

[Billing Codes: 4510-29-P]

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210-AB65

Health Care Continuation Coverage

AGENCIES: Employee Benefits Security Administration.

ACTION: Proposed rules.

SUMMARY: These proposed regulations contain amendments to notice requirements of the health care continuation coverage (COBRA) provisions of Part 6 of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to better align the provision of guidance under the COBRA notice requirements with the Affordable Care Act provisions already in effect, as well as any provisions of federal law that will become applicable in the future.

DATES: Written comments on this notice of proposed rulemaking are invited and must be received by [insert date 60 days after publication in the **Federal Register**].

ADDRESSES: Written comments may be submitted to the Department of Labor as specified below. Any comment that is submitted will be shared with the other Departments and will also be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Comments, identified by “Health Care Continuation Coverage,” may be submitted by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail or Hand Delivery: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attention: Health Care Continuation Coverage.

Comments received will be posted without change to www.regulations.gov and available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Elizabeth Schumacher, Employee Benefits Security Administration, Department of Labor.

Customer service information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor’s website (www.dol.gov/ebsa).

SUPPLEMENTARY INFORMATION:

I. Background

The continuation coverage provisions, sections 601 through 608 of title I of the Employee Retirement Income Security Act (ERISA), were enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), which also promulgated parallel provisions of the

Internal Revenue Code (the Code) and the Public Health Service Act (the PHS Act).¹ These provisions are commonly referred to as the COBRA provisions, and the continuation coverage that they mandate is commonly referred to as COBRA coverage. COBRA, as enacted, provides that the Secretary of Labor (the Secretary) has the authority under section 608 to carry out the provisions of part 6 of title I of ERISA. The Conference Report that accompanied COBRA divided interpretive authority over the COBRA provisions between the Secretary and the Secretary of the Treasury (the Treasury) by providing that the Secretary has the authority to issue regulations implementing the notice and disclosure requirements of COBRA, while the Treasury is authorized to issue regulations defining the required continuation coverage.²

On May 26, 2004, the Department of Labor (Department) issued final regulations implementing various provisions of the COBRA notice requirements and model notices to facilitate compliance with the requirement to provide the general notice of continuation coverage (general notice) as well as COBRA continuation election notice (election notice).³ The model general notice was issued in an appendix to § 2590.606–1 and the model election notice was issued in an appendix to § 2590.606–4.

In general, under COBRA, group health plans must provide a written notice of COBRA rights to each covered employee and spouse (if any) “at the time of commencement of coverage” under the plan. Generally, the notice must be furnished to each covered employee and to the employee’s spouse (if covered under the plan) not later than the earlier of: (1) either 90

¹ The Code and PHS Act COBRA provisions, although very similar in other ways, are not identical to the COBRA provisions in title I of ERISA in their scope of application. The PHS Act provisions apply only to State and local governmental plans, and the Code provisions grant COBRA rights to individuals who would not be considered participants or beneficiaries under ERISA. *See* PHS Act, 42 U.S.C. 300bb–8; Code section 5000(b)(1).

² H.R. Conf. Rep. No. 99–453, 99th Cong., 1st Sess., at 562–63 (1985). The Conference Report further indicates that the Secretary of Health and Human Services, who is to issue regulations implementing the continuation coverage requirements for State and local governments, must conform the actual requirements of those regulations to the regulations issued by the Secretary and the Treasury. *Id.* at 563.

³ 69 FR 30084 (May, 26, 2004).

days from the date on which the covered employee or spouse first becomes covered under the plan or, if later, the date on which the plan first becomes subject to the continuation coverage requirements; or (2) the date on which the administrator is required to furnish an election notice to the employee or to his or her spouse or dependent.⁴

In addition to the general notice, group health plans must provide an election notice at the time of certain qualifying events.⁵ In general, an individual who was covered by a group health plan on the day before a qualifying event occurred may be able to elect COBRA continuation coverage upon a qualifying event (such as termination of employment or reduction in hours that causes loss of coverage under the plan).⁶ Individuals with such a right are called qualified beneficiaries. A group health plan must provide qualified beneficiaries with an election notice, which describes their rights to continuation coverage and how to make an election. The election notice must be provided to the qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event.

