

Morgan Lewis

# Modified COBRA Notices for the ACA Environment

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# 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

# 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*

# Model COBRA Notices

- 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

# Model COBRA Notices

- 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)

# Model COBRA Notices

- 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

# Model COBRA Notices

- Detailed Exchange discussion
  - *Enrollment rules and deadlines*
  - *Exchange contact information*
  - *Switching coverage*
  - *Special enrollment windows*
- Factors to consider:
  - *Premiums*
  - *Networks*
  - *Drug formularies*

# Model COBRA Notices

- *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!

# Model COBRA Notices

- 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)

# Model COBRA Notices

- 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

# 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

# COBRA and Exchange 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**

# COBRA and Exchange 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!

# COBRA and Exchange Coverage

- 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*

# COBRA and Exchange Coverage

- 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*

# COBRA and Exchange Coverage

- 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

# The Future of COBRA

- 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*

# The Future of COBRA

- 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

# The Future of COBRA

- 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*

# The Future of COBRA

- 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?

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