AMERICAN BENEFITS COUNCIL

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

Attention: COBRA Notice Regulations

Ladies and Gentlemen:

I am writing on behalf of the American Benefits Council ("the Council") regarding the Department of Labor's ("Department") proposed regulations that implement the notice requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). 68 Fed. Reg. 31832 (May 28, 2003). The Council is a public policy organization representing principally Fortune 500 companies. In addition, the Council represents organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council commends the Department for proposing regulations which clarify many issues that have been outstanding for a number of years. The development of model notices and the Department's position that a plan has 90 days from commencement of coverage to deliver the general notice to the employee and spouse are particularly helpful. However, certain provisions of the proposed regulations would require costly and unnecessary changes in administrative processes and would increase the potential liability of group health plan sponsors. COBRA is an area that is

one of the most heavily litigated under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Hundreds of COBRA cases are litigated each year. We are concerned that a number of provisions of the proposed regulations create new uncertainties and impose new duties on plan sponsors that will lead to increased and unnecessary COBRA litigation and liability. This could have significant negative consequences on companies that sponsor and provide services to group health plans subject to ERISA.

Accordingly, as described in greater detail below, the Council urges the Department to:

- Eliminate the new notice requirements in the proposed regulations that are not mandated by statute, or clarify that these requirements are optional and not subject to penalty.

- Allow a plan to reject a notice from a qualified beneficiary as untimely if the plan does not receive a notice that satisfies the plan's "reasonable notification procedures" within the statutory time frame.

- Eliminate the rule in the proposed regulations which states that, in the absence of "reasonable procedures," an oral communication by a qualified beneficiary will be deemed to satisfy the qualified beneficiary's notice requirements.

- Give plans the flexibility to send an election notice and general notice that provide necessary information but are uniform for all qualified beneficiaries.

- Clarify how conflicts between these regulations and the Treasury Regulations should be resolved.

- Provide a longer time frame for compliance by making the final regulations effective no earlier than the first day of the first plan year beginning on or after January 1, 2005.

Discussion

A. Eliminate new notice requirements that are not mandated by statute, or clarify that these requirements are optional and not subject to penalty.

The COBRA statute requires administrators of group health plans to provide only two types of COBRA notices- an initial notice upon enrollment in the plan to inform a participant about his or her rights under COBRA, ERISA § 606(a)(1), and an election notice upon the occurrence of a qualifying event to inform a qualified beneficiary of the right to elect COBRA. ERISA § 606(a)(4). The proposed regulations impose two additional notice obligations by requiring a plan administrator to also provide notice in following circumstances:

> (i) when an individual is not eligible for COBRA, but has notified the plan of the occurrence of a certain events (i.e., divorce, legal separation, dependents ceasing to satisfy eligibility requirements, occurrence of second qualifying event, or a determination that a qualified beneficiary has been determined by the Social Security Administration to be disabled or to no longer be disabled). The notice must explain why the individual is not eligible, and must be furnished within the time frame that would apply if the individual was entitled to elect continuation coverage, 29 C.F.R. § 2590.606-4(c);
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> (ii) when COBRA coverage for any qualified beneficiary terminates before the maximum COBRA period. The notice must explain the reason the coverage has terminated, the date of termination, and any rights the qualified beneficiary may have under the plan to elect alternative group or individual coverage, such as a conversion right, 29 C.F.R. § 2590.606-4(d).

Although many plans may already provide notice under the circumstances described above, if the proposed regulations are adopted in current form, failure to comply with these new notice requirements could form the basis for excise taxes under the Internal Revenue Code imposed on the employer, the plan (in the case of a multiemployer plan), and even, in certain circumstances, the insurer or administrator. I.R.C. § 4980B(e)(1). In addition, failure to comply with the notice requirements could form the basis

for participant lawsuits for benefits and similar claims under ERISA §§ 502(a)(1)(B) and 502(a)(3), as well as participant suits against plan administrators to impose statutory penalties under ERISA § 502(c)(1). This significantly increases the potential liability of the plan sponsor, plan administrator and the plan. Since these new notice requirements are not contained in the statute, there is no basis for the Department to impose these requirements and the associated costs and potential liabilities upon plan sponsors. The Department should either eliminate the new notice requirements altogether, or provide that compliance with the new notice requirements is voluntary and will not give rise to the above adverse consequences.

