [enter percent and amount]

Employee contribution: [enter percent and amount]

Total premium amount: [enter amount]

Now that a qualifying event has occurred, you may continue your health coverage, but you will pay the entire premium [plus the percent, if applicable] each month.

3. The model general notice and model election notice should include more specific information to help individuals with disabilities extend their COBRA continuation coverage period.

Page 31847: The model notice explains the COBRA disability extension period. However, many beneficiaries often have to wait longer than 18 months for an SSA determination, and may have to go without coverage if this decision is not made within the timeframe set under COBRA. We suggest that both notices alert beneficiaries that when filing for SSDI, they should alert SSA that their claim should be expedited in order to meet the COBRA requirements.

4. The model general notice and model election notice should provide more specific information about Medicare's interaction with COBRA.

The interaction between Medicare and COBRA is very complex. Over the years we have counseled numerous individuals who have found themselves without coverage under Medicare Part B for doctor's services, paying more for their Part B coverage as a result of delayed enrollment, and/or unable to purchase Medicare supplemental (Medigap) insurance as a result of incorrect information provided by plan sponsors who are unfamiliar with Medicare rules.

As a result, individuals who are on Medicare when they experience a COBRA qualifying event need specific information concerning the effect of a COBRA election on their Medicare benefits. The COBRA notices should be modified to inform qualified beneficiaries that:

a. a qualified beneficiary, enrolled in Medicare Part A but not in Medicare Part B, should enroll in Medicare Part B within six months of the date of the qualifying event. Otherwise, the qualified beneficiary may be precluded from enrolling in Part B until the next Medicare general election period after COBRA ends, and may result in the qualified beneficiary being without coverage for doctor's services for up to a year.

b. election of COBRA may affect the number and kinds of Medicare supplemental (Medigap) insurance policies a qualified beneficiary may be able to purchase.

c. a qualified beneficiary who is eligible for Medicare at the time of the qualifying event can contact 1-800-Medicare or his or her State Health Insurance and Assistance Program (SHIP) for information about COBRA and Medicare.

5. All information included in the election notice should be repeated in the general notice.

Information included in the election notice should also be included in the general notice. The general notice is often part of the summary plan description, so it is often used as a reference by beneficiaries. The election notice is also critical for beneficiaries who will not refer to the summary plan description or general notice or for beneficiaries such as separated or divorced spouses who no longer have access to the SPD. Requiring all of the relevant information relating to COBRA rights and the consequences of electing, or failing to elect, COBRA coverage is essential to insure that participants and beneficiaries will be fully informed of their rights at every stage of their decision-making process.

6. More information about where to go for help should be provided in both model notices.

There are a number of excellent resources now available to consumers that could greatly assist them as they decide whether to elect COBRA or have questions about their rights under the law. The Department of Labor has an excellent brochure explaining COBRA rights and keeps a toll-free assistance line to help consumers with complaints or questions, but neither of these resources is mentioned in either the rules or model notices. State insurance departments are also an excellent resource for consumers, and can help inform consumers of their rights to additional, more expansive coverage under state “mini-COBRA” laws that apply to smaller ERISA group health plans. Consumer ombudsman programs, both public and private, are also an excellent resource for consumers who need help. All of these resources should be mentioned to enable consumers to take advantage of the assistance they provide to help consumers navigate a complex health care system. Both notices should provide more information about these specific resources for beneficiaries who need help.

Page 31848: The model notice only offers the Department of Labor’s (DOL’s) internet address as a possible resource, but many beneficiaries may not have access to or experience with the internet. We suggest that the following resources also be mentioned to ensure consumers have access to the full range of resources that are available:

- DOL’s 1-800 number for consumer assistance, including information that consumers can ask questions or request a free copy of DOL’s COBRA booklet for more information. DOL should test the number to make sure that it is responsive to consumers’ questions.
- Information on DOL’s regional and local offices, and how consumers can obtain the most recent contact information for each.
- Information about how consumers can contact the National Association of Insurance Commissioners for the phone number and website of their state insurance commissioner, who can also help answer questions about their COBRA rights and tell them about possible state programs that provide broader protections than the federal law.
- Information about State Health Insurance Assistance Programs (SHIPs) for Medicare beneficiaries who need help with COBRA and Medigap eligibility and coordination of benefits issues and also give 1-800-Medicare.
- Information about consumer health assistance programs (ombudsman) that can help consumers. See the Health Assistance Partnership’s program locator at www.healthassistancepartnership.org for current listings.
- Information about the TAARA health insurance tax credit program is available at the HCTC at HCTC Customer Contact Center toll free at 1-866-628-HCTC (1-866-628-4282). Information is also available at www.irs.gov by searching under “HCTC.”

7. Information about appeal rights should be included in both model notices.

The final regulation and both model notices must include information about rights to appeal COBRA denials, including right to file a civil action under ERISA. The COBRA notice should include a statement of the beneficiary’s right to file a civil action in the case of a dispute with the plan over whether the individual has a right to COBRA coverage. Such

statement should be comparable to the one required under the Department's claims procedure rules (29 CFR 2560.503(1)(g)(iv)).

