



UPDATE ON FINAL COBRA NOTICE REGULATIONS

This is a follow-up to our May 2004 communication on COBRA regulations (the "Final Regulations") issued by the Department of Labor ("DOL") on May 26, 2004. The Final Regulations are similar to the 2003 proposed regulations, with some changes. The Final Regulations are applicable for notice obligations that arise in plan years starting on or after November 26, 2004 (i.e., January 1, 2005 for calendar-year plans).

This update is divided into three parts:

- A) **Analysis** of the Final Regulations,
- B) **Implementation Roadmap**, including highlights of major changes to notices,
- C) **Frequently Asked Questions** (FAQ).

A) Analysis

The Final Regulations cover four types of notices:

- 1) General Notice of Continuation Coverage, previously known as the Initial Rights Notice or Initial Notification;
- 2) Employer Notice to Plan Administrator;
- 3) Covered Employee/Qualified Beneficiary Notice to Plan Administrator; and
- 4) Plan Administrator Notices to Covered Employees/Qualified Beneficiaries (i.e., Election Notice, Notice of Unavailability of Coverage and Notice of Early Termination of Coverage).

The DOL provided a model General Notice and Election Notice. CONEXIS is not using DOL-provided model notices because the language in the notices may result in coverage greater than COBRA requires. An example is included in the analysis of the General (Initial) Notice below.

1) General (Initial) Notice of Continuation Coverage (29 CFR 2590.606-1)

a) For plans already subject to COBRA, this notice must be sent no later than 90 days after coverage begins. For many plans, coverage begins at the time of hire. If you are required to send an Election Notice before you have sent the General Notice, you may satisfy the General Notice requirement by sending only the Election Notice. Nevertheless, many qualified beneficiaries' notice obligations are deferred until the qualified beneficiary is notified of the obligation to provide notice, either through the General Notice or the summary plan description (SPD). Thus, the General Notice should be sent as soon as possible after the employee becomes covered under the Plan despite the 90-day rule.

b) The covered employee, covered spouse, and covered dependent child are entitled to a General Notice; in many cases, this may be a single notice. If the covered employee and covered spouse become covered under the Plan at the same time and reside together, a single notice addressed to both may be sent to their last known address. If the spouse becomes covered at a separate date (and after the covered employee has received his or her General Notice), a separate notice must be sent to the spouse even if they reside at the same address. In addition, a dependent child is deemed to receive the notice that the parent with whom the child lives received; however, if the child resides at a different address from the parent who received the

notice, a separate notice must be sent to the covered dependent child (e.g. a child receiving coverage under a qualified medical child support order).

c) Inclusion of the General Notice in the SPD will satisfy the General Notice requirement. Generally, the SPD disclosure rules in ERISA do not require the employer to provide an SPD to both the employee and covered spouse; therefore, the employer can hand the SPD to the employee at work (even if the employee has family coverage) or make the SPD available on a work-related website. If you use the SPD to satisfy the General Notice requirement, the SPD would have to be mailed to the last known address of a covered spouse.

d) The DOL-provided model notice, while a safe harbor, does not fully protect employer interests. For example, it makes the 11-month disability extension and the extension for a second qualifying event available to all “family members”, instead of limiting it to qualified beneficiaries. Thus, under the model notice, a spouse added during the COBRA coverage period would be entitled to an extension after a second qualifying event.

2) Notice from Employer to Plan Administrator (29 CFR § 2590.606-2)

Employers must notify the Plan Administrator when a qualifying event occurs relating to the covered employee’s termination of employment (other than for gross misconduct), reduction of hours, death, entitlement to Medicare, or employer bankruptcy. Recall that a covered employee’s Medicare entitlement will rarely constitute a qualifying event due to Medicare secondary payer rules. The notice must include sufficient information to enable the administrator to determine the plan, the covered employee, the qualifying event and the date of the qualifying event. This provision does not materially change our current process. The DOL itself noted that it did not modify this section from the earlier proposed regulations.

