

July 28, 2003

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

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Attn: COBRA Notice Regulations (29 CFR Part 2590)

Dear Sir/Madam:

On behalf of the American Association of Health Plans (AAHP), I would like to offer comments on the proposed rule concerning continuation coverage available under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The COBRA Notice Regulations were published in the Federal Register on May 28, 2003. The proposed rule applies to group health plans offered pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).

AAHP is the nation's principal association of health plans, representing more than 1,000 plans that arrange health coverage for approximately 170 million Americans nationwide. Our member plans include health maintenance organizations (HMOs), preferred provider organizations (PPOs), and other similar health plans. AAHP's member health plans administer and provide benefits to ERISA group health plans that are subject to the COBRA requirements.

AAHP would like to commend the Department of Labor for its development of standards for the administration of COBRA benefits. In general, we believe that the proposed rule establishes clear and fair guidelines for plan administrators as well as for participants and beneficiaries of ERISA group health plans.

We are concerned, however, that certain of the requirements of the proposed rule may complicate the administration of COBRA continuation benefits and expose our health plan members to potential liability for their role in providing benefits to ERISA group health plans. We have attached a discussion document with AAHP's detailed comments regarding the proposed rule to this letter.

We believe that the following issues in the proposed rule should be addressed and we have detailed recommendations in the attached document:

- The **implementation date** should be moved forward to ERISA group health plan years beginning on or after **January 1, 2005** to allow sufficient time for implementation.
- The procedures for group health plans to provide the **initial COBRA rights notice** should be clarified.
- The proposed rule should establish time limits and procedures for **employee and beneficiary notices** that are not in conflict with the requirements of ERISA.
- Additional **model COBRA notices** should be developed by the Department.

AAHP appreciates the opportunity to provide comments on the proposed rule and we look forward to working with the Department on the implementation of the requirements for COBRA continuation coverage. Please feel free to contact me at (202) 778-3259 or ddennett@aahp.org if you have any questions.

Sincerely,

Diana C. Dennett
Executive Vice President

Attachment

**Proposed Rule on Health Care Continuation Coverage
Comments of the American Association of Health Plans
July 28, 2003**

The following are comments on behalf of the American Association of Health Plans regarding the proposed rule on health care continuation coverage available under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The proposed rule, which was published in the Federal Register on May 28, 2003, applies to group health plans established pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).

(1.) Implementation Date for the Proposed Rule

ERISA group health plans should be given sufficient time to implement the new COBRA notice requirements.

The Notice of Proposed Rulemaking indicates that the Department intends to implement the final rule beginning with ERISA group health plan years starting on or after January 1, 2004. Even if a Final Rule concerning COBRA continuation coverage is finalized fairly quickly and published in the Federal Register, it will take ERISA group health plans time to revise plan documents and to prepare any necessary changes to Summary Plan Descriptions and to COBRA notice documents. In addition, group plan administrators will have to revise their administrative and processing systems to comply with the notice requirements. January 1, 2004 does not give ERISA group health plan sufficient time to comply with the rule.

AAHP recommends that the final rule be implemented for ERISA group health plan years starting on or after January 1, 2005.

(2.) Initial Notice of COBRA Rights (29 CFR §2590.606-1)

A. The ERISA group health plan should be responsible for providing the initial notice of COBRA rights to covered individuals.

The proposed rule (29 CFR §2590.606-1(a)) states that an initial notice of COBRA rights shall be provided by the "administrator" of the group health plan. In contrast, the ERISA statute places responsibility for providing such notices directly on the ERISA group health plan (42 USC §300bb-6 (1)). While the ERISA group health plan may choose to delegate this function to the group health plan administrator, the group health plan may also decide to have the COBRA notice furnished by a third party administrator (TPA), health insurer, or other entity.

AAHP recommends that the proposed rule require the initial notice of COBRA rights be provided by the ERISA group health plan.

B. ERISA group health plans should be allowed to send a combined COBRA rights and COBRA election notice to individuals in certain situations.

The proposed rule (29 CFR §2590.606-1(b)) requires that the initial notice of COBRA rights be furnished to an employee and to any covered spouse the earlier of: (a) 90 days after the individual is covered under the group health plan; or (b) when the individual must be informed of their right to elect COBRA coverage because of a “triggering event.” In other words, the group health plan has up to 90 days to inform individuals of their COBRA rights unless there is an earlier event, such as a divorce, that would trigger the individual’s right to COBRA coverage.

