

Federal COBRA Compliance for Employers

**New DOL Notice Regulations Effective 11/26/04 plus
IRS Rulings and Various Court Decisions**

**Presenter: Mary Jo Drake, Principal
COBRA Management Services, LLC
an Affordable Solutions, Inc. Company**

206.729.1571 or maryjo@cobramanagement.com

Need Forms and Help?

Visit our web site at
www.cobramanagement.com
and click on the **COBRA Enrollee**
link in the index.

Summary of Requirements

effective with Plan year's 11/26/04 forward

- ✓ **New model General notice.**
- ✓ **New model Election notice.**
- ✓ **New internal qualifying event notification procedures for employers and Plan Administrators.**
- ✓ **Explicit instructions on how to provide notification of a qualifying event.**
- ✓ **New: COBRA expiration and termination notices for everyone and everything.**
- ✓ **New: Rejection notices in writing to those filing notice of a qualifying event.**
- ✓ **IRS ruling and court decisions.**

Insurance Companies and COBRA

They care if you don't comply!

- ✓ The Plan is required to comply with COBRA not the insurance company.
- ✓ They will abide by the COBRA regulations IF you are in compliance.
- ✓ They may have their own views on COBRA that may differ from your procedures. When in doubt, check with the carrier on such items as COBRA premium rates for non-employees, Medicare as a qualifying event, claims processing during the grace period, etc.
- ✓ Don't rely on the insurer for compliant General Notices. Be sure to review.
- ✓ Check on their practices for the COBRA rate structure and Medicare entitlement as a 2nd QE event (IRS ruling).

What Plans are Subject to COBRA?

- ✓ COBRA applies to any group health plan, including medical, dental, vision and Rx.
- ✓ Individual health plans may be subject to COBRA if “sponsored” by employer.
- ✓ FSAs are subject to special rules. Must be clarified in the Election Notice.
- ✓ EAPS that provide benefits (and not just referrals) are subject to COBRA.

Tip: COBRA is an employer regulation and not an insurance regulation.

Notice #1: Initial Rights Notice

General Notice

Newly Enrolled Employees & Spouses

- When the Plan first becomes subject to COBRA – provide to all employees and spouses covered by the Plan(s).
- Following significant changes in the Regulations.
- **New active Plan employees and covered spouses within 90 days of enrollment.**
- New active Plan spouses if added during open enrollment or special enrollment, etc.

Distribution Procedures:

- **Must be furnished using “measures reasonably calculated to ensure actual receipt of the material.”**
- **Hand delivery to the employee is OK but will not constitute delivery to spouse.**
- **SPD must contain a General Notice. And can suffice for spouse notification if, according to legal counsel, it is mailed with spouses name on envelope.**
- **Review the SPD’s General Notice carefully, particularly if prepared by an insurer.**
- **Create a legally defensible audit trail based on written procedures.**

Model General Notice

Requires Customization

- ✓ The new model notice should be used (as a starting point) but be aware that it may not be complete as written by the DOL (per legal counsel).
- ✓ Make sure the General Notice in your SPD is corrected for the new notice requirements.
- ✓ Must state which Plan(s) are addressed by the General Notice. Reason: there can be multiple entities issuing the General Notice.
- ✓ Plan names and contact information. There should be no ambiguity regarding who to contact, how to contact and when to contact. If it is ambiguous, delayed or “improper” notification will **NOT** be forgiven.

- ✓ **General notice must contain a description of all key elements of COBRA, including qualifying events, disability extensions, anticipation of divorce rules, duration, how COBRA interacts with HIPAA, etc., etc., etc.**
- ✓ **Explicit information on when and how to pay both the initial and on-going premiums.**
- ✓ **Must contain detailed procedures on when and how to notify the Plan Administrator of an initial qualifying event for divorce, legal separation or a child's ceasing to be a dependent.**
- ✓ **Clear statement on how COBRA entitlement can be lost by not complying with the various deadlines.**

- ✓ **Explanation of importance of providing current addresses.**
- ✓ **Statement on how to obtain more detailed information from the SPD or the Plan Administrator.**
- ✓ **Information on how to contact the DOL.**

Notice #2: Election Notice

New Model Notice

- ✓ Sent to individuals who lose coverage under the Plan due to a listed Qualifying Event.
- ✓ The persons losing coverage are called Qualified Beneficiaries.
- ✓ **New Model Notices are require detailed and customized information.**

Tip: When in doubt ask yourself:

- Is there a loss in coverage,
- Is it due to a listed Qualifying Event, and
- Is it other than a voluntary drop in coverage.

Model Election Notices

- ✓ Notice must be written. Verbal NOT O.K.
- ✓ For divorce, Medicare entitlement and loss of dependent status, if explicit instructions have not been provided about how and when to provide notice of a qualifying event, the 60 days does not start running until a general notice or SPD is provided that includes the correct instructions. This can create problems with insurer.
- ✓ Partial list of information to be included is as follows.

- ✓ **Name of each qualified beneficiary is best. If not available, you can indicate, for example, that a spouse or child(ren) are qualified beneficiaries and have independent rights.**
- ✓ **Date active coverage will terminate.**
- ✓ **Date COBRA will commence.**
- ✓ **Explicit details on how to make an elections and procedures surrounding verbal elections.**
- ✓ **Explanation of the maximum continuation period and early terminations.**
- ✓ **Explicit details on how and when to pay both the intitial and the monthly premiums.**
- ✓ **Clear information on payment grace periods and how timelines are measured.**

- ✓ **Explanation of the consequences of NOT electing COBRA particularly as pertains to HIPAA portability and guaranteed access to health insurance.**
- ✓ **Explanation of second qualifying events and detailed information on how to provide notice.**
- ✓ **Information on the special rules for Health FSAs.**
- ✓ **Trade Act of 2002, if applicable.**
- ✓ **Medicare extensions if deemed a second qualifying event for a spouse or child on COBRA for 18 months. New IRS ruling.**
- ✓ **Explicit information on Social Security disability extensions and how and when to provide proper notice.**

Election Notice Issuance and Notification Deadline

Under COBRA, the Plan Administrator must be notified when a qualifying event occurs within a certain deadline that varies depending on the type of the qualifying event.

