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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, D.C. 20210



Attention: COBRA Notice Regulations

Ladies and Gentlemen:

We are writing to provide comments regarding the proposed health care continuation coverage regulations (the proposed regulations) issued by the Department of Labor (DOL) on May 28, 2003, under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA).

The Employee Benefits Institute of America LLC (EBIA) publishes several employee benefits manuals, including one entitled *COBRA: The Developing Law* (EBIA 1990-present, updated quarterly) that is widely used by employers, employee benefits professionals and government officials. EBIA also presents employee benefits seminars and publishes other employee benefits materials, such as the EBIA WEEKLY, an e-mail newsletter outlining each week's developments in employee benefits law. Our mission at EBIA is to "help employers and advisors know the law." (sm)

We are providing comments to the DOL not in an effort to advocate any particular constituency's point of view but rather to encourage and foster clarity and consistency. Our comments are few in number, focusing on seven "big picture" items.

I. Guidance is needed regarding the relationship between the proposed regulations and the DOL claims regulation.

As the DOL acknowledges in the preamble to the proposed regulations,[1] and as demonstrated by the many COBRA cases reported each year, frequent disputes arise in connection with eligibility for COBRA coverage and terminations of COBRA coverage. We believe that guidance on the issue of the applicability of the DOL claims regulation[2] to COBRA disputes is very much needed and that the proposed regulations, when issued in their final form, would be an excellent opportunity for the DOL to provide this guidance.

[1] Preamble to 2003 Proposed DOL Regulations, 68 Fed. Reg. 31831, 31836, 31838 (2003).
[2] DOL Reg. § 2560.503-1.

By way of background, while the DOL claims regulation provides detailed rules with respect to claims for benefits that are made to group health plans, there is no specific discussion of COBRA-related claims. Sometimes COBRA disputes arise when individuals file claims for reimbursement of medical expenses with a plan and these claims are denied (for example, when a claim for reimbursement is denied because regular plan coverage has terminated in connection with a qualifying event and COBRA coverage has not been elected or paid for). In such circumstances, the DOL claims regulation would apply to require plan denials of medical expense reimbursements to be communicated in writing,[3] with particular content requirements,[4] subject to the appeal process prescribed by the claims regulation.[5]

But often COBRA disputes arise without the participant/beneficiary's having made a claim for benefits or incurring any expenses that could form the basis for such a claim. For example, a qualified beneficiary may inquire whether he or she is eligible for COBRA coverage after a termination of employment or may send a notice of qualifying event (such as a divorce, legal separation or cessation of dependent status) to the plan administrator. EBSA's website indicates that the DOL claims regulation applies to eligibility determinations only if they are part of a claim for benefits: "If an individual asks a question concerning eligibility for coverage under a plan without making a claim for benefits, the eligibility determination is not governed by the claims procedure rules."[6] This is consistent with the claims regulation's statement of scope and purpose: "[T]his section sets forth minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries."[7]

It appears, based on the foregoing, that the DOL claims regulation does not apply to actions with respect to COBRA coverage that a plan might take (for example, termination or denial of COBRA coverage due to ineligibility) that are not in response to a claim for benefits. But the claims regulation's definition of "adverse benefit determination" could possibly be interpreted to include plan actions that are not taken in response to a claim for benefits.[8] It would be very helpful if the DOL would specify in its final COBRA regulations which kinds of communications with qualified beneficiaries constitute adverse benefit determinations within the meaning of the DOL's claims regulation. Especially needed is clarification as to whether the new "notice of unavailability of continuation coverage" and the new "notice of termination of continuation coverage"

[3] DOL Reg. § 2560.503-1(g).
[4] DOL Reg. § 2560.503-1(g).
[5] DOL Reg. § 2560.503-1(h)(3).
[6] Frequently Asked Questions about the Benefit Claims Procedure Regulation, Q/A-3, http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html (as visited Aug. 12, 2003).
[7] DOL Reg. § 2560.503-1(a)
[8] *See* DOL Reg. § 2560.503-1(m)(4). "The term 'adverse benefit determination' means any of the following: a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit, including any such denial, reduction, termination, or failure to provide or make payment that is based on a determination of a participant's or beneficiary's eligibility to participate in a plan."

required by the proposed regulations[9] will constitute adverse benefit determinations under the DOL's claims regulation.

