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DOL updates model COBRA notices to highlight marketplace options

Since January 1, 2014, individuals who lose group health plan coverage due to a qualifying event have been able to choose either to continue that coverage through COBRA or enroll in marketplace coverage. The DOL recently issued a new model COBRA election notice that advises qualified beneficiaries about the availability and advantages of marketplace coverage, and points out some factors that they should consider in deciding between coverage options. It also issued a new model general COBRA notice that refers to marketplace coverage. In conjunction with the issuance of these notices, CMS opened a special enrollment window until July 1, 2014 for current qualified beneficiaries to enroll in marketplace plans. Employers wishing to communicate the special enrollment window opportunity need to do so quickly in advance of the July 1 deadline.

Background

For almost 30 years, individuals who otherwise would lose group health plan coverage because of certain “qualifying events” — such as job loss, divorce, and aging out of dependent child status — have been able to continue their coverage due to rights granted under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). COBRA coverage can be an expensive option though, because these individuals, known as “qualified beneficiaries,” may be required to pay up to 102% of the full cost of group health plan coverage — with actual plan costs for the employer typically higher than the 102%. Additionally, COBRA coverage is limited in duration, lasting a maximum of 18 months following a termination of employment or reduction in hours and 36 months after other qualifying events.

The inception of the Affordable Care Act (ACA) marketplace (also known as the exchange) created new health coverage opportunities for qualified beneficiaries. Marketplace coverage may be less expensive than COBRA coverage for many individuals, and, unlike COBRA coverage, is available indefinitely.

In May 2013, the DOL issued an updated model COBRA election notice that contained some information about marketplace coverage options. (See our May 9, 2013 *For Your Information*.) This model notice advised individuals about the forthcoming opportunity to purchase coverage through the marketplace and about marketplace premium tax credits. The notice also explained that COBRA eligibility does not limit an individual's eligibility for a marketplace premium tax credit.

> Buck comment. For purposes of the premium tax credit, COBRA coverage is treated differently than coverage for active employees. Active employees who are eligible for employer coverage that meets affordability and minimum value standards are not eligible for marketplace premium tax credits. (See our June 18, 2012 *For Your Information*).

Proposed rules and model notices

On May 2, 2014, with the marketplace now up and running, the DOL issued proposed rules that removed prior model notices from its COBRA regulations and released new versions of the COBRA model general notice and model election notice.These new notices highlight the availability of marketplace coverage. To accompany these proposed rules, DOL, IRS, and HHS together released a new set of ACA-related FAQs stating that the model COBRA notices are available on DOL's website.

Updated model general notice. The general notice highlights the availability of marketplace coverage, noting that individuals losing group health coverage may be eligible to buy an individual plan through the marketplace, where they might qualify for lower costs on monthly premiums and out-of-pocket expenses. It also states that marketplace coverage may cost less than COBRA coverage.

Updated model election notice. The election notice expands on the language of the 2013 model election notice. It describes the marketplace as offering "one-stop shopping" for finding and comparing private health insurance options; explains how marketplace subsidies that lower monthly premiums and cost-sharing reductions may be available; and informs individuals that they can learn through the marketplace whether they qualify for free or low-cost coverage through Medicaid or the Children's Health Insurance Program (CHIP). The model election notice points out that an offer of COBRA coverage does not limit an individual's eligibility for a marketplace tax credit, and explains that an individual has a 60-day marketplace special enrollment opportunity beginning on the date of the qualifying event.

The model election notice also cites factors for individuals to consider in deciding between COBRA and marketplace coverage, including whether and when an individual who elects COBRA coverage can switch to marketplace coverage. Specifically, an individual who elects COBRA coverage will be eligible for marketplace coverage during the annual marketplace open enrollment, upon experiencing an event that creates another marketplace special enrollment opportunity, such as marriage or the birth of a child, or upon exhausting COBRA coverage. In the absence of another special enrollment event, an individual who terminates COBRA coverage before the end of the maximum COBRA period will have to wait until open enrollment to enroll in marketplace coverage. An individual who enrolls in marketplace coverage relinquishes his or her COBRA rights.

Updated model CHIP notice. In conjunction with the model COBRA notices, DOL also updated the model CHIP notice to reflect marketplace alternatives.

The proposed rules also make technical changes that will enable the DOL to update future model COBRA notices simply by providing the most current versions on DOL's website. The DOL invites comments, due by July 7, 2014, on ways to improve the new model notices. It will consider use of these models to be good faith compliance with the COBRA notice requirements until final regulations are issued. However, as before, use of the model notices is not mandatory.

The model notices are designed for use by single-employer group health plans. Modifications may be necessary for other types of group health plans, such as multiemployer plans.

CMS bulletin on special enrollment period for qualified beneficiaries

Concurrent with the DOL's release of the updated COBRA notices, CMS issued a bulletin establishing a special enrollment period (along with other special enrollment periods and hardship exemptions) for current "COBRA-eligible individuals" and "COBRA beneficiaries" to enroll in plans through the federally facilitated marketplace (FFM) until July 1, 2014. According to the bulletin, the special enrollment period was provided because of concerns that the prior model COBRA notices (or other employer COBRA notices) did not sufficiently describe the availability of the marketplace options and that the lack of information could have affected coverage choices.

> Buck comment. While the guidance uses the terms "COBRA-eligible individuals" and "COBRA beneficiaries," the special enrollment period appears directed at qualified beneficiaries.

