

LAW WATCH

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NEW CALIFORNIA LAW EXTENDS COBRA COVERAGE

The California Legislature recently passed a new law, Assembly Bill No. 1401, which extends the maximum period of COBRA coverage under insured healthcare plans to 36 months for qualifying events occurring on or after January 1, 2003.

Background

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") is the federal law requiring employer-sponsored group health plans to offer beneficiaries, who would otherwise lose coverage as a result of a "qualifying event," the opportunity to elect continuation of their health plan coverage. Qualifying events include loss of a job, a reduction in hours, and death or divorce of the employed spouse or parent. The period of continuation coverage depends on the nature of the qualifying event; continuation coverage for up to 18 months must be available when loss of coverage is due to termination of employment or reduction in hours, and 36 months of continuation coverage must be available for loss of coverage due to death or divorce. COBRA exempts group health plans maintained exclusively by employers who have fewer than 20 employees.

"Cal-COBRA" is a California law that was originally enacted to provide for continuation coverage to employees of small employers who were not governed by COBRA. Cal-COBRA

Executive Summary

Action: AB 1401 requires HMOs and health insurers to extend California's COBRA continuation coverage period to 36 months for all qualified beneficiaries.

Impact: AB 1401 applies to HMOs and health insurers. The new law does not apply to self-insured plans, and imposes no express obligations on employers. However, employers may want to provide notice of the availability of extended coverage under AB 1401 when COBRA termination notices are given.

Effective Date: The new law applies to all individuals who begin COBRA continuation coverage on or after January 1, 2003. However, since beneficiaries must exhaust their initial continuation periods under federal COBRA or Cal-COBRA (at a minimum, initial coverage will be 18 months), no person will be covered under AB 1401 continuation coverage before July 1, 2004.

requires continuation coverage for individuals who work for employers with between 2 and 19 employees.

Cal-COBRA otherwise generally mirrors the Federal law, with a few exceptions. For example, Cal-COBRA generally allows a premium charge of 110% for the continuation coverage, as opposed to the 102% limit of COBRA.

New Cal-COBRA Law

Cal-COBRA was recently amended by Assembly Bill No. 1401. The new law, codified at California Health and Safety Code Section 1363.06 *et seq.* and California Insurance Code Section 10127.14 *et seq.*, extends the continuation coverage period to 36 months with respect to all qualifying events occurring on or after January 1, 2003. The new law requires health care service plans/health maintenance organizations ("HMOs") and health insurance carriers to offer enrollees of employer-sponsored healthcare