

BENEFIT

Plan Developments

A monthly report covering plan design and legislative changes

Volume 46, Number 8

COBRA Notice Requirements Being Updated

New regulations have been proposed by the Department of Labor (DOL) to clarify the requirements for notices that employees, employers, and plan administrators must issue under the 17-year-old **Consolidated Omnibus Budget Reconciliation Act (COBRA)**.

The DOL regulations are intended to be effective for plan years beginning in 2004. They address four existing notification areas mentioned in COBRA, and call for two new notices not previously mentioned in the statute. The notification areas are:

- Initial or general notice;
- Qualifying event notices from employers to plan administrators;
- Notices employees and family members must provide plan administrators;
- Election notice plan administrators must provide employees and family members;

- Notice of unavailability of COBRA coverage (new); and
- Notice of termination of COBRA coverage (new).

Some Notification Details

The *general notice*, which provides basic information on COBRA that employees and their family members need to

know prior to a qualifying event, must be provided to qualified individuals within 90 days after the plan's coverage begins. This general notice requirement can be satisfied by including the information in the **summary plan description (SPD)** which is subject to the same 90-day deadline. The SPD must be sent to the covered employee; it does not have to be sent to the uncovered spouse. If a married couple is enrolled in the plan and resides at the same address, one notice to both can be used. If an employee and spouse enroll in the plan at different times, however, separate notices must be sent to each.

Employers must send *qualifying event notices* (e.g., termination of employment, reduction in hours) to plan administrators within 30 days of the event.

Employees or family members must *notify plan administrators* of qualifying events (e.g., divorce, legal separation, loss of depend-

In This Issue

- LTCI Now Seen As Important, Says Benefit Study
- High Court Clarifies Physician Rule In Disability Case
- Not Checking Facts Means Sleeping Employee Wronged
- Legislative Action



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The *general notice* must be provided within 90 days after coverage begins.

ent status) affecting their participation in the plan. Plans must have a reasonable procedure for furnishing these notices and for setting time limits on submission.

The notice that plan administrators provide to qualified employees and their family members of their right to elect continuing coverage *must be in writing* and describe available health plan options, premium payment requirements, consequences for not taking COBRA, and how coverage could be extended due to a disability or a second qualifying event. (The DOL proposal includes a model election notice.)

The DOL proposal included *two new notice requirements* for plan administrators: notice of unavailability of continuing coverage and notice of termination of COBRA coverage. The first, which must be provided within 14 days after a plan administrator receives notification from individuals of a qualifying event, would explain why an employee or family member is not entitled to continuation coverage. The second, which must be provided as soon as practical, must be in writing and contain the reason and the date for early termination, as well as the rights of the qualified employee or family member for alternative coverage.

A DOL fact sheet on the proposal can be found at <http://www.dol.gov/ebsa>.

LTCI Now Seen As Important, Says Benefit Study

Employees now consider **long-term care insurance (LTCI)** and group life insurance as equally important company benefits, accord-

ing to Prudential Financial Inc.'s *2003 LTC Insurance Employee Benefit Study*.

The focus on LTCI as a benefit is understandable, according to study findings, given the fact that "virtually all Americans have been touched by a family member or friend making the often difficult financial decisions and sacrifices needed when long-term care assistance becomes necessary."

Although many employees have apparently witnessed the need for LTCI, a majority of them need to be educated about its benefits and features. Only 14% of those surveyed said they feel very familiar with the benefits and features of LTCI, and only 30% said they had attempted to learn about such insurance from a financial professional.

Prudential said the study signals an opportunity for employers to improve the financial safety and confidence of their employees by adding LTCI to their palette of employee benefits.

Other findings from the study:

- 62% of employees said they would consider LTCI as a voluntary benefit if it was offered by their employers;
- 82% said they would consider buying LTCI coverage if their employer subsidized its cost; and
- 62% either believed or were unsure if government programs were in place that would cover nursing home or home health care aide costs.

In conjunction with the study, a Prudential vice president noted that many employees don't realize that, unless a person becomes impoverished, **Medicare** does not necessarily pay for custodial care. As a result, many are beginning to realize their retirement savings could be placed in jeopardy in the absence of LTCI.

The Prudential survey was taken in March 2003. A total of 300 full-time or part-time employees who ranged in age from 25 to 65 participated in the survey.

High Court Clarifies Physician Rule In Disability Case

The U.S. Supreme Court has ruled that employer-sponsored health care plans do not need to defer to an employee's doctor when making decisions to cover **disability claims**. In issuing the ruling, the court overturned a decision by the 9th U.S. Circuit Court of Appeals that said the "treating physician rule" applies in making disability decisions.

