

**HARRANG LONG GARY RUDNICK P.C.**  
**ATTORNEYS & COUNSELORS AT LAW**

WALTER W. MILLER  
 360 East 10th Avenue, Suite 300  
 Eugene, Oregon 97401-3248  
 (541) 686-6598  
 (541) 686-6564 (Fax)  
[wally.miller@harrang.com](mailto:wally.miller@harrang.com)

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 Employee Benefits Security Administration  
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 200 Constitution Avenue, NW  
 Washington, D.C. 20210

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Attention: COBRA Notice Regulations

RE: Comments Regarding Proposed COBRA Notice Regulations

On May 28, 2003, the Employee Benefits Security Administration of the Department of Labor issued proposed regulations (the "Proposed Regulations") setting forth minimum standards for the timing and content of notices required under the health care continuation coverage (COBRA) provisions of Part 6 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). My comments regarding various aspects of these Proposed Regulations are respectfully set forth below.

**A. DISABILITY DETERMINATION NOTICE PERIOD [§ 2590.606-3(c)(2)]**

1. Synopsis of Comment. The notice of disability determination provisions of the Proposed Regulations do not adequately address the situation of a qualified beneficiary whose disability determination date precedes the date of the applicable COBRA qualifying event.
2. Statutory Background.
  - a. ERISA Section 602(2)(A)(v) grants an elongated period of COBRA continuation coverage to a qualified beneficiary who is determined by the Social Security Administration (SSA) to have been disabled at any time during the first 60 days of the COBRA continuation coverage. This elongated period of coverage is available to the

disabled qualified beneficiary, as well as to each other qualified beneficiary (such as a spouse or dependent of the disabled individual) who is entitled to COBRA continuation coverage by reason of the same qualifying event. *See* Treas. Reg. § 54.4980B-7, Q&A-5.

- b. ERISA Section 606(a)(3) provides that a qualified beneficiary who has been determined by the SSA to have been disabled during the first 60 days of the COBRA continuation coverage period must notify the plan administrator within 60 days after the date of the SSA disability determination. A plan is not required to offer the elongated 29-month period of COBRA coverage if the notice of the SSA disability determination is not timely provided to the plan administrator.
3. Proposed Regulations. Section 2590.606-3(c)(2) of the Proposed Regulations refines the disability determination notice period rules by holding that the period for providing the notice cannot end before the date that is 60 days after the later of:
  - The date of the disability determination by the SSA; or
  - The date on which the qualified beneficiary is properly informed of both the responsibility to provide the notice and the plan's procedures for submitting the notice to the plan administrator.
4. Problem With Regulation. If a qualified beneficiary (for example, a spouse of a covered employee) was disabled and determined to be so by the SSA prior to the applicable qualifying event), or even prior to the date that the covered employee became employed by the plan sponsor, then it would be impractical, and maybe impossible, for the qualified beneficiary to furnish the disability determination notice within the prescribed 60-day time frame.
5. Example. This problem is illustrated by the example set forth below.
  - a. Employee A is married to a spouse who is disabled for SSA purposes. The date on which the SSA made that disability determination was January 31, 1995. The spouse continues to be disabled.

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attention: COBRA Notice Regulations

RE: Comments Regarding Proposed COBRA Notice Regulations

July 18, 2003

Page 3

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- b. Employee A became employed by the employer on February 15, 2004 (i.e., well after the SSA disability determination date). On April 1, 2004, Employee A became covered under the employer's group health plan. Effective as of June 30, 2004, Employee A terminated employment with the employer.
- c. As a result of the termination of employment, Employee A and her spouse, and any covered dependents, would generally be entitled to 18 months of COBRA continuation coverage. Nevertheless, because the spouse was determined to have been disabled at some time during the first 60 days of that COBRA continuation coverage period, the spouse and each other qualified beneficiary affected by the qualifying event (i.e., the employee and covered dependents) are presumptively entitled to the 29 months of COBRA coverage.
- d. However, the extended period of coverage is available only if the notice of the SSA determination is timely provided to the administrator of the plan. Under the Proposed Regulations, "timely" means within 60 days after the later of the SSA disability determination or the date on which notice of the qualified beneficiary's obligation to inform the plan administrator of the SSA determination is provided to the qualified beneficiary.
- e. In this example, Employee A and her spouse could not have provided the plan administrator with notice of the SSA's disability determination within 60 days of that determination because Employee A was not even employed by the employer as of that date.
- f. Employee A could, we suppose, be required to submit the notice of disability determination within 60 days of receiving the general COBRA notice. However, it is an incongruous policy to require a qualified beneficiary to provide a notice pertaining to a future qualifying event at the beginning of the employment relationship, rather than at the time of the actual qualifying event. As a practical matter, a newly-hired individual will not realize the significance of this notice obligation, and therefore, will not then provide the notice as presumptively required.

