

December 2004

Dear Employer:

Changes have been instituted to COBRA laws, and this letter serves to ensure you are aware of those changes that may affect your COBRA responsibilities. We cannot speak to all possible contingencies, and you should contact your legal counsel or benefits program advisor if you have questions about the possible implications for your particular plan.

As a preliminary reminder, the Internal Revenue Service (IRS), Department of Labor (DOL), and Department of Health and Human Services (HHS) each have authority and responsibilities under COBRA. The IRS is charged with issuing regulations defining required COBRA coverage, the DOL with issuing regulations regarding COBRA's notice and disclosure requirements and the DHHS with issuing regulations regarding the application of COBRA to state and local governments. The information below describes guidance from both the IRS and DOL.

### **Medicare Entitlement**

As you know, Medicare entitlement is one of the "qualifying events" that can trigger a right to COBRA continuation coverage. Earlier this year, the IRS issued guidance (Revenue Ruling 2004-22) clarifying a widely misunderstood point.

Under COBRA, an event is a qualifying event, triggering a right to COBRA, only if it results in a loss of coverage for the qualified beneficiary. It was already widely accepted that Medicare entitlement is rarely an initial qualifying event, because it seldom results in a loss of coverage.<sup>1</sup> However, where a qualified beneficiary elects COBRA in connection with a termination of employment or reduction in working hours qualifying event and then, during that period of COBRA continuation, experiences a second qualifying event (including a Medicare entitlement qualifying event), COBRA allows the "stacking" of the second qualifying event to add to the maximum COBRA continuation period that usually follows a termination or reduction in hours qualifying event. Because becoming Medicare-entitled after electing COBRA is cause for termination of the COBRA continuation of the newly Medicare-entitled individual, it appears many, if not most, COBRA commentators and administrators regarded Medicare entitlement of the employee or former employee arising after his or her termination of employment or reduction in working hours qualifying event as a second qualifying event for his or her dependents who had elected COBRA. The IRS Revenue Ruling substantially limits the instances in which that is the case.

Under the IRS guidance, Medicare entitlement (and, by inference, any other potential second qualifying event) will only be a second qualifying event if it would have been a

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<sup>1</sup> This is because, in most circumstances, employers are required by federal law to offer active employees (and their spouses) who become Medicare-entitled the same coverage as they offer active employees (and their spouses) who have not yet become Medicare-entitled.

qualifying event in the absence of the initial qualifying event. That means that, only if the Medicare entitlement would have caused a loss of coverage in the absence of the termination of employment or reduction in hours qualifying event will the Medicare entitlement be a second qualifying event, entitling the other qualified beneficiaries to additional COBRA continuation. Because, as stated above, Medicare entitlement is virtually never an initial qualifying event, this means Medicare entitlement will almost never be a second qualifying event either.

### **Department of Labor COBRA Notice Requirements**

Earlier this year, the DOL issued a final rule (29 CFR §2590.606-1 through 4) regarding COBRA notices. The rule, which applies to plan years beginning on or after 26 November 2004, provides guidance about the timing, delivery, and content of required COBRA notices, as well as creating notice obligations that had not previously existed. The rule includes models of two of the required notices, which you may wish to review and adapt for use with your plan. While it is impossible to summarize all the guidance provided in the DOL's new rule, the following comprise some of the most important points about each of the notice categories identified by DOL.

### **General Notice**

This notice is provided by the plan administrator to each employee and spouse (if a spouse is covered). Under the rule, the notice is to be provided within 90 days of the date that the individual becomes covered by the plan. (If the plan is exempt from COBRA at that time (for instance, because you are an exempt small employer), the notice would need to be given within 90 days of the date that COBRA begins to apply to the plan.) If the most recent information is that the employee and spouse live at the same address, the requirement can be met by sending the notice addressed to both at that address. Otherwise (including when a spouse is added to coverage after the employee's original enrollment date), separate notices should be sent to the current addresses that are on file. If a qualifying event should happen before a general notice has been sent (that is, within the first 90 days), this notice requirement may be satisfied by simply sending the Notice of Right to Elect COBRA described further below. Generally, this notice is sent by regular mail, but it may be sent via other avenues (including electronically) if consistent with the requirements of 29 CFR §2520.104b-1.