In writing about the ruling, Justice Ruth Bader Ginsburg said: "We hold that plan administrators are not obliged to accord special deference to the opinions of treating physicians." Justice Ginsburg noted the "treating physician rule" imposed by the lower court was originally developed by the Court of Appeals as a means to control disability determinations by administrative law judges under the **Social Security Act**.

By accepting and codifying such a rule, Justice Ginsburg noted, the Social Security commissioner sought to serve the need for efficient administration of an obligatory nationwide benefits program. In contrast, the justice pointed out, nothing in the **Employee Retirement Income Security Act of 1974 (ERISA)** requires employers to establish employee benefits plans or mandates what kind of benefits employers must provide if they choose to have such a plan.

In issuing the clarification, the high court settled a dispute between

Black & Decker Disability Plan and Kenneth Nord, an employee who suffered from a degenerative disk disease and chronic pain. When Nord said his condition rendered him unable to work, Black & Decker referred him to a neurologist for an independent examination. The neurologist concluded that, aided by pain medication, Nord could perform sedentary work. As a result, Nord filed suit under ERISA.

As part of its ruling, however, the high court said that plan administrators "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." But courts have no warrant to require administrators to automatically provide special weight to the opinions of a claimant's physician, nor impose a discrete burden of explanation on administrators when they credit reliable evidence that conflicts with a treating physician's evaluation.

Not Checking Facts Means Sleeping Employee Wronged

By failing to ascertain the nature of a medical emergency, the 7th Circuit Court of Appeals ruled a company did not abide by provisions outlined in the **Family and Medical Leave Act (FMLA)** and, therefore, should not have fired him after security videos revealed he was frequently sleeping on the job.

In *John Byrne v. Avon Products, Inc.*, the appeals court reversed a district court ruling, stating Byrne and his family had repeatedly advised the company of Byrne's need for leave to deal with a serious health condition, but the company's response was to ignore the situation and then to fire him.

Health care plans do not need to defer to "treating physician rule."

The firing occurred after Byrne's supervisor attempted to confront him about sleeping on the job, only to discover Byrne had left work early. The supervisor then attempted to contact Byrne by phone, but was told by the employee's sister that he was "very sick." Ultimately, Byrne agreed to a meeting to discuss the issue but then failed to attend it. The company fired Byrne for missing the meeting, as well as sleeping on the job.

However, Byrne was found to be suffering from severe depression, hallucinations, and panic attacks and, following two months of treatment, asked to be rehired. When Avon refused, Byrne filed suit under FMLA and the **Americans with Disabilities Act (ADA)**.

The court found that the employee's sister's comment about Byrne being "very sick" should have provided sufficient notice for FMLA leave. Furthermore, the appellate court noted that evidence showed Byrne had been a model employee prior to a sudden change in behavior and his sleeping on the job.

In noting a district court's earlier ruling in favor of the company, the appellate court said no court should "act as a super personnel department. . .yet that is one of the district court's errors in this case: it decided that sleeping on the job was a terminable event. . .effectively substituting its view of how Avon should make decisions, without paying attention to the facts."

Legislative Action

Genetics Information Protection

The Genetics Information Non-discrimination Act (S.1053) has been unanimously approved by the

Senate Health, Education, Labor and Pensions Committee. The bill would protect individuals from discrimination in hiring, employment, and health insurance on the basis of genetic information.

Besides denying individuals the ability to enroll in health insurance plans, the Act would prohibit health insurance plans from charging higher premiums because of genetic information, or from basing premiums of a group health plan on genetic information of members or their families.

Sen. Judd Gregg, R-NH, chairman of the approving committee, said the legislation "fulfills the promise of the Human Genome Project" and encourages individuals to take advantage of genetic screening, counseling, testing, and new therapies while being protected by the law.

'Time Off' Pay Proposal Withdrawn

Fearing a legislative defeat, Republican leaders in the U.S. House of Representatives withdrew a bill that would have allowed employers to offer hourly workers compensatory time off instead of overtime pay.

The bill would have amended the Fair Labor Standards Act of 1938 which ensures that hourly workers receive time-and-a-half pay for overtime in the week it is worked. The amendment would have allowed employees to choose between pay or time off, both calculated at a time-and-a-half rate. Employers, however, would be able to prevent employees from taking days off they believed would unduly disrupt business.

Proponents said the bill would give employees flexibility to spend more time with their families, while critics said the measure would place pressure on employees to please their employers by forgoing overtime pay.

The Act would prohibit plans from making charges based on genetic information.