On May 8, 2013, the Department issued Technical Release 2013-02 and an updated model election notice with additional information regarding health coverage options that will be available beginning January 1, 2014 under the Patient Protection and Affordable Care Act (Affordable Care Act).⁷ The guidance highlighted that some qualified beneficiaries may want to consider and compare health coverage alternatives to COBRA continuation coverage that are available through a new competitive private health insurance market – the Health Insurance Marketplace (Marketplace). The Department also noted that some qualified beneficiaries may

⁴ See 29 CFR § 2590.606-1.

⁵ See 29 CFR § 2590.606-4.

⁶ For more information on COBRA continuation coverage requirements applicable to group health plans, see “An Employer’s Guide to Group Health Continuation Coverage Under COBRA,” available at www.dol.gov/ebsa/publications/cobraemployer.html.

⁷ See Technical Release 2013-02 available at <http://www.dol.gov/ebsa/newsroom/tr13-02.html>.

also be eligible for a premium tax credit (a tax credit to help pay for some or all of the cost of coverage in plans offered through the Marketplace).

These proposed regulations amend paragraph (g) of § 2590.606–1 and paragraph (g) of § 2590.606–4 and delete the two appendices containing the model notices to better facilitate provision of updated model election notices and solicit comment before promulgation of final regulations.

II. Overview of the Proposed Regulations

These proposed regulations contain amendments to notice requirements of the COBRA provisions of Part 6 of title I of ERISA to better align the provision of guidance under the COBRA notice requirements with the Affordable Care Act provisions already in effect, as well as provide valuable flexibility to respond to provisions of federal law that will become applicable in the future. The proposed amendment will eliminate the current version of the model general notice contained in the appendix of § 2590.606–1 and the model election notice contained in the appendix of § 2590.606–4 as these model notices are outdated. Additionally, these proposed regulations make technical changes to the instruction language pointing to the model notices in the appendices in paragraph (g) of § 2590.606–1 and paragraph (g) of § 2590.606–4. These changes will permit the Department to amend the model notices as necessary and provide the most current versions of the model notices on the Department’s website. These changes will also eliminate confusion that may result from multiple versions of the model notices being available in different locations. Contemporaneous with issuance of these proposed regulations, the Department is also issuing updated versions of the model general notice and model election notice, as well as guidance announcing the availability of such updated notices. These updated notices reflect that coverage is now available in the Marketplace and the updated model election

notice provides information on special enrollment rights in the Marketplace. The Department invites comment on ways to improve or streamline the model notices, whether the Department's provision of new model notices is sufficient and, if not, whether the Department should expand the underlying content requirements or require use of mandatory language.

The updated model notices are available in modifiable, electronic form on the Department's website at www.dol.gov/ebsa/cobra.html. As with the earlier models, in order to use these model notices properly, the plan administrator must complete them by filling in the blanks with the appropriate plan information. Until rulemaking is finalized and effective, the Department of Labor will consider use of the model notices available on its website, appropriately completed, to be good faith compliance with the notice content requirements of COBRA. The Department notes that the use of the model notices is not required. The model notices are provided solely for the purpose of facilitating compliance with the applicable notice requirements.

III. Economic Impact and Paperwork Burden

A. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to the requirements of the executive order and review by the Office of Management and Budget

(OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is not “significant” within the meaning of section 3(f) of the Executive Order. Therefore, the proposed rule was reviewed by OMB. However, because the rule merely removes the model notices from the CFR and the model notices themselves remain voluntary, the Department does not expect this rulemaking to result in significant costs or benefits.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the APA (5 U.S.C. 551 et seq.) and are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the rulemaking describing the impact of the rule on

small entities. Small entities include small businesses, organizations and governmental jurisdictions.