II. The inconsistency between the proposed regulations and the final IRS COBRA regulations as to the deadline for qualifying event notices from covered employees/qualified beneficiaries to plan administrators needs resolution.

The final IRS COBRA regulations provide that the deadline for a qualifying event notice to the plan administrator from a covered employee/qualified beneficiary is 60 days after the later of the date of the qualifying event or the date that coverage is lost.[10] The proposed regulations, however, distinguish between two types of plans. If a plan uses the delayed employer notice rule (i.e., the plan provides that the maximum coverage period and the employer qualifying event notice period begin when coverage is lost, as permitted by ERISA § 607(5)), then the plan may impose a notice period that ends not earlier than 60 days after the loss of coverage.[11] If the plan does not use the delayed employer notice rule (in such case, the COBRA maximum coverage period would begin on the date of the qualifying event), then the notice period may end not earlier than 60 days after the qualifying event.[12] The difference between the final IRS COBRA regulations and the proposed regulations is illustrated in the example below.

> **Example:** Under a group health plan, the maximum coverage period begins on the date of the qualifying event, but coverage is not lost until the end of the month in which the qualifying event occurred. (The plan does not use the delayed employer notice rule.) Under the proposed regulations, the plan may limit the period for a covered employee or qualified beneficiary to provide notice of a qualifying event to 60 days after the date of the qualifying event, even though plan coverage ends on a later date (the last day of the month). The result would be different under the final IRS COBRA regulations—qualified beneficiaries would have until 60 days after the date that coverage is lost to notify the plan of a qualifying event.

As illustrated above, the final IRS COBRA regulations provide a rule that is more beneficial to covered employees and qualified beneficiaries than that provided in the proposed regulations, and plan administrators need to know which rule they may safely adopt. It would be very helpful to plan administrators if the IRS and DOL could resolve

[9] DOL Prop. Reg. §§ 2590.606-4(c) and 2590.606-4(d) (2003).
[10] Treas. Reg. § 54.4980B-6, Q/A-2(a).
[11] DOL Prop. Reg. § 2590.606-3(c)(1)(i) (2003). The proposed regulations provide another outside date for the qualifying event notice if this occurs later: the date on which the qualified beneficiary is informed, through the furnishing of the plan's summary plan description or the general notice, of both the responsibility to provide the notice and the plan's procedures for providing such notice to the administrator. DOL Prop. Reg. § 2590.606-3(c)(1)(iii) (2003).
[12] DOL Prop. Reg. § 2590.606-3(c)(1)(ii) (2003). The proposed regulations provide another outside date for the qualifying event notice if this occurs later: the date on which the qualified beneficiary is informed, through the furnishing of the plan's summary plan description or the general notice, of both the responsibility to provide the notice and the plan's procedures for providing such notice to the administrator. DOL Prop. Reg. § 2590.606-3(c)(1)(iii) (2003).

this inconsistency by agreeing upon the operative rule or by agreeing on which agency has regulatory authority with respect to this matter.

III. When must plan administrators provide notices of unavailability of continuation coverage?

The proposed regulations impose a new requirement that plan administrators provide a notice of unavailability of continuation coverage. This requirement is unclear as to the circumstances in which the notices must be provided, as discussed in subsections A and B below.

A. Must a plan administrator provide a notice of unavailability of continuation coverage in response to late or defective notices?

The proposed regulations state that the plan administrator must provide the notice of unavailability of continuation coverage when it receives a notice of qualifying event "furnished in accordance with § 2590.606-3."[13] DOL Prop. Reg. § 2590.606-3 requires plans to establish reasonable procedures for covered employees and qualified beneficiaries to use in furnishing notices to the plan administrator and permits plans to set deadlines (with minimums prescribed by the proposed regulations) for these notices. If a covered employee or qualified beneficiary furnishes a late notice, does not use the form required by the plan, or does not provide the notice to the individual at the address required by the plan, then the notice has not been "furnished in accordance with" DOL Prop. Reg. § 2590.606-3.

Does this mean that plan administrators do not have to give a notice of unavailability of continuation coverage to covered employees and qualified beneficiaries whose notices are late or defective? If plan administrators do not have to give a notice of unavailability in response to late or defective notices from covered employees and qualified beneficiaries, when would a plan administrator have to give the notice of unavailability?

