



NEW COBRA NOTICE PROCEDURES (FINALLY)

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1. INTRODUCTION.

May 26, 2004 was a red letter day for health plan administrators. The Employee Benefits Security Administration (“EBSA”), the Department of Labor unit which enforces Title I of ERISA, issued a final regulation with respect to COBRA notification procedures. (On June 23, EBSA caught some, not all, mistakes. This article and references include those changes.)

Attached to the new regulation are sample notices. The General Notice is for new enrollees and their families. The election notice and explanation (the “Election Materials”) are for use at the time of a COBRA qualifying event, such as termination of employment. Plans which use the sample General Notice and Election Materials will be deemed to comply with Title I. Although the effective date of the new regulations is for plan years beginning on or after November 26, 2004 (i.e. calendar year 2005 or later for most plans), it makes a great deal of sense to start using the new sample materials now. They are much better than previous government efforts, although a bit of customization is still quite appropriate.

The actual regulation and copies of the General Notice and the Election Materials may be accessed with this [LINK](#).

2. THE GENERAL (INITIAL) NOTICE.

A. A belated effort.

Many health plans were still struggling with the sample notice that PBWA (the DOL predecessor to EBSA) issued shortly after COBRA enactment in 1986. That form notice was woefully out of date by 2003, when EBSA issued a proposed revision. We will editorialize that if Congress is going to change the rules every few years, seven times for COBRA since 1986, and expect the private sector to keep up, that it ought to prompt the enforcement agencies to be a little more prompt in issuing guidance.

This new General Notice is pretty good. When you examine it, you will see that it does require a bit of customization. For example, you will want to indicate whether you charge the 2% premium for normal coverage or the 50% premium for disability coverage. And you will probably want to delete some of the discussion of Medicare entitlement as a qualifying event, because it really can't be, due to Medicare Secondary Payer rules. And you will have to insert

some identifying information. But read it. It's a pretty decent summary. And the EBSA advises it is just a sample that may be customized further.

Although the General Notice is almost 20 years in the making, EBSA makes clear it is not good enough to double as a COBRA description for an SPD. SPD's will need even more information. For example, the sample General Notice does not tell qualified beneficiaries receiving COBRA coverage that it is their obligation to notify the plan administrator of second qualifying events (such as divorces) if they want to extend their protection for more than the basic 18 months, and it does not leave room to provide precise instructions on the procedures to be followed. This was a conscious EBSA decision. It felt that this would make the General Notice too complicated, and that beneficiary notice obligations are better addressed in the Election Materials provided at the time of the first qualifying event, as discussed below.

But we wonder why this sample General Notice could not have been done so that it would also serve as a good SPD comprehensive discussion. For the one in 1,000 employees who actually read the thing, after perusing the hundreds of other pages describing their benefits (right), an extra paragraph or two would not have been an insurmountable chore. We will recommend that change before you distribute the new General Notice. Let's proceed further.

B. The details of distribution

Your first choice will be whether to distribute the new EBSA General Notice as a separate notice or as part of your SPD. The regulations permit you to dispense with the separate General Notice if it is contained within your SPD. But whatever you distribute, a General Notice or an SPD that contains the General Notice, it must be timely. And the right person(s) have to receive it.

Although the statute says that the General Notice is supposed to be provided on enrollment, the regulation provides a 90 day period after enrollment, which is consistent with the distribution period for SPD's. As you probably know, SPD's only need to be provided to a participant and not to spouses and dependent children. However, the General Notice has to be "provided" to spouses (and indirectly to dependent children), but not really. The regulation confirms that a mailing of a single General Notice, addressed to employee and spouse, is sufficient. A separate mailing to a spouse is only required if the Plan has information of a separate address or if the spouse is first enrolled more than 90 days after the employee. Separate mailings to dependent children are not necessary.