B. Allow a plan to reject a notice from a qualified beneficiary as untimely if the plan does not receive a notice that satisfies the plan's "reasonable notification procedures" from a qualified beneficiary within the statutory time frame.

The proposed regulations require plans to establish "reasonable notification procedures" for covered employees and qualified beneficiaries to follow upon divorce, legal separation, dependent ceasing to satisfy eligibility requirements, occurrence of second qualifying event, or a determination that a qualified beneficiary has been determined by the Social Security Administration to be disabled or to no longer be disabled. 29 C.F.R. § 2590.606-3(b)(1)-(3). A procedure is deemed "reasonable" if it satisfies four requirements: (i) it is described in the summary plan description, (ii) it specifies who is designated to receive notices, (iii) it specifies how the qualified beneficiaries must give notice, and (iv) it specifies the required content of the notice.

Under the proposed regulations, the participant need not follow all of these procedures in order to preserve his or right to coverage. Rather, as long as a qualified beneficiary provides a notice within the plan's time limits that contains enough information to enable the plan administrator to identify the plan, the covered employee and qualified beneficiaries, the qualifying event or disability determination and the date on which it occurs, the plan may not reject the notice as untimely. 29 C.F.R. § 2590.606-3(d)). A plan administrator may, however, require that the additional information be provided before the qualified beneficiary's notice requirement is deemed satisfied.

Where a plan has established reasonable notification procedures for qualified beneficiaries to follow, plan administrators should be permitted to reject notices that do not satisfy such procedures. By definition, in that circumstance, the participant's notice is unreasonably provided and plans should not be compelled to accept such notice. If a participant's notice is rejected and that participant does not submit a new notice that satisfies the required procedures within the statutory time period set forth in ERISA § 606(3), a plan administrator should be permitted to reject such notice as untimely. Without such a rule, qualified beneficiaries have little incentive to comply with the notice procedures that the plan has adopted, and the burden to obtain such information remains on the plan administrator.

C. **Eliminate rule which states that an oral communication by a qualified beneficiary will be deemed to satisfy notice requirements.**

If a plan does not adopt reasonable notification procedures within the meaning of the proposed regulations (as described above), the proposed regulations provide that a written or oral communication by a qualified beneficiary to an individual customarily considered in charge of the plan (including an organizational unit of the employer that has customarily handled employee benefits matters, an officer of an employer or an insurer), will be deemed to satisfy the notice requirement, triggering the plan's responsibility to send an election notice. 29 C.F.R. § 2590.606-3(b)(4).

There are almost no circumstances under ERISA in which oral communication satisfies a notice obligation. Indeed, throughout the entire claims procedure regulations, the only exception to the general rule that all notification must be in writing is for urgent care claims under a group health plan. 29 C.F.R. § 2560.503-1(g)(2) (in the case of an adverse benefit determination by a group health plan concerning a claim involving urgent care, oral notice is permitted as long as written or electronic notification is furnished to the claimant not later than 3 days after the oral notification); 29 C.F.R. § 2560.503-1(h)(2) (in the case of an appeal of an adverse benefit determination for a claim involving urgent care, a request for an expedited appeal of an adverse benefit determination may be submitted orally or in writing by the claimant). Clearly, there is little precedent to support the Department's position that oral notice by a qualified beneficiary is sufficient.

Allowing a qualified beneficiary's oral communication to serve as adequate notice to the plan will increase the likelihood that a plan will fail to process the notice, thus keeping the COBRA election period open and increasing the potential for adverse selection. In addition, permitting oral notice will encourage litigation. Participants who have not given proper written notice will claim oral notice has been given and will challenge the reasonableness of the plan's procedures. Difficult issues of proof will arise in determining whether oral notice was given, and significant uncertainty as to whether notice was given to an appropriate individual within the organization. It is critical that the notice be in writing so that it is referred to the appropriate individual. The proposed regulations should therefore require that a qualified beneficiary's notice always be in writing, even where a plan has not adopted reasonable notification procedures.

