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### DOL Issues Proposed Regulations On COBRA Notices

On May 28, 2003, the Department of Labor (DOL) issued proposed regulations regarding the various notices and disclosures required by COBRA. The proposed regulations (29 CFR Part 2590) make significant changes to the COBRA notice requirements, including:

- Requiring the initial COBRA notice (called the "general notice" in the proposed regulations) to be provided to covered employees and covered spouses within 90 days after coverage under a group plan begins, and specifying the content of the initial notice;
- Requiring that employers provide plan administrators notice of certain qualifying events (death, termination of employment, reduction in hours or Medicare entitlement) usually within 30 days, and describing the content of such notices;
- Defining rules governing when and how plan administrators can require covered employees and qualified beneficiaries to provide notice of certain qualifying events, and the consequences that plan administrators may impose for failure to provide these notices within the specified time limits;
- Requiring plan administrators to provide the COBRA election notice within 14 days after receiving notice of a qualifying event, and specifying 15 provisions the election notice must contain;
- Requiring plan administrators to provide a notice of unavailability of COBRA continuation coverage (usually within 14 days) if, after receiving notice of a qualifying event, the plan administrator determines that the individual is not entitled to COBRA continuation coverage, and specifying the contents of this notice; and
- Requiring plan administrators to provide qualified beneficiaries who are receiving COBRA continuation coverage a written notice of any termination of their COBRA coverage that is earlier than the applicable maximum coverage period.

The final form of these proposed regulations will be effective as of the first day of the first plan year that occurs on or after January 1, 2004.

The proposed regulations reaffirm the 44-day time limit for providing the COBRA election notice, when the employer is also acting as the plan administrator.

The DOL has published an updated model initial notice as an appendix to the proposed regulations. In the preamble to the proposed regulations, the DOL stated that it will not consider use of the older notice found in ERISA Technical Release 86-2 (TR 86-2) as evidence of good-faith compliance on the part of either the employer or plan administrator. The DOL's position reflects the fact that

COBRA has been amended since the DOL released TR 86-2, and it has not previously reissued the model notice to incorporate the amendments. Because the DOL has now stated that use of an initial notice based on TR 86-2 will not show good-faith compliance, employers should modify their initial notice to reflect the provisions of the model notice released with the 2003 proposed regulations, in order to provide the most current and correct information they can.

Under the proposed regulations, plans may also require covered employees and qualified beneficiaries to provide the plan administrator with notice of the following:

- Occurrence of a second qualifying event after a qualified beneficiary has become entitled to COBRA coverage with a maximum duration of 18 or 29 months;
- Determination by the Social Security Administration, under Title II or Title XVI of the Social Security Act, that a qualified beneficiary has been found to be disabled at any time during the first 60 days of COBRA continuation coverage;
- Determination by the Social Security Administration that a qualified beneficiary previously found to be disabled is no longer disabled.

According to the proposed regulations, if a plan administrator is notified of a qualifying event, and subsequently determines that the individual is not entitled to COBRA coverage under the law, then the plan administrator is required to provide the individual with an explanation as to why the individual is not entitled to elect COBRA coverage. The plan administrator must provide this notice to the individual within 14 days of after receiving notice of the qualifying event (or within 44 days of receiving notice of the qualifying event, if the plan administrator is also the employer of the individual concerned).

Plan administrators must provide qualified beneficiaries with a notice of termination of continuation coverage. This notice is required whenever a qualified beneficiary's COBRA coverage is terminated earlier than the end of the maximum period of COBRA coverage to which they are entitled by virtue of the qualifying event. Accordingly, if the plan administrator is terminating COBRA coverage for non-payment (either because the payment was insufficient by a not insignificant amount, or because the payment was not made or was made after the end of the applicable grace period), then the plan administrator must send the qualified beneficiary this notice of termination of COBRA coverage. This notice must be written in a manner calculated to be understood by the average plan participant, and must include the following information:

- The reason the COBRA coverage has terminated earlier than the end of the maximum period of COBRA coverage applicable to the qualifying event;
- The date of the termination of the COBRA coverage; and
- Any rights the qualified beneficiary may have under the plan or under applicable law to elect an alternative group or individual coverage, such as conversion coverage.

***Garner Consulting can help you comply with the COBRA regulations.***

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*Garner Consulting does not practice law. Please seek qualified counsel if you need legal advice. For employee benefits or managed care consulting, please call Zaven Kazazian or Andy Keowen at (626) 440-0399.*

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