

Keeping COBRA Notices Compliant in an Ever-Changing Landscape

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NOVEMBER, 2020

2020 has presented several issues requiring urgent attention for employers who sponsor group health plans, including a need to update the notices required under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), in particular the general (or initial) notice and the continuation coverage election (or enrollment) notice. This article will describe what employers should keep in mind while updating their COBRA notices, including (i) recent revisions to the Department of Labor's (DOL's) model COBRA notices in May 2020, (ii) the mandatory extensions to certain COBRA-related deadlines due to the COVID-19 pandemic, and (iii) the allegations in the many class-action lawsuits filed over the last few years alleging deficiencies in COBRA notices.



Required COBRA Notices and the Model DOL COBRA Notice

The 2004 COBRA regulations describe certain notices that the “administrator” of an applicable group health plan¹ are required to provide employees and/or qualified beneficiaries. The two most important of these notices are the general (or initial) notice and the election or (enrollment notice).

Under the COBRA regulations, the administrator must provide each covered employee and spouse (if any) with a general (or initial) notice at the time coverage under the plan begins.² The general notice is required to include six information items including, a general description of COBRA continuation coverage, when it may become available, and what needs to be done to protect one's right to receive such coverage, among other things.³

The COBRA regulations also require administrators to provide election (or enrollment) notices to qualified beneficiaries (i.e., those individuals who have a right to elect COBRA continuation coverage).⁴ The election notice must include fourteen information items, including the procedures to elect coverage, the cost of the coverage, the duration of the coverage, and events which may cause the coverage to terminate early, among other things.⁵

Both the general notice and election notice must be “written in a manner calculated to be understood by the average participant.” The COBRA regulations also include, in separate appendices, a model general notice and a model election notice (and the latter includes a model enrollment or election form). Under the regulations, group health plans are not required to use the model notices; however, use of the model notices, “appropriately modified and supplemented” to reflect the applicable plan terms and contact information, will be deemed to satisfy the notice requirements.

In 2014, the DOL issued proposed regulations to amend the notice requirements. The proposed regulations included removing the appendices with model notices from the regulations in order to facilitate updates to the model notices (which could then be posted to the DOL’s website instead of amending the regulations every time the model notices are updated). Concurrent with issuing the proposed regulations, the DOL provided updated model notices which explain to qualified beneficiaries that if they lose job-based health insurance coverage, they may pursue coverage through other avenues, such as the Health Insurance Marketplace (also known as the Health Insurance Exchange), Medicaid, or another group health plan (e.g., a spouse’s plan).

May 2020 Updated Model Notices

On May 1, 2020, the DOL provided further updated model notices and responses to some frequently asked questions ([FAQs](#)). In introducing the updated model notices, the DOL included a reminder that in order to use these model notices properly, the “Plan Administrator must fill in the blanks with the appropriate plan information.” The DOL provided the updated model notices in both English and Spanish.

The prior model notices did not address the interaction between Medicare and COBRA. For individuals who qualify for both Medicare and COBRA continuation coverage, there are several factors to consider in deciding whether to elect only one type of coverage or both. Although Medicare is generally less costly than COBRA, an individual covered under an employer-sponsored plan and in the midst of receiving certain medical treatments may want to decline Medicare and elect COBRA coverage to retain the services of their current physician and hospital facilities. However, declining Medicare when one is first eligible for Medicare may result in higher Medicare premiums in the future.

The updated model notices and FAQs include explanations on the interaction between Medicare and COBRA, as follows:

1. A Medicare-eligible qualified beneficiary may enroll in Medicare instead of electing COBRA continuation coverage after the group health plan coverage ends.
2. In general, if a Medicare-eligible individual does not enroll in Medicare Part A or B when first eligible because he or she is still employed, he or she has an 8-month special enrollment period to sign up, beginning on the earlier of (a) the month after employment ends, or (b) the month after group health plan coverage based on current employment ends.
3. If a Medicare-eligible qualified beneficiary does not enroll in Medicare Part B and elects COBRA continuation coverage instead, he or she may have to pay a Medicare Part B late enrollment penalty and may have a gap in coverage if he or she wants to enroll in Medicare Part B later.

4. If a Medicare-eligible qualified beneficiary first elects COBRA continuation coverage and then later enrolls in Medicare Part A or B *before* COBRA continuation coverage ends, then the plan may terminate COBRA continuation coverage early.
5. If a Medicare-eligible qualified beneficiary becomes entitled to either Medicare Part A or B (i.e., becomes eligible and enrolled under Medicare, on or before the date of the COBRA election), COBRA coverage may not be discontinued on account of Medicare entitlement, even if he or she enrolls in the other part of Medicare after the date of the election of COBRA coverage.
6. If a Medicare-eligible qualified beneficiary is enrolled in both COBRA continuation coverage and Medicare, Medicare will generally pay first (primary payer) and COBRA will pay second.

For more information on the interaction between Medicare and COBRA, the model notices direct the reader to the following website: <https://www.medicare.gov/medicare-and-you>.

Extended COBRA Deadlines

On April 28, 2020, a few days before providing the updated model notices and FAQs, the DOL, along with the Department of the Treasury and the Internal Revenue Service, issued guidance providing COBRA qualified beneficiaries with extended deadlines to elect continuation coverage and to pay the premiums associated with such coverage (the Joint Notice).