In order to avoid confusion as to when this notice requirement applies, we strongly recommend that the regulations be rewritten to clearly state whether the notice of unavailability must be given in response to late or defective qualifying event notices from covered employees and qualified beneficiaries (and it would be helpful to give examples of situations that would give rise to the unavailability notice requirement).

B. In response to which notices from covered employees and qualified beneficiaries must a notice of unavailability be provided?

The proposed regulations say that the notice of unavailability of continuation coverage must be provided in response to a "notice of qualifying event."[14] It is clear that the unavailability notice must be provided in response to a notice of a first qualifying event.

[13] DOL Prop. Reg. § 2590.606-4(c)(1) (2003).
[14] DOL Prop. Reg. § 2590.606-4(c)(1) (2003).

But it is not clear whether an unavailability notice must be provided in response to a notice of second qualifying event, or perhaps even a notice of disability determination. The requirement to provide a notice of unavailability of COBRA coverage is stated as follows:

> In the event that an administrator who receives a notice of qualifying event furnished in accordance with [the proposed regulations] is not entitled to continuation coverage under [COBRA], the administrator shall provide to such individual an explanation as to why the individual is not entitled to elect continuation coverage.[15]

The proposed regulations distinguish between different types of notices that covered employees and qualified beneficiaries are required to provide. For example, in listing the notices that covered employees and qualified beneficiaries must provide, "notice of the occurrence of a qualifying event" is listed separately from "notice of the occurrence of a second qualifying event,"[16] and notice of a disability determination is another separate listing. When the proposed regulations spell out the time limits that plans may impose with respect to notices from covered employees and qualified beneficiaries, notices of qualifying events and notices of second qualifying events are treated together under a subsection entitled "*Time limits for notices of qualifying events.*"[17] Disability notices are discussed under a separate subsection entitled "*Time limits for notice of disability determination.*"[18]

The notice that the proposed regulations require is called the "Notice of unavailability of continuation coverage."[19] It is described as "an explanation as to why the individual is not entitled to elect continuation coverage."[20] In other words, it appears that this notice is required only in response to a notice of a first qualifying event, not a second qualifying event notice or notice of disability determination.

But the proposed regulations are not clear on this point, and clarification would be helpful. Is the notice of unavailability of continuation coverage required only in response to a notice of a first qualifying event, or is it also required in response to a second qualifying event notice or notice of disability determination? If it is required in response to second qualifying event notices and disability determination notices, this should be clearly stated and the content requirements for the notice of unavailability should be revised accordingly.

IV. When does the 60-day COBRA election period begin to run?

A qualified beneficiary may elect COBRA coverage at any time within 60 days after the date plan coverage terminates or, if later, 60 days after the date of the election notice to the qualified beneficiary from the plan administrator.[21] Historically, plan administrators

[15] DOL Prop. Reg. § 2590.606-4(c)(1) (2003).
[16] DOL Prop. Reg. § 2590.606-3(a) (2003).
[17] DOL Prop. Reg. § 2590.606-3(c)(1) (2003).
[18] DOL Prop. Reg. § 2590.606-3(c)(1) (2003).
[19] DOL Prop. Reg. § 2590.606-4(c) (2003).
[20] DOL Prop. Reg. § 2590.606-4(c)(1) (2003).
[21] ERISA § 605(2).

have assumed that, for election notices that are mailed, the qualified beneficiary's 60-day election period begins to run on the date that the election notice is sent to the qualified beneficiary, basing this assumption on information provided by both the DOL and the IRS.[22]

Support for this "date sent" approach was undercut by the February 1998 issuance of the district court's opinion in *Kerr v. Chicago Transit Authority*.[23] The court held in this case that the election period does not begin until the election notice is actually received by the qualified beneficiary.

Subsequent to *Kerr*, with the issuance of its February 1999 final COBRA regulations, the IRS changed its formulation of the 60-day rule to substitute the word "provided" for the word "sent."[24] Thereafter, in July 1999, the DOL made an identical change to its description of the 60-day election period in its revised COBRA booklet, saying that the 60-day period "is measured from the later of the loss of coverage date or the date the COBRA election notice is provided."[25]

The proposed regulations are silent as to the COBRA election period and use the word "furnish" in stating the requirement that plan administrators provide COBRA election notices.[26] We recognize that the proposed regulations permit the election notice and other notices that plan administrators must provide to be furnished by means other than mailing (e.g., hand delivery and electronic delivery).[27] The proposed regulations confirm that the DOL's generally-applicable requirements for furnishing reports, statements, notices and other documents required by ERISA or DOL regulations are applicable to COBRA election notices.[28] Under these rules, the election notice must be furnished using measures "reasonably calculated to ensure actual receipt of the material."[29]

It would be most helpful if the DOL's final COBRA regulations were to specify, for each approved method of delivery, when the COBRA election period begins to run. For example, one approach would be to say that, for election notices that are mailed, the election period begins on the later of the date that coverage is lost or the date that the notice is mailed.