8. Both model notices should more clearly explain the *individual* right to COBRA.

Page 31854: Currently, the model notice states that "each qualified beneficiary who elects continuation coverage will have the same rights under the plan as other participants or beneficiaries covered under the plan." Clearer information about the *individual* nature of COBRA rights is needed, i.e., that individuals' rights to COBRA continuation coverage exist independently of other family members, regardless of whether another qualified beneficiary (whether a spouse, a parent, or a divorced spouse) elects COBRA. The COBRA regulations clearly state that each qualified beneficiary must be offered the opportunity to make an independent election to receive COBRA continuation coverage (26 CFR 54.4980B-6 (Q&A-6)). The model notices should also clearly reflect this individual nature of COBRA rights.

9. A special model notice should also be included for qualified beneficiaries in a bankrupt company.

Currently, footnote 11 of the preamble states that the model election notice is not to be used during bankruptcy. However, notice to former employees must be provided during bankruptcy in order to inform them about their options such as electing COBRA (or no option to elect COBRA), enrolling in the TAARA Health Insurance Tax Credit program, or other opportunities under a collective bargaining agreement. A special notice for former employees of a bankrupt company should be developed and required in the final rules that includes more specific information about the beneficiaries' rights to COBRA coverage, TAARA tax credits, or other coverage options.

10. Both model notices should explain the meaning of "day".

We recommend that both model notices define "day." For example, both model notices should state, "Day for the purposes of COBRA notice requirements means a *calendar* day. A *calendar* day is any day of the week, Monday through Sunday. For example, ten *calendar* days from Monday, August 1 is Thursday, August 11."

11. Both model notices should clearly define "gross misconduct."

Page 31845: The model general notice does not define gross misconduct. Because gross misconduct is not defined in the COBRA statute or regulations, and has generally been left to the courts' interpretation of state unemployment insurance law, we suggest that the model notice include language that instructs administrators to customize the definition of gross misconduct.

12. The notices should provide more specific information about safeguards for separated and divorced spouses.

The notice should include information that a husband (or wife) cannot decline COBRA continuation coverage on behalf of the spouse. Therefore, if the husband (or wife) chooses not to elect COBRA continuation coverage on behalf of the spouse, the spouse must still be allowed to elect COBRA continuation coverage within the given time period (26 CFR 54.4980B-6 (Q&A-6 Example 1)).

II. Changes Needed to Better Reflect Statutory Requirements:

1. The election and payment schedule information in the model election notice should be modified.

COBRA establishes certain protections for individuals relating to the timing of election and payment for COBRA coverage. Under COBRA, individuals have a 60 day period in which to elect coverage, during which time the individual may reverse an initial decision to refuse coverage. 29 U.S.C.A. § 1165(1). Once an individual elects COBRA continuation coverage, the statute bars the plan from requiring the individual to pay any premium within the first 45 days after the initial election of COBRA coverage. 29 U.S.C.A. § 1162(3). In addition, COBRA guarantees a 30 day grace period after the premium is due (or longer if the plan allows) for an individual to make the payment, during which time the plan cannot discontinue coverage. 29 U.S.C.A. § 1162(2)(C). The model notices (and the rule provisions which discuss the notice requirements) appear to depart from these statutory protections in at least four places and should be corrected to better reflect the statutory requirements.

Page 31853: The COBRA Continuation Coverage Election Form includes a clause that states that it must be completed and returned by mail by a given date, but provides no information to inform beneficiaries that they can change their mind to elect coverage even if they have already refused coverage within the first 60 day period. This election form should include a statement that makes clear that if the enrollee sends in the form declining COBRA coverage but then changes his or her mind within the 60 day election period, the enrollee can still elect COBRA coverage (26 CFR 54.4980B-6 (Q&A-4)).

Page 31854: The election notice states that “Continuation coverage will be terminated before the end of the maximum period of any required premium is not paid on time...”, but fails to clarify that “on time” under the statute means within the 30 day grace period allowed by law. This omission could lead to confusion about whether the plan has the right to terminate coverage if a payment is not made by the due date. To correct any misperception, this language should be changed to reflect that an individual always has a 30 day grace period in which to make the payment before coverage will be terminated. For example, the notice language could be amended to read “Continuation coverage will be terminated before the end of the maximum period if any required premium is not paid on time (i.e., within the 30 day grace period allowed after the date the premium is due)...”

Page 31856: The model election notice incorrectly states that the first payment for continuation coverage must be made within 45 days after the date of election or the individual will lose all continuation coverage rights. This runs in direct contradiction to the statutory requirement that plans may not require payment to be made within the first 45 days

after the initial election of COBRA coverage. 29 U.S.C.A. § 1162(3). The notice should be changed to reflect that the plan cannot require payment until *after* the first 45 days have passed.