This special enrollment opportunity is applicable only to the FFM, although CMS encourages state-based marketplaces to adopt similar special enrollment periods.

> Buck comment. While CMS created this new special enrollment window to address what it expressed as the problem of previous COBRA notices insufficiently addressing marketplace options, the bulletin does not require employers to notify qualified beneficiaries about the special enrollment opportunity. Even so, employers looking to reduce their COBRA-related costs and/or ensure that qualified beneficiaries are aware of this special enrollment period may wish to consider a directed communication about this development. Given the July 1, 2014 deadline, such communication should be sent as soon as possible.

COBRA coverage in a marketplace world

Many anticipated that the availability of less expensive marketplace coverage would make the COBRA coverage provisions effectively irrelevant. While both employers and employees may find the marketplace alternative attractive, they should be aware of potential coverage gaps that individuals might experience when electing marketplace coverage — and the ways in which COBRA coverage can fill these gaps. The updated model COBRA notices do not address these gaps or the role of COBRA in filling them, nor do they discuss common reasons why an individual may prefer COBRA coverage even though it is more expensive and limited in duration.

COBRA as a bridge to fill coverage gaps

Unlike COBRA coverage, which, if elected, is generally retroactive to the date of the qualifying event, marketplace coverage is generally effective prospectively. This aspect of marketplace administration can leave individuals with gaps in coverage between the time their work-related coverage ends and marketplace coverage takes effect. Specifically, final regulations governing marketplace standards provide that when work-related coverage is lost, marketplace coverage may be effective, at the earliest, on the first day of the month following enrollment. When an individual loses work-related coverage, group health coverage may end immediately. In that case, an individual who enrolls in a marketplace plan could be without any coverage until the beginning of the following month. Even when group health coverage continues through the end of the month, as is the case for many employer-sponsored plans, depending on the loss of coverage date, the individual may have very little time within which to opt for a marketplace plan.

> Example 1. Mary's employment is terminated on May 1 and the plan provides that coverage ends immediately. Marketplace coverage would not begin until June 1 even if Mary enrolls right away. Mary has no coverage between May 1 and June 1.

> Example 2. John's employment is terminated on May 30 and the plan provides that coverage continues through the end of the month. John must enroll in marketplace coverage by the next day, May 31, for that coverage to take effect June 1. If John waits until June 15 to enroll, marketplace coverage will not take effect until July 1, and John will have no coverage between June 1 and July 1.

A qualified beneficiary could use COBRA coverage to fill in these gaps. Marketplace final regulations (which were issued after the updated model COBRA notices came out) provide that an individual who loses minimum essential coverage (such as work-related health coverage) has 60 days before *and* after the loss of coverage within which to select a marketplace plan. On the front end, this date range allows marketplace elections in anticipation of a loss of coverage, such as when an individual is still employed but has been notified of an upcoming termination date. On the back end, it incorporates the fact that a plan administrator generally has 44 days following a qualifying event to provide a COBRA election notice, and that a qualified beneficiary then has a 60-day period to elect COBRA coverage once the notice has been provided.

> Buck comment. Here's how the process can work. Rich loses work-related coverage on August 1 due to a qualifying event, and subsequently enrolls in marketplace coverage on September 16 (which is within 60 days of the loss of coverage). Rich then elects COBRA coverage on September 16 to fill the gap in medical coverage that occurs before the marketplace coverage becomes effective on October 1. Because COBRA coverage is retroactive to the date of the qualifying event, the COBRA coverage can fill the gap between August 1 and September 30. When the marketplace coverage becomes effective October 1, Rich drops the COBRA medical coverage as of September 30. Rich can disenroll from COBRA coverage by not paying COBRA premiums on a timely basis, as COBRA coverage is only effective with respect to the time period for which a qualified beneficiary pays COBRA premiums.

However, qualified beneficiaries who elect COBRA coverage should be mindful of the time limits of the marketplace special enrollment window. As the updated model election notice states and a recent CMS FAQ confirms, once the marketplace special enrollment window ends, a qualified beneficiary who voluntarily terminates COBRA coverage must wait until open enrollment to sign up for a marketplace plan The only exception would be if the individual qualifies for a different marketplace special enrollment period.

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Circumstances where COBRA coverage may be preferred

Additionally, while many COBRA-eligible individuals will undoubtedly opt for marketplace plans, there are a number of situations in which COBRA coverage might be preferable notwithstanding high COBRA premiums and the limited coverage duration.

For individuals who have already met or are close to meeting their annual deductible or the annual out-of-pocket limit, continuing their current coverage may make good financial sense — even factoring in the higher cost of the premiums. People undergoing a course of treatment may want to maintain access to the same network of available providers rather than switch providers, as may be necessary given the narrow provider networks that many marketplace plans offer. Yet other individuals experiencing a qualifying event may anticipate gaining different coverage in short order, such as by securing another job or gaining health coverage through another source like Medicare, and therefore may wish to maintain current coverage for the anticipated short time period.

In closing

Employers should carefully review the updated model notices and consider revising their COBRA notices in light of these models, given that the DOL will consider use of the models to be good faith compliance with COBRA notice requirements. As explained in the updated models, marketplace plans provide a cost-efficient alternative to COBRA coverage. Employers share in the cost savings when COBRA-eligible individuals choose marketplace plans over COBRA coverage. Nevertheless, the choice between COBRA and marketplace coverage is more complicated than the updated model notices suggest. Employers may wish to communicate with COBRA-eligible individuals about potential coverage gaps as well as considerations beyond the cost of premiums.

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