V. The description of the second qualifying event rule in the proposed regulations' model general notice and model election notice needs clarification.

[22] *See* DOL booklet, *Health Benefits under the Consolidated Omnibus Reconciliation Act (COBRA)* (1994) (replaced and revised 1999); Prop. Treas. Reg. § 1.162-26, Q/A-32 (1987) (later re-issued and finalized as Treas. Reg. § 54.4980B).

[23] *Kerr v. Chicago Transit Authority*, 1998 U.S. Dist. LEXIS 2166 (N.D. Ill. 1998).

[24] Treas. Reg. § 54.4980B-6, Q/A-1.

[25] DOL booklet, *Health Benefits under the Consolidated Omnibus Reconciliation Act (COBRA)* (revised July 1999). The prior (1994) version of this booklet used the word "sent" instead of "provided."

[26] DOL Prop. Reg. § 2590.606-4(b)(1) (2003).

[27] DOL Prop. Reg. § 2590.606-4(f) (2003); DOL Reg. § 2520.104b-1.

[28] DOL Prop. Reg. § 2590.606-4(f) (2003).

[29] DOL Reg. § 2520.104b-1.

The multiple qualifying event rule applies when a second qualifying event occurs during the 18-month maximum coverage period following a covered employee's termination of employment or reduction in hours. The DOL's model general notice describes the multiple qualifying event rule this way:

> If your family experiences another qualifying event while receiving COBRA continuation coverage, the spouse and dependent children in your family can get additional months of COBRA continuation coverage, up to a maximum of 36 months. This extension is available to the spouse and dependent children if the former employee dies, enrolls in Medicare (Part A, Part B, or both), or gets divorced or legally separated. The extension is also available to a dependent child when that child stops being eligible under the Plan as a dependent child.[30]

The DOL's model election notice describes the multiple qualifying event rule in the following fashion:

> An 18-month extension of coverage will be available to spouses and dependent children who elect continuation coverage if a second qualifying event occurs during the first 18 months of continuation coverage. The maximum amount of continuation coverage available when a second qualifying event occurs is 36 months. Such second qualifying events include the death of a covered employee, divorce or separation from the covered employee, the covered employee's enrolling in Medicare, or a dependent child's ceasing to be eligible for coverage as a dependent under the Plan.[31]

Both formulations of the rule appear to permit a second qualifying event extension when an event occurs during the initial 18-month maximum coverage period that would not have caused a loss in coverage under the plan. This formulation goes beyond what we think the statute requires.

A qualifying event is a triggering event listed in the statute that causes (or will cause) a loss of plan coverage within the maximum coverage period.[32] For example, assume that under a group health plan a spouse will lose coverage upon a divorce but not upon a legal separation. If the spouse becomes legally separated from the employee, there is no loss of coverage and no qualifying event. However, under the DOL's model notices, legal separation during the 18-month maximum coverage period will trigger an extension of the maximum coverage period to up to 36 months even if legal separation would not have caused a loss of coverage under the plan.

Similarly, under most plans, spouses and dependent children do not lose coverage when the covered employee becomes entitled to Medicare. When the covered employee becomes entitled to Medicare, there is no loss of plan coverage and there is no qualifying event. The DOL's model notices, however, appear to permit an extension of the maximum coverage period to up to 36 months for the spouse and dependent child if the covered employee becomes entitled to Medicare during the initial 18-month maximum

[30] Appendix to DOL Prop. Reg. § 2590.606-1, Model General Notice of COBRA Continuation Coverage Rights (for use by single employer group health plans).
[31] Appendix to DOL Prop. Reg. § 2590.606-4, Model COBRA Continuation Coverage Election Notice (for use by single employer group health plans).
[32] ERISA § 603; Treas. Reg. § 54.4980B-4, Q/A-1.

coverage period—even when the covered employee's Medicare entitlement never would have caused the spouse or dependent child to lose coverage in the first place.

