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July 24, 2003

Ann L. Combs, Assistant Secretary
Employee Benefits Security Administration
Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW, Suite S-2524
Washington, DC 20210

RE: Comments of Health Care For All on Proposed Rule 29 CFR Part 2590 (Health Care Continuation Coverage) and Model Forms

Dear Assistant Secretary Combs:

Please accept the comments of Health Care For All and Health Law Advocates on the Department of Labor's proposed regulations, 29 CFR Part 2590, Health Care Continuation Coverage, 68 Fed. Reg. 31832 (May 28, 2003). Health Care For All is the leading advocacy organization for Massachusetts' health care consumers. Health Law Advocates is Health Care For All's public interest law firm and represents Massachusetts residents seeking access to health care and coverage.

We support the Department's promulgation of this long-anticipated rule on COBRA's notice requirements. It is apparent that the Department has considered the interests of group health plan beneficiaries in creating the rule. In particular, we commend the Department on requiring that plan administrators provide beneficiaries with notice when COBRA coverage is unavailable (proposed 29 CFR §2590.606-4(c)), and when COBRA coverage will terminate prior to the maximum coverage period (proposed 29 CFR §2590.606-4(d)). Nonetheless, we have concerns about certain aspects of the proposed rule, including the accessibility of the model forms to the average plan participant. We recommend that the Department seek consumer input to ensure that this complex information is understandable to most beneficiaries. We also have special concerns about the potential impact of the regulations on separating and divorcing spouses, which we note throughout.

Health Law Advocates has represented a number of clients who have had COBRA notice problems. We include case examples in our comments to illustrate the potential impact of the proposed regulations on the problems we have encountered.

A. Proposed 29 CFR §2950.606-1 – General Notice of Continuation Coverage

Section 606(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) requires a group health plan to provide, at the time of commencement of

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coverage under the plan, written notice to each covered employee and spouse of his/her COBRA rights. *See* 29 U.S.C. § 1166(a)(1). The proposed regulation is intended to clarify what the notice should contain, and when and how it must be provided. We have the following concerns about this regulation.

1. General notice of COBRA rights in summary plan description only is insufficient

We oppose allowing inclusion of the general, initial notice of COBRA continuation coverage in the summary plan description (SPD) to satisfy 29 U.S.C. § 1166(a)(1). *See* proposed 29 CFR §2590.606-1(e). While the SPD must include comprehensive information on COBRA continuation rights (SPD must contain plan's requirements respecting "eligibility for participation and benefits," 29 U.S.C. §1022(b)), permitting a plan administrator to forego separate initial notice of COBRA rights will prejudice participants and their dependents. In the absence of regulatory guidance, this may have become the practice of some plans. Nonetheless, we believe that a separate initial notice of COBRA rights should have to be sent to plan beneficiaries to prevent this important information from getting lost in the "fine print" of an often voluminous and sometimes confusing SPD. Health Law Advocates has received calls, especially from dependent spouses after a divorce or separation, who do not recall having received initial notice of their COBRA rights, most likely for this reason.

2. Ninety days is too long a period for provision of the general notice

A plan administrator should not have 90 days after coverage commences to furnish the general notice of COBRA rights to covered employees and their spouses. Presumably the Department proposed this period because a plan has 90 days to furnish the SPD. *See* 29 U.S.C. § 1024(b)(1). As discussed above, we believe a separate initial COBRA notice should be required, so the SPD period should not control. In addition, the SPD must be furnished 90 days after the employee *becomes* a participant, which may be earlier than when coverage commences. *See* 29 U.S.C. § 1002 (definition of "participant").

More importantly, 29 U.S.C. § 1166(a) clearly states that the initial COBRA notice shall be give *at the time of commencement of coverage* under the plan. Even assuming the statute allows a reasonable period of time beyond the date coverage commences, 90 days is excessive given the importance of COBRA rights and the impact knowledge of these rights may have on beneficiaries' actions.

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3. Contents of notice

The list of information to be included in the general notice is comprehensive, and covers some areas plan administrators might otherwise omit to the possible detriment of beneficiaries. In particular, we support the requirements that the notice: 1) state that it does not fully describe continuation coverage or other rights under the plan (29 CFR 2950.606-1(c)(6)); and 2) explain the importance of keeping the plan administrator informed of current addresses of all beneficiaries. 29 CFR §2950.606-1(c)(5).

