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Health Policy Institute

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

ATTN: COBRA Notice Regulations
Submitted electronically

Thank you for the opportunity to comment on the Proposed Rule for Health Care Continuation Coverage published on May 28, 2003 in the Federal Register. I would like to commend the Department of Labor for publishing this notice. These proposed rules do much to clarify the notice requirements for employers, employees, and beneficiaries. The new requirements related to notice of early termination, lack of eligibility, and the relationship between COBRA and rights under the Health Insurance Portability and Accountability Act (HIPAA) to guaranteed issue coverage can be particularly helpful.

As important information gaps remain, however, these rules could benefit from greater clarification in several areas. The comments below offer suggestions to address some of these gaps and to further clarify these rules. These comments focus, in particular, on the second election period under the Trade Act of 2002, the relationship between COBRA and HIPAA, and similar discrete issues.

My comments are based on my extensive experience, through my work here at Georgetown University's Health Policy Institute and as staff of the ERISA Working Group for the National Association of Insurance Commissioners, analyzing federal employee benefits and health insurance laws with an emphasis on how they impact consumers, particularly those with chronic conditions.

Trade Act of 2002 and COBRA

The Trade Act of 2002 (P.L. 107-210) provides benefits for those who have lost their job and

insurance coverage because of foreign trade or who are between the ages of 55 and 64, and had their pensions assumed by the Pension Benefit Guarantee Corporation. These individuals and their families can receive a 65 percent refundable and advanceable tax credit to help them pay for the cost of qualified health insurance, including COBRA. The Trade Act of 2002 also amends §605 of ERISA to require plans to offer a second 60-day COBRA election period for those who have been certified as TAA-eligible individuals. (See §203 of P.L. 107-210).

More guidance and information to employers about the Trade Act of 2002 and how it affects their COBRA responsibilities will be especially helpful, particularly since these requirements are so new. The preamble makes note of the Trade Act of 2002 but the notice provisions of the regulation fail to include specific provisions. The model notices also fail to provide mention of the second 60-day election period or other relevant guidance to plans, participants and beneficiaries on this matter. To strengthen the rules in this area, I recommend, at a minimum, the following suggestions be included:

- For those employers whose employees might be eligible for a second election notice period and the 65 percent tax credit, §2590.606-4, Notice Requirements for Plan Administrators of the regulation, should explicitly require that the notice explain the procedure TAA-eligible individuals must follow to elect continuation coverage during the second election period, including how they may become certified for TAA, and thus eligible for the second COBRA election period, the time period during which the election must be made, and the process for making the election.
- The section in the model information notice about election of coverage should include information about the second 60-day election period and its relationship to pre-existing condition exclusion periods.
- In the model information notice about COBRA continuation rights attached to the election form, plans who think their employees might be eligible for TAA are given the option to provide this information. Instead, they should be required to do so.
- The paragraph in the model information notice about the cost of COBRA should be revised as follows:

[If employees might be eligible for trade adjustment assistance, add:
You may be eligible for help with your COBRA premium. The Trade Act of 2002 created a new tax credit for certain individuals who become eligible for trade adjustment assistance due to loss of job or coverage due to foreign competition. Retired employees between the ages of 55 and 64 whose pensions were assumed by the Pension Benefit Guarantee Corporation (and their dependents) may be eligible for the tax credit as well. Under the new tax provisions, eligible individuals can either take the tax credit or get advance payment of 65 percent of premiums paid for qualified health insurance including COBRA. If you have questions about your eligibility for these new tax credits, call the Health Care Tax Credit Customer Service Contact Center toll-free at 1-866-628-4282. TTD/TTY callers may call toll-free at 1-866-626-4282. More information about the Trade Act of 2002 is available at www.doleta.gov/tradeact/2002act_index.asp.

Health Insurance Portability and Accountability Act and COBRA

The text of the regulation requires plans to inform participants and beneficiaries about the impact their decision on continuation coverage will have on other rights available under the Health Insurance Portability and Accountability Act of 1996. This requirement enhances considerably the value of the proposed regulation. The language in the model information notice attached to the model election form that carries out this requirement needs considerable strengthening. I would recommend, at a minimum, language that is similar to the following:

Your decision whether to elect COBRA coverage can affect your future access to health coverage in several ways.

