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

Re: COBRA Notice Regulations

To Whom It May Concern:

The Society for Human Resource Management (SHRM) is pleased to respond to the Employee Benefit Security Administration's (EBSA) request for comments on its proposed regulations implementing the notice requirements of the health care continuation coverage (COBRA) provisions of part 6 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 175,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 100 countries.

STATEMENT OF INTEREST

The Society's membership includes HR professionals who are responsible for administering COBRA's provisions. SHRM members are concerned with the proposed regulations governing COBRA's notification requirements, since they are charged with implementing COBRA in companies across the nation.

In this country, individuals are extremely dependent upon employer sponsored benefit programs including health plans. Generally, once coverage under a group health plan begins, COBRA requires group health plans to offer qualified beneficiaries the opportunity to elect a temporary extension of group health coverage (continuation coverage) following certain events that would otherwise result in the loss of coverage (qualifying events). HR professionals, on behalf of their employer companies, have

administered the COBRA notice requirements for their employees with little guidance since COBRA's enactment.

COBRA was initially enacted in 1985. In the next year the Department of Labor (DOL) issued ERISA Technical Release 86-2, which offered a model initial COBRA notification. Since 1986, SHRM members have provided initial COBRA notices based on the model initial notice in Technical Release 86-2 to employees and their spouses covered by their group health plans. However, the model initial notice has been outdated for several years because of statutory and regulatory changes, and SHRM members have been required to modify the model initial notice without assurance that the modified, but current, notice satisfies the statutory initial notice requirement. In addition, SHRM members have only had a DOL "Fact Sheet" from June 1989, with its list of recommended information items, to guide them in providing notices to qualified beneficiaries of their right to elect continuation coverage after the occurrence of a qualifying event.

Finally, 17 years after Technical Release 86-2 and 14 years after the June 1989 "Fact Sheet," SHRM, on behalf of its 175,000 members, welcomes the new guidance provided by the proposed regulations addressing the COBRA notice requirements and welcomes the opportunity to comment on the proposed regulations and new model forms.

INTRODUCTION

SHRM welcomes this opportunity to present comments to the EBSA on its proposed regulations implementing COBRA's notice requirements. As noted above, SHRM members have a vested interest in the obligations imposed by the regulations because many SHRM members are responsible for administering their health plans' compliance with the COBRA notice requirements. SHRM's response to EBSA's Request for Information thus initially commends the EBSA for issuing these long overdue regulations and also focuses on HR professionals' concerns about complying with them.

COMMENTS ON THE PROPOSED COBRA NOTICE REGULATIONS

The administrator of a group health plan subject to COBRA must provide an initial COBRA notice that describes the right to COBRA notification coverage to all covered employees and their covered spouses, as well as a notice of COBRA election rights to all qualified beneficiaries on the occurrence of a qualifying event. HR professionals acting as group health plan administrators have been using the ERISA Technical Release 86-2 as their model, which, until the release of the proposed regulations was considered good faith compliance with the statutory initial notice requirement. According to the preamble to the proposed regulations, use of that model notice is no longer considered good faith compliance with the initial notice requirement. This is appropriate, because the model notice does not accurately reflect statutory and regulatory changes enacted since 1986. However, this change means that all group health plans subject to COBRA must

reevaluate their current initial notice procedures and revise their initial notices as necessary.

HR professionals acting as group health plan administrators will need to modify their COBRA notices to conform to the notice content requirements described in the proposed regulations. In particular, a group health plan's COBRA notices will need to be replaced with properly completed model forms if the plan wishes to avail itself of the regulatory safe harbor. However, under the proposed effective date of final regulations, administrators of group health plans subject to COBRA will have little time to make these alterations. The preamble to the proposed regulations state that final regulations would become effective for plan years beginning on or after January 1, 2004. If the proposed effective date is implemented, HR professionals and the companies they represent, as well as other group health plan administrators, will have little time to bring their COBRA notice procedures into compliance. Complying with final regulations could require companies subject to COBRA to develop new or revised notification procedures, draft revised notification forms, revise the summary plan descriptions (SPDs) for their group health plans, and adopt reasonable procedures for qualified beneficiaries to follow when furnishing plan administrators with notice of a qualifying event. To provide group health plans and plan administrators adequate time to implement all these changes, SHRM suggests that the effective date of the final regulations be extended to the later of April 1, 2004 or 9 months after the date the final regulations are promulgated