Once a triggering event occurs, the individual must be sent a second notice that informs the individual of his or her right to elect COBRA continuation coverage (*See*: 29 CFR §2590.606-4). Because of the interaction of the timing requirements of these two rules, it is possible that an individual would receive two separate notices at the same time - - an initial notice of COBRA rights and the COBRA election notice.

The initial notice of COBRA rights and the COBRA election notice include the same information. For example, both notices must identify the group health plan, indicate the plan’s procedures for electing continuation coverage, describe the continuation coverage that is available under the plan, and indicate the length of time such coverage will be provided. Because both notices provide the same information, it may be more administratively efficient for the ERISA group health plan to provide a single notice to individuals who have a triggering event which occurs prior to the time when the initial notice of COBRA rights is delivered. This notice would combine the requirements of the initial notice of COBRA rights and the COBRA election notice.

AAHP recommends that ERISA group health plans be permitted to send a single notice to individuals informing them of their COBRA rights if the individual has a triggering event that occurs prior to the time that they receive their initial COBRA notice. This notice would include the requirements for the notice of COBRA rights (29 CFR §2590.606-1) and the COBRA election notice (29 CFR §2590.606-4).

C. The model COBRA rights notice should clearly identify the entity responsible for COBRA administration on behalf of the ERISA group health plan.

The proposed rule (29 CFR §2590.606-1 (c)) outlines the information that must be included in the initial notice of COBRA rights. For example, the notice must contain the name, address, and telephone number of the party responsible under the plan for administering continuation coverage. The proposed rule incorporates a Model Notice of COBRA Rights, however, that requires the disclosure of the name, address, and telephone number of the group health plan administrator if different from the entity or individual responsible for COBRA administration.

Different individuals or entities may be responsible for administration of the group health plan and administration of the continuation coverage that is available under the plan.

Putting contact information in the notice for both the group health plan administrator and for the COBRA benefits administrator does not adequately inform beneficiaries of who to contact with questions about their COBRA rights. The notice should give beneficiaries a single point of contact within the group health plan on COBRA administration issues.

AAHP recommends that the Model General Notice of COBRA Continuation Coverage Rights be revised to include the name, address, and telephone number of the party responsible for administering COBRA continuation coverage under the plan. The model notice form should be amended as follows:

~~The Plan Administrator is [enter name, address and telephone number of Plan Administrator]. [If the Plan Administrator administers COBRA continuation coverage, add the following: The Plan Administrator is responsible for administering COBRA continuation coverage.] [If the Plan Administrator does not administer COBRA continuation coverage, add the following: COBRA continuation coverage for the Plan is administered by [enter name, address and telephone number of party responsible for administering COBRA continuation coverage].~~

(3.) Notice Requirements for Employees and Beneficiaries (29 CFR §2590.606-3)

A. Employees and beneficiaries should notify the ERISA group health plan administrator of qualifying events.

In certain situations a covered employee or qualified beneficiary must notify the ERISA group health plan of a qualifying event such as a divorce or when a dependent child ceases to be covered under the plan. The proposed rule (29 CFR §2590.606-3(b)) describe the “reasonable procedures” that ERISA group health plans may establish for the furnishing of such notice to the plan by the employee or beneficiary.

The proposed rule also states that if the ERISA group health plan fails to establish reasonable procedures for receiving notices, it is deemed to have received notice of a qualifying event if a written or oral communication about the event is brought to the attention of the employer, to a health insurance company or service providing benefits to the plan, or to any officer of the employer or health insurer. This “deemed notice” provision does not assure that the ERISA group health plan will receive adequate notice of a triggering event from a covered employee or qualified beneficiary and is contrary to the requirements of ERISA.

The ERISA statute provides that covered employees or qualified beneficiaries are responsible for “notifying the plan administrator of the occurrence of any qualifying event” (42 USC §300bb-6 (3), emphasis added). A “plan administrator” is defined as either: (a) the person designated by the plan documents; (b) the plan sponsor, if an administrator is not designated; or (c) if an administrator is not designated and a plan sponsor cannot be identified, such other person as may be designated by regulation. (See 29 USC §1002 (16)(A)).

