

Group Health Plans: Are You Ready for 2005?

September 10, 2004

Now that the HIPAA privacy rule has become effective and your group health plan documents have been amended to comply, you can take a breather, right? Well, maybe. But not for long. Remember your old friend COBRA? The Department of Labor (DOL) recently issued final COBRA notice regulations, and they are effective January 1, 2005, for most plans. How about your summary plan description (SPD)? It should be updated to comply with the new COBRA notice rules and any plan or benefit changes taking effect next year. Never got around to preparing a real SPD? That benefit description from the insurance carrier you hand out as a substitute may not pass muster under ERISA, which could expose you to statutory penalties. There is still time to address these issues by 2005 but you will want to act soon.

COBRA Notice Regulations

You already know that you have to give notice to group health plan participants at certain points in time, such as when they become covered and when they lose coverage. So what has changed? The new DOL regulations tell you specifically how and when to provide the notices and what information you must include in the notices. They also tell participants and qualified beneficiaries when they must provide certain notices to you.

What Are The Notice Requirements?

Under the new regulations, you must provide the following notices (for this purpose we will assume you are acting as both the employer and the plan administrator for your group health plans):

- *Front-End Notice.* A general notice provided to a covered employee and the covered employee's spouse generally within 90 days after the time they each become covered under the group health plan.

- *Back-End Notice.* A notice of each qualified beneficiary's right to elect COBRA continuation coverage, along with an election form and an explanation of COBRA coverage, provided within 44 days after a qualifying event.

- *Notice of Unavailability.* A notice that a former participant is not entitled to COBRA continuation coverage or that a qualified beneficiary is not entitled to an extension of COBRA coverage. The notice must be provided within 14 days after you receive notice of a qualifying event, second qualifying event, or disability determination from the former participant or qualified beneficiary.

- *Notice of Termination.* A notice that a qualified beneficiary's COBRA continuation coverage is terminating before the end of the maximum coverage period (e.g., because the qualified beneficiary obtains other group health plan coverage or fails to pay a premium on time). The notice must be provided as soon as practical after termination of coverage.

In addition, a participant or qualified beneficiary must provide the following notices to the plan administrator:

- *Notice of a Qualifying Event.* In the case of a qualifying event that is the divorce or legal separation of the covered employee or a dependent child's losing eligibility for coverage under the plan as a dependent child, notice that the qualifying event has occurred.

- *Notice of a Second Qualifying Event.* In the case of a qualified beneficiary that is already receiving COBRA continuation coverage, notice that a second qualifying event has occurred (e.g., death, divorce, or legal separation) that would have caused the qualified beneficiary to lose coverage under the group health plan if the first qualifying event had not occurred.

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- *Notice of Disability Determination.* Notice that a qualified beneficiary receiving 18 months of COBRA continuation coverage has been determined by the Social Security Administration (SSA) to be disabled either before or during the first 60 days of COBRA continuation coverage.

- *Notice of Cessation of Disability.* Notice that a qualified beneficiary previously determined by the SSA to be disabled has been determined by the SSA to be no longer disabled.

Didn't The DOL Publish Model Notices I Can Use?

Along with the final regulations, the DOL did publish model Front-End and Back-End Notices. If you use the model notices, you are deemed to satisfy the minimum front-end and back-end notice requirements. That's the good news. The bad news is that the DOL's model notices were not drafted with your interests in mind, so they do not contain many provisions permitted by the regulations that can streamline your COBRA administration and protect you against unnecessary risks. In addition, the DOL provided models for only two of the four notices you must give and none of the notices a participant or qualified beneficiary must give. Here are a few of the shortcomings we see in the DOL model forms:

- *No Notice Procedures.* Under the regulations, you may require that participants and qualified beneficiaries give notices in accordance with reasonable notice procedures, if you communicate those procedures in the Back-End Notice and the COBRA provisions of your SPD. For example, you may require all notices to be given in writing, to a specific person, and within a specific time period (subject to certain minimums imposed by the regulations). Absent specific notice procedures, the regulations otherwise allow notices to be given orally, to any of your employee benefits personnel, and within no specific period of time (except that notice must be given by the end of the maximum coverage period). The DOL models do not contain any notice procedures, so using them leads to uncertainty and may expose you to costly coverage disputes with your carrier or stop-loss insurer if notices are not timely received or communicated.

- *No Consequences for Failure to Follow Notice Procedures.* If you require participants and qualified beneficiaries to follow reasonable notice procedures, you may impose consequences for failure to do so. For example, if you require notice of a qualifying event to be given in writing within 60 days after the qualifying event, you may deny COBRA continuation coverage if only oral notice is given or if notice is not given within 60 days. Because the DOL models do not include any notice procedures, it is not clear under what circumstances you may deny COBRA coverage if you use them. Again, this leads to uncertainty and possible coverage disputes that could leave you holding the bag on a pricey claim.