We believe that the model general notice and the model election notice would more accurately reflect the COBRA statute if they were modified to clarify that second qualifying events must by definition be events that would cause a loss of coverage under the plan.

In a similar vein, we note that the portions of the model notices quoted above refer to "family members," "dependent children" and "spouses" as the individuals who may be entitled to extended COBRA coverage as the result of a second qualifying event. As not all family members, dependent children and spouses are necessarily qualified beneficiaries, we advise against the misleading use of these terms. In fact, the people who may have the right to extended COBRA coverage as the result of a second qualifying event are qualified beneficiaries who have elected and paid for COBRA coverage and whose COBRA coverage is still in effect at the time of the second qualifying event (and certain newborns and newly-adopted children).[33]

VI. The regulations should clarify whether generic general notices and combined notices applicable to more than one group health plan may be used.

The DOL's model general notice states as follows: "You are receiving this notice because you have recently become covered under [*enter name of group health plan]* (the Plan)."[34] The model election notice likewise refers to one specific group health plan: **"This notice contains important information about your right to continue your health care coverage in the [*enter name of group health plan]* (the Plan)."**[35]

Both model notices appear to be intended for use only in connection with one group health plan. There are practical reasons for making it clear that both notices may be used as combined notices for more than one plan and that the general notice may be a generic notice that does not give specific plan information.

In many circumstances an individual will enroll in more than one group health plan sponsored by an employer at the same time (e.g., major medical, dental and health FSA). It would be more efficient to permit plans to satisfy the COBRA general notice and election notice requirement by providing one combined general notice (upon commencement of coverage) and one combined election notice (upon the occurrence of a qualifying event) that describes the continuation coverage rights attaching to all of the plans under which an individual is covered, rather than requiring a separate notice for each plan. (Of course, any differences in the COBRA rights associated with different plans would need to be spelled out clearly.) We recommend clarifying whether the model notices may be used as combined notices for more than one plan.

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[33] Treas. Reg. §§ 54.4980B-7, Q/A-6(b), and 54.4980B-3, Q/A-1(f).

[34] Appendix to DOL Prop. Reg. § 2590.606-1, Model General Notice of COBRA Continuation Coverage Rights (for use by single employer group health plans).

[35] Appendix to DOL Prop. Reg. § 2590.606-4, Model COBRA Continuation Coverage Election Notice (for use by single employer group health plans).

Furthermore, it would be efficient to permit plans to satisfy the COBRA general notice requirement by providing a general notice that does not describe group health plan information in detail. This is because employers frequently change their group health plan arrangements (e.g., by changing insurers, by changing from an insured plan to a self-insured plan or by changing from an indemnity to an HMO arrangement). If the general notice refers to the plan SPD (which must be distributed annually and modified in the interim to reflect material modifications), it will be directing qualified beneficiaries to the place where they can find current information regarding the plan or plans covering them. The general notice, delivered at the time of enrollment, will likely become outdated to the extent that it contains specific plan information. We recommend clarifying whether the model general notice may refer to the plan's SPD or plan document for specific plan information.

VII. Guidance is needed as to whether COBRA general notices must be provided again to covered employees and spouses who were earlier provided with general notices that were in good faith compliance with the statute.

It is entirely likely that most plan administrators, in reviewing the proposed regulations, will reach the conclusion that their general notice and election notice forms used in the past must be modified in significant ways to meet the content requirements of the proposed regulations. Before the issuance of the proposed regulations, many of these same plan administrators were employing general notice and election notice forms that were developed using every effort to comply in good faith with COBRA's requirements. Does the DOL intend to require plans that earlier provided general notices in good faith compliance with COBRA to provide new general notices meeting the requirements of the proposed regulations to the covered employees and spouses that were already provided with general notices? Or are the standards contained in the proposed regulations to be applied on a prospective basis only?

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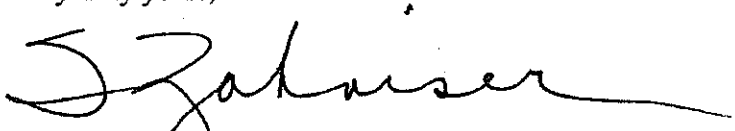
Thank you for the opportunity to provide comments in connection with this very important regulatory initiative. If we can provide further information, please do not hesitate to contact us.

Very truly yours,



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