The general notice has been a requirement of COBRA since its inception and the contents of the general notice are not markedly changed. It must include the plan's name and a name, address, and phone number of a party to be contacted for additional information. It must describe in general terms who are qualified beneficiaries, what are qualifying events, maximum periods of COBRA continuation, opportunities to extend COBRA, and COBRA premium payment requirements. It also must explain of which qualifying events the employer will notify the plan administrator and, perhaps more importantly, of which qualifying events and other occurrences the employee or qualified beneficiary has the obligation to notify the plan administrator, as well as specifying any requirement for that notice. These latter qualifying events and occurrences of which the employee or qualified beneficiary must provide notice include divorce, legal separation, and loss of dependent child status qualifying events, as well as Social Security determinations of

disability (or cessation of disability) and occurrence of second qualifying events. This notice also should explain the importance of keeping addresses updated and state that the notice is not a full description of continuation and that more complete information is available from the plan administrator and in the plan's summary plan description. Finally, the rules require that this notice be calculated to be understood by the average plan participant.

### **Employer Notice**

This is the notice that an employer provides to the entity that administers COBRA for it. In many cases, the employer may do its own administration, so the notice is between departments, subdivisions, or employees within the employer. The notice informs the administrator that an employee has died, terminated employment, reduced working hours below those necessary to qualify for coverage, or become Medicare entitled. Notice is also given to the administrator by the employer if it has filed a Chapter 11 bankruptcy and retirees and their dependents have or will lose coverage as a result.

Most plans run their COBRA from the date that coverage is lost and, in that case, this employer notice must be given to the plan administrator within 30 days of that date. Other plans run COBRA from the actual date that a qualifying event occurred. In those plans, notice must be given within 30 days of the qualifying event. (In multiemployer plans, a longer period permitted in the plan may apply.) Note that, according to the DOL, this notice period applies even if you are both the employer and the plan administrator.

Because this notice is not external to the public, the DOL does not provide a lot of detail about it. Essentially, it must allow the plan administrator to determine the plan, covered employee, and qualifying event involved and the date of the qualifying event. (Administrators may require additional information from you.)

### **Employee/Qualified Beneficiary Notice**

As mentioned above, the employee or qualified beneficiary has the responsibility to notify the administrator of certain qualifying events and other occurrences. These are a divorce or legal separation of a covered employee and spouse, a child's loss of dependent child status under the terms of the plan, the occurrence of a second qualifying event during the continuation period associated with a termination of employment or reduction in working hours, a determination by Social Security that a qualified beneficiary entitled to continuation by virtue of a termination or reduction in hours was disabled within the first 60 days of COBRA continuation, or a final determination by Social Security that a qualified beneficiary who had previously been determined disabled has ceased to be disabled. With the exception of the last of these, the employee or qualified beneficiary must be given at least 60 days to provide this notice.<sup>2</sup> Notice of a final determination of cessation of disability can be required within 30 days.

Plans must establish reasonable procedures for furnishing this notice, including describing those procedures in the summary plan description, specifying the individual or

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<sup>2</sup> In the case of Social Security disability determination, the plan can also require that the notice be given during the 18 months of COBRA continuation following the termination or reduction qualifying event.

entity to whom and the means by which notice is to be sent, describing the information that the plan deems necessary to provide continuation, and describing timeliness, content, and source of notice requirements. A plan may require completion of a particular form if it is easily available at no cost. It is important to establish reasonable procedures, because, in their absence, notice generally will be deemed to have been given if the occurrence of a specified event is communicated in writing or orally in a manner reasonably calculated to bring it to the attention of the person or unit that normally handles employee benefits or, in a plan subject to state insurance laws, any person or unit that handles claims or any officer of the insurer. Regence BlueShield of Idaho cannot ensure that occurrences brought to its attention in this manner will be communicated to you or the plan administrator and assumes no liability for any failure to do so.

The plan may establish reasonable content requirements for this notice, but may not deem the notice untimely if a notice is timely provided that allows the administrator to at least determine the plan, covered employee and qualified beneficiary(ies), and qualifying event or disability determination involved and the date of the qualifying event or determination. The employee or qualified beneficiary then must be allowed to provide supplementary information to complete the content requirements established under the plan.

Finally, although this notice is generally given by the employee or a qualified beneficiary, the rule provides that it may be given by a representative acting on behalf of either and that notice from any of these sources satisfies the notice responsibility for all qualified beneficiaries arising from that same event.

