PROGRAM MEMORANDUM
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Department of Health and Human Services

Centers for Medicare & Medicaid Services

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Title: Medigap Bulletin Series – INFORMATION

Subject: Interaction between COBRA and Medigap Guaranteed Issue Requirements in Situations Involving Termination of Employer Group Coverage

Market: Medigap

I. <u>PURPOSE</u>

This bulletin addresses the situation in which a Medicare beneficiary has supplemental health coverage through an employee welfare benefit plan, and the plan is terminated because the employer goes out of business, as a result of bankruptcy or otherwise. The bulletin clarifies that the individual has Medicare supplement (Medigap) guaranteed issue rights whether or not the individual is offered COBRA continuation coverage by a related entity, such as a parent corporation.[i] Also, this bulletin clarifies that an individual who is offered, and elects, COBRA coverage under these circumstances, rather than applying for a Medigap policy before the end of the guaranteed issue period, will have a second Medigap guaranteed issue period if the individual subsequently exhausts the COBRA benefits.

II. <u>BACKGROUND</u>

A. *<u>Medigap Guaranteed Issue Right Upon Loss of Employer Plan Coverage</u>*

Section 1882(s)(3) of the Social Security Act (the Act) specifies circumstances under which certain Medicare beneficiaries are entitled to purchase a Medigap policy on a guaranteed issue basis. Under section 1882(s)(3)(B)(i), one of these circumstances is when an individual "is enrolled under an employee welfare benefit plan that provides health benefits that supplement the benefits under Medicare and the plan terminates or ceases to provide all such supplemental health benefits to the individual."[ii]

Because most Medicare beneficiaries are no longer actively employed, most health coverage that is provided to Medicare beneficiaries under an employee welfare benefit plan is retiree coverage. Medicare is usually the primary payer when the individual is retired,[iii] and therefore, because section 1882(s)(3)(B)(i) only pertains to coverage that "supplements" Medicare, it only applies when Medicare is primary.[iv]

B. *COBRA*

COBRA requires that certain individuals be allowed to retain coverage under a “group health plan” for a specified period of time after they lose membership in the group as the result of a “qualifying event,” such as a termination of employment, or, for a dependent, the death of the primary beneficiary. This is referred to as continuation coverage. [v] COBRA implemented the requirement for continuation coverage through amendments to several statutes. With respect to private employers, the relevant provisions are contained in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). In most cases, COBRA coverage simply allows the individual to continue in the same group health plan for a specified period of time, although a person can be required to pay up to 102% of the total premium. In some instances, however, when an employer declares bankruptcy and the group health plan terminates, a related corporate entity may be required to offer COBRA coverage, through a different group health plan than the one that has terminated. This is because the COBRA provisions of ERISA and the Code treats all entities that are part of the same “control group” as a single employer for COBRA purposes.[vi]

III. ISSUES

Questions have arisen about whether a Medigap issuer must offer guaranteed issue rights to individuals whose employer group health plan terminates, but who are offered COBRA continuation coverage within the context of a “control group.” We have been asked, first, whether these individuals can be refused Medigap guaranteed issue rights simply because they have been **offered** benefits under a plan provided by another entity within the same corporate structure as the bankrupt employer. We have also been asked whether these individuals have a choice between the COBRA coverage offered by the other entity and guaranteed issue rights to purchase a Medigap policy. We will also address whether these beneficiaries lose their Medigap guaranteed issue rights if they accept the COBRA coverage.[vii]

IV. DISCUSSION

It is CMS’s position that if a Medicare beneficiary shows that he or she was receiving supplemental benefits through an employee welfare benefit plan, and the plan has terminated, or has ceased to provide all benefits, due to the employer’s bankruptcy or otherwise, a Medigap issuer must provide guaranteed issue rights to the individual pursuant to section 1882(s)(3)(B)(i) of the Act, regardless of whether the individual is offered coverage by a related entity pursuant to COBRA requirements.[viii] The only exception would be if the issuer can establish, based on the relevant facts and circumstances, that the individual’s **original** coverage was actually through the related entity’s health plan all along, and that the individual has simply lost the benefit of having the now-bankrupt employer provide contributions to reduce the individual’s premium under that plan.[ix]

If the individual elects the COBRA coverage offered by the related entity instead of using the Medigap guaranteed issue right within the 63-day period provided for in section 1882 of the Act, the individual will be entitled to a second guaranteed issue right if the individual subsequently exhausts the COBRA benefits. The reason the individual receives a second guaranteed issue right is that COBRA continuation coverage is coverage provided under a group health plan. It is irrelevant whether the group health plan coverage was provided by the individual’s original plan (in the situation in which that original plan still exists), or by the plan of a related entity, after the original plan terminates.

