New COBRA Model Notices and Coordination with Marketplace Enrollment

May 16, 2014

By Gretchen Harders, Michelle Capezza, Susan Gross Sholinsky, and Daniel J. Green*

On May 2, 2014, the U.S. Departments of Labor and Health and Human Services published a series of guidance and model notices clarifying the provision of health insurance to recently terminated employees. The Department of Labor issued proposed rules amending the notice requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"), to better align the COBRA notice requirements with the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 ("Affordable Care Act"). This would allow employers to advise employees upon termination of employment that the former employee may be eligible to purchase coverage through a Health Insurance Marketplace ("Marketplace"), which may be more affordable than their coverage offered under COBRA. The proposed rules were accompanied by a new Model Election Notice and COBRA Continuation Coverage General Notice that employers may use to satisfy their COBRA notice obligations. The guidance also provided a new model Children's Health Insurance Program ("CHIP") notice, which advises employees that they may potentially be eligible for CHIP subsidies. Recognizing that the interaction between COBRA and Marketplace coverage has not been clear, the Department of Health and Human Services also issued a bulletin providing for special enrollment periods for COBRA beneficiaries. This bulletin allows individuals eligible for or enrolled in COBRA coverage to enroll on the Marketplace until July 1, 2014.

Both COBRA and the Affordable Care Act offer health care coverage options to employees and their dependents when they lose health care coverage in connection with their termination of employment. COBRA allows former employees to elect to continue health care coverage generally for 18 months following termination of employment, provided that an employee pays the employer's cost of such coverage. Employees generally have 60 days upon receipt of the COBRA election forms to elect COBRA coverage. The Affordable Care Act allows employees who lose their employer-sponsored health care coverage to elect to purchase health insurance coverage on the Marketplace during a special enrollment period of 60 days following termination of employment.

The COBRA model notices were updated to educate employees of the availability of the new option to purchase insurance on the Marketplace as an alternative to COBRA coverage. Newly terminated employees are advised under the COBRA model notices to think carefully before making their election. If an employee elects to continue coverage through his or her employer through COBRA, and the employee ceases making payments after 60 days, the employee will no longer be eligible for the special enrollment period to purchase insurance on the Marketplace and will need to wait until the open enrollment period (unless there is another special qualifying event, such as marriage or birth of a child). If the employee receives a COBRA subsidy from the employer and the subsidy runs out, the employee will need to either continue to pay the full COBRA premium or wait until the next open enrollment period on the Marketplace. Another factor for employees to consider is that enrollment on the Marketplace is prospective, while enrollment in COBRA provides coverage retroactive to the date of termination of employment. This means it may not be possible for employees without advance notice of termination of employment to enroll in seamless coverage on the Marketplace.

An interesting question is what impact subsidized COBRA will have on Marketplace enrollment and vice versa. Employers are permitted to subsidize COBRA coverage offered under a group health plan, but employers are not permitted to subsidize the costs of individual health insurance coverage purchased through the Marketplace. Moreover, the availability of subsidized COBRA could affect the individual's eligibility for a premium tax subsidy on the Marketplace. The COBRA model election notice lists the factors that employees should consider in choosing coverage options (among them is the availability of severance payments and employer-subsidized COBRA coverage), and directs employees receiving severance packages to contact the Department of Labor for assistance in discussing their options. Though the rules have not yet been issued, employers also should be mindful that subsidized COBRA offered to highly compensated employees could result in a violation of the Affordable Care Act's nondiscrimination rules prohibiting insured health plans from discriminating in favor of highly compensated employees. That being said, subsidizing COBRA coverage for the first 60 days following termination of employment might be the best option for effectively bridging coverage to Marketplace enrollment for the downsized workforce.

Though Marketplace coverage may be cheaper, employers are obligated under federal and state law to offer COBRA coverage, and it is ultimately the employee's decision as to which coverage option to elect.

What Employers Should Do Now

- Update COBRA general and election notices to include the model language on a terminated employee's right to enroll in coverage on the Marketplace.

- Communicate with current COBRA or COBRA-eligible beneficiaries regarding their extended right to enroll in Marketplace coverage through July 1, 2014.

- Review and revise your existing group health plan's COBRA communications, policies, and procedures to address the availability of coverage on the Marketplace.

- Consider adding information regarding the Marketplace to any termination notices that may be required under applicable state law, particularly those that require you to confirm an employee's last day of health insurance coverage.

****

For more information about this Advisory, please contact:

Gretchen Harders	**Michelle Capezza**	**Susan Gross Sholinsky**
New York	New York	New York
212-351-3784	212-351-4774	212-351-4789
gharders@ebglaw.com	mcapezza@ebglaw.com	sgross@ebglaw.com

*__Daniel J. Green__, a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm's New York office, contributed significantly to the preparation of this Advisory.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.