Depending on the type of qualifying event, the notification can come from the employer or the employee/qualified beneficiary.

1. If a COBRA TPA is used, the TPA always has 14 days to issue an election notice.
2. If the employer and Plan Administrator is the same entity, the employer has 30 days to notify the Plan Administrator of a qualifying event and the P.A. has 14 days to issue the notice (**44 days total – supported by 2004 DOL regs.**) to provide the Election Notice in the event of:

- » *Termination*
- » *Loss of Hours*
- » *Employee Entitlement to Medicare*
- » *Death of Employee*

3. If the notification is by the employee or qualified beneficiary for the following qualifying events, they have *60 days* to provide notification from the later of the date of the qualifying event or the loss of coverage:

- » *Divorce or Legal Separation*
- » *Child's loss of a dependent status.*
Typically, age, school or marriage.

Plan Administrator has 14 days to provide the Election Notice.

Notification Process

Explicit Instructions Required

- ✓ **Explicit notification instructions must be included in the General Notice and Election Notice. If not included, notification to any person at the company will serve as proper notification.**
- ✓ **Include name of Plan Administrator, address, phone, email, fax and clear instructions on how and when to make the notification. Preferably, supply a form.**
- ✓ **If a General Notice or SPD is not issued, the courts will excuse delayed notification and the 60 day will start when a proper General Notice or SPD is provided.**

Election Notice Mailing Procedure

Be prepared to “prove” that you sent the Notice.

Recent court case.

- **First Class mail with audit trail. May no longer be sufficient.**
- **First Class mail with Certificate of Mailing.**
- **Certified mail with NO return receipt requested.**
- **Last known address. Can hand out if it’s employee only coverage if you can prove it later.**
- **If spouse covered, name of spouse on envelope. Must mail to spouse.**
- **Conservative approach: Separate Notice to Employee and Spouse.**

- ✓ **The maximum coverage period for all Qualified Beneficiaries under the same qualifying event becomes 29 months. Can be extended to 36-months if another Qualifying Event occurs prior to the expiration of the 29-months**
- ✓ **Independent Rights to Elect applies. Any or all of the Qualified Beneficiaries can elect the 11-month extension.**
- ✓ **Premiums can be increased to 150% of the active rates IF the disabled individual elects the extension.**

Notice #3: Notice of Unavailability of COBRA Coverage

- **If an employee, dependent or qualified beneficiary makes an inquiry regarding COBRA entitlement, you must provide a written explanation of their non-entitlement within 14 days.**
- **Follow the standard mailing protocol of 14 days and address it to both the employee and, if any, a covered spouse.**
- **Examples would be an initial notification of divorce, legal separation and a child's loss of dependent status OR notice of second qualifying event or disability.**
- **Require that all inquiries be in writing and, preferably, using a form you supply.**

Notice #4: Termination Notices

- ✓ **Maximum Continuation and Termination for any Reason – Include Conversion Info.**

Within 180 days prior to the expiration of the COBRA Continuation Period (18, 36 or 29 months), notify the Qualified Beneficiaries that coverage will cease. At the same time, it is necessary to advise them of any possible conversion rights or other state mandated benefits. If conversion is available, it is important to include language re: ineligibility for a HIPAA guaranteed insurance policy if conversion plan is purchased.

✓ **Early Termination of COBRA**

Must respond in writing when a termination occurs for any reason.

- **Premium not paid on time.**
- **After COBRA election, becomes entitled to Medicare.**
- **After COBRA election, becomes covered by another group health plan that does *not* contain any limitations with respect to pre-existing conditions.**
- **Employer ceases to maintain any group health plan.**
- **No Longer Disabled.**
- **For cause. Not easy – proceed only with counsel's advice.**

Other Correspondence

- ✓ **Loss of Dependent Status Notification**
 - Not strictly required, but prudent, in the event a spouse loses coverage in “anticipation of a Qualifying Event.” For example, dropped at open enrollment.
- ✓ **IRS 98-12**
 - A series of Questions and Answers that helps an employee or Qualified Beneficiary under COBRA and the variables to be considered prior to election or non-election.

Special Premium Payment & Severance Arrangements

- ✓ Anyone can pay the COBRA premium for the qualified beneficiary.
- ✓ If the employer is paying the premium due to a severance package arrangement, COBRA should commence at the normal time. The individual should not remain on the active plan.
- ✓ All election rules apply.

COBRA Extensions: Medicare as Second QE (IRS Ruling) and Disability

- ✓ **A spouse's extension to 36-months due to the ex-employee's Medicare Entitlement as been clarified by the IRS. It is not a triggering event resulting in a loss of coverage and, therefore, will not result in an extension. Contact your insurers!**
- ✓ **Social Security Disability – several issues clarified**
 - **Requires that a qualified beneficiary is disabled on any day during the first 60 days of COBRA coverage.**
 - **The Social Security Determination letter must be presented within the latest of 60 days from the date of receipt, 60 days from the loss of active coverage date or 60 days from the date the qualified beneficiary is first informed of their obligation to provide notice within 60 days.**
 - **The qualified beneficiaries notification must be before the expiration of the initial 18-month COBRA period.**

Need Forms and Help?

Visit our web site at
www.cobramanagement.com
and click on the **COBRA Enrollee**
link in the index.