

# Agenda

- New DOL Model COBRA Notices
- Contretemps and Conflicts: COBRA and Exchange Coverage
- The Future of COBRA: A Practitioner's Perspective

# New DOL Model COBRA Notices

- DOL released updated model COBRA notices in May
- Both General Notice (sometimes called the COBRA Rights Notice) and Election Notice models
- Located at:
  - http://www.dol.gov/ebsa/cobra.html
- Companions:
  - FAQs Part XIX
  - Updated CHIP Notice
  - Proposed regulations to "decouple" DOL model COBRA notices from regulatory process

- Why use model COBRA notices?
  - Safe harbor: Models (appropriately completed) satisfy
     Code and ERISA obligations if sent at the correct time and to the correct recipients
    - See FAQs Part XIX
  - Eliminates cost of creating and updating customized notices
  - Customized notices often fall out of compliance unless carefully maintained and updated
  - Strong emphasis on model notices from COBRA vendors

- Revised COBRA General Notice:
  - Emphasizes ACA Exchange, Medicaid, and possible spouse group health coverage (and possible lower cost)
  - Simplifies multiple qualifying events
  - Contains a fair amount of wordsmithing (around 150 changes in total—many minor)

- Revised COBRA Election Notice:
  - Emphasizes ACA Exchange, Medicaid, and possible spouse group health coverage (and possible lower cost)
    - "Cost" referenced 14 times!
  - Notes end of preexisting condition exclusions
  - Simplifies multiple qualifying events
  - Warns of subsequent restrictions on switching to other coverage

#### Detailed Exchange discussion

- Enrollment rules and deadlines
- Exchange contact information
- Switching coverage
- Special enrollment windows

#### – Factors to consider:

- Premiums
- Networks
- Drug formularies

- Severance (discussed later)
- Service areas
- Cost-sharing
- Contains a fair amount of wordsmithing (around 240 changes in total—many major)
- On balance, almost an advertisement for Exchange coverage!

- Big opportunity to educate COBRA qualified beneficiaries about the merits of Exchange coverage and the risks and costs associated with COBRA coverage
  - The beginning of the end of COBRA? (See "A Practitioner's Perspective" later in this material)

- Is this the time to move away from customized COBRA notices to partial or full use of DOL models?
  - Proposed "decoupling" may lead to more frequent revisions of DOL model notices
    - OMB expiration date on new Model COBRA Notices is 10.31.2016—but sooner revisions from DOL are always possible

# Contretemps and Conflicts: COBRA and Exchange Coverage

- Much like Medicare coverage, there are only limited opportunities to begin Exchange coverage
  - Annual enrollment (expected to be 11.15—2.14 for 2015)
    - Coverage effective 1.1.2015 only if enrolled by 12.15.2014)
  - Special Enrollment Periods
    - Similar to HIPAA rules, with additional ACA triggers
      - Loss of minimum essential coverage
      - Exhaustion of COBRA coverage
        - » Does not include failure to pay COBRA premiums before expiration of COBRA coverage

- Special Enrollment Period is 60 days from the date of the event
- Generally, Exchange coverage effective first of next month IF enrolled by the 15th of prior month, but first of second month if enrolled on or after the 16th of prior month
  - Date of birth, adoption, placement for adoption have day of event coverage

- Mismatch with COBRA rules
  - Particularly if:
    - COBRA coverage ends with day of QE
    - COBRA event occurs in 2nd half of a month, and COBRA coverage ends at the end of the same month
  - Could lead to electing COBRA to "fill the gaps"
  - But, be careful—COBRA coverage prevents the receipt of an Exchange subsidy!

- Subsidized COBRA—a special problem:
  - COBRA coverage makes an individual ineligible for subsidized Exchange coverage
  - COBRA subsidies rarely end before the conclusion of the 60-day Special Enrollment Period
  - COBRA subsidies rarely end December 31 to align with annual enrollment period for Exchange coverage
    - And would have to enroll in Exchange coverage by 12.15 to get Exchange coverage starting 1.1

- Argue that voluntary termination of COBRA = special enrollment opportunity?
  - Is this individual "newly eligible or ineligible for advance payments of the premium tax credit"
- Any attempt to expand Exchange Special Enrollment Periods will not be embraced by insurers
  - Due, in part, to the end of preexisting condition exclusions and medical underwriting

- Subsidized COBRA creates dangerous issue at end of subsidy period
- Highlights Exchange problems created by subsidized COBRA coverage
  - May not be able to move to Exchange coverage at end of subsidy
  - Evaluate continued viability of COBRA subsidy
    - Possibly move to taxable lump sum at termination of employment to replace subsidized COBRA coverage?
      - Not everyone will want to receive—or be able to qualify for subsidized Exchange coverage

