

New Proposed COBRA Notice Regulations Issued

1986 Model COBRA Notice Immediately Obsolete

The Department of Labor (“DOL”) has issued new proposed regulations implementing the various notice requirements contained in COBRA. Although the regulations are not proposed to be effective until January 1, 2004, *the model general COBRA notice issued in ERISA Technical Release 86-2 (June 26, 1986) is immediately obsolete* and use of that notice is no longer considered good faith compliance with the COBRA notice requirements. The DOL has, however, issued a new model general COBRA notice as well as a model COBRA election form. This Alert provides an overview of the new proposed regulations and reproduces the model general COBRA notice.

COBRA Notification Requirements

COBRA requires group health plans to provide certain participants and beneficiaries who lose their health coverage with the opportunity to elect to continue coverage under the plan at group rates for a specified period of time. A failure to satisfy the COBRA continuation coverage requirements can result in the imposition of an excise tax equal to \$100 per day for each qualified beneficiary during the non-compliance period. The proposed regulations set minimum standards for the timing and content of the notices required under COBRA, and establish standards for the administration of the notice process. Four types of notices are required under COBRA and are addressed by the proposed regulations: the general COBRA notice; the employer’s notice of qualifying events; the qualified beneficiary’s notice of qualifying events; and the plan administrator’s notice to qualified beneficiaries.

General COBRA Notice

Administrators of group health plans covered by COBRA must provide a written notice of COBRA rights to each plan participant (and his or her spouse, if any) at the time coverage begins. The proposed regulations provide that this notice must be given no later than 90 days after the date on which plan coverage starts. The notice must contain basic plan administrative information, a detailed description of the continuation coverage available (including, *e.g.*, the individuals eligible, the types of qualifying events that may give rise to COBRA coverage, and the responsibility for notification that a qualifying event has occurred), a statement that it is important to keep the plan administrator informed of the current address of participants and beneficiaries, and a statement that more complete information regarding COBRA rights under the plan is available in the plan’s summary plan description (“SPD”). The proposed regulations also contain guidelines for delivering the notice, and state that the notice requirement may be satisfied by including the required information in the SPD.

The model general notice published by the DOL with the proposed regulations is reproduced at the end of this Alert. The DOL has stated that the use of an appropriately completed model notice (as issued pursuant to final regulations) will be considered compliance with the content requirements of the regulations, but that the DOL does not intend to require its use and anticipates that a variety of other notices could satisfy the regulations. The DOL has specifically requested comment on whether the proposed model general notice adequately reflects

current practice and provides plans with sufficient flexibility.

Notice Requirement for Employers

Under COBRA an employer must notify its group health plan administrator of the occurrence of the following COBRA qualifying events: death of the covered employee; termination of employment (other than by reason of gross misconduct); reduction in hours of employment; Medicare entitlement; and bankruptcy of the employer in the case of employees entitled to retiree medical coverage. The proposed regulations state that this notice must generally be given no later than 30 days after the date on which the qualified beneficiary loses coverage under the plan due to the qualifying event, and that the notice must include sufficient information to enable the plan administrator to identify the covered employee, the type of qualifying event, and the date on which the qualifying event occurred.

Notice Requirement for Qualified Beneficiaries

Under COBRA qualified beneficiaries are responsible for notifying the plan administrator of the following qualifying events: divorce or legal separation; a beneficiary's ceasing to be covered under the plan as a dependent child; the occurrence of a second qualifying event after a beneficiary has become entitled to COBRA coverage; and a Social Security Administration ("SSA") determination during the first 60 days of COBRA coverage that a qualified beneficiary is disabled or any later determination by the SSA that the qualified beneficiary is no longer disabled. The proposed regulations state that a plan must "establish reasonable procedures" for the furnishing of such notices, and provide that at a minimum the procedures must be described in the plan's SPD, specify who must receive the notice, and state the means qualified beneficiaries must use for giving notice and the required content of the notice. The proposed regulations also set forth the circumstances under which a qualified beneficiary will have been deemed to have given the notice in the absence of specific procedures, and generally state that a qualified beneficiary must be given at least 60 days following a qualifying event to provide the notice to the plan administrator. Special time limits are set forth

for notices attributable to disability determinations by the SSA.