GENERAL NOTICE

COBRA requires the administrator of a group health plan to provide covered employees and their covered spouses with an initial notice explaining that upon certain qualifying events they will have the opportunity to elect COBRA continuation coverage for up to 36 months. The proposed regulations, which refer to the initial notice as the "general notice," update but otherwise do not substantially change the content of the 1986 model initial notice. In addition to describing the circumstances in which COBRA continuation coverage may be available, the proposed regulations also require the general notice to include basic information about COBRA that employees and other qualified beneficiaries need to know to protect their rights should a qualifying event occur that was not previously included in the 1986 model notice. This basic information includes the COBRA administrator's name, address and phone number; the procedures a qualified beneficiary must follow to notify the plan administrator of a divorce, legal separation, child's ceasing to be a dependent, disability of a qualified beneficiary, or cessation of a qualified beneficiary's disability; an explanation of the importance of informing the administrator of a change of a covered person's address; and a statement that the notice does not fully describe continuation coverage and that more information will follow when a qualifying event occurs.

The proposed regulations make three significant changes with regard to the distribution of the general notice. SHRM applauds these changes primarily because they validate the practices currently being used by a majority of HR professionals. First, the proposed

regulations state that the general notice must be provided to covered employees and their covered spouses within 90 days after the employee or spouse first becomes covered by the group health plan. Second, the regulations specifically state that the general notice may be included in the health plan's SPD if the SPD is properly furnished within the 90-day time limit. This practice in particular is one most SHRM members acting as plan administrators already follow. Last, the proposed regulations include a model general notice and provide a safe harbor for plan administrators who use a properly completed model notice.

EMPLOYER AND PLAN ADMINISTRATOR RESPONSIBILITIES FOLLOWING QUALIFYING EVENT

Following an occurrence of a qualifying event employers have 30 days to notify plan administrators of such occurrence. Further, the proposed regulations state that employer notice must include sufficient information to enable the plan administrator to determine the plan, the covered employee, the qualifying event and its date of occurrence. Plan administrators then have 14 days to send qualified beneficiaries notice of their COBRA election rights. The proposed regulations require that the election notice is provided in writing and that it include such items as available health plan options, premium payment requirements, consequences of failing to elect COBRA, and how COBRA coverage may be extended due to disability or a second qualifying event. SHRM believes these requirements are fair as they simply conform to general practice.

Additionally, the proposed regulations provide a model election notice including these requirements and that is not required, but if used, will be deemed to be in compliance with the regulations. The proposed regulations also reaffirm what many HR professionals and their employers already believe: that when the plan administrator and the employer are the same, the election notice is to be provided to qualified beneficiaries within 44 days.

COVERED EMPLOYEE AND QUALIFIED BENEFICIARY RESPONSIBILITIES FOLLOWING A QUALIFYING EVENT

COBRA also requires, where applicable, covered employees and other qualified beneficiaries to give the group health plan administrator notice of a qualifying event such as a divorce or the loss of a dependent. The proposed regulations clarify the timing of these notices, require plans to adopt reasonable procedures for qualified beneficiaries to follow when furnishing this notice, and specify the rights and obligations of plan administrators and qualified beneficiaries if the plan does not adopt compliant procedures. SHRM welcomes the proposed regulations' clarification that a plan administrator can establish notice procedures to be followed by qualified beneficiaries and can require qualified beneficiaries to comply with those procedures. HR professionals acting as plan administrators will be able to clearly educate covered employees and qualified beneficiaries of their obligations under the plan's notice procedures and the consequences of not fulfilling those obligations, and also be able to

administer this aspect of COBRA continuation coverage with greater certainty as to the plan administrator's rights and obligations.

