

administrator.<sup>6</sup> Section 606(a)(4) requires a plan administrator who has received a notice of qualifying event to provide each qualified beneficiary with a notice of such beneficiary's rights under the COBRA provisions. The provision of an election notice starts the running of the 60-day period during which qualified beneficiaries may elect continuation coverage. *See* section 605(1)(C).

The maximum period for which a plan is obliged to provide COBRA coverage is 36 months, but in certain circumstances a plan is required to provide only 18 months of continuation coverage (after a qualifying event that is termination or reduction in hours of a covered employee's employment). The COBRA provisions require an 18-month period of COBRA coverage to be extended to a longer period in only two circumstances: if a qualified beneficiary is or becomes disabled, or if a second qualifying event occurs. Sections 602(2) and 606(a)(3) require notice of a disability to be provided as a prerequisite to the disability extension. The right to an extension of continuation coverage based on the occurrence of a second qualifying event is based on providing notice of such second qualifying event pursuant to section 606(a)(3).

The Trade Act of 2002, Public Law 107-210, enacted on August 6, 2002, amended section 605 of ERISA to add a new subsection (b). This new subsection provides a second 60-day COBRA election period for certain individuals who become eligible for trade adjustment assistance (TAA) pursuant to the Trade Act of 1974.<sup>7</sup> New section 605(b)(1) provides that an individual who is either an eligible TAA recipient under section 35(c)(2) of the Code or an eligible alternative TAA recipient under section 35(c)(3) of the Code (collectively, a TAA-eligible individual), and who did not elect continuation coverage during the 60-day COBRA election period that was a direct

consequence of the TAA-related loss of coverage,<sup>8</sup> may elect continuation coverage during a 60-day period that begins on the first day of the month in which he or she is determined to be a TAA-eligible individual, provided such election is made not later than 6 months after the date of the TAA-related loss of coverage. The individual may elect coverage for both himself or herself and his or her family. Any continuation coverage elected during the second election period will begin with the first day of the second election period, and not on the date on which coverage originally lapsed. However, the time between the loss of coverage and the start of the second election period will not be counted for purposes of determining whether the individual has had a 63-day break in coverage under section 701(c)(2) of ERISA (and corresponding provisions of the PHS Act and the Code).

The new second COBRA election period is intended to assist individuals who become TAA-eligible in taking advantage of a new tax credit, also created by the Trade Act of 2002. Under the new tax provisions, individuals who become eligible for TAA assistance can take a tax credit of 65% of premiums paid for qualified health insurance. The Trade Act of 2002 provides for advance payment of the tax credit to health insurers, beginning in 2003. COBRA continuation coverage is one of the types of health insurance that qualifies for the tax credit. Because of the importance of the right to elect COBRA continuation coverage as a TAA-eligible individual, it is the view of the Department that information on the possible availability of a new second election period in the event of TAA eligibility should, pursuant to 29 CFR 2520.102-3(o), be included in the summary plan description of a group health plan as part of the discussion of continuation coverage provisions.

It is anticipated that information on the right to a second COBRA election, together with other information on trade adjustment assistance and the health coverage tax credit, will also be made available to potentially eligible individuals through the State Workforce Agencies in connection with the certification process for trade adjustment assistance.

<sup>8</sup> Section 605(a)(1) of ERISA provides that the election period is the period which: (A) begins not later than the date on which coverage terminates under the plan by reason of a qualifying event; (B) is of at least 60 days' duration; and (C) ends not earlier than 60 days after the later of the date coverage terminates or the date of the notice.

### C. Overview of Proposed Regulations

The provision of timely and adequate notifications regarding COBRA rights, the occurrence of qualifying events, and election rights is critical to the effective exercise of COBRA rights. Failure to meet notice requirements may cause a qualified beneficiary to lose COBRA rights or may conversely cause a plan administrator to be subject to fines or other adverse consequences. In the Department's view, regulatory guidance establishing clearer standards for the administration of the COBRA notice processes would reduce the risks both to plans and to qualified beneficiaries by providing certainty as to how the notice obligations can be met.<sup>9</sup> The attached proposed regulations are intended to provide the necessary guidance.

The proposed guidance comprises four separate regulations. Section 2590.606-1 covers the general notice. Section 2590.606-2 creates rules for employer-provided notices of the occurrence of a qualifying event. Section 2590.606-3 addresses the responsibilities of qualified beneficiaries to provide notice of a qualifying event or a disability. Finally, § 2590.606-4 deals with the election notice and other notices that plan administrators must provide subsequent to the election of COBRA coverage. As part of this proposal, the Department is also including, for public comment, model forms for two of the administrator's notices: the general notice and the election notice.<sup>10</sup> The model forms are appended, respectively, to § 2590.606-1 and § 2590.606-4. Each model allows for inclusion of plan-specific information to reflect the circumstances of a particular plan. It should be noted, however, that these models have been designed for use primarily by single-employer plans and do not reflect the special rules or practices that may apply in the case of other types of group health plans, such as multiemployer plans or plans sponsored by unions for their members.<sup>11</sup> The Department specifically requests comment on what, if any, changes should be made to the model

<sup>9</sup> On September 23, 1997, the Department issued a Request for Information (RFI) to assess public views on the advisability of developing regulations on the COBRA notice provisions. 62 FR 49894 (Sept. 23, 1997). The Department received 15 comments in response to that RFI. These proposed regulations take into account the views expressed in those comments.

<sup>10</sup> Of the 15 comments received in response to the COBRA notice RFI, 11 commenters advocated that the Department develop model plan administrators' notices.

<sup>11</sup> The model election notice, further, is not designed to be used when bankruptcy is the qualifying event.

<sup>6</sup> When the qualifying event is the death of the covered employee, the termination or reduction of hours of the covered employee's employment, the covered employee's becoming entitled to Medicare, or a bankruptcy proceeding of the employer, the notice obligation falls on the employer. For the other qualifying events (divorce or legal separation or a dependent child's ceasing to be a dependent under the terms of the plan), the notice obligation falls on the covered employee or qualified beneficiary.

<sup>7</sup> Pursuant to the Trade Act of 1974 (19 U.S.C. 2101 *et seq.*), workers whose employment is adversely affected by international trade (increased imports or a shift in production to another country) may become entitled to receive TAA, which primarily consists of career counseling, up to two years of training, income support during training, job search assistance, and relocation allowances.