

# The New Final COBRA Notice Rule and What It Means For Consumers

## Introduction

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On May 26, 2004 the US Department of Labor released the final rule for Healthcare Continuation Coverage, also referred to by some as the COBRA Notice Rule, under Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

The final rule governs notice provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA) requiring certain health plan sponsors, namely employers with more than twenty employees on fifty percent of the working days in the preceding calendar year, to offer qualified beneficiaries continued coverage at group rates under certain circumstances where a beneficiary would otherwise lose their healthcare coverage. These circumstances in which a beneficiary might be eligible for COBRA include, but are not limited to, death of the covered family member, divorce, and termination of employment for reasons other than cause.

This new rule sets the minimum standards for the substance and timing of the notice to consumers of their rights and obligations to exercise the COBRA protections available to them. The new rule and this document pertain only to the notice requirements. Because rulemaking authority for COBRA is divided between the Secretary of the Department of Labor and the Secretary of the Treasury, the rule does not govern issues related to which plans are subject to COBRA, who is a qualified beneficiary, and what constitutes a qualifying event. These topics are covered in separate rules issued by the Treasury Department. It is very important that all Consumer Health Assistance Programs understand these additional rules govern the substantive rights of consumers with regard to COBRA and should programs find a conflict between the notice rules, the rules promulgated by the Treasury Department, and/or the statute, the programs should carefully consider the substantive rights of the consumer and not rely solely on the notice received by the consumer or the model notices.

Proposed rules on COBRA notice were published by the US Department of Labor on May 28, 2003<sup>1</sup> and the Health Assistance Partnership (HAP) together with several Consumer Health Assistance Programs submitted electronic comments in response to the proposed rules in July of 2003 (see HAP website). The comments submitted by HAP and the Programs generally supported the decision to promulgate rules and suggested three main areas in which the proposed rules could be improved to better meet the needs of the approximately 113 million beneficiaries affected by the rule. The comments suggested, first, that there are a number of areas where more substantive information is needed in the rules and model notices to ensure the notices will be meaningful to participants and beneficiaries. Second, some changes to the rules and notices that are needed to ensure they conform to current statutory requirements. Finally, changes to the style and form are needed to ensure the notices will be received and understood by all participants and beneficiaries.

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<sup>1</sup> A Request for Information was also published on September 23, 1997 to inquire about public opinion on whether the DOL should develop regulations.

## **Summary of the Final Rule**

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The final rule sets out the responsibilities of the employer, the plan administrator, and the beneficiary under various situations that may give rise to COBRA eligibility. The final rule, like the proposed rule, consists of separate four regulations:

### **1) The Rule Requiring General Notice of COBRA Rights Be Given to Beneficiaries at the Time They Enroll in the Plan**

COBRA requires group health plans to provide notice in writing to each covered employee and, if applicable, their spouse, of COBRA rights at the time “coverage commences” under the plan. The first regulation specifies the requirements for the content and timing of that notice.

Specifically, the regulations require that the notice be in writing and written in a manner calculated to be understood by the average plan participant. They also must be furnished to the beneficiary either the earlier of 90 days after the date coverage under the plan commences or 90 days after the date on which the plan first becomes subject to COBRA.

The regulations specify that the notice shall include the following:

- Name of the plan
- Name, address and phone number of the party to reach for additional info
- A general description of the coverage
- Who is a qualified beneficiary
- The type of qualifying events that give rise to coverage
- The obligation of the employer to notify the plan administrator of certain qualifying events
- The maximum period that continuation coverage is available
- When coverage may be extended
- The plans requirements about payment of premiums
- When and how the beneficiary must notify the administrator of a qualifying event
- When and how to give notice of a SSD determination
- The importance of why to ensure the plan has current addresses for the plan beneficiary
- Information that the notice does not describe all continuation rights and that more information is available from the plan administrator
- An explanation that the plan may furnish both the covered person and the spouse only one notice if both persons reside at the same address

The final rule does provide that notice in the Summary Plan Description (SPD) of the above would satisfy this notice requirement. The final rule also states that use of the model notice provided in an appendix to the regulation is not required. Plans may utilize the model notice, which is intended for use by single employer plans while the notice must be modified for use by multiple employer plans or association plans. And, the regulations state that separate notices do not have to be given to dependent children even if the plan knows that these dependent children reside at a separate address.

### **2) The Rule Governing When the Employer Must Provide Notice to the Plan of a Qualifying Event**

The second regulation in the rule pertains to the requirement under COBRA that the employer must provide notice to the plan administrator that a qualifying event has taken place in the following circumstances:

- The employee beneficiary has died
- The employee beneficiary becomes entitled to Medicare
- The employee beneficiary is terminated or his or her work hours are reduced
- The employer enters into a bankruptcy proceeding

Under these circumstances, the regulation requires that notice generally must be furnished by the employer to the plan administrator not later than 30 days after the date on which the qualifying event occurred. The notice requirement does not apply to multiemployer plans and does not apply if the plan provides that the continuation coverage shall commence on the date of loss of coverage, in which case the notice must be provided not later than 30 days after the date on which the qualified beneficiary loses coverage due to the qualifying event. The notice must contain sufficient information to enable the plan administrator determine the plan, covered employee, qualifying event, and the date of the qualifying event.

### **3) The Rule Governing When a Beneficiaries Must Provide Notice to the Plan of a Qualifying Event**

There are events which only an employee beneficiary can be aware of and thus must disclose to the plan in order to exercise COBRA rights. If an employee or spouse wishes to exercise COBRA rights, the rule imposes an obligation to notify the plan administrator in the event of:

- Divorce or legal separation
- A beneficiary ceases to have dependent status under the plan
- A beneficiary is determined disabled by the Social Security Administration within the first 60 days of continuation coverage
- A beneficiary determined within the first 60 days of continuation coverage to be disabled by the Social Security Administration has been determined to no longer be disabled.

Plans must develop “reasonable” procedures about how a beneficiary needs to provide this notice. Reasonable procedures generally must be described in the SPD. And, the procedures must specify the means by which the beneficiary must give notice. Opportunities to carrying out these procedures have to be easily available at no cost to the beneficiary and the procedures should require the beneficiary to describe the qualifying event. If no procedures are in place, the written or oral communication reasonably calculated to bring the matter to the attention of someone who customarily handles benefits for the employer or communication with a representative of the plan administrator should suffice. It should be noted that the regulations provide further suggestion about which types of persons are appropriate to contact at the employer or plan. The plan must the allow the beneficiary at least 60 days after either the qualifying event or the date the beneficiary would lose coverage due to the qualifying event to provide notice.

### **4) The Rule Requiring Election Notices be Sent to Beneficiaries by Plan Administrators When a Qualifying Event has Taken Place**

Under the law, a plan administrator is required to notify each qualified beneficiary of his or her right to elect COBRA within 14 days of when the administrator is notified of the qualifying event. If the employer is also the plan administrator, the administrator shall furnish a notice to the beneficiary not later than 44 days after the date on which the qualifying event or subsequent loss of coverage occurred.

The notice furnished by the plan administrator must contain:

- Name of the plan
- Name address and phone of the plan administrator
- Identification of the qualifying event
- Names of the qualified beneficiaries
- Date on which coverage under the plan will terminated unless coverage is selected
- Statement that each individual who is qualified has an independent right to select coverage
- An explanation of the procedures for selecting coverage
- An explanation of the consequences of failing to elect coverage
- A description of the coverage available
- An explanation of the maximum period of coverage available
- A description of the circumstances that coverage could be extended
- An explanation of the cost
- Due dates for payments
- The importance of why to ensure the plan has current addresses for the plan beneficiary
- Information that the notice does not describe all continuation rights and that more information is available from the plan administrator
- An explanation that the plan may furnish both the covered person and the spouse only one notice if both persons reside at the same address

If the notice is to inform the beneficiary of termination of the continuation coverage, it must be sent to each qualified beneficiary, provide a reason, and provide the date of termination, and the rights to elect an alternative group or individual plan, such as conversion.

The effective date of the final rule is two months from publication, meaning July 28, 2004. However, because the rule relates to notice, including notice in Summary Plan Descriptions, which are typically only made available to beneficiaries each plan year, the practical effective date of the rule is actually somewhat more complicated. The rule provides that, in order to allow plans to implement the new rule, the new notices requirements take effect on the first day of the first plan year beginning on or after six months after the date of publication of the rule. This means that consumers may not see new notices for up to 18 months from the date the rule was published, or until November 2005.

### **Comparison of the Proposed Rule and Final Rule**

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The Final Rule and Proposed Rule are very similar but some substantive changes were made to the Final Rule based on comments the Department received. As previously noted, the final rule, like the proposed rule, contains four separate regulations: 1) a rule requiring that a beneficiary must be provided with general notice of COBRA rights at the time of enrollment, 2) a rule

regarding the employers duties to provide notice of a qualifying event, 3) a rule imposing responsibility on beneficiaries to provide notice to an employer in certain circumstances that a qualifying event has taken place, 4) a rule regarding the notice obligations of plan administrators.

1) Seven changes were made to the first rule, the general notice rule:

- A new paragraph was added to clarify that providing notice within 90 days is consistent with the “commencement of coverage” language of the Act.
- A new paragraph has been added at to clarify that in the instance that a plan must furnish both a general notice and election notice in the first 90 days following the beneficiaries commencement of coverage, the plan may satisfy its obligations by providing only the election notice.
- The Model Notice has been amended to allow placement of plan specific identification information at the end of the notice.
- The Model Notice has been modified to eliminate contact information for both the COBRA administrator and the plan administrator and now only requires the contact information of a party that will provide additional information upon request.
- The provision that a beneficiary must provide the plan notice of a second qualifying event has been eliminated from the general notice content requirements.
- The Model Notice has been amended to eliminate references to COBRA coverage beginning dates.
- Clarifications have been made on the subject of providing notice to dependent children, which is not required even if the dependent child triggered the qualifying event.

2) No changes were made to the rule relating to an employer’s obligation to provide notice of a qualifying event.

3) Three changes were made to the rule related to the responsibility of a qualified beneficiary to provide notice to the plan or employer:

- Rather than requiring an employee to give notice, when required, to “any officer of the employer” the rule has been revised to provide that an employee must give notice to a party that customarily handles benefit matters for the employer.
- A very important change was made to the start date of the 60-day notice period that an employee has to provide notice. Changes were made to bring this regulation into conformance with the Treasury Department regulations. In the final rule, the 60-day period begins on the latest of the date of the qualifying event, the date on which there is a loss of coverage, or the date on which the beneficiary is informed through the SPD or Cobra General Notice of her obligation to provide notice.
- For beneficiaries with a SSA Disability Determination, the final notice requires beneficiaries to provide a notice of disability within 60 days after the latest of the SSA disability determination, the date on which the qualifying event occurs, the date on which the beneficiary loses coverage, or the date on which the qualified beneficiary is informed of the duty to provide such notice.

4) Four changes were made to the rule on plan administrators’ notice obligations:

- Elimination of the requirement that information concerning alternative coverage and conversion rights be included in the election notice.
- The Model Election Notice has been revised to make it clear that identification of the qualified beneficiaries can be accomplished by either their status under the plan (spouse, employee, dependent) or by listing their names on the Notice.
- The language on the Trade Act in the Model Notice has been modified to reference both Pension Benefit Guarantee Corporation (PBDC) and Trade Adjustment Act (TAARA) opportunities for coverage. Both programs are essentially tax credits that cover most of the cost of coverage for those who have lost their coverage due to bankruptcy of their retiree plan or due to trade.
- Clarifications have been made to show that the unavailability notice must be furnished to beneficiaries regardless of the reason coverage is unavailable or whether the notice is in reference to a second qualifying event or request for a disability extension.

The comments submitted by HAP and the Programs generally supported the decision to promulgate rules and the overall structure of the rules, but made three general recommendations, primarily about the model notices provided to beneficiaries (as opposed to the substantive duties of administrators, employers, or consumer beneficiaries). First, HAP recommended that there are a number of areas where more substantive information is needed in the rules and model notices to ensure the notices will be meaningful to participants and beneficiaries. Second, recommendations were made about changes to the rules and notices that are needed to ensure they conform to current statutory requirements. Finally, changes to the style and form were recommended to ensure the notices will be received and understood by all participants and beneficiaries.