Health insurance issuers are not responsible for drafting plan documents for ERISA group health plans for which they provide health benefits and are therefore not in a position to assure that the ERISA group health plan has established reasonable procedures for receiving notices from a covered employee or qualified beneficiary of a qualifying event. As a result, the health insurance issuer should not be required to assume the responsibility and potential liability risk for receiving notices of qualifying events from employees and beneficiaries.

In addition, several health insurance issuers may provide health benefits to an ERISA group health plan. It is not reasonable to expect that notice to one insurer will adequately provide notice of a qualifying event to all health insurance issuers that are providing benefits to an ERISA group health plan. The COBRA notice regulations should clearly indicate that covered employees and qualified beneficiaries must provide notice to the plan administrator of a qualifying event.

AAHP recommends that the notice rule (29 CFR §2590.606-3) require covered employees and qualified beneficiaries to provide notice to the plan administrator of a qualifying event.

B. Employees and beneficiaries should notify the ERISA group health plan administrator of a qualifying event within the time period required by ERISA.

The ERISA statute (29 USC 300bbb-6 (3)) and the COBRA notice regulations (29 CFR 2590.606-3) require covered employees and qualified beneficiaries to provide notice to the group health plan within certain time limits depending on the type of qualifying event. While the time limits in the ERISA statute are mandatory, the limits outlined in the notice regulations appear to be permissive. For example, the COBRA notice regulation provides that the ERISA group health plan may provide a covered employee or qualified beneficiary, “a period of time longer than that specified in this section to provide notice . . .” (29 CFR 2590.606-3 (f)). In contrast, the ERISA statute clearly provides that the covered employee or qualified beneficiary is responsible for notifying the plan administrator of a qualified event within the specified time period. (*See*: 29 USC 300bbb-6 (3)).

AAHP recommends that the COBRA notice regulations clearly state that a covered employee or qualified beneficiary is responsible for notifying the plan administrator of a qualifying event within the time period specified in the ERISA statute.

C. It is more administratively efficient for state workforce agencies to inform employees and beneficiaries of their eligibility for health coverage tax credits.

The regulations include a Model COBRA Continuation Coverage Election Form that is to be provided to individuals informing them of the rights to elect COBRA continuation coverage. The notice includes a paragraph describing the rights of certain individuals to qualify for tax credits under the 2002 Trade Act. The instructions on the form state that

the paragraph is to be included in situations where the employee might be eligible for trade adjustment assistance.

In many cases, the ERISA group health plan will not be aware at the time they furnish a COBRA election notice to an individual, whether that individual qualifies for the tax credits. These credits are available in certain limited situations to workers who lose employment because of jobs being moved overseas due to trade legislation. Individuals who are "TAA qualified" and who would therefore qualify for the tax credits obtain job assistance and training from state workforce agencies. These state agencies are responsible for notifying TAA qualified individuals of the availability of health coverage tax credits. (See: Employment and Training Administration, Unemployment Insurance Program Letter No. 05-03, November 22, 2002). The state workforce agencies are in a better position than ERISA group health plans to identify those individuals who would benefit from receiving information about the availability of tax credits.

AAHP recommends that the COBRA election notice not include information on the availability of tax credits that are available to TAA qualified individuals because that information is already provided to such individuals through the state workforce agencies.

(4.) New Notice Requirements (29 CFR §2590.606-4)

The Department should provide model notice forms for the notice of unavailability of COBRA coverage and the notice of early termination.

The proposed rule requires two additional notices to be provided by the ERISA group health plan. The group health plan must notify covered employees or qualified beneficiaries of the unavailability of COBRA coverage in situations where the plan administrator receives notice of a qualifying event and determines that the individual is not qualified for COBRA coverage. (29 CFR §2590.606-4 (c)). The second notice is furnished by the group health plan when COBRA coverage is terminated early because the qualified beneficiary fails to pay premiums or obtains other health insurance coverage. (29 CFR §2590.606-4 (d)). While the proposed rule incorporates model notice forms for other types of COBRA notices, it does not include model notice language for these two notices.

AAHP recommends that the Department develop model notice forms for the notice of the unavailability of COBRA coverage and for the notice of termination of COBRA coverage.