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COBRA Compliance Includes Termination, Unavailability Notices

By Juli Hanshaw


When employers thought they finally had COBRA figured out, the U.S. Department of Labor (DOL) released final notice regulations, which added two new notices: the termination notice and the unavailability notice. What makes these notices so important for a COBRA administrator?

Termination Notice

The termination notice provides information to qualified beneficiaries (QBs) when COBRA ends before the expiration of the maximum time allowed; that is, 18, 29 or 36 months. (See sidebar.)

Elements of the Termination Notice

The termination notice must include:

- Reason for early termination
- Date of the termination
- Any rights the QB may have under the plan to elect alternative group or individual coverage, such as a conversion right 

COBRA could terminate before the end of the allowable maximum time frame for several reasons:

- **End of all group health plans** — The employer has terminated all of its group health plans(s).
- **Non-payment** — Payment was either not sent by the end of a grace period or the payment was returned for non-sufficient funds.
- **Other coverage** — After the COBRA election date, a QB becomes covered under another group health plan that does not contain any exclusion or limitation with respect to any pre-existing condition(s) that applies to the QB.

- **Medicare entitlement** — After the date COBRA is elected, a QB becomes entitled to Medicare (actually enrolled, not just eligible).
- **Cause** — Coverage may be retroactively terminated for cause, such as fraudulent activity, on the same basis that the plan terminates the coverage of a similarly situated active employee for cause.
- **End of disability** — If the QB is no longer deemed disabled by Social Security, coverage will terminate the first of the month that is more than 30 days after the date of the final determination.

The termination notice should be sent “as soon as practicable” following the plan administrator’s determination that COBRA coverage will terminate, which includes following any proper grace periods to make COBRA payments. Unfortunately, DOL has not defined what it means by “as soon as practicable.” A safe standard is to send the notice shortly after the decision is made to terminate coverage.

The notice needs to go to all QBs, but a single notice will suffice if they all live at the same address. First class mail is typically used to satisfy the requirement that delivery must be “reasonably calculated to ensure actual receipt.” Very often, employers will send the HIPAA certificate of creditable coverage at the same time, due to loss of coverage.

What if an employee elects coverage but never pays for it? Is a termination notice required? Technically, it is not required because the regulations presuppose that the plan administrator “is providing continuation coverage.” However, many plan administrators will go ahead and send the notice. After all, it has the benefit of telling the QB that coverage has been lost.

See *COBRA Compliance*, p. 11

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Unavailability Notice

COBRA has always required a covered employee or QB to notify the plan administrator of specific COBRA events. If an individual is not eligible for continuation coverage or additional time on COBRA for these specified events, the plan administrator must send the unavailability notice within 14 days from the date the event is reported.

The unavailability notice should be mailed with proof of mailing and include an explanation of why the coverage is not available. (See sidebar.)

Unavailability Notice: What to Explain

Reasons why coverage is not available that are subject to explanation in an unavailability notice include:

- Event reported late
- QB did not meet requirements for a disability extension
- Extension reported beyond time frame
- Extended COBRA time not valid 

An employer should have reasonable procedures in place for notification of the COBRA events by employees and QBs. These procedures can require use of a form to provide a notification of an event.

The events required to be reported by a covered employee or QB are:


- Divorce or legal separation
- Dependent child no longer eligible
- Second COBRA qualifying event
- Being deemed disabled by the Social Security Administration (SSA)
- No longer disabled by SSA

Unlike the termination notice, the unavailability notice does not need to go to all QBs, only to those who are not entitled to the COBRA coverage that was requested. Thus, a secondary event request for 36 months of coverage would not need to be sent to the covered employee. Also, if someone else made the request (for example, a family member), the unavailability notice still would need to be sent to the QB who was affected. The single notice rule applies to unavailability notices, just like it

does for other COBRA notices. This notice should be sent via first class mail to reasonably ensure receipt.

Don't Minimize Compliance

While these two notices do not get as much attention as other COBRA notices, it is important to note that they are arguably subject to statutory penalties of up to \$110 per day. There is an additional danger to compliance failures. QBs who do not receive these notices may mistakenly assume their coverage continues and rely to their detriment on the fact that they did not hear otherwise. That spells trouble.

Who would think that meeting notice requirements could become so time consuming? It's not as easy as a couple notices here and there. A proper compliance program means creating and sending perhaps more than 15 possible notices. It's not a walk in the park for an employer to keep track of all the notice requirements. It takes planning, and knowing the rules and numerous time frames to remain in compliance. 

Final FMLA Rules Effective Jan. 16

Final rules amending the Family and Medical Leave Act (FMLA) go into effect on Jan. 16.

The U.S. Department of Labor (DOL) issued the long-awaited rules Nov. 17, 2008 (73 Fed. Reg. 67933). The rules did not substantively affect the interplay between FMLA and COBRA coverage. Because taking FMLA leave is not a COBRA qualifying event, any coverage provided during the leave period is not COBRA coverage and cannot be credited toward the satisfaction of COBRA's requirements. Also, employers cannot charge employees on FMLA leave the COBRA rates for FMLA coverage; instead, they must charge them the rate for active employees.

Employers should note, however, that although the FMLA requires employers to "pay for health insurance continuation coverage" while an employee is on leave, if an employee, while actively working, contributed to his or her insurance premiums, that contribution would continue during the leave. Specifically, the final FMLA regulations state that, "Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave

See *FMLA Rules*, p. 12

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