Page 31857: The model election notice appears to suggest that a plan may suspend coverage during the grace period and then retroactively reinstate coverage once payment is made. However, allowing plans to suspend coverage even temporarily during the grace period violates the spirit of the law, which provides COBRA enrollees with a 30 day grace period in which to make “timely payments.” 29 U.S.C.A. § 1162(2)(C). It also violates the letter of the current regulations, which state that after the election period, “payment may be made to the plan by the date that is 30 days after the first day of that period OR payment at a later date if the plan allows it.” (26 CFR 54.4980B-8 (Q&A-5)). In keeping with these requirements, the rule and model notice should be corrected to delete any language that could be construed to permit a plan to suspend coverage during the grace period.

2. The rule should provide more specific guidelines for plans about what is a “reasonable procedure for furnishing the required notices.”

The rule includes provisions empowering plans to dictate “reasonable procedures” for notice requirements for covered employees and beneficiaries with which beneficiaries would have to comply in order to be deemed eligible for COBRA. 29 CFR § 2590.606-3(b). This language does not appear to have any grounding in the underlying statute and could be construed to delegate to the plan too much authority to establish procedures which might be burdensome for the beneficiaries and interfere with their rights to elect COBRA coverage. The following are examples of places where the rule appears to delegate too much discretion to the plan and should be changed.

Page 31848: In the proposed rule at 29 CFR § 2590.606-3(b), plans are empowered to establish “reasonable procedures” for the furnishing of notices by covered employees and qualified beneficiaries if they meet certain requirements, but there are no safeguards included to ensure that whatever procedures are created cannot unduly burden an individual’s right to exercise their COBRA rights. By contrast, the existing provisions in the proposed rule clearly state that the plan can dictate the information concerning the qualifying event or determination of disability that would be required and the “easily available” forms that must be submitted, which would appear to make things easier for plans and potentially more burdensome for individuals. Instead, the rule should include a provision that clearly states that plan procedures are only deemed reasonable if they do not unduly burden an individual’s ability to exercise their rights to COBRA coverage. More specifically, the rule should also clearly provide examples of the types of documentation that all plans should accept as notice of a qualifying event or disability determination. And, it should clearly state that a form may only be deemed “easily available, without cost” to covered employees and beneficiaries if it is available in paper form at no cost to the individual.

Page 31849: The proposed rule at 29 CFR 2590.606-3(b)(4), includes provisions about fixing mistakes of the content of the notice. However, covered employees and beneficiaries

also need protections to ensure that they are not penalized when the plan has failed to establish a reasonable procedure for providing notice. To correct this problem, the rule should add a provision assuring that when a beneficiary does not provide complete notice and the plan is assembling information, the clock will stop, and the incomplete notice should be considered notice for the purposes of meeting time requirements. The rule should include guidelines for fixing problems that arise if the beneficiary gives proper notice to the wrong contact.

III. Changes Needed to Improve Style and Format:

1. The general style of both model notices should be more accessible and should be tested on consumers to ensure readability.

The overall style of the notices may need to be simplified to make it more understandable to the average participant and beneficiary. In keeping with the plain language requirements created under Executive Order, the readability of these notices should be tested on consumers to ensure that it will be understandable in its current form. In addition, some parts of the notice need to be rewritten to ensure that beneficiaries can understand and therefore properly comply with the notice requirements. For example, the notice needs to explain more clearly when the qualified beneficiary must notify the plan of a qualifying event.

Page 31847: The information should be bulleted as follows:

If you experience the following, you must notify the Plan Administrator within 60 days to ensure your COBRA continuation coverage rights:

- a. Divorce from your spouse
- b. Legal separation from your spouse
- c. A dependent child loses eligibility for coverage because they no longer meet the definition of 'dependent'.

3. The rule must create guidelines for providing notice to beneficiaries who are Limited English Proficient (LEP).

The rule must ensure that plans make these critical COBRA notices available to LEP beneficiaries in languages other than English when appropriate. The Summary Plan Description (SPD) regulations provide clear guidelines to help plans understand when written disclosures must be made accessible in other languages based on the number of LEP beneficiaries enrolled in the plan (29 CFR 2520.102-2(c)). In order to assure that notice is provided to LEP individuals, the rule should require plans to comply with the SPD rules relating to LEP individuals for translation of COBRA notices.

4. Notice of Qualifying Event When Individual Not Eligible

The proposed rule says that the administrator shall furnish to each beneficiary, not later than 14 days after receipt of the notice of qualifying event the notice of the right (or lack of a right) to elect continuation coverage (29 CFR 2590 606-4 (c)). The rules should specify that this notice should be given to the beneficiary "as soon as possible but not later than 14 days," otherwise some individuals may incur costs that they erroneously expect their health plan to pay, not knowing that they are not eligible to elect COBRA. Beneficiaries may have made other decisions about their health care if they had known COBRA was not an option. Also, as mentioned above, the notice of no qualifying event should also include notice of the right to appeal and the right to file a civil action.