The remaining contents (described in subparagraphs (1) through (4) of this regulation) make more specific what the statute requires. *See* 29 U.S.C. §1166(1). We have a few comments here. First, under subparagraph (2), the general notice should have to include information about when and under what circumstances continuation coverage may be terminated before the applicable maximum period. The notice should also have to contain information about the *plan's* obligation to notify beneficiaries of their rights upon certain qualifying events, not just beneficiaries' notice obligations (see subparagraphs (3) and (4)). Furthermore, information should have to be included about election rights and time periods, and any right to switch plan options. With regard to beneficiaries' duty to report certain qualifying events, the regulation should specify that the notice include time lines. Finally, subparagraph (4) should also mention the obligation to report to the plan administrator an end to Social Security disabled status.

4. Issues for spouses

Since 1996, Health Law Advocates has spearheaded the Divorce Judgment and Health Insurance Project, which seeks to identify and eliminate barriers to maintaining health insurance after divorce and separation. We have special concerns about the way in which the proposed regulations may affect spouses facing this difficult life transition.

- a. The plan administrator should have to define "divorce" and "legal separation" for purposes of triggering COBRA rights. ERISA plans are all over the map with these definitions. Sometimes by the time the spouse-beneficiary learns of the definition, she or he has already been dropped from the plan.
- b. Plans should not be permitted to give a single notice to both covered employee and spouse, even when the plan's information indicates that the couple lives at the same address. Arguably, the statute requires separate notice to participant and spouse ("shall provide . . . written notice to each covered employee and spouse of the employee"). The same is true for the SPD. *See* 29 USC 1024(b)(1) ("shall furnish to each participant, and each beneficiary . . . a copy of the SPD"). Moreover, as a matter

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of policy, separate notices should be the required practice. There may be domestic abuse or other valid reasons why a spouse cannot rely on the participant to apprise him or her of COBRA rights.

5. The proposed model form needs revision

We support making a model initial notice form available to group plan administrators. A model form will make compliance easier and will minimize the risk of inadequate notice of rights to beneficiaries. However, the form proposed, while containing helpful information, has a number of shortcomings. In general, the form needs to be easier to understand and follow for the average beneficiary. Both the language level and the organization of the model make it less than straightforward. The following are additional specific comments.

- a. Use of a format that breaks out key information would be helpful, rather than having most of the notice in narrative form. For example, maximum coverage periods should be identified in a readable chart or bulleted list rather than buried in the narrative. (See model, page 3.)
- b. The statement that the notice gives incomplete information should be highlighted and set off (e.g., in a text box). In the model, this critical warning is buried at the bottom of the first paragraph. Also, the warning should state that for “complete” information about rights and obligations under the plan, the beneficiary should request a copy of the plan document from the plan administrator. Furthermore, the notice should state that the summary plan description is required by law to be furnished by the plan administrator.
- c. Key plan contacts. At several points the model leaves space for insertion of the name and contact information of the party or parties responsible for handling certain plan responsibilities. This information should have to be placed up front, with a clear explanation of the functions each contact performs. This is particularly true for plans that have more than one point of contact, e.g., a Plan Administrator and a COBRA benefits administrator. In the proposed model, contact information appears in various places and may be duplicative and confusing.

Case example: JF's group health plan required COBRA payments to be sent to a different entity than the plan administrator. JF's coverage was cancelled when his electronic payments went to the wrong address. Health Law Advocates was able to get JF's coverage reinstated. Clear and prominent listing of key contact information on the model form would help prevent such improper terminations.

- d. Responsibility for payment. The model includes a sentence about payment “under the

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plan, qualified beneficiaries who elect COBRA continuation coverage [must pay or are not required to pay].” (See model, page 1, ¶ 3.) The model should then state that another person or entity may pay for COBRA coverage, but that the qualified beneficiary is responsible for ensuring that payment is made on time in order to maintain coverage.

- e. Definitions: The model should require plan administrators to define key terms clearly and in a manner consistent with the statute and existing COBRA regulations. The terms to be defined should include:
- “Gross misconduct” - Covered employees have a right to notice of what constitutes “gross misconduct” so they can avoid this behavior and to contest any such assessment.
 - “Divorce” – In most states, the court issues a decree *nisi*, which becomes final after a period of time. (In Massachusetts, this period is generally 90 days.) In order to exercise their rights, COBRA-eligible spouses need to know when the plan considers the divorce to have occurred.
 - “Legal separation” – Plans apply widely varied definitions of “legally separated” and “legal separation.” In Massachusetts, there is no formal, recognized state of “legal separation”; this is likely true for other states as well. The notice must clearly define this term so dependent spouses can protect themselves from unnecessary and avoidable loss of coverage.
 - “Dependent child” – Whether or not a child is considered a “dependent” varies widely from plan to plan. Requiring clear, advance notice will allow families prepare for a child’s continued coverage.
 - “Enrolled in Medicare” – People are often unaware that “entitlement” to Medicare (based on receipt of Social Security disability benefits or age) makes automatic “enrollment” in Medicare Part A. Because Medicare does not cover prescription drugs and places substantial cost-sharing burdens on enrollees, beneficiaries need to understand ahead of time when COBRA coverage will end so they may investigate options for Medicare supplemental coverage.
6. Disability extension. Information about the notice requirements to get a disability extension is extremely important, yet easy to overlook in the proposed model. We recommend that this information, especially the time periods for notifying the plan administrator of disability status, be set off with bullets, in a text box in bold, or in some other fashion. In addition, in line 4, we suggest changing “your entire family” to “all qualified beneficiaries in your family covered by the plan.” Finally, the word “original” should be inserted before “18-month period of COBRA continuation coverage” in the last sentence.
7. Second qualifying event. We recommend the replacement of the first sentence with the

