



# COBRA UPDATE

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# Topics to be Discussed

- Introduction
- Notice Requirements
- State Law Issues
- Outsourcing
- Case Law

# Introduction

- COBRA provides the opportunity to purchase continued health care benefits to employees and their families who might otherwise lose such coverage
- Plans subject to COBRA
- Qualified beneficiaries
- Qualifying events

## Introduction (cont'd)

- Duration of COBRA coverage
- Notice requirements
- Paying for COBRA coverage
- Business transactions and COBRA
- Penalties for noncompliance

# Notice Requirements

- Effective 1st day of plan year after 11/26/04 (1/1/05 for calendar year plans)
- Two new safe harbor notices
  - “General notice” - provided at time coverage commences
  - “Event notice” - provided at time of a qualifying event
- Old safe harbor notice no longer valid

## Notice Requirements (cont'd)

- General notice
  - Within 90 days of date coverage commences
  - Single notice ok for employee and spouse
  - May be included in SPD, but problematic
  - DOL has issued a model notice

## Notice Requirements (cont'd)

- Employer notices
  - Must notify plan administrator within 30 days of employee's death, termination of employment, reduction in hours, Medicare entitlement or bankruptcy

## Notice Requirements (cont'd)

- Employee and QB notices -- must notify plan administrator
  - Within 60 days of divorce/legal separation or child ceasing to meet definition of dependent
  - Within 60 days of the occurrence of a second QE
  - Within 60 days of a determination of disability (and prior to end of 18 month period)
  - Within 30 days of cessation of disability

## Notice Requirements (cont'd)

- Employee and QB notices (cont'd)
  - Time frames do not apply if general notice was not provided
  - Notice may be provided by a representative
  - Notice by one individual is considered notice by all affected QBs

## Notice Requirements (cont'd)

- Election notice
  - Must be provided by plan administrator within 14 days of being notified of a QE (special rule if employer is the plan administrator -- 44 days)
  - Notice must provide detailed information on COBRA rights and responsibilities
  - DOL has issued a model notice

## Notice Requirements (cont'd)

- Termination Notice (new)
  - Must be given when COBRA ends before the maximum period
  - Must be given ASAP after determination that coverage will or has ended

## Notice Requirements (cont'd)

- Unavailability Notice (new)
  - Must be given if notice of a QE, second QE or disability determination is received but it is determined that COBRA is not available
  - Must be given within 14 days of notification

## Notice Requirements (cont'd)

- Plan must have reasonable procedures for providing notice to the plan administrator
  - Must be in the SPD
  - Must specify how and to whom the notice is to be provided and what information is needed
  - Must conform with the timing of COBRA
  - Cannot cause a deficient notice to be disregarded for purely technical errors

## Notice Requirements (cont'd)

- Plan must have reasonable procedures for providing notice (cont'd)
  - Plan may require use of a specific form
  - If a plan does not have reasonable procedures, oral notice may be acceptable
- Notices by plan can be sent first class mail, but a Certificate of Mailing should be requested

## State Law Issues

- Forty-six states have laws similar to COBRA which require insurers to continue health insurance coverage for former employees and their dependents beyond the time of employment
- Alabama, Alaska, Delaware, and Michigan are the exceptions

## State Law Issues (cont'd)

### Interaction with federal law: general principles

- ERISA will preempt state laws if they purport to control employers
- State law can control only insurance companies and their policies; self-insured employer plans are controlled by ERISA

## State Law Issues (cont'd)

### Interaction with federal law: general principles (cont'd)

- COBRA has no preemption clause, so if its rules are less protective than state law, state law will apply

## State Law Issues (cont'd)

### Key Issues

- WHO may continue coverage
- WHAT coverage must continue
- HOW LONG coverage must continue
- WHO must notify individuals of their rights

## State Law Issues (cont'd)

### California

- Applies to small employers, but not self-insured
- Up to 36 months continuation
- Disability continuation
- Senior COBRA
- Conversion rights
- Health care plans must notify of rights within 60 days of event; employers must notify plan of event within 30 days

## State Law Issues (cont'd)

### Illinois

- Applies to all group policies
- Current/former/surviving spouses, dependents included; spouses & dependents have own rights
- Spouses over 55
- Premiums for HIV+ individuals
- Conversion rights