REASONABLE NOTIFICATION PROCEDURES

Under the proposed regulations, group health plans subject to COBRA must adopt reasonable procedures by which covered employees and other qualified beneficiaries are to provide the required notice of a qualifying event, as discussed above. According to the regulations, reasonable procedures must be stated in the SPD, specify how and to whom the notice must be given and describe the information required to be in the notice. The proposed regulations make clear that if the group health plan fails to adopt reasonable procedures, any oral or written communication describing the qualified event made will satisfy the notice requirement. As noted above, SHRM welcomes the clarity provided by the proposed regulations. However, SHRM also notes that employers sponsoring group health plans and their HR representatives will need adequate time to adopt and disseminate reasonable procedures.

NEW PLAN ADMINISTRATOR NOTICE REQUIREMENTS

The proposed regulations establish two new situations when a group health plan administrator must provide a notice to a qualified beneficiary or other individual. The first situation is when a plan administrator receives a notice of a qualifying event from an individual and determines that an individual is not entitled to continuation coverage. In that situation, the plan administrator must then notify the individual that the individual is not eligible to elect continuation coverage and why he or she is not eligible. The proposed regulations require this notification to be in writing and be provided within 14 days after the plan administrator receives the individual's notice. Although not required under the COBRA statutory provisions, many HR professionals acting as plan administrators provide a similar type of notice when denying continuation coverage, under the reasoning that a denial of continuation coverage is a denial of a claim for plan benefits. Under ERISA's claims procedures, a plan administrator must give a claimant written notice of a full or partial denial of any claim for benefits and advise the claimant of his or her right to request a review of the claim denial. The proposed regulations formalize this common practice, but require the plan administrator to notify the individual of the denial of continuation coverage eligibility within a much shorter time period than the time period in which a plan administrator must notify a claimant of a denial of a claim for plan benefits. While SHRM agrees it's not unreasonable for the final regulations to require a group health plan administrator to provide written notice of an individual's ineligibility for continuation coverage under COBRA, SHRM believes a group health plan administrator should be permitted to provide this written notice under the procedures established under ERISA Section 503 and the related Labor Regulations for processing other claims under the group health plan.

The second situation when the proposed regulations impose a new notice requirement is when an individual's COBRA coverage is terminated before the maximum COBRA

continuation coverage period is exhausted. The proposed regulations do not establish a specific time period within which the plan administrator must provide this notice, but rather require that the notice be provided as soon as practicable after the plan administrator determines that continuation coverage will terminate. As with ineligible individuals, many HR professionals acting as plan administrators already provide this notice to qualified beneficiaries. SHRM does not object to formalizing this notice requirement in the final regulations, because notifying a qualified beneficiary that continuation coverage will cease protects the rights of the plan administrator as well as providing valuable and timely information to the qualified beneficiary about his or her health benefit coverage. However, if this notice requirement is retained in the final regulations, SHRM suggests that a specific time frame be established within which this notice must be provided. A specific time frame for providing this notice ensures that all qualified beneficiaries under all group health plans will receive the notice in a uniform manner. In addition, establishing a specific time frame for providing this notice helps protect a plan administrator from a qualified beneficiary's claim that the notice was not provided "as soon as practicable" and any related claim for penalties arising from a late notice or claims for benefits under ERISA Section 502 because of improper termination of the qualified beneficiary's continuation coverage.

CONCLUSION

SHRM appreciates the opportunity to submit these comments. We would be happy to provide you with additional information or clarification of our concerns. Should you need additional information, please contact me at 703-535-6061.

Respectfully,



Wendy E. Wunsch, Esq.
Manager, Employment Regulation
Society for Human Resource Management