### **Plan Administrator Notices**

Perhaps the most important change wrought by the new rule is in the notices that plan administrators are required to provide. The rule provides for three different types of notices, two of which are new. The notices are to be sent to each qualified beneficiary, except that a single notice may be sent to an employee and spouse, if the latest information is that they are at the same address, and notice sent to an employee or covered spouse will suffice as notice to dependent children, if the latest information is that they are at the same address.

### **Notice of Right to Elect COBRA**

The first type of plan administrator notice has existed since COBRA's inception. It is provided to qualified beneficiaries when the plan administrator has been notified of the occurrence of a qualifying event and it informs the qualified beneficiaries of their rights to continue coverage. This notice must be calculated to be understood by the average plan participant.

The administrator must provide this notice within 14 days after timely receipt of the Employer Notice or Employee/Qualified Beneficiary Notice described previously, except, where the administrator and employer are the same. In that case, the administrator must provide the notice within 44 days of the date of the loss of coverage (in a plan that runs COBRA from the loss of coverage) or within 44 days of the qualifying event (in a plan that runs COBRA from that date).

The required contents of this notice are quite extensive, but include the name of the plan and name, address, and phone number of the party responsible for administration of COBRA, the qualifying event, identification of the qualified beneficiaries (by either status or name), and identification of the date coverage will terminate if COBRA is not elected. The notice must also include statements that each qualified beneficiary has a separate right to continue, that a covered employee or qualified beneficiary (ex-)spouse may elect for all qualified beneficiaries, and that a parent may elect for a minor child. Further, the notice must explain plan procedures for electing COBRA (including both the time period for election and the date by which election must be made) and the consequences of failing to elect or choosing to waive continuation (including the effects on future rights to portability, guaranteed access to individual coverage, and special enrollment periods, with reference to the location of additional information. The procedure for revoking a waiver of COBRA must be described, as well as a description of continuation coverage and the date it would begin. The maximum continuation period, continuation termination date, and events that can cause early termination of COBRA must be described, as well as circumstances in which the maximum period of COBRA may be extended and the lengths of those extensions. In notices related to termination of employment or reduction in working hours qualifying events, there must be descriptions of the qualified beneficiary's responsibility to provide notice of a second qualifying event and/or Social Security Administration determination regarding disability, with description of the procedures and deadlines for providing those notices and consequences of failing to do so. This notice must indicate the amount that a qualified beneficiary must pay for COBRA continuation coverage, the right to pay premium monthly, and the premium due dates, grace periods, address for payment, and consequences of non-payment or untimely payment. Finally, this notice must explain the importance of keeping addresses current and updated with the administrator and state that the notice is not a full description of continuation or other rights and that more complete information is available in the summary plan description or from the administrator.

### **Notice of Unavailability of COBRA**

This is the first of the two new plan administrator notices that are added by the new DOL rule. It arises in response to an Employee/Qualified Beneficiary Notice described above (that is, in connection with the an assertion of a divorce, legal separation, or child's loss of dependent child status qualifying event, a second qualifying event, or a Social Security disability determination) and is given only if the plan administrator concludes that claimed event does not make the individual eligible for COBRA.

The DOL does not provide a great deal of specificity about the contents of this notice, but it must explain why the individual is not eligible for COBRA or additional COBRA in a manner calculated to be understood by the average plan participant. The deadline for providing this notice is the same as that for providing the Notice of Right to Elect COBRA.

### **Notice of Termination of COBRA**

The second of the new plan administrator notices must be provided to any qualified beneficiary whose COBRA continuation coverage is being or has terminated prior to the maximum continuation period. It must be calculated to be understood by the average plan participant and must contain an explanation of the reason for the termination of COBRA, the effective date of the termination of COBRA, and a description of any rights the qualified beneficiary has to elect an alternative coverage, such as individual coverage or conversion. This notice must be given "as soon as practicable" after the administrator determines that COBRA will terminate.

The IRS Revenue Ruling and the DOL final rule can be obtained from the IRS and DOL Web sites at <http://www.irs.gov> and <http://www.dol.gov>, respectively. Sample COBRA notices are provided on our Web site at <http://www.id.regence.com>. These notices are for informational purposes only and are not intended to supply legal advice.

We hope that you find this information of assistance and we appreciate the opportunity that you have afforded us to assist you in providing your group health plan to your employees.

Sincerely,

A handwritten signature in cursive script that reads "Steve Colleran".

Steve Colleran  
Vice President, Sales