3) Covered Employee/Qualified Beneficiary Notice to Plan Administrator (29 CFR § 2590.606-3)

a) The Final Regulations require plans to establish reasonable procedures for notices furnished by covered employees and qualified beneficiaries and put them in the SPD. The reasonable procedures should identify to whom the notice must be sent, by when, and whether a particular form is required or not. The absence of such reasonable procedures will permit qualified beneficiaries to furnish notices, either orally or in writing, to benefit plan personnel without regard to whether such personnel administer COBRA.

b) Covered employees and qualified beneficiaries must provide notice to the Plan Administrator of the following events:

- Divorce or legal separation of a covered employee;
- Qualified beneficiary ceasing to qualify for coverage as a dependent child;
- Second qualifying event;
- SSA disability determination of a covered employee or qualified beneficiary during the first 60 days of COBRA coverage; and
- Covered employee/qualified beneficiary ceasing to be disabled according to the SSA.

With regard to a qualifying event notice, the qualified beneficiary must have at least 60 days from the later of the (i) the date of the qualifying event (ii) the date coverage is lost as a result of the qualifying event, or (iii) the date the qualified beneficiary is notified of the obligation to provide notice through the SPD or General Notice.

With regard to the disability determination, there has been a significant change. The proposed regulations required the plan to allow at least 60 days from the date of the disability determination. The Final Regulations expand the notice period to require at least 60 days from the later of (i) the date of the determination, (ii) the date of the qualifying event (iii) the date coverage is lost as a result of the qualifying event, or (iv) the date the covered employee or qualified beneficiary is notified of the notice obligation through the SPD or the General Notice. In addition, the notice must be provided within the 18-month COBRA period.

c) These notices should, at a minimum, identify the plan, the covered employee and qualified beneficiaries, and the type and date of the qualifying event or disability. For incomplete notices a plan may require that the information be supplemented within a reasonable period of time.

4) Plan Administrator Notices to Covered Employees/Qualified Beneficiaries (29 CFR § 2590.606-3)

Please note: For ERISA purposes, CONEXIS' role is not as Plan Administrator but as an independent contractor providing COBRA administrative services.

a) The regulations confirm that Plan Administrators must provide the Election Notice within 14 days of receipt of notice of the qualifying event.

b) The Final Regulations clarify the Election Notice period when the employer is the Plan Administrator:

- If the employer is responsible for providing notice to the Plan Administrator (i.e., the qualifying event is termination of employment/reduction in hours, employee death, Medicare entitlement, or employer bankruptcy), notice must be sent within 44 days of receipt of notice.
- If the covered employee/qualified beneficiary is responsible for providing notice to the Plan Administrator (i.e., the qualifying event is any of the events in section 3)b) above), notice must still be sent within 14 days receipt of notice.

c) The Election Notice has extensive content requirements, which are discussed in greater detail in the Roadmap below.

d) There is a new Notice of Unavailability of Coverage. This notice must be sent within 14 days of receipt of a covered employee/qualified beneficiary notice of a qualifying event, a second qualifying event or a disability determination. The only content requirement is that the notice provide a specific explanation as to why coverage was unavailable. It does not appear that an appeals process is required. If an appeals process is established, it is not subject to ERISA's claims procedure regulations.

CONEXIS was already providing an equivalent of this notice for denials of disability extension coverage. In other situations, however, this would be an additional notice that is not specifically addressed in the current services agreement. Unless directed otherwise, CONEXIS will issue the unavailability notice once notified by the requesting individual.

e) There is a new Notice of Early Termination of Coverage. This notice is required when COBRA coverage terminates before the end of the COBRA period. It must be sent as soon as practicable after the decision to terminate has been made. The notice does not need to be furnished in advance of termination, as clearly stated in the preamble to the Final Regulations. This notice has the following content requirements:

- The reason for the early termination;
- The date of termination; and
- Any rights to alternative or conversion coverage.

Prior to the Final Regulations, CONEXIS issued a Cancellation Notice to qualified beneficiaries whose coverage terminated prior to the end of the maximum COBRA coverage period. This notice has now been renamed and revised to comply with the Final Regulations.