So, if it is your plan practice to give the full SPD, a hefty document in most cases, to your employee at the workplace, it seems a bit cumbersome to have to mail the same thing to the house to put the spouse on notice. A simple General Notice in the mail, addressed to Mr. and Mrs. Employee, seems easier. However, if your practice is to mail the SPD to the house, why not just address it to Mr. and Mrs. Employee and dispense with the mailing of a separate General Notice? Either practice is permitted.

3. THE ELECTION MATERIALS: DISTRIBUTING THEM AFTER THE FIRST QUALIFYING EVENT.

If an employee loses coverage due to death, termination, reduction in hours, or employer bankruptcy, an employer has a full 30 days to notify the plan administrator. The employer notice must adequately inform the plan administrator of the name of the plan, the covered employee, and the date and type of qualifying event. As a practical matter, information about beneficiaries and their addresses will also be necessary (even if not required by the regulation).

Making clear in the SPD and General Notice that employees and beneficiaries must provide up to date information of address changes is a good start.

After receiving the employer notice, the plan administrator then has 14 days to send to each qualified beneficiary a COBRA election form with explanatory notice ("Election Materials"). If the employer and the plan administrator are the same entity, the regulation makes clear that there is a 44 day period in total to send the notice to the COBRA beneficiaries. That helps; some courts had said that there should only be 14 days.

A copy of the Election Materials may be viewed at this link, and you should read them thoroughly so that you can answer questions. This is the critical communication, and its contents and delivery method have been and will continue to be the source of litigation.

The new regulation has a great discussion about how to send the General Notice. But it is not helpful on the issue of who gets the Election Materials and at what address. It simply directs the plan administrator to send Election Materials to all qualified beneficiaries. So we suggest that a plan administrator not take shortcuts. A separate set of Election Materials should be sent to each address where one or more beneficiaries are known to reside. If there are two possible addresses (the husband and wife are separated), send a set of Election Materials to each address. Separate envelopes addressed to each minor child are not necessary.

The Election Materials make clear that any member of the family unit may elect coverage. For the typical plan, which provides single or family coverage as the only alternatives, this gives any member of the family unit the right to elect family coverage. (In the unusual situation where only one member of a family elects coverage, the Plan may only charge 102% of the single rate, Rev. Rul. 96-8.)

What do you do to notify young adults? They have the power to contract for themselves, may not communicate with mom and pop who pay the bills, and may still be carried as dependents on health insurance. I recommend separate notices addressed specifically to young adults. And if the Plan Administrator knows the college address, a separate election form should be sent there as well as to the home with the resident parent. What we try to avoid with this procedure is the claim from an injured young adult dependent that he or she would have contracted for the coverage if informed. (The regulation is silent on all this.)

The regulation addresses a few technicalities about the procedures for sending the Election Materials:

1. The Plan can measure these notification requirements from the date when coverage would be lost, rather than the date of the qualifying event. This is helpful for Plans which measure the COBRA date from the end of the month in which the qualifying event occurred.
2. It's OK to include HIPAA certificates of creditable coverage with the mailing. (Some were concerned that this might load too much information into the envelopes with the Election Materials).
3. The regulation is flexible. First class, and even second and third class, mailings are OK. (Who do you know who is so cheap as to use third class mail for COBRA Election Materials?). I recommend that you reach deep for the 37 cents and use first class mailing. The responsible employee for COBRA administration should maintain a log. Certified mail, return receipt, is a pain when no one signs the green card, and legally

unnecessary. A plan administrator does not need to prove receipt, only mailing. Sending a mailing by certified mail, with no return receipt requested, still requires a trip to the post office, which does tax some mail rooms that prefer to use private in-house metering. There is no harm in using that type of mailing as an alternative procedure. But first class mail with a log more than meets the regulation's requirements.

4. Electronic mailing is permissible, but totally impractical. Under EBSA rules, permission must be obtained from recipients, so how do you get that permission from a non-employee spouse and dependents without a prior written communication in most cases? Snail mail works best. It's still a terrific idea to put copies of the Election Materials, and the General Notice, on your Website, of course. (And remember that if you have an HR website, that your HIPAA privacy notice must be posted on it, as required by HHS, the agency which administers the privacy portions of HIPAA).