- *No Specific Notice Forms Required or Provided.* Under the regulations, you may require participants and qualified beneficiaries to give notice on specific forms that you provide. This also offers you more uniformity and certainty in your COBRA administration. The model notices, however, do not require use of any specific notice forms and do not provide models for any forms other than the election form included as part of the Back-End Notice.

- *Health FSA Plans Not Addressed.* COBRA generally applies to all group health plans, which include health FSA plans. For many health FSA plans, however, COBRA continuation coverage is required to last only until the end of the plan year. The model notices do not specifically address health FSA plans or the ways in which they differ from other group health plans.

- *No Model Notice of Unavailability or Termination.* Although the regulations require you to give a Notice of Unavailability and a Notice of Termination when appropriate, the DOL has not provided models for either of these notices.

How Do I Comply?

In general, to comply with the final notice regulations you must begin using notice forms that meet the requirements of the regulations by the first day of your 2005 plan year. (You may begin relying on the new regulations sooner if you wish.) You could get by with the DOL model forms, but you will not benefit from the employer-friendly provisions of the regulations if you do. This may expose you to a significant (and unnecessary) risk of expense and loss due to possible coverage disputes and general uncertainty. In addition, as time goes by you probably will have many questions or needs that the model notices will not answer or satisfy. Rather than rely on the DOL models, you may wish to contact your employee benefits advisor to obtain more appropriate notices. At Foulston Siefkin LLP, for example, we work with each of our clients to design a complete package of COBRA notices that satisfies the regulations, improves certainty, and minimizes risk.

Updating Your SPD

Although obtaining good COBRA notices is a first step in complying with the new regulations, you also will need to update your SPD. To impose the reasonable notice procedures allowed by the regulations, your SPD must describe those procedures. And even though the regulations do not say this directly, your SPD must contain a more complete description of COBRA continuation coverage than any of the required notices. In addition, by including the explanations otherwise provided in the Front-End Notice, the SPD can function as a Front-End Notice. Although we do not recommend this approach as a matter of general practice, the regulations do allow you to satisfy the front-end notice requirement by timely delivering an SPD to a covered employee or spouse, if the SPD contains the required information.

In the next few months you also may be renewing insurance contracts or modifying your benefit structures. Of course, any changes in the benefits offered under your group health plans should be reflected in your SPD as well. In some instances, courts have concluded that participants were entitled to rely on the terms of an SPD even when it conflicted with the terms of the plan, so it is important to make sure your SPD and plan documents are in agreement. Otherwise, you could wind up paying for the better of two benefit options out of your own pocket.

You will want to make changes to the COBRA provisions of your SPD soon, so you can begin to impose the notice procedures at the same time all of the new notice requirements become effective. As long as you are updating your SPD for COBRA, you will want to incorporate any other changes for 2005 as well. You may wish to contact your employee benefits advisor to begin discussing these changes. At Foulston Siefkin LLP, for example, we work with each of our clients to prepare accurate SPDs that include complete and up-to-date COBRA provisions designed around their group health plans.

Why You Should Have An SPD

If you never got around to preparing an SPD, there is no time like the present to get started. ERISA requires that you have an SPD for your group health plans and provide it to participants within 90 days after they become covered. If a participant requests an SPD and you do not have one, you can be subject to a penalty of \$110 per day until you provide one.

You may have worked around the SPD requirement by simply delivering a benefit description or certificate of insurance to participants. Although those documents may have much of the same information you would include in an SPD, they don't necessarily cover everything required by ERISA. In general, an SPD must include a description of the plan's funding mechanism and administration, including the name and address of a person upon whom legal process may be served. Most benefit descriptions don't include all that information. In addition, an SPD must describe the plan's claims procedures and include a statement of each participant's rights under ERISA. Benefit descriptions don't always address those points either. Finally, ERISA requires that an SPD be "written in a manner calculated to be understood by the average plan participant." Although a benefit description or certificate of insurance does not necessarily fail this standard, anyone that has attempted to wade through the fine print might wonder. A true SPD—even if it is designed merely to "wrap around" an existing benefit description—can distill the most pertinent information into a user-friendly format for the participants.

Taking Action

The bottom line is this: Now is a good time to think about what you need to do for your group health plans, so you will be ready for 2005. If you have questions or want more information, you should contact your regular employee benefits advisor. If you don't have a regular advisor, the employee benefits and ERISA group at Foulston Siefkin LLP would welcome the opportunity to work with you to prepare plan documents, summary plan descriptions, and COBRA notices specifically designed to meet your needs.

For Further Information

Foulston Siefkin regularly counsels clients on issues relating to Employee Benefits. If you are interested in additional information regarding these matters, please visit our website at www.foulston.com or if you would like to discuss specific ways in which Foulston Siefkin can help you can contact **Doug Hanisch** at (316) 291-9748, or dhanisch@foulston.com, **James Rankin** at (785) 233-3600 or jrankin@foulston.com or **Jay Rector** at (316) 291-9722 or jrector@foulston.com, or **Jason Lacey** at (316) 291-9756, or at jlacey@foulston.com.

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