

Employers Should Review the Content of their COBRA Notices Now

The U.S. Department of Labor (DOL) issued revised model COBRA notices on May 1, 2020. The revised notices add information regarding the interaction between Medicare and COBRA and are intended to assist Medicare-eligible qualified beneficiaries when making healthcare coverage decisions.

In response to the COVID-19 pandemic and associated economic downturn, many employers have been (or will be) forced to reduce the hours of or terminate large segments of their workforces. In these circumstances, plan administrators typically will be required to notify qualified beneficiaries of their COBRA rights due to a loss of eligibility under the terms of the applicable group health plan.

Recently, there has been an increase in litigation asserting that such COBRA notices are deficient. Many of these lawsuits allege that the COBRA notices provided by plan administrators either did not include all of the necessary information as required by the COBRA regulations or included misleading or inaccurate information. Employers considering adopting the newly issued model COBRA notices may also want to review the content of their current notices to ensure they are compliant.

Background

Employers are required to provide qualified beneficiaries (employees and their families who may elect COBRA continuation coverage upon a qualifying event) with certain notices explaining their rights under COBRA. The general notice (also referred to as the initial notice), and the election notice are the two primary notices that communicate COBRA rights.

The general notice must be provided to each qualified beneficiary at the time coverage commences under the group health plan. The general notice communicates to the plan participants their COBRA rights and obligations.

Additionally, a plan administrator must, upon a qualifying event occurring, furnish an election notice to each qualified beneficiary who loses plan coverage in connection with the qualifying event. The election notice informs the qualified beneficiaries of their rights to COBRA continuation coverage and how to make an election.

The DOL provides model general and election notices that may be used by plan administrators. The recently revised versions of these notices inform qualified beneficiaries who did not enroll in Medicare Part A or B when first eligible because they were still employed that they have an 8-month special enrollment period beginning on the earlier of the month after employment ends, or the month after group health plan coverage based on current employment ends, to sign up for Medicare Part A or B. Additionally, the revised notices inform qualified beneficiaries who elect COBRA continuation coverage and who do not enroll in Medicare Part B that should the qualified beneficiary decide to enroll in Medicare Part B at a later date there may be a late enrollment penalty and gap in coverage. The notices also include the following new information: (1) as a general rule, if a qualified beneficiary is enrolled in both COBRA and Medicare, Medicare will pay first (i.e., be the primary payer) and COBRA will pay second; and (2) if a qualified beneficiary elects COBRA continuation coverage and later enrolls in Medicare Part A or B before the COBRA continuation coverage ends, the group health plan may terminate the qualified beneficiary's continuation coverage.

While this is useful information for qualified beneficiaries who are Medicare-eligible or may become Medicare-eligible during the COBRA period, it is interesting to note that the new notices were issued just one day after the publication of an IRS and DOL joint notice that temporarily extended COBRA election and premium payment deadlines. These extended COBRA deadlines were summarized in a previous information memo which can be accessed [here](#). Notably, the model COBRA notices were not revised to include any information regarding the extended deadlines. This is an area where additional guidance for plan administrators would be welcome.

The newly revised model notices as well as FAQs from the DOL regarding the model notices can be accessed [here](#).

COBRA Litigation

The FAQs and model notices reiterate that the appropriate use of the model notices by plan administrators (i.e., plan administrators must fill in the blanks with the appropriate plan information) is deemed by the DOL to be good faith compliance with the notice content requirements of COBRA.

However, in recent years, there has been an uptick in the number of lawsuits filed alleging that COBRA notices issued by plan administrators were deficient. As many employers have been forced to reduce their workforce due to COVID-19, this litigation trend will likely continue. Failure to provide a correct and accurate COBRA notice can result in a court awarding statutory penalties of up to \$110 per day, as well as other fees and costs as the court deems proper.

In light of the newly issued model notices, the uptick in COBRA notice litigation and the economic conditions increasing the likelihood of COBRA qualifying events occurring, we believe it is a good time for employers to review their current COBRA notices, and update them accordingly.

If you have any questions about this information memo, please contact [Daniel Nugent](#), any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.



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