4. INFORMATION WHICH A BENEFICIARY SHOULD RECEIVE.

Before the regulation effective date, many plan administrators will have to make their SPD's even less "summary" in nature than they are currently. COBRA requires that beneficiaries notify plan administrators of certain qualifying events: divorce, legal separation (but only if separation causes loss of coverage), ceasing to be a dependent, disability of a covered beneficiary during the first 60 days of coverage, notice of a "second qualifying event" occurring during the first 18 months of COBRA coverage, and notice that SSA has determined a covered beneficiary to no longer be disabled.

The qualified beneficiary has only 60 days to notify the plan administrator of a qualifying event which is his reporting responsibility. That period of time will be tolled unless the qualified beneficiary has been notified of his obligations and of the Plan's preferred way of receiving the communication (i.e. through use of a special form addressed to employee X in the HR Department). That makes sense, but it is bizarre that the regulation specifically requires that the notice of those required procedures be through an SPD or the General Notice. I can't help feeling that this was an error and that notice in the Election Materials would also suffice.

Putting the information just in an SPD won't help the average, non-employee beneficiary. As you know, SPD's are not required to be given to qualified beneficiaries, only to the employee participants. What good is the information in a General Notice, distributed many years before the first qualifying event, and undoubtedly misplaced? And the preamble to these regulations is specific that the General Notice was abbreviated due to the EBSA concern it was too long, so there is not a good description within it of the obligation to report second events.

It is silly to think that notice in the Election Materials, which are provided right after the first continuation event, doesn't suffice to put qualified beneficiaries on notice. It's my view, in spite of the new regulation, that a good description within the Election Materials suffices. For those who are more conservative, the obvious solution is just to amplify the General Notice, and to stick a little more into those SPD's which do not already adequately describe the notification obligations of covered beneficiaries.

EBSA addressed two other related questions. May the Plan insist that notices required of beneficiaries be in writing, and may the Plan require the use of special forms for that purpose? "Yes" to both of those. But if you do use forms, send them out with the Election Materials, or provide clear directions on how to get them. In all events, your procedures should be clear that written notice is required, simply to eliminate the "he said - she said" type of dispute.

5. WHAT PROCEDURES APPLY IF A BENEFICIARY GIVES NOTICE OF A CONTINUATION EVENT WHICH DOES NOT SUPPORT A CLAIM TO EXTENDED COVERAGE?

There is some controversy over this. EBSA insists in these final regulations that written denial of coverage must be sent to the beneficiary within 14 days of the claim. The statute does not support this. It will lead to unnecessary controversy. If a plan administrator cannot make a determination within this short period, it is probably best advised to make a preliminary denial and to request additional information as part of a reconsideration proceeding. This seems arbitrary, but EBSA leaves no choice after inventing this new administrative burden, which disregards the claims procedure in most SPD's. The written denial must be expressed in a manner which can be understood by an average participant and explain the reasons. Interestingly, the regulation does not require notice of appeal rights, as would be the typical case when claims are denied. We recommend that the SPD's description of appeal rights be included nonetheless.

6. WHAT PROCEDURES APPLY IF COVERAGE IS TO BE CUT SHORT?

There are many reasons why COBRA continuation coverage may be cut short. A plan administrator might learn that a participant in extended disability continuation is not disabled, or that a COBRA beneficiary is covered under another, although less generous, plan. Coverage may be cut off in advance of notice, but the plan administrator must provide a written statement promptly, and in easy to understand terms, as to why it took the action. It also must describe any available conversion rights. As is the case with the 14 day denial described above, the regulation does not require notice of appeal rights, as would be the typical case when claims are denied. We recommend that the SPD's description of appeal rights be included nonetheless.

7. CONCLUSION.

The new regulations and sample notices, although long overdue, are better than what we had. We wish regulators would try more often to develop sample written materials to assist employers in connection with their benefit plans. Let me know if you need assistance or if questions arise.

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