As discussed above, the proposed rule would amend the 2004 final regulation by deleting references to the model notices and two appendices containing the model notices to better facilitate provision of updated model election notices and solicit comment before promulgation of final regulations. The proposed rule does not make any material changes to the notices. Therefore, the Department hereby certifies that the proposed rule is not likely to have a significant economic impact on a substantial number of small entities. The Department welcomes public comments regarding its certification.

C. Paperwork Reduction Act

The Office of Management and Budget approved the COBRA model notice information collection request under OMB Control Number 1210-0123, which is scheduled to expire on October 31, 2016. As discussed above, the proposed rule would amend the 2004 final regulation by deleting references to the model notices and two appendices containing the model notices to better facilitate provision of updated model election notices and solicit comment before promulgation of final regulations. The Department does not believe that these minor modifications implement any substantive or material change to the information collection; therefore, no further review is requested of OMB at this time. The Department solicits comment on this understanding.

D. Congressional Review Act

This proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, will be transmitted to Congress and the Comptroller General for review.

E. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L.104-4), as well as Executive Order 12875, this proposed rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than \$100 million, adjusted for inflation, or increase expenditures by the private sector of more than \$100 million, adjusted for inflation.

F. Federalism Statement

Executive Order 13132 (Aug. 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

IV. Statutory Authority

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L.104-191, 110 Stat. 1936; sec. 401(b), Pub. L. 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111-148, 124 Stat. 119, as amended by Pub. L. 111-152, 124 Stat. 1029; Secretary of Labor's Order 1-2011, 77 FR 1088 (January 9, 2012).

List of Subjects in 29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2590 as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

1. The authority citation for Part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L.104-191, 110 Stat. 1936; sec. 401(b), Pub. L. 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111-148, 124 Stat. 119, as amended by Pub. L. 111-152, 124 Stat. 1029; Secretary of Labor’s Order 1-2011, 77 FR 1088 (January 9, 2012).

2. Section 2590.606-1 is amended by removing the appendix to the section, and revising paragraph (g) to read as follows:

§2590.606-1 General notice of continuation coverage.

* * * * *

(g) *Model notice.* The requirements of paragraph (c) of this section are satisfied with respect to a single-employer group health plan if the plan provides a notice in accordance with the model certificate authorized by the Secretary, appropriately modified and supplemented as necessary, consistent with guidance issued by the Secretary. Use of the model notice is not mandatory. The model notice reflects the requirements of this section as they would apply to single-employer group health plans and must be modified if used to provide notice with respect to other types of group health plans, such as multiemployer plans or plans established and maintained by employee organizations for their members. In order to use the model notice, administrators must appropriately add relevant information where indicated in the model notice,

select among alternative language, and supplement the model notice to reflect applicable plan provisions. Items of information that are not applicable to a particular plan may be deleted. Use of the model notice, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements of paragraph (c) of this section.

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3. Section 2590.606-4 is amended by removing the appendix to the section, and revising paragraph (g) to read as follows:

§2590.606-4 Notice requirements for plan administrators.

* * * * *

(g) *Model notice.* The requirements of paragraph (b)(4) of this section are satisfied with respect to a plan administrator if the plan provides a notice in accordance with the model certificate authorized by the Secretary, appropriately modified and supplemented as necessary, consistent with guidance issued by the Secretary. Use of the model notice is not mandatory. The model notice reflects the requirements of this section as they would apply to single-employer group health plans and must be modified if used to provide notice with respect to other types of group health plans, such as multiemployer plans or plans established and maintained by employee organizations for their members. In order to use the model notice, administrators must appropriately add relevant information where indicated in the model notice, select among alternative language, and supplement the model notice to reflect applicable plan provisions. Items of information that are not applicable to a particular plan may be deleted. Use of the model notice, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements of paragraph (b)(4) of this section.

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Signed this _____ day of _____, 2014.

Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
Department of Labor