# The Future of COBRA: A Practitioner's Perspective

- COBRA will not go away anytime soon
  - If, for no other reason, COBRA is found in the statutory
     Code and ERISA rules—and the Congressional stalemate makes any legislation a long shot
    - Regulators cannot merely "regulate" COBRA out of existence or radically change its terms in ways that conflict with statutory language

- There are real advantages to COBRA coverage
  - Physician network differences compared to Exchange coverage
  - Course of ongoing treatment
  - Already-satisfied plan deductible
- But the primary driver for COBRA—preexisting condition exclusions—has been relegated to the dustbin of history

- Perhaps argue that COBRA should only run through the end of the calendar year of the qualifying event?
  - Satisfies the plan design/mid-year disruption issues noted earlier
  - While not all plans are run on a calendar year basis, those that are may radically change from year to year anyway
  - Already recognize this limited duration for healthcare spending accounts
    - And only for those who would be disadvantaged by an immediate end to the health FSA

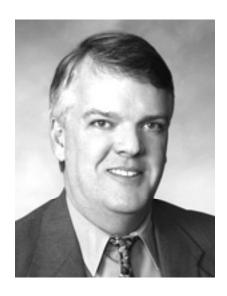
- Will the economics of Exchange coverage and possible subsidies lead to a migration away from COBRA?
- Returning to where we started—should COBRA notices be revised to emphasize the Exchange issues and opportunities to start this migration?
- How about COBRA annual enrollment material?
- How about COBRA enrollment material?
  - Do employers have an obligation to tell COBRA qualified beneficiaries about the Exchange interactions with COBRA?

# Questions?

# **Contact Information**



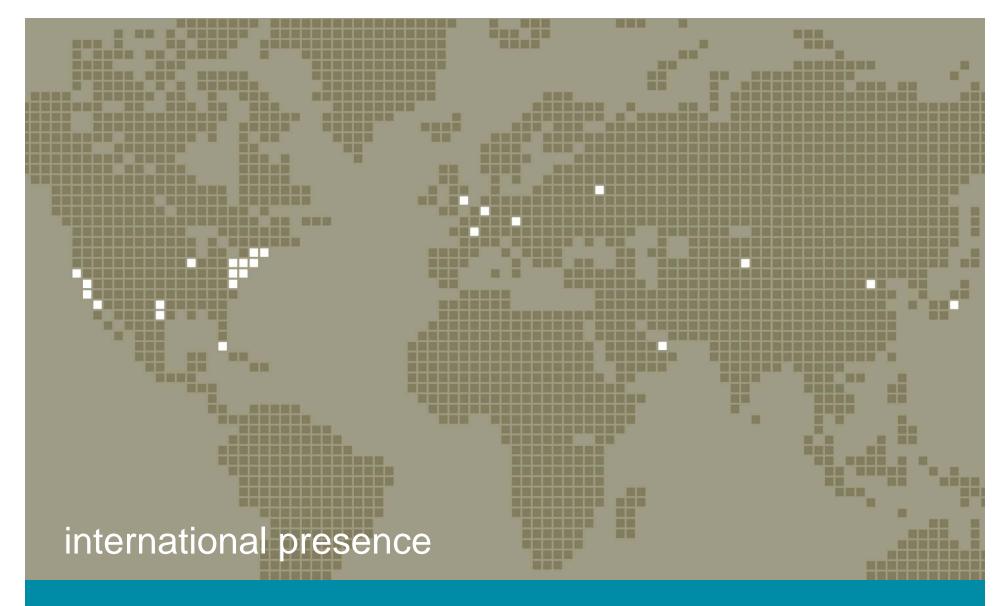
Andy R. Anderson
Partner, Chicago
+1.312.324.1177
aanderson@morganlewis.com



Robert M. Hunter
Sr. Client Emp Benefit Advisor, Philadelphia
+1.215.963.5058
rhunter@morganlewis.com

### DISCLAIMER

- This material is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It does not constitute, and should not be construed as, legal advice on any specific matter, nor does it create an attorney-client relationship. You should not act or refrain from acting on the basis of this information. This material may be considered Attorney Advertising in some states. Any prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change.
  - © 2014 Morgan, Lewis & Bockius LLP. All Rights Reserved.



Almaty Beijing Boston Brussels Chicago Dallas Dubai\* Frankfurt Harrisburg Houston Irvine London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington Wilmington