D. Give plans the option to send an election notice and general notice that provide necessary information but are uniform for all qualified beneficiaries.

To comply with the proposed regulations, an election notice must contain specific information. 29 C.F.R. § 2590.606-4(b)(4)(i)-(xv). The proposed regulations contain a model notice that can be used for this purpose. Much of this information is generic in nature, such as the consequences of failing to elect coverage, or a description of the circumstances under which the maximum period of continuation coverage may be extended due to a second qualifying event or disability. However, to fully comply with the proposed regulations, a plan administrator must individually tailor the notice for each qualified beneficiary. For example, the proposed regulations and model notice require that the election notice identify the applicable qualifying event and specify the premium that a qualified beneficiary will be required to pay. 29 C.F.R. § 2590.606-4(b)(4)(ii) and (xi). This means that a plan administrator must alter the contents of the notice for each qualified beneficiary whenever a qualifying event occurs.

Many plan sponsors currently send the same election notice to all qualified beneficiaries. Changing to an individualized format will be costly and unnecessary. A generic election notice adequately informs qualified beneficiaries of their rights to elect COBRA coverage without imposing

additional cost on the plan sponsor. Plan administrators should be given the flexibility to use one election notice for all qualified beneficiaries without being forced to alter that notice for each qualified beneficiary, as long as the notice clearly conveys information about applicable timeframes, coverage options and costs. Similarly, the requirement that the general notice contain the name of the group health plan under which continuation coverage is available should be modified to allow a generic reference to group health plans. 29 C.F.R. § 2590.606-1(c)(1). This would allow an employer with many group health plans subject to COBRA to produce one general notice for all participants.

E. Clarify how conflicts between these regulations and the Treasury Regulations should be resolved.

To the extent that there are conflicts between these regulations and the final Treasury Regulations, the Department should provide guidance on how to resolve those conflicts. For example, Treas. Reg. § 54.4980B-6, Q&A-2, which specifies the deadline by which the qualified beneficiary must provide notice of a qualifying event to the plan administrator, differs from 29 C.F.R. § 2590.606-3(c)(2)-(3), which addresses the same issue. A general rule concerning which regulations control in the event of conflict would be helpful.

F. Provide a longer time frame for compliance by making the final regulations effective no earlier than the first day of the first plan year beginning on or after January 1, 2005.

The proposed regulations indicate that the Department intends to make them effective in final form as of the first day of the first plan year that occurs on or after January 1, 2004. Even if the regulations are finalized within the next few months, this effective date would not provide an adequate amount of lead time for plans to become compliant, particularly since the regulations impose new notice requirements, require plans to adopt reasonable procedures and require the inclusion of such procedures in the plan's SPD. Assuming that the regulations are finalized before the end of this year, an effective date no earlier than the first plan year beginning on or after January 1, 2005 is essential. This would appear reasonable, given that the Department is not operating under a legislative mandate to publish

regulations by a particular date. In addition, since there is a reasonable chance that legislative proposals containing substantive COBRA provisions may be enacted in the next year, a delayed effective date would allow the Department time to coordinate the implementation of the new COBRA regulation and reduce the likelihood that plan sponsors will be required to modify COBRA administrative procedures and notices twice in the same year. (See, e.g., "Healthcare Act of 2003," H.R. 2402/ S. 1030, 108th Cong. § 214 (2003) allowing the use of tax credits to pay for employer health coverage and extending the election period under COBRA).

Conclusion

The Council is very concerned that key aspects of the proposed regulations unnecessarily burden group health plan sponsors by creating additional cost and exposure to liability. In current form, the proposed regulations thwart the efforts of plan sponsors to provide group health plan coverage for employees in a cost-effective manner. The Council urges the Department to modify the proposed regulations to address our concerns.

Sincerely,

James A. Klein

James A. Klein
President