It should be noted that even when a retiree has been offered what is commonly referred to as "unlimited" or "lifetime" COBRA benefits by the related entity (see endnote vi, above), he or she might nonetheless still lose those benefits. If a plan contains network provisions, and offers services only within a specific geographic service area, the individual's movement out of the service area constitutes exhaustion of COBRA. The subsequent termination of all group health plans of all remaining entities within the control group will also result in exhaustion of COBRA benefits.[x] If there is no longer any entity left in the control group offering a plan, then there can no longer be any COBRA continuation coverage. However, if the individual simply ceases paying premiums for the COBRA coverage, it is CMS's position that the plan has not ceased providing benefits to the individual. Rather, the individual has voluntarily dropped the COBRA coverage and is not entitled to guaranteed issue rights to a Medigap policy.[xi]

Frequently, bankruptcy situations arise suddenly and individuals need to act quickly. Therefore it is important to understand how the COBRA timeframes interact with the Medigap guaranteed issue deadline. Employers may have up to 44 days **after** plan termination to provide a COBRA notice to qualified individuals. The individuals then have 60 days from delivery of the notice to decide whether to elect the COBRA coverage. Ordinarily, the coverage is retroactive to the date they lost coverage under the original plan. In addition, they have 45 more days after making the election in which to pay the premiums for this retroactive coverage. Under Federal law, the 63-day Medigap guaranteed issue period is also triggered by a notice that the individual has lost coverage under the group health plan. However, the exact time that the guaranteed issue period begins will depend on state law, which may provide for the 63-day time period to start later, thus providing a later deadline. State law may also provide for the period to be longer than 63 days.[xii]

In many cases there will be considerable overlap between the COBRA period and the Medigap period. An individual may be able to wait until close to the end of the Medigap guaranteed issue period to make a decision, without losing the option to elect and pay for retroactive COBRA coverage. If the individual ultimately chooses the Medigap option, the retroactive COBRA coverage can fill the gap between loss of the retiree plan and start of the Medigap policy. Electing COBRA on a temporary basis while the Medigap guaranteed issue period is still in effect does not terminate a Medigap guaranteed issue right.[xiii] Letting the guaranteed issue period expire without applying for a Medigap policy does terminate the right. Finally, it should also be noted that one important distinction between COBRA and Medigap is that the benefits under the group health plan through which the COBRA coverage is provided may be subject to change at any time at the discretion of the plan sponsor, while Medigap policies are guaranteed renewable.

Where to get more information:

If you have any questions regarding this bulletin, contact the Private Health Insurance Group, the Centers for Medicare & Medicaid Services, formerly the Health Care Financing Administration, via e-mail at *phigmedigap@cms.hhs.gov* or by telephone toll-free at 1-877-267-2323, Ext. 6-1565.

You may obtain an electronic copy of this bulletin and other technical Medigap regulatory resources at *http://www.cms.hhs.gov/medigap*. Consumer-oriented Medigap materials can be obtained at *www.medicare.gov*

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[i] "COBRA" refers to the amended requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985.

[ii] Note that section 1882(s)(3)(B)(i) of the Act provides for a guaranteed issue right when either the plan itself terminates or the plan continues in existence but the individual's coverage under it entirely ceases. Thus, an individual has a guaranteed issue right to Medigap when the individual's COBRA coverage ends, or the individual loses coverage under the plan because a plan provision that allows termination of the individual's coverage takes effect (e.g., spousal coverage ends when the retired employee dies).

[iii] Section 1862(b) of the Social Security Act requires group health plans (GHPs) of employers with 20 or more employees to pay primary to Medicare for individuals age 65 or over if the GHP coverage is based on the current employment of the individual or the current employment of the individual's spouse. The Act also requires large group health plans (LGHPs) of employers of 100 or more employees to pay primary for people under age 65 who have Medicare because of disability and who are covered under an LGHP because of the individual's current employment or the current employment of a family member. If the individual's Medicare is based on ESRD, GHP coverage (including COBRA continuation coverage) is the primary payer for a 30-month coordination period and Medicare is the secondary payer regardless of the employment status or size of employer."

[iv] A number of states' laws provide guaranteed issue rights to beneficiaries who lose coverage under an employee welfare benefit plan that is primary to Medicare. However, this bulletin only addresses Federal law requirements.

[v]The bankruptcy of an employer was added as a qualifying event by the Omnibus Budget Reconciliation Act of 1986. Federal COBRA requirements only apply to employers with 20 or more employees. Many state laws (commonly called "mini COBRA laws") also require a form of continuation coverage for employees, and sometimes retirees, of employers with fewer than 20 employees. The terms of each particular state statute would determine whether any of the principles set out in this bulletin would apply to individuals in that state.

[vi]COBRA coverage is usually only provided for a specified period, up to 18, 29, or 36 months. However, under the Code, when an employer organization declares bankruptcy and ceases to provide health coverage, another entity within the same corporate structure may be required to provide unlimited, or "lifetime" COBRA continuation coverage under its own group health plan to retirees who are losing coverage under the original entity's plan.