B) Implementation Roadmap (What employers should do or consider doing)

1) General Notice of Continuation Coverage (29 CFR § 2590.606-1)

- **Consider whether you want to reissue the General Notice** to all covered employees, their spouses and dependent children to eliminate a potential argument later that they were not provided sufficient notice. CONEXIS does not believe this is necessary. The final regulations apply to notice obligations arising after the effective date so a new notice is not technically required. Admittedly, there are changes that could affect COBRA decisions after the effective date for those who have already received a General Notice; however, the changes made by the final COBRA regulations will also change the SPD and require either issuance of a revised SPD or a summary of material modifications (SMM). Keep in mind that you must comply with COBRA's single notice rule to ensure proper distribution of the SMM/SPD to the covered spouse.
- **Understand the major changes to the CONEXIS standard General Notice**, which include:
 - Renaming the Notice to mirror the model notice in the regulations
 - Providing specific contact details for additional information (§ 2590.606-1(c)(6))
 - Clearer definition of the term "qualified beneficiary" (§ 2590.606-1(c)(2))
 - Inclusion of plan specific information (§ 2590.606-1(c)(1))
 - Inclusion of a sentence on special Health FSA continuation rights (§ 2590.606-1(c)(2))
 - Identification of qualifying events requiring employer notice (§ 2590.606-1(c)(2))
 - Identification of how coverage may be extended (§ 2590.606-1(c)(2))
 - Further clarification of reasonable procedures for qualified beneficiary notice of an SSA disability determination (§§ 2590.606-3(b) & 2590.606-1(c)(4))
 - Further clarification of reasonable procedures for qualified beneficiary notices of divorce, legal separation, or a child ceasing to be a dependent (§§ 2590.606-3(b) & 2590.606-1(c)(3))
- **Update your SPD.** The Final Regulations require a description of participants' and qualified beneficiaries' rights and obligations. This requirement is not new; the ERISA SPD regulations have required this for years. The Final Regulations set forth the required contents of a General Notice and your SPD contents should match those. See the Frequently Asked Questions (FAQ) below for more information on what your SPD should contain.
- **Evaluate whether to use the General Notice or your SPD.** The SPD may be substituted for the General Notice as long as it meets the content requirements and you distribute the SPD pursuant to the COBRA distribution rules, which require notice to the covered spouse as well. In the preamble to the Final Regulations, the DOL asserted that "many, and perhaps most, plans would prefer to take advantage of the reduced cost and added efficiency of providing a single disclosure document that satisfies both the General Notice requirement and the SPD requirement".

2) Notice from Employer to Plan Administrator (29 CFR § 2590.606-2)

- **Ensure that employer notifications continue to be timely.** The Final Regulations reiterated the 30-day time period in which employers must provide notice of a qualifying event.

3) Covered Employee/Qualified Beneficiary Notice to Plan Administrator (29 CFR § 2590.606-3)

- **Ensure that you follow the reasonable procedures contained in the revised notices.** Currently, CONEXIS requires evidence of an SSA determination.
- **Update your SPD to include covered employee/qualified beneficiary notice procedures and new timelines for disability determinations.**

4) Plan Administrator Notices to Qualified Beneficiaries (29 CFR § 2590.606-3)

- **Understand the major changes to the CONEXIS standard Election Notice**, which include:
 - Inclusion of specific plan information (§ 2590.606-4(b)(4)(i))
 - Identification by name or status of the qualified beneficiaries entitled to elect coverage (§ 2590.606-4(b)(4)(iii))
 - Identification of the qualifying event (§ 2590.606-4(b)(4)(ii))
 - Discussion of each qualified beneficiary's independent right to elect coverage (§ 2590.606-4(b)(4)(iv))
 - Clarification of various terms, including qualified beneficiary and qualifying event
 - Explanation of consequences for failing to elect or waiving coverage (§ 2590.606-4(b)(4)(vi))
 - Further clarification of where additional information may be found regarding conversion rights (§ 2590.606-4(b)(4)(vi))

- **Update your SPD.** The Election Notice refers to the SPD as a source for more information in several areas, including a fuller description of continuation coverage, the availability of continuation coverage, and any plan exceptions as to the duration of continuation coverage. You must update the SPD to describe the plan's procedures for the covered employee or qualified beneficiary to provide notice to the plan administrator and to reflect the new time frames for providing notice of the disability determination. Also make sure that your SPD contains information on the possible availability of a new second COBRA election period in the event of trade adjustment assistance, as stated in the preamble of the Final Regulations. See the Frequently Asked Questions (FAQ) below for more information on what your SPD should contain.

