

addition to identifying significant pertinent facts, such as the names and contact information for plan administrators and (if different) COBRA administrators and the qualified beneficiaries and qualifying event, the election notice must describe the continuation coverage being made available and the manner in which the qualified beneficiaries' COBRA rights must be exercised, making clear that each qualified beneficiary has an independent right to elect continuation coverage.<sup>18</sup> The notice must explain the plan's payment requirements, payment schedule, and payment policies (including grace periods and the consequences of late payment or non-payment). If the plan makes alternative coverage available or provides any conversion options, the notice must describe those options and alternatives and explain how choosing them would affect continuation coverage rights. The notice must also specifically state that it does not fully describe continuation coverage or other rights under the plan and that more complete information is available in the plan's summary plan description or from the plan administrator.

The notice must inform qualified beneficiaries of the consequences of not electing continuation coverage under the plan.<sup>19</sup> The Department is concerned that many participants and beneficiaries will not take into account the possible effects of not electing COBRA coverage on other rights they may have to secure health care coverage (e.g., limitations on pre-existing condition exclusions, guaranteed right to purchase individual coverage without a pre-existing condition exclusion, special enrollment rights). The regulation (and model election notice, discussed below) are designed to remind participants and beneficiaries of these considerations as part of the continuation coverage election process.

determined that a qualifying event does not occur when an employee begins a family or medical leave from employment under the Family and Medical Leave Act (FMLA), but may occur if the individual does not return to work at the end of the FMLA leave. 26 CFR 54.4980B-10.

<sup>18</sup> The notice could either provide a full description of the offered coverage (including separate options) or make specific reference to relevant portions of the plan's SPD, along with information on how to obtain the SPD.

<sup>19</sup> In particular, paragraph (b) requires the notice to include an explanation of the effect of electing or not electing continuation coverage on rights guaranteed under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which became Part 7 of title I of ERISA. See § 2590.606-4(b)(4)(vi). The model election notice contains specific language that would carry out this requirement.

If continuation coverage is offered for only a maximum of 18 months, the notice must also provide information on possible extensions of that period due to disability or second qualifying events, including detailed instructions on any notices required to be given by qualified beneficiaries.

Paragraph (b) of the regulation coordinates the running of the statutory 14-day time limit for providing an election notice with circumstances that could affect that period, such as a plan's adoption of the alternative limits permitted under section 607(5), or the special rules for multiemployer plans. Paragraph (e) further provides rules permitting a single election notice to be provided to multiple qualified beneficiaries who are part of a single family unit.

If a plan administrator receives a notice of a qualifying event pursuant to § 2590.606-3 from a participant or beneficiary not eligible to receive continuation coverage under the plan, paragraph (c) of the regulation requires the administrator to provide notice to the individual(s) explaining why he or she is not entitled to such coverage. When a participant or beneficiary submits a notice of qualifying event, there is an expectation of coverage on the part of the participant or beneficiary. Requiring notice in such circumstances is intended to avoid problems attendant to misunderstandings in this area. The notice is subject to the same timing requirements as those applicable to election notices.

Paragraph (d) of the regulation requires a specific notice to be provided to qualified beneficiaries in the event that the administrator terminates a period of continuation coverage before the end of its maximum duration. The COBRA provisions permit early termination of continuation coverage in a number of circumstances, such as when the employer ceases to offer group health coverage to its employees or when the required premium payment is not timely paid. In the Department's view, providing a notice of early termination serves an important administrative function and permits qualified beneficiaries to take appropriate next steps to protect their access to health coverage, either on a group or individual basis. Accordingly, the proposed regulation requires plan administrators to give specific notice of early termination of continuation coverage. Such notice must be provided as soon as administratively practicable after the termination decision is made, must explain why and when the continuation coverage is being terminated, and must describe any

rights to other coverage the qualified beneficiaries will have upon termination. Nothing in these proposed regulations is intended to prevent a plan administrator from combining, for ease of administration, the furnishing of an early termination notice to a qualified beneficiary with the furnishing of the certificate of creditable coverage that must be provided to the qualified beneficiary under Part 7 of ERISA.

The appendix to this section contains a model election notice for plan administrators to use in discharging this notice obligation. The model election notice, like the model general notice, allows for inclusion of plan-specific information and provides alternatives, where appropriate, to tailor specific notices to reflect specific plan design. Among the alternatives, the model election notice includes language about the new 65% tax credit under the Trade Act that may be used if an administrator believes employees might be eligible for trade adjustment assistance. The model is intended for use only by single-employer group health plans and does not reflect the special rules that may apply to other plans, such as multiemployer plans or union-sponsored plans. Because of the complexity of the applicable rules, the model is also not intended for use when bankruptcy is the qualifying event.

Use of an appropriately completed model election notice under final regulations would be considered by the Department compliance with the content requirements of the regulation. However, the Department does not intend to require use of the model election notice and anticipates that plans could satisfy the requirements of the regulation through other types of notices. As with the proposed model general notice, the Department specifically solicits public comment on whether the model election notice adequately reflects current COBRA administrative practice and provides sufficient flexibility to be used by a majority of group health plans, as well as suggestions as to how the model could be improved.

## D. Regulatory Impact Analysis

### Summary

The Department expects these proposed regulations to benefit both plan sponsors and participants. They will dispel plan administrators' uncertainty about how to comply with COBRA notice provisions and reduce the risk of inadvertent violations. They will help participants and beneficiaries to understand how to exercise their COBRA rights thereby averting costly