Under COBRA, a qualified beneficiary has 60 days from the date group health plan coverage terminates or, if later, 60 days after the date of their COBRA election notice to elect COBRA continuation coverage. Once qualified beneficiaries elect COBRA coverage, they have 45 days to make their initial COBRA premium payments. Subsequent premium payments must be made within the 30-day grace period that starts at the beginning of each coverage month (i.e., within 30 days after the due date for that coverage month).

The Joint Notice extends the above deadlines by disregarding any days in the “Outbreak Period,” i.e., the period from March 1, 2020 until 60 days after the announced end of the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (the “National Emergency”) (or other date announced by the applicable federal agencies in a future notification). For more information on these deadline extensions, see our newsletter article, [COBRA, HIPAA Special Enrollment, Claims and Appeals, and ERISA Notice Related Deadlines Extended](#).

The May 2020 updated COBRA model election notice does not include any reference to the extended deadlines provided by the Joint Notice. Instead, the model notice refers to the normal deadlines (i.e., 60 days for electing coverage, and 45 or 30 days for paying the premiums, as applicable). To avoid confusion and possibly minimize future litigation, employers should include information regarding the extended deadlines within (or along with) the COBRA election notices sent to qualified beneficiaries while the National Emergency is still in effect. Instead of updating the election notice itself to reflect these extended deadlines, many plan administrators and COBRA administrators have included a description of these extended deadlines in a separate document enclosed with the COBRA election notice.

Recent COBRA Notices Litigation

In the last four years, increasing numbers of employers have been sued by former employees alleging that they received defective COBRA notices. Over the last two years, in particular, such lawsuits have been initiated against the following household-name employers: Home Depot, Target, Starbucks, Southwest Airlines, Best Buy, The Hershey Company, Coca-Cola Beverages Florida, Nestle Waters North America, and Amazon.

Typically, this litigation involves class action lawsuits and former employees who did not elect COBRA coverage and then subsequently incurred significant costs for medical treatments while uninsured. The lawsuits generally focus more on the election notices than on the general notices. The plaintiffs typically allege that the actual election notices deviated from the DOL's regulations, resulting in (i) the notices being misleading to qualified beneficiaries; (ii) the qualified beneficiaries having insufficient information to make informed decisions regarding COBRA coverage; and (iii) the qualified beneficiaries failing to enroll in COBRA coverage to their detriment.

The alleged defects in the COBRA election notices generally include one or more of the following:

- Omission of the qualifying event permitting an election of continuation coverage (e.g., termination of employment, reduction in work hours, death of employee, divorce);
- Omission of the COBRA enrollment or election form;
- Omission of the plan name;
- Failure to sufficiently identify the plan administrator;
- Failure to include the address indicating where the COBRA premium payments should be mailed;
- Failure to provide the date on which, if elected, COBRA continuation coverage will begin;
- Failure to include information on how COBRA coverage can be lost prematurely (e.g., because of late premium payments);
- Failure to provide an explanation of the maximum period for which COBRA coverage will be available;
- Failure to provide the notice "written in a manner calculated to be understood by the average participant"; and
- Conflicting information on when the COBRA enrollment or election form is due.

So far, no court has ruled on the merits of any of these recent lawsuits; however, some employers have chosen to settle. Guidance from the DOL would be helpful here. For example, the regulations do not require that the notices be issued in foreign languages. Nonetheless, one may argue that if a significant number of plan participants are fluent in Spanish only, a notice written in English only is not "written in a manner calculated to be understood by the average participant." The DOL has not provided guidance addressing this or other issues raised in these lawsuits.

However, on October 5, 2020, the DOL filed an amicus brief in the case, *Carter v. Southwest Airlines Co. Board of Trustees*.⁶ In that case, the plaintiff alleges that the COBRA election notice did not comply with the DOL's regulations in part because the election notice excluded contact information for Southwest Airlines as the plan administrator. Southwest Airlines argues the notice included the name, address and phone number of the party responsible for COBRA administration (i.e., a third-party administrator). In its brief, the DOL asks the court to rule that the regulations do not require COBRA election notices to include the contact information for plan administrators where a different entity administers the plan's COBRA continuation coverage. This amicus brief suggests that the DOL may not be receptive to allegations that require a hyper-technical reading of the COBRA notice regulations; however, it's just one example. We will closely watch the progress of this and other lawsuits, and hope more guidance is forthcoming from the DOL.

Next Steps

Employers should carefully review their COBRA notices to ensure compliance with the regulations, preferably through use of the DOL's model notices with appropriate modification and supplementation to reflect the applicable plan terms and contact information. Until the National Emergency ends, employers should also make sure that qualified beneficiaries are notified of the extended deadlines to elect continuation coverage and pay the premiums.

¹ The requirements for COBRA continuation coverage do not apply to group health plans maintained by (i) churches; (ii) governmental entities of the U.S., Washington, D.C., and U.S. territories and possessions; (iii) state and local government agencies which do not receive Public Health Service Act funding; and (iv) small employers (i.e., generally, employers with fewer than 20 employees).

² See 29 C.F.R. § 2590.606-1.

³ See 29 C.F.R. § 2590.606-1(c).

⁴ See 29 C.F.R. § 2590.606-4.

⁵ See 29 C.F.R. § 2590.606-4 (b)(4).

⁶ Brief for Secretary of Labor as Amicus Curiae, *Carter v. Southwest Airlines Co. Board of Trustees* (M.D. Fla. 2020) (Case No. 8:20-cv-01381-WFI-JSS).

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