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following: "If you and/or members of your family are receiving COBRA because of termination of employment or a reduction in work hours, and you or another qualified beneficiary has a second qualifying event, all qualified beneficiaries in the family may be eligible for an extension of COBRA, for up to a total maximum of 36 months." The list of second qualifying events should then be broken out (for example, in bulleted form).

8. When notice is considered received by the plan. The model notice should tell participants and beneficiaries clearly what kind of notice (oral, written or electronically transmitted) is adequate, and, if written or e-mailed, whether the notice must be received or only sent by the deadline.
9. Resources for further information. The model notice does not adequately inform consumers how to contact the Department of Labor for further information on COBRA or related rights. A toll-free telephone number (if available) and/or regional phone numbers for EBSA should be included, as well as a mailing address. Those without access to the internet would also benefit from information about obtaining hard copies of DOL publications. Finally, the notice should include resources for additional information on continuation of retiree health coverage in the context of employer bankruptcy (see model, page 2), as the information currently included is very general.

B. 29 CFR §2590.606-3 – Notice Requirements for Covered Employees and Qualified Beneficiaries

The proposed regulation lays out in substantial detail a plan's requirements for informing a covered beneficiary of when s/he is responsible for notifying the plan administrator of a qualifying event. In general, the regulation provides helpful clarification of the statute; however, we do have some suggestions and criticisms.

1. Reasonable procedures

We agree that plans should have to establish reasonable procedures for informing beneficiaries of when they must notify the plan of a qualifying event. The procedures should be described in full in the SPD, as proposed, *and* in the initial, separate COBRA notice given to covered employees and their spouses. In addition, we suggest that employers be required to post prominently at the workplace the procedures and a summary of COBRA rights and responsibilities, as is done with other laws, such as the Family and Medical Leave Act.

2. Plans should not be permitted to require use of a specific form

We recommend that paragraph (b)(3) be deleted in its entirety. A plan should not be

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allowed to *require* a specific form and reject other forms of notice that are consistent with the statute. *See* 29 USC §1166(a)(3). A plan may make available a specific form at no cost and encourage beneficiaries to use it; however, actual notice that is reasonably calculated to notify appropriate persons at the employer, plan administrator or insurer, and *actual* notice to such persons, should be adequate. Thus, the beginning of paragraph (b)(4) should be amended to read:

Even if a plan has established reasonable procedures under paragraph (b) of this section, notice shall be deemed to have been provided when a written or oral communication identifying a specific qualifying event is made in a manner reasonably calculated to bring the information to the attention of, or such notice is actually received by . . .

3. To whom notice may be given under paragraph (b)(4)

The list of contact points or persons identified for the receipt of notice is too limited. At a large company, beneficiaries may not know the officers or the unit that handles employee benefits. A small organization may have less formal communication channels. Dependent spouses are at a particular disadvantage when it comes to knowing who to contact about a qualifying event. We therefore recommend the following revisions (in italics) to subparagraphs (b)(4)(i) and (iii):

- (i) in the case of single employer plan, either the organizational unit that has customarily handled employee benefits matters of the employer, any officer of the employer, *or the manager or supervisor of the covered employee; . . .*
- (iii) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization subject to regulation under the insurance laws of one or more States, the person or organizational unit at such company, service or organization that handles claims for benefits under the plan, any officer of such company, service or organization, *or the designated customer service unit of such company, service or organization.*

4. Who may provide notice of a qualifying event

Paragraph (e) of 29 CFR 2590.606-3 deems notice of a qualifying event by the covered employee or any qualifying beneficiary, or by his or her “representative”(not further defined) to satisfy the responsibility of all qualified beneficiaries. In general, treating notice by one as notice for all better protects the COBRA rights of qualified beneficiaries. Unfortunately, angry spouses have been known to notify a plan administrator of a “separation” or “divorce” falsely or out of spite, sometimes in defiance of a court order to maintain coverage for the dependent spouse pending finalization of a divorce. Therefore, if notified by the employee of a divorce or legal

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separation, the plan administrator should have to confirm the qualifying event by requiring adequate documentation or contacting the covered spouse.