- **Become familiar with the Unavailability Notice and when it is to be furnished.** The notice is used when a covered employee or qualified beneficiary provides notice of qualifying event, second qualifying event or disability and is not eligible for coverage.

- **Become familiar with the Early Termination of Coverage Notice.** Significant changes were made to the Cancellation Notice, including a more expansive list of early termination reasons (§ 2590.606-4(d)(2)(i)) and alternative and conversion rights (§ 2590.606-4(d)(2)(iii)).

C) Frequently Asked Questions

The following is a short list of frequently asked questions relating to the Final Regulations;

Q: When do the Final Regulations go into effect?

A: The Final Regulations apply to any notice obligations that arise on or after the first day of the first plan year beginning on or after November 26, 2004. For employers with calendar plan years, the effective date is January 1, 2005.

Q: There are a lot of changes to the General Notice and Election Notice. Do we need to be concerned about notices that were sent prior to the effective date of the Final Regulations?

A: The DOL stated in the preamble to the Final Regulations that it would "view compliance with either the proposed rules or the final rules, including use of the model notices as proposed or as finalized, to constitute good faith compliance with the COBRA statutory notice requirements".

Q: When does an event constitute a second qualifying event?

A: The Final Regulations confirm that an event is considered a second qualifying event only to the extent that the qualified beneficiary would "lose coverage under the Plan had the first qualifying event not occurred".

Q: What is the deadline for providing the General Notice?

A: Generally, it is within 90 days of the beginning of plan coverage or within 90 days of the plan becoming subject to COBRA. Employers may use an SPD to satisfy this requirement, but care must be taken to deliver the SPD to both the covered employee and covered spouse under the single-notice rule. The General Notice need not be sent if the employer sends a required Election Notice within the 90-day time frame. In fact, in the preamble to the Final Regulations, the DOL stated that it would "duplicative, if not confusing or

distracting” to send both the Election Notice and the General Notice within the 90-day time frame.

Q: What are the content requirements for the General Notice?

- A: The General Notice must specifically contain:
- Plan specific information, including plan name, and name, address and phone number for additional information;
 - General description of COBRA coverage, including identification of classes of individuals who can become a qualified beneficiary, the type of qualifying events, notice obligations of the employer, the maximum period of COBRA (including any available extensions) and the plan’s premium payment requirements;
 - Explanation of a qualified beneficiary’s notice responsibilities in the event of divorce, legal separation, an SSA disability determination, and a child ceasing to be a dependent, and a description of the notification procedures;
 - Explanation of the importance of keeping the Plan Administrator informed of current addresses; and
 - Statement that the notice does not fully describe COBRA coverage and that more complete information is available from the Plan Administrator and the SPD.

Q: When must a covered employee or qualified beneficiary notify the Plan Administrator?

- A: They must notify the Plan Administrator of:
- A qualifying event related to divorce, legal separation or a child ceasing to be a dependent;
 - A second qualifying event;
 - An SSA disability determination; and
 - An SSA determination that the covered employee or qualified beneficiary is no longer disabled.

Q: What are the content requirements for the Covered Employee/Qualified Beneficiary Notice?

- A: This notice must:
- Adequately describe the qualifying event or disability determination (for disability, a copy of the SSA award is required); and
 - Contain any additional supplemental information that the plan deems necessary for making the appropriate determination.

Q: When must a covered employee or qualified beneficiary provide notice of an SSA disability determination?

- A: The qualified beneficiary must provide notice within 60 days of the later of:
- The date of the determination;
 - The date of the qualifying event;
 - The date that coverage is lost; or
 - The date on which the qualified beneficiary receives notice of the duty to provide notice of disability through the SPD or General Notice.

