



The Departments of Labor and Health & Human Services Seek to Enhance Care Benefits Under COBRA

On May 2, 2014, the Employee Benefits Security Administration of the Department of Labor (DOL) released proposed regulations, which contain changes to the existing Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) notice requirements. These changes are intended to incorporate applicable provisions under the Affordable Care Act into the COBRA notice requirements, and to provide flexibility to respond to provisions of federal law that will become applicable in the future. The proposed regulations provide updated versions of the model general notice and model election notice forms, which were previously made available by the DOL. The updated model notices are available in modifiable, electronic form on the DOL's website at www.dol.gov/ebsa/cobra.html. Employers should consider using the updated model notices (modified, as needed, to fit the employer's particular situation) on a going-forward basis because the DOL will consider the use of the model notices to be good faith compliance with the notice content requirements under COBRA.

Also on May 2, 2014, the Department of Health & Human Services (HHS) Centers for Medicare & Medicaid Services (CMS) issued guidance establishing special enrollment periods for individuals seeking to enroll in a health care plan through the federally-facilitated health insurance exchange established under the Affordable Care Act (the Federal Exchange). HHS is encouraging state-based marketplaces to adopt similar special enrollment periods, but unless and until states take such action, these special enrollment periods are only available through the Federal Exchange. Employers may want to notify employees and former employees of these special enrollment periods.

Overview of the COBRA Notice Requirements

Under the COBRA notice requirements, group health plans must generally provide a written notice of COBRA rights to each covered employee and spouse (if any) at the time of commencement of coverage

under the plan (the General Notice). Under most circumstances, the General Notice must be furnished to each covered employee and to the employee's spouse (if covered under the plan) not later than the earlier of: (i) either 90 days from the date on which the covered employee or spouse first becomes covered under the plan or, if later, the date on which the plan first becomes subject to the continuation coverage requirements; or (ii) the date on which the administrator is required to furnish an election notice to the employee or to his or her spouse or dependent.

In addition to the General Notice, group health plans must provide an election notice at the time of certain qualifying events (the Election Notice). In general, an individual who was covered by a group health plan on the day before a qualifying event occurred may be able to elect COBRA continuation coverage upon a qualifying event (such as termination of employment or reduction in hours that causes loss of coverage under the plan). A group health plan must provide such individuals with the Election Notice, which describes their rights to COBRA continuation coverage and how to make an election. The employer has 30 days to notify the plan administrator of certain qualifying events and then the Election Notice must be provided within 14 days after the plan administrator receives the notice of a qualifying event.

The updated versions of the model General Notice and model Election Notice forms provided under the proposed regulations are intended to facilitate compliance with the COBRA notice requirements described above.

Changes to the Model General Notice and Model Election Notice Forms

The general substance of the model General Notice and Election Notice forms has not changed under the proposed regulations. However, the model notices add language that is intended to provide notice of alternative coverage options besides COBRA continuation coverage, including coverage through health insurance exchanges established under the Affordable Care Act (the Exchanges), Medicaid, or other available group health plans (such as a spouse's plan). In addition, the model Election Notice under the proposed regulations provides a description of the Exchanges and instructions on enrolling for healthcare coverage under the Exchanges, including applicable deadlines for such enrollment.

CMS Guidance

The Exchanges must permit enrollment in a qualified health plan during a special enrollment period outside of the annual open enrollment period when a specified triggering event occurs, such as an individual's or dependent's loss of minimum essential coverage, or the acquisition of a new dependent through marriage, birth, adoption, or placement for adoption. In addition, special enrollment periods may apply to individuals that demonstrate to the Exchanges, in accordance with guidelines issued by HHS, that the individual meets other exceptional circumstances. Pursuant to this authority, the guidance issued by CMS establishes two new special enrollment periods, one for individuals eligible for or already enrolled in COBRA, and another for individuals whose individual health plan renewal date falls outside of the general open enrollment period.

A special enrollment period already exists for individuals when (i) the individuals are initially eligible for COBRA due to a loss of other minimum essential coverage, and (ii) when an individual's COBRA coverage is exhausted. CMS was concerned that the former model General Notice and Election Notice forms did not sufficiently address the coverage options available under the Exchanges. Therefore, the guidance issued by CMS provides for a special enrollment period that allows certain individuals eligible for or

already on COBRA continuation coverage to enroll in a qualified health plan under a Federal Exchange through July 1, 2014.

The guidance issued by CMS provides for a second special enrollment period applicable to individuals whose health plan coverage expires after the open enrollment period. Eligible individuals will be able to report to the Federal Exchange that they will not renew their plan up to 60 days before the renewal date, and can get coverage in the Federal Exchange, effective the first of the month following the renewal date. Eligible individuals will also have 60 days from the renewal date to select a qualified health plan in the Federal Exchange, effective as of the selection date.

The special enrollment periods described above are not available to individuals in states with a state-based Exchange, unless the state adopts similar special enrollment periods, which states are encouraged to do by HHS.¹

Conclusion

Given the relative complexity of the COBRA notice requirements and in light of potentially significant sanctions for non-compliance, employers should review their current General Notice and Election Notice forms and revise them, as necessary, to be consistent with the updated guidance provided by the Department of Labor under the proposed regulations and the model forms provided thereunder.

Employers should also consider notifying individuals that may be eligible for the special enrollment periods described above as coverage under the Federal Exchange may be less costly than COBRA continuation coverage and COBRA qualified beneficiaries may be eligible for cost sharing reductions and a premium tax credit towards the cost of plans offered in the Federal Exchange. In addition, individuals that select COBRA continuation coverage tend to be higher users of medical services, which can increase the costs of employer sponsored plans. Thus, it may be beneficial to the employer for its COBRA eligible employees and former employees and any other qualified beneficiaries to take advantage of the special enrollment period to cease COBRA continuation coverage and enroll in a qualified health plan under the Federal Exchange.

This *GT Alert* was prepared by **Michael R. Einig** and **Magan P. Ray**. If you would like more information regarding the forgoing, please contact any member of our [Global Benefits and Compensation Group](#), or your regular contact at our firm.

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¹ These states are California, Colorado, Connecticut, Washington D.C., Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington.

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