## State Law Issues (cont'd)

### Massachusetts

- Voluntary termination: 31 days; involuntary termination: 39 weeks; plant closing: 90 days
- Spouses and dependents get 39 weeks if employee is laid off or dies (divorce irrelevant)
- Small Employer bound to same rules as COBRA
- Policyholder must notify of rights

## State Law Issues (cont'd)

### New York

- Up to 18 months if not under COBRA's ERISA and PHSA rules
- Up to 29 months for disabled
- Up to 36 months for dependents
- Student medical leaves
- Dependent spouses covered indefinitely
- Military Reservists
- Individuals with AIDS
- Conversion rights
- Policyholders must notify of benefits' end date

# Outsourcing

Things to look for:

- What service is third party vendor providing:
  - COBRA - Administration  
(e.g., notices, collecting premiums, claims review, see Unavailability Notice)
  - HIPAA - Administration  
(e.g., issuance of Certificates of Creditable Coverage)

## Outsourcing (cont'd)

- Safe harbor notices vs. individually designed notices
- State law issues
- Indemnification
  - Review indemnification provisions
  - Maintain vendor responsibility for negligence

## Case Law

*Simpson v. T. D. Williamson, Inc.*, 2004 WL 1350483,  
(N.D. OK) 2004

Facts:

- Spouse separated from her husband in 2000
- In February, 2002, husband's employer notified her coverage terminated due to separation
- Husband and spouse divorced September, 2002 and no other COBRA notice was provided

## Case Law (cont'd)

### Issue:

Does a court-ordered separation order constitute a qualifying event under COBRA?

### Ruling:

No, because separation order is not a qualifying event for purposes of triggering COBRA notice

- Employer failed to give COBRA notice after qualifying event of divorce

## Case Law (cont'd)

*Starr v. Metro Systems, Inc.*, 2004 WL 1798362, (D. Minn.) 2004

### Facts:

- Employee/daughter receive medical coverage
- Employee terminated employment and asserts his daughter did not received COBRA notice (one notice was sent by employer - addressed to him)

### Issue:

Is a separate COBRA notice required for a dependent child living in the same household as employee?

## Case Law (cont'd)

### Ruling:

- No COBRA requirement entitling a minor child living in the same household as her father to a separate COBRA notice
- Notice sent to the covered employee was sufficient to give notice to the employee's children
- Whether a COBRA notice is sufficient is a question of fact that involves determining whether the notice was sufficient to allow the qualified beneficiary to make an informed decision whether to elect coverage

## Case Law (cont'd)

*Heebner v. Nationwide Mutual Ins. Co.*, 2004 WL 22594239, (E.D. PA) 2003

### Facts:

- Employee was terminated and his wife claims she did not receive any notice of his COBRA rights to continue benefits
- Employee's wife admits having a telephone conversation with employer about the details of COBRA coverage

## Case Law (cont'd)

### Issue:

Does COBRA require written notice of COBRA rights?

### Ruling:

- COBRA requires employers to give notice to terminated employees that they are entitled to elect to continue health benefits
- There is no requirement under COBRA that such notice be written

## Case Law (cont'd)

- Other Cases
  - *Fink v Dakotacare (2003, CA8) 2003 WL 1618467* - Employee was entitled to coverage for the one-month period between the termination of the plan's relationship with HMO A and the beginning of her coverage under the health plan of her mother's new employer, even though her mother refused to transfer COBRA coverage to HMO B, the new plan administrator, because --
    - (1) the plan sponsor has an obligation to provide the coverage without intermittent gaps independent from its relationship with its insurers, and
    - (2) the mother made a timely premium payment for the one month of coverage to the predecessor HMO.

## Case Law (cont'd)

- Other Cases (cont'd)
  - *Gotay v Becton Dickinson Caribe Ltd.* (2003, DC Puerto Rico) 2003 WL 1889167 - A group health plan administrator fulfilled its post-qualifying event notice requirement when it sent two notices to a terminated employee via certified mail, return receipt requested, to the employee's last address of record, even though the administrator did not receive either return receipt, where there was adequate evidence that the notices had been delivered in good faith

## Case Law (cont'd)

- Other Cases (cont'd)
  - *DeGruipe v Sprint Corp.* (1999, DC LA) 1999 WL 486887 - an employer was found to have no liability for failure to provide a required post-qualifying event notice where the notice, which was sent by certified mail, was lost by the U.S. Postal Service, because the employer's delivery method met the requirements of the statute

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