[vii] We have also been asked whether Medicare beneficiaries can be offered COBRA at all. The Supreme Court ruled in 1998 (*Geissal v. Moore Medical Corp.)* that an individual who has other coverage (including Medicare) prior to experiencing a COBRA qualifying event must be offered the opportunity to elect COBRA and, if the individual so elects, to have benefits continue for the full length of time that COBRA rules would otherwise provide, given the nature of the qualifying event. However, if an individual becomes entitled to Medicare after electing COBRA, the sponsor of the group health plan is not required to continue making COBRA coverage available to the individual. Thus, an individual's full allotment of COBRA coverage may be truncated by Medicare entitlement that occurs after COBRA election. This bulletin addresses situations that arise as a result of the *Geissal* decision (in which individuals have Medicare before the employer plan terminates). Prior to that decision, plans may have thought that they did not have to provide COBRA coverage to individuals with Medicare.

[viii] We note that the right to COBRA benefits is triggered by loss of coverage under a "group health plan," as defined in §607(1) of ERISA. That section defines this term as "an employee welfare benefit plan providing medical care (as defined in section 213(d) of the Code) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise." The Medigap guaranteed issue right is triggered by loss of all supplemental coverage under an "employee welfare benefit plan." That term is not defined in §1882 of the Act, but for COBRA purposes it is defined in §3(1) of ERISA. Accordingly, for purposes of applying section 1882(s)(3)(B)(i) of the Act, we are interpreting the term "employee welfare benefit plan that provides health benefits" as used in section 1882(s) to be synonymous with a "group health plan" as used in the section 607(1) of ERISA.

[ix] When the plan continues in existence, but the employer stops making contributions, the loss of the employer contributions triggers COBRA rights, but not Medigap guaranteed issue rights. Section 1882(s)(3)(b)(i) of the Act provides Medigap guaranteed issue rights only in the event of a loss of **all** supplemental coverage. It does not make loss of employer contributions to the employee welfare benefit plan a basis for guaranteed issue rights. By contrast, depending upon provisions contained in the plan documents, an employer that continues in business may be able to cease offering a separate retiree-only plan that provides benefits that supplement Medicare. In such cases, the individual would have a guaranteed issue right to a Medigap policy because all coverage would be lost, but there would be no COBRA offering unless the employer were establishing a successor retiree plan through which continuation coverage could be offered. This bulletin primarily addresses situations in which COBRA continuation coverage is required to be offered through a different plan, as occurs in bankruptcy situations.

[x] Under the COBRA regulations at 26 CFR §54.4980 B-7, A-4(e), in the case of an employer bankruptcy, COBRA coverage provided by another entity for a qualified retired employee ends on the date of the retired covered employee's death (and 36 months after the date of death for the covered employee's dependents) unless, beforehand, the employer or employee organization ceases to provide any group health plan to any employee, at which point the COBRA coverage would cease to exist. Therefore, the offer of "lifetime" COBRA benefits could be limited to the life of the company.

[xi]The exception would be if the individual lives in a state that has expanded the guaranteed issue right in such a way that coverage would be available even if the individual voluntarily drops COBRA.

[xii] Under Federal law, as amended in 2000 by the Medicare, Medicaid and SCHIP Benefits Improvement and Protections Act (BIPA), the guaranteed issue period for individuals who have a right under section 1882(s)(3)(B)(i) of the Act begins with the <u>date of the notice</u> of loss of coverage under the employee welfare benefit plan, regardless of whether this notice is delivered before or after the coverage has been lost. However, pursuant to changes suggested by the National Association of Insurance Commissioners (NAIC), many states have adopted more generous provisions that date the guaranteed issue period from "the later of: (i) the date the individual receives a notice of termination or cessation of all supplemental health benefits (or if notice is not received, notice that a claim has been denied because of such a termination or cessation); or (ii) the date that the applicable coverage terminates or ceases; and ends sixty-three (63) days thereafter; . . ." A few states have also extended the guaranteed issue period, for instance, to 90 days.

[xiii] Note that even if the individual chooses COBRA coverage, and lets the guaranteed issue period expire, he or she **can** ultimately be entitled to guaranteed issue rights, but only if he or she continues to pay the COBRA premiums until all COBRA benefits are exhausted. Also, see section III.C. of Medigap bulletin series Transmittal No. 02-01dealing with processing applications for Medigap guaranteed issue policies and policies sold during open enrollment periods. In that section we clarified that an individual may apply for multiple Medigap policies, dropping one and exchanging it for another, as many times as the individual wants so long as the guaranteed issue period is still in effect. Similarly, taking COBRA coverage to fill a gap in coverage until a Medigap policy can be put into effect does not terminate the guaranteed issue period. The period only ends when the full 63 days have elapsed.