6. Viewpoint. The practical approach, and one that follows the spirit of the Proposed Regulations, is to have the final regulations hold that the time limit for the notice of the furnishing of a SSA disability determination by a qualified beneficiary may not end before the date that is 60 days after the latest of:

- The date of the SSA disability determination;
- The date that the qualified beneficiary is informed of the obligation to provide the notice and the plan's procedures for providing such; or
- The date as of which the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event.

7. Sample Provision. Following is a sample provision effecting the approach suggested above.

**§ 2590.606-3. Notice requirements for covered employees and qualified beneficiaries.**

\* \* \*

(c) *Periods of time for providing notice.*

\* \* \*

(2) *Time limits for notice of disability determination.* (i) Subject to paragraph (c)(2)(ii) of this section, the period of time for furnishing the notice described in paragraph (a)(4) of this section may not end before the date that is 60 days after the later latest of:

(A) The date of the disability determination by the Social Security Administration; or

(B) The date on which the qualified beneficiary is informed, through the furnishing of the summary plan description or the notice described in § 2590.606-1, of both the responsibility to provide the notice and the plan's procedures for providing such notice to the administrator; or

(C)(i) In the case of a plan that provides, pursuant to section 607(5) of the Act, that continuation coverage and the applicable period for providing notice under section 606(a)(2) of the Act shall commence with the date of loss of coverage, the date on which the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; or

(ii) In the case of any plan other than a plan described in paragraph (c)(1)(i) of this section, the date on which the relevant qualifying event occurs.

**B. COBRA ELECTION RIGHTS NOTIFICATION PERIOD [§ 2590.606-4(b)(2)]**

1. Synopsis of Comment. The Proposed Regulations may require an employer that also serves as the plan administrator to provide a notice of right to elect COBRA continuation coverage (the "COBRA Election Rights Notice") in regard to a qualifying event that is either the divorce or legal separation of the covered employee or a dependent child losing the status of a dependent (a "Divorce or Loss of Dependency Status Qualifying Event") before the employer even receives notice that the qualifying event has occurred.
2. Statutory Background.
  - a. ERISA Section 606(a)(3) imposes upon a covered employee or qualified beneficiary the obligation to provide the plan administrator notice of a Divorce or Loss of Dependency Status Qualifying Event. The notice must be submitted within 60 days after the date of the qualifying event.
  - b. ERISA Section 606(a)(4)(B) requires a plan administrator that receives notice of an inurrence of a Divorce or Loss of Dependency Status Qualifying Event to provide the affected qualified beneficiary with a COBRA Election Rights Notice.
  - c. ERISA Section 606(c) states that in the situation described above, the COBRA Election Rights Notice must be provided within 14 days after the plan administrator is notified of the qualifying event.

3. Proposed Regulations.

a. Section 2590.606-4(b)(2) of the Proposed Regulations pertains to a plan with respect to which the employer is also the plan administrator (an "Employer-Administrator"). This Proposed Regulation states that upon receipt of a notice of a qualifying event (including notice of a Divorce or Loss of Dependency Status Qualifying Event), the Employer-Administrator must furnish the COBRA Election Rights Notice to the qualified beneficiary. More significantly, this Proposed Regulation further states that the COBRA Election Rights Notice must be provided not later than 44 days after the date on which the qualified beneficiary loses coverage under the plan due to the qualifying event (or after the date on which the qualifying event occurred, if the plan has adopted such administrative rule).

b. Section 2590.606-3(c)(1) of the Proposed Regulations states, however, that the time limit for a qualified beneficiary to provide a plan administrator of notice of a Divorce or Loss of Dependency Status Qualifying Event cannot end any earlier than 60 days after the date on which the qualified beneficiary loses coverage under the plan due to the qualifying event (or, again, after the date on which the qualifying event occurred if the plan has adopted such rule).