- If it takes more than 63 days to replace your health coverage, you may be subject to a pre-existing condition exclusion period for as much as one year (and in some cases 18-months). However, if you avoid a gap in health insurance coverage that is longer than 63 days, your new group health plan must reduce the pre-existing condition exclusion period by the amount of time you were previously covered under certain types of health coverage, including COBRA. Thus, COBRA can help reduce or even eliminate the length of time that your next health insurance plan will exclude coverage for any existing health conditions you may have.
- COBRA can also help you get access to health insurance policies on your own without risk of being turned down or being subject to a pre-existing condition exclusion period. If you do not have access to a group health plan through an employer, federal law requires the states to designate certain types of health insurance coverage that you can buy on your own, without being turned down or being subject to a pre-existing condition exclusion period. You may be able to obtain a high-risk pool policy or some other specially designated HIPAA policy. To be eligible for this coverage, however, you must take COBRA for the maximum time it is available to you and buy this new coverage within 63 days of COBRA ending, among other requirements. If you do not elect COBRA, you will not be eligible for these policies. To learn more about these HIPAA policies contact your state insurance agency.

The special enrollment right language in the model information notice which follows this text should be retained. The discussion later in the information notice on election of other coverage besides continuation coverage is generally helpful and very important to include as well.

General Comments

Individual election rights: In each of the model notices, participants and beneficiaries are notified that they have an individual right to elect COBRA. This is an area that is confusing to participants and beneficiaries. To avoid any misunderstanding, in each model document, this statement should be emphasized earlier than it currently is stated. For example, in the Model General Notice of COBRA Continuation Rights, the third paragraph might read, "COBRA continuation coverage is.... A qualified beneficiary is someone who will lose coverage under the

Plan because of a qualifying event. Depending on the type of qualifying event, employees, spouses of employees, and dependent children of employees may be qualified beneficiaries. Each of these qualified individuals has their own independent right to elect continuation coverage. [For example, even if your spouse does not elect COBRA, you may still do so.] Under the plan, qualified beneficiaries who elect COBRA continuation coverage [choose and enter appropriate information: may pay or are not required to pay] for COBRA continuation coverage. I also suggest incorporating, at the end of the discussion of when dependent children become qualified beneficiaries, a statement that spouses and dependent children have an independent right to elect COBRA as well.

Similarly, in the model election notice and model information notice, the individual right to election should be prominently displayed and emphasized in the early paragraphs of the document in addition to any current references.

Bankruptcy: The proposed regulations should include a model election notice to be used in the event of bankruptcy when applicable.

Disability: The Social Security Administration's (SSA) disability determination process is typically very lengthy and overwhelming. SSA procedures (though not necessarily well known or practiced) do exist for expediting disability determinations for individuals seeking a determination for COBRA purposes only. In general, however, the model notices should inform participants and beneficiaries that they should tell SSA that they are subject to COBRA's limited timeframe for presenting a disability determination. If there is a central contact number they should call to help them expedite this process, it would be helpful to include that information as well.

Payment provisions: Participants and beneficiaries who are electing COBRA are often experiencing financial and other difficulties. Consequently, it is especially important that they have a clear understanding of when they must pay for their coverage before they lose COBRA. The language in the model information notice regarding when and how payment for continuation coverage must be made is unclear. It should require plans to indicate the number of days those persons electing continuation coverage have to make their first payment and should include a note to the plan that this time period must not be less than 45 days. Also, this same paragraph should clarify that the participant or beneficiary will be given a 30-day grace period before coverage can be terminated.

The second to last page of the model information notice does indicate whether plans will or will not send a periodic notice when payments are due. Participants and beneficiaries do not always understand that they will not receive a bill before payment is due. This lack of understanding can result in an avoidable loss of coverage. I recommend that this sentence be emphasized in some way, either by printing it in italic or bold letters, or by making it its own separate paragraph.

Contact information: Both the model general notice and the model information notice should include the Department of Labor's toll-free consumer contact number in addition to the website address.

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Thank you for your consideration of these comments. If you have any questions about them or would like to discuss them further, please feel free to contact me at 202-687-0634.

Thank you.

Sincerely,

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