C. 29 CFR §2590.606-4 – Notice Requirements for Plan Administrators

This regulation clarifies the statutory requirements for notice of the right to elect COBRA coverage, and requires plan administrators to furnish two additional notices: 1) notice of unavailability of continuation coverage; and 2) notice of early termination of continuation coverage. 29 CFR §2590.606-4(c), (d). A number of Health Law Advocates' clients learned COBRA was terminated when they sought medical care, and incurred bills they could ill afford to pay. While the new notices may not prevent the loss of COBRA coverage, they will help beneficiaries plan ahead so they can avoid uncovered costs and ineligibility or limited coverage under future plans (due to pre-existing condition exclusions or waiting periods). Indeed, we would encourage the Department to consider requiring notice of termination of COBRA continuation coverage in *all* cases, not just early terminations. Beneficiaries often have difficulty keeping track of the COBRA termination date and notice would help them plan adequately for the impending loss of coverage.

The following are some specific comments about each type of notice.

1. Election notice

We support having a model form for COBRA election notice. Unfortunately, the proposed form is not written in a manner to be understood by the average plan participant. The lengthy form does not provide a clear and easy-to-understand guide to help beneficiaries make an educated decision about electing COBRA coverage. Instead, it presents complex information in a jumbled and visually unclear format that seems likely to overwhelm beneficiaries. The form must more clearly and simply explain the right to elect COBRA coverage, the implications of not doing so, the procedures to follow, and how to get more information to make this important decision.

One particular area in which the model notice needs improvement is explanation of payment requirements and procedures. Under the statute, the time that may elapse between a qualifying event and receipt of the election notice has consequences that are not adequately dealt with in the model.

Case example: Health Law Advocates' client B.B. got divorced and her ex-husband notified the plan 60 days later. The plan then sent her a confusing election notice. B.B. waited until the end of the 60-day period to elect, as she was unsure she could afford the coverage. Because the election notice was unclear about how much she had to pay initially (more than four

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months of premiums); B.B. failed to make timely, complete payments and lost her coverage. Without extremely clear explanation of the payment due, how it is calculated, and timelines for payment, this is a possible scenario for many beneficiaries.

2. Notice of early termination

a. Time period

Notice of early termination of coverage should have to be furnished within a maximum time frame, rather than "as soon as practicable." See 29 CFR §2590.606-4(d)(3). Ideally, such notice should have to be given in advance of the premature termination so the beneficiary can address the cause, if possible (especially in the case of non-payment of premium). Even if coverage cannot be preserved or reinstated, prompt notice will allow beneficiaries to arrange for other coverage without pre-existing condition exclusions.

Case example: Health Law Advocates' client M.C. learned at the pharmacy that the family's COBRA coverage through her husband's former employer had ended. She later found out that the company had become insolvent and discontinued the group plan. Had M.C. received timely notice of the COBRA termination, the family would have been better prepared to find non-group coverage or enroll in a public program.

b. Early termination notice should be separate from HIPAA notice

The preamble to the regulations notes that plans are permitted to give the notice of early COBRA termination in the same document as the HIPAA notice of creditable coverage. Unless such plan flexibility is required by HIPAA, these very important but distinct notices should be separate. Of course, a plan may still mail or deliver the two documents to a beneficiary at the same time.

c. Single notice of early termination to the covered employee and spouse is inadequate

We reiterate here our earlier comments about the inadequacy of single notice for an employee and covered spouse. (See page 3, section A(4)(b), *infra*.)

D. Additional comments

Health Care For All and Health Law Advocates have reviewed the excellent and thorough comments prepared by the National Partnership for Women and Families, the Health Assistance Partnership and the Center for Medicare Advocacy. (See copy enclosed.) We support these thoughtful comments in their entirety, and ask that the Department give their recommendations

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careful consideration.

Thank you for the opportunity to comment on these important regulations. Please contact one of us if you have any questions.

Sincerely,

John McDonough
Executive Director
Health Care For All

Laurie Martinelli
Executive Director
Health Law Advocates

Enclosure (Comments of National Partnership for Women and Families et al.)

cc: Massachusetts Congressional Delegation

PW/BC