4. Problem With Regulation. The Proposed Regulations potentially require that an Employer-Administrator provide a COBRA Election Rights Notice in regard to a Divorce or Loss of Dependency Status Qualifying Event to a qualified beneficiary prior to the date that the Employer-Administrator is notified of such qualifying event.

5. Example. This problem is illustrated by the example set forth below.

a. Employee B is covered under a group health plan. Employee B's employer is also the administrator of the plan. Employee B has a child (Child A) who graduates from college on June 25, 2004. After graduation, Child A ceases to be a dependent of Employee B and is no longer eligible for dependent coverage under the group health plan.

b. Under the terms of the group health plan, Child A will lose coverage on June 30, 2004, the last day of the month in which the qualifying event occurred. The group health plan follows the ERISA Section 607(5) rule, and measures the COBRA coverage and notice periods from the loss of coverage date.

- c. Per ERISA Section 606(a)(3) and Section 2590.606-3(c)(1) of the Proposed Regulations, the plan allows Child A 60 days from the loss of coverage date (i.e., until August 29, 2004) to provide notice of the qualifying event to the employer. Child A in fact provides proper notice to the employer of the qualifying event on August 24, 2004, the 55<sup>th</sup> day after the loss of coverage date.
  - d. Upon the receipt of notice of the qualifying event, the employer is obligated to give Child A a COBRA Election Rights Notice. Pursuant to Proposed Regulations Section 2590.606-4(b)(2), this notice must be furnished to the qualified beneficiary no later than August 13, 2004, the 44<sup>th</sup> day after the date on which Child A loses coverage under the plan. However, as of August 13, 2004, the employer was not yet notified of the qualifying event.
  - e. Consequently, the Proposed Regulations require the employer to perform an impossible act, which is to give notice to Child A in regard to a qualifying event before the employer had any knowledge of the qualifying event.
6. Viewpoint. The general time period for providing a COBRA Election Rights Notice as prescribed in ERISA Section 606(c) is 14 days after the date the plan administrator receives notice of the applicable qualifying event. This same policy should be incorporated into the Proposed Regulations Section 2590.606-4(b)(2) so that the time period for providing the COBRA Election Rights Notice is the normal 44-day deadline, or if later, the 14<sup>th</sup> day after the notice is received by the Employer-Administrator.
7. Sample Provision. Following is a sample provision effecting the approach suggested above.

**§ 2590.606-4. Notice requirements for plan administrators.**

\* \* \*

(b) *Notice of right to elect continuation coverage.*

\* \* \*

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attention: COBRA Notice Regulations  
RE: Comments Regarding Proposed COBRA Notice Regulations  
July 18, 2003  
Page 8

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(2) In the case of a plan with respect to which an employer of a covered employee is also the administrator of the plan, except as provided in paragraph (b)(3) of this section, a notice meeting the requirements of paragraph (b)(4) of this section shall be furnished within the period below that ends last:

(i) The 44-day period ending after:

(A) In the case of a plan that provides, pursuant to section 607(5) of the Act, that continuation coverage and the applicable period for providing notice under section 606(a)(2) of the Act shall commence with the date of loss of coverage, the date on which a qualified beneficiary loses coverage under the plan due to the qualifying event; or

(B) In all other cases, the date on which the qualifying event occurred.

(ii) The 14-day period ending after the date of the administrator's receipt of the notice of qualifying event.

\* \* \*

Should you have any questions regarding the foregoing comments, please feel free to contact me.

Yours very truly,

*/s/ Walter W. Miller*

WALTER W. MILLER

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