Q: What are the content requirements for the Election Notice?

- A: The Election Notice must specifically contain:

- Plan specific information, including plan name, and name, address and phone number for additional information;
- Identification of the qualifying event;
- Identification, by status or name, of all qualified beneficiaries entitled to elect COBRA coverage and the termination date of coverage unless COBRA coverage is elected;
- Independent right to elect COBRA coverage statement;
- Description of election procedures;
- Explanation of the consequences of failing to elect or waiving COBRA coverage;
- Description of COBRA coverage;
- Explanation of the maximum period of COBRA coverage, including any events that might cause early termination of coverage;
- Description of the circumstances for extending COBRA coverage;
- Description of qualified beneficiary’s duty to provide second qualifying event notices and notice that a disabled qualified beneficiary is no longer disabled;
- Certain cost and payment information;
- Description of payment due dates, the right to pay on a monthly basis, grace periods, payment address, and the consequences of delayed payment and non-payment;
- Explanation of the importance of keeping the Plan Administrator informed of current addresses; and
- Statement that the notice does not fully describe COBRA coverage and that more complete information is available from the Plan Administrator and the SPD.

Q: What are the content requirements for the Unavailability Notice?

- A: This notice must state why the requesting individual is not entitled to COBRA coverage.

Q: When must the Unavailability Notice be sent?

- A: This notice must be sent within 14 days of the Plan Administrator’s receipt of such notice from the covered employee or qualified beneficiary.

Q: What are the content requirements for the Early Termination Notice?

- A: This notice must contain:
- The reason for the early termination;
 - The date of termination; and
 - Any rights to alternative or conversion coverage.

Q: When must the Early Termination Notice be sent?

- A: This newly required notice must be sent as soon as practicable after the decision that coverage should be terminated. The DOL has indicated it can be sent with the HIPAA Certificate of Creditable Coverage.

Q: Did the DOL issue model unavailability and early termination notices?

- A: No. The DOL declined a request to do so, stating “it would be difficult to develop a single model form for such notices that would serve adequately to cover every circumstance, or even the most frequent circumstances...” You will notice that the

CONEXIS notices require customization for each circumstance.

Q: How should employers change their SPD?

A: The regulations relating to SPDs require “a description of the rights and obligations of participants and beneficiaries with respect to continuation coverage...” Plan Administrators should update their SPDs to include at least the information in the General Notice and Election Notice.

In particular, the Final Regulations require that the SPD contain reasonable procedures for notices from covered employees and qualified beneficiaries. Also, the preamble to the Final Regulations states that the SPD should contain a description of the potential availability of the health care tax credit for employees who are eligible for trade adjustment assistance. A sample paragraph is contained in the model Election Notice. Lastly, the SPD should reflect the new time periods for providing notice of a disability determination.

Q: The various regulations alternatively refer to when notices are sent, furnished or provided. Did the Final Regulations offer any guidance on this issue?

A: Yes. The preamble to the Final Regulations states that “a required notice generally should be considered ‘furnished’ by a Plan Administrator as of the date of mailing, if mailed by first class mail,

certified mail, or Express Mail; or as of the date of electronic transmission, if transmitted electronically”.

Q: Do the Final Regulations apply to state and local governmental group health plans that are governed by the Public Health Service Act (PHSA)?

A: No, they do not. Only the Department of Health and Human Services (“HHS”) has authority to issue regulations under PHSA. Following is a link for more information about PHSA: <http://www.cms.hhs.gov/hipaa/hipaa1/cobra/default.asp>. HHS has stated that it “adopts policies established by Labor and Treasury to the extent that there is no basis for differentiating between the private and public sector COBRA statutes”. As a practical matter, CONEXIS will provide notices in accordance with the Final Regulations for all clients, unless directed otherwise.

Q: Where can I find a copy of the Final Regulations and Model Notices?

A: Following is the link for a PDF version: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/pdf/04-11796.pdf>

Following is the link for a TEXT version: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/04-11796.htm>

Should you have any questions, please contact your Services Representative. Thank you for your business, and we look forward to continuing to serve your compliance needs.

Sincerely,

CONEXIS