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Take Notice of COBRA Content in SPD

By Rich Glass, JD

COBRA is a notice-driven law. There is the general notice, the election notice, the unavailability notice, the early termination notice and premium shortfall notice, to name a few. Another COBRA notice worthy of attention is the summary plan description (SPD), the major notice from ERISA.

The SPD is probably the benefits document that is most akin to our Bill of Rights, the first 10 Amendments to the U.S. Constitution. On its Web site, the U.S. Department of Labor (DOL) sums up the SPD this way: "The summary plan description is an important document that tells participants what the plan provides and how it operates."

SPD Requirements Are Clear

The SPD content regulations, issued in 2000, provide a long list of more than 20 specific elements that must be in SPDs for each ERISA plan. Some do not apply to group health plans. But one clear requirement is in section (o) of those regulations:

A description of the rights and obligations of participants and beneficiaries with respect to continuation coverage, including, among other things, information concerning qualifying events and qualified beneficiaries, premiums, notice and election requirements and procedures, and duration of coverage.

Another clear requirement is the ERISA rights statement, which contains one paragraph on COBRA.

Employers must pay special attention to the COBRA SPD requirement. The failure to do so can cost employers dearly.

In *Lifecare Hospitals v. Health Plus of Louisiana*, the SPD was silent on the length of the election period, which under COBRA must be "at least 60 days." Due to that mistake, the plan was required to cover more than \$250,000 in unpaid claims. In *Branch v. G. Bernd Co.*, the SPD stated COBRA had

a 31-day election period. This inaccurate statement and other factors led the court to hold that election period was "open ended," putting the employer's plan on the hook for almost \$100,000 in unpaid claims. Finally, in *Phillips v. Riverside*, the plan tried to rely on the COBRA statement in the SPD to show that the qualified beneficiary had proper notice of his COBRA rights. The court concluded that the COBRA SPD verbiage was "confusing at best," holding the plan administrator responsible for nearly \$40,000 in unpaid claims.

There is another reason why the COBRA SPD wording is so important. The general and election notices must contain a statement that more complete information regarding COBRA rights is available in the SPD.

COBRA Content in SPD

What content should be in the COBRA SPD?

The COBRA general notice is a good starting point. The DOL COBRA notice regulations set out six required elements that essentially cover all the main points related to COBRA, including qualified beneficiaries' rights and obligations. In fact, some employers simply insert the COBRA general notice into the SPD to satisfy the COBRA requirement. You should exercise caution, however, because the delivery requirements differ between the COBRA general notice and the SPD. While they both have a 90-day deadline from when coverage starts, the general notice must be provided to the employee and any spouse, while SPD delivery is only required to the employee. The SPD is often provided in person and can be provided electronically with prior informed consent. It is impractical to meet the COBRA requirement with in-hand or e-mail delivery. First class mailing is necessary.

See *COBRA & SPD*, p. 17

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An SPD should address the interplay between COBRA and the Family and Medical Leave Act (FMLA). Under the FMLA, the qualifying event does not occur when the reduction of hours occurs, but when the employee fails to return from leave. The COBRA coverage offered to FMLA individuals is based on coverage the day before FMLA leave began, not the day before the termination of employment.

At least one court has held that an SPD should discuss the implications of not electing COBRA.

The Trade Act of 2002 makes available a second election period for those former employees who become eligible for trade adjustment assistance. While the DOL's model general notice does not include Trade Act language, DOL has indicated that information on this special election right should be in the SPD. The DOL's model election notice contains a paragraph on the Trade Act that can be incorporated in the SPD for this purpose.

The SPD COBRA statement should include the requirements for qualified beneficiaries to notify the plan for certain events (for example, divorce, dependent ceasing to be a dependent). These notice procedures should contain the 60-day timeframe and identify whom to contact. Failure to provide notice of these reasonable procedures could delay the notification timeframe.

To the extent that the employer offers retiree health coverage, the SPD should clarify how that coordinates with COBRA. Sometimes, retiree coverage is offered as COBRA alternative coverage. Sometimes, retiree coverage consists of subsidized COBRA coverage. Other times, it is simply viewed as a continuation of active employee coverage, under the same terms and conditions.


At least one court has held that an SPD should discuss the implications of not electing COBRA. Failing to elect COBRA can cause a gap in creditable coverage for HIPAA purposes and may affect the availability of other types of coverage (for example, post-COBRA state continuation, state high risk pool coverage).

The American Recovery and Reinvestment Act of 2009 (ARRA) should have prompted changes to a variety of documents, including the SPD. ARRA makes available a 65-percent premium subsidy to assistance eligible individuals (AEIs). The AEI requirements and

other ARRA rules are not easy to understand. A summary of the major provisions should be in an employer's general notice, election notice and the SPD.

The ARRA provisions alone should have necessitated an update to the SPD in 2009 because COBRA rights, obligations, premiums and elections changed. The DOL issued model notices that can form the basis for the SPD verbiage. Whenever a material modification is made to the SPD, it must be communicated to all plan participants within 210 days after the end of the plan year in which the material change occurs or within 60 days, if it causes a material reduction in benefits. Therefore, from a technical standpoint, because ARRA did not cause a material reduction in benefits, most employers still have time to make ARRA-related changes to the SPD. However, taking action, not waiting until the last minute, is recommended.

Now that an ARRA's extension has been enacted, additional updates to the SPD and communication to plan participants are required.

The SPD is one of the most important benefits documents for a group health plan. It should be at the fingertips of every benefit professional that has responsibility for plan administration. COBRA is a key building block of the SPD. 

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