Specifically, the recommendations were:

**1) The Model and Election Notices Should Include More Information:**

- The cost of COBRA and options for paying for it.
- Information on the TAARA health insurance tax credit
- Individuals with disabilities extending their COBRA continuation coverage period.
- Medicare's interaction with COBRA.
- All information included in the election notice should be repeated in the general notice.
- Where to go for help should be provided in both model notices.
- Appeal rights should be included in both model notices. Such statement should be comparable to the one required under the Department's claims procedure rules.
- Clearly explaining the individual right to COBRA.
- A special model notice should also be included for qualified beneficiaries in a bankrupt company.
- Both model notices should explain the meaning of "day".
- Both model notices should clearly define "gross misconduct."
- Safeguards for separated and divorced spouses.

**2) Changes Needed to Better Reflect Statutory Requirements**

- This election form should include a statement that makes clear that if the enrollee sends in the form declining COBRA coverage but then changes his or her mind within the 60 day election period, the enrollee can still elect COBRA coverage.

- The election notice states that “Continuation coverage will be terminated before the end of the maximum period of any required premium is not paid on time...”, but fails to clarify that “on time” under the statute means within the 30 day grace period allowed by law
- The model election notice incorrectly states that the first payment for continuation coverage must be made within 45 days after the date of election or the individual will lose all continuation coverage rights.
- The model election notice appears to suggest that a plan may suspend coverage during the grace period and then retroactively reinstate coverage once payment is made. However, COBRA enrollees with a 30 day grace period in which to make “timely payments.”
- The rule should provide more specific guidelines for plans about what is a “reasonable procedure for furnishing the required notices.”
- The rule includes provisions empowering plans to dictate “reasonable procedures” for notice requirements for covered employees and beneficiaries with which beneficiaries would have to comply in order to be deemed eligible for COBRA. This language does not appear to have any grounding in the underlying statute.

### **3) Changes Needed to Improve Style and Format**

- The notice needs to explain more clearly when the qualified beneficiary must notify the plan of a qualifying event.
- The rule must create guidelines for providing notice to beneficiaries who are Limited English Proficient (LEP).
- The rules should specify that this notice should be given to the beneficiary "as soon as possible but not later than 14 days," otherwise some individuals may incur costs that they erroneously expect their health plan to pay, not knowing that they are not eligible to elect COBRA.
- The notice of no qualifying event should also include notice of the right to appeal and the right to file a civil action.

However, with the exception of additional information about Pension Benefit Guarantee Corporation beneficiaries, none of the comments submitted by HAP resulted in significant changes to the Final Rule.

### **What the Final Rule Means to Consumers and Health Assistance Programs**

The final rule governing notice obligations of plan administrators, employers, and consumers for continuation coverage contains some important information that consumer health assistance programs need to know about in order to assist consumers.

Consumers should:

- Read their SPD when they first receive it to be aware of their continuation rights. Under the rules, consumers may no longer receive a separate SPD and notification of COBRA rights when they enroll in a plan.
- Be aware of their obligation to provide notice to their plan within 60 days of the qualifying event or the time at which they would lose their coverage under the plan,

whichever is later. They need to know that they must provide this notice in the manner required by the plan and should refer to their SPD for instructions. They may be required to use a form.

- Understand the circumstances in which the employer is required to provide notice to the plan administrator on their behalf.
- Know that the maximum amount of time that a consumer should go without receiving the election notice from the plan after a qualifying event or losing coverage due to a qualifying event, which depending on the plan sometimes occurs at the end of the month during which the qualifying event took place, is 44 days.
- Know whether they are covered under a single or multiple employer plan because multiple employer plans may not have to abide by the same deadlines single employer plans must abide by with regard to notice requirements.

Health assistance programs, on the other hand, should not rely solely on the election notices for complete descriptions of the consumer's continuation coverage rights and Health Insurance Portability and Accountability Act portability (HIPAA) rights. Special note should be taken that in many states consumers lose their protections from pre-existing condition exclusions unless they take and use all the continuation coverage available to them. Therefore, some consumers may need more information than is provided in those notices.

Some consumers may also need special help identifying if they have experienced a second qualifying event and how to handle providing notice to the plan in that instance. And, Health Assistance Programs should know the effective date of the rules and be aware that different rules may apply to different plans between now and November 26, 2005, the date on which all plans subject to COBRA are required to be in compliance with the final rule.