Notice Requirements for Plan Administrators

No later than 14 days after receipt of a notice that a qualifying event has occurred, a group health plan administrator must furnish a COBRA election notice to each qualified beneficiary. The proposed regulations set forth timing and content requirements for the election notices, require administrators to notify individuals if continuation coverage is determined not to be available, and require notice to be given to the qualified beneficiary when COBRA coverage will terminate before the end of the maximum period for such coverage. The DOL has published a model election notice with the proposed regulations, and has stated that use of an appropriately completed model election notice (once finalized) would be deemed compliance with the content requirements of the regulation. However, the model notice is intended for use only by single-employer group health plans and does not reflect the special rules that may apply to multiemployer or union-sponsored plans, and is not intended for use when bankruptcy is the qualifying event due to the complexity of the applicable rules. A copy of the model election notice can be found at the DOL's website, www.dol.gov.

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MODEL GENERAL NOTICE OF COBRA CONTINUATION COVERAGE RIGHTS

(For use by single-employer group health plans)

CONTINUATION COVERAGE RIGHTS UNDER COBRA

Introduction

You are receiving this notice because you have recently become covered under [*enter name of group health plan*] (the Plan). This notice contains important information about your right to COBRA continuation coverage, which is a temporary extension of coverage under the Plan. The right to COBRA continuation coverage was created by a federal law, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). COBRA continuation coverage can

become available to you and to other members of your family who are covered under the Plan when you would otherwise lose your group health coverage. **This notice generally explains COBRA continuation coverage, when it may become available to you and your family, and what you need to do to protect the right to receive it.** This notice gives only a summary of your COBRA continuation coverage rights. For more information about your rights and obligations under the Plan and under federal law, you should either review the Plan's Summary Plan Description *or* get a copy of the Plan Document from the Plan Administrator.

The Plan Administrator is *[enter name, address and telephone number of Plan Administrator]*. *[If the Plan Administrator administers COBRA continuation coverage, add the following:* The Plan Administrator is responsible for administering COBRA continuation coverage.] *[If the Plan Administrator does not administer COBRA continuation coverage, add the following:* COBRA continuation coverage for the Plan is administered by *[enter name, address and telephone number of party responsible for administering COBRA continuation coverage]*.]

COBRA Continuation Coverage

COBRA continuation coverage is a continuation of Plan coverage when coverage would otherwise end because of a life event known as a "qualifying event." Specific qualifying events are listed later in this notice. COBRA continuation coverage must be offered to each person who is a "qualified beneficiary." A qualified beneficiary is someone who will lose coverage under the Plan because of a qualifying event. Depending on the type of qualifying event, employees, spouses of employees, and dependent children of employees may be qualified beneficiaries. Under the Plan, qualified beneficiaries who elect COBRA continuation coverage *[choose and enter appropriate information must pay or are not required to pay]* for COBRA continuation coverage.

If you are an employee, you will become a qualified beneficiary if you will lose your coverage under the Plan because either one of the following qualifying events happens:

- (1) Your hours of employment are reduced, or
- (2) Your employment ends for any reason other than your gross misconduct.

If you are the spouse of an employee, you will become a qualified beneficiary if you will lose your coverage under the Plan because any of the following qualifying events happens:

- (1) Your spouse dies;
- (2) Your spouse's hours of employment are reduced;
- (3) Your spouse's employment ends for any reason other than his or her gross misconduct;
- (4) Your spouse becomes enrolled in Medicare (Part A, Part B, or both); or
- (5) You become divorced or legally separated from your spouse.

Your dependent children will become qualified beneficiaries if they will lose coverage under the Plan because any of the following events happens:

- (1) The parent-employee dies;
- (2) The parent-employee's hours of employment are reduced;
- (3) The parent-employee's employment ends for any reason other than his or her gross misconduct;
- (4) The parent-employee becomes enrolled in Medicare (Part A, Part B, or both);
- (5) The parents become divorced or legally separated; or
- (6) The child stops being eligible for coverage under the plan as a "dependent child."

[If the Plan provides retiree health coverage, add the following paragraph:]

Sometimes, filing a proceeding in bankruptcy under title 11 of the United States Code can be a qualifying event. If a proceeding in bankruptcy is filed with respect to *[enter name of employer sponsoring the*

Plan], and that bankruptcy results in the loss of coverage of any retired employee covered under the Plan, the retired employee is a qualified beneficiary with respect to the bankruptcy. The retired employee's spouse, surviving spouse, and dependent children will also be qualified beneficiaries if bankruptcy results in the loss of their coverage under the Plan.

The Plan will offer COBRA continuation coverage to qualified beneficiaries only after the Plan Administrator has been notified that a qualifying event has occurred. When the qualifying event is the end of employment or reduction of hours of employment, death of the employee, *[add if Plan provides retiree health coverage: commencement of a proceeding in bankruptcy with respect to the employer,]* or enrollment of the employee in Medicare (Part A, Part B, or both), the employer must notify the Plan Administrator of the qualifying event *[choose and enter option applicable to this Plan: (1) within 30 days of any of these events or (2) within 30 days following the date coverage ends.]*

For the other qualifying events (divorce or legal separation of the employee and spouse or a dependent child's losing eligibility for coverage as a dependent child), you must notify the Plan Administrator. The Plan requires you to notify the Plan Administrator within 60 days [or enter longer period permitted under the terms of the Plan] after the qualifying event occurs. You must send this notice to: *[Enter name of appropriate party]*. *[Add description of any additional Plan procedures for this notice, including a description of any required information or documentation.]*

Once the Plan Administrator receives notice that a qualifying event has occurred, COBRA continuation coverage will be offered to each of the qualified beneficiaries. For each qualified beneficiary who elects COBRA continuation coverage, COBRA continuation coverage will begin *[Enter the option applicable to this Plan: (1) on the date of the qualifying event or (2) on the date that Plan coverage would otherwise have been lost]*.

COBRA continuation coverage is a temporary continuation coverage. When the qualifying event is the death of the employee, enrollment of the employee in Medicare (Part A, Part B, or both), your divorce or

legal separation, or a dependent child losing eligibility as a dependent child, COBRA continuation coverage lasts for up to 36 months.

When the qualifying event is the end of employment or reduction of the employee's hours of employment, COBRA continuation coverage lasts for up to 18 months. There are two ways in which this 18-month period of COBRA continuation coverage can be extended.

Disability extension of 18-month period of continuation coverage

If you or anyone in your family covered under the Plan is determined by the Social Security Administration to be disabled at any time during the first 60 days of COBRA continuation coverage and you notify the Plan Administrator in a timely fashion, you and your entire family can receive up to an additional 11 months of COBRA continuation coverage, for a total maximum of 29 months. *[Insert and modify to reflect actual Plan provisions on this notice: You must make sure that the Plan Administrator is notified of the Social Security Administration's determination within 60 days of the date of the coverage.]* This notice should be sent to: *[Enter name of appropriate party]*. *[Add description of any additional Plan procedures for this notice, including a description of any required information or documentation.]*

Second qualifying event extension of 18-month period of continuation coverage

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 26 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. **In all of these cases, you must make sure that the Plan Administrator is notified of the second qualifying event within 60 days of the second qualifying event [or enter longer period if permitted under the terms of the Plan]. This notice**

must be sent to: *[Enter name of appropriate party.]*
[Add description of any additional Plan procedures for this notice, including a description of any required information or documentation.]

and District EBSA Offices are available through EBSA's website at www.dol.gov/ebsa.

If You Have Questions

If you have questions about your COBRA continuation coverage, you should contact *[enter name of appropriate party]* or you may contact the nearest Regional or District Office of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). Addresses and phone numbers of Regional

Keep Your Plan Informed of Address Changes

In order to protect your family's rights, you should keep the Plan Administrator informed of any changes in the addresses of family members. You should also keep a copy, for your records, of any notices you send to the Plan Administrator.

Should you have any questions about this Alert, please contact the Kirkland & Ellis employee benefits attorney with whom you normally work, or any of the following:

Chicago

Vicki V. Hood
(312/861-2092)

Toni B. Merrick
(312/861-2461)

Alexandra Mihalas
(312/861-2104)

Robert R. Zitko
(312/861-2058)

London

Stuart L. Mills
(44-20-7816-8750)

Washington, D.C.
Thomas D. Yannucci
(202/879-5056)

Los Angeles

Jeffrey S. Davidson
(213/680-8422)

New York

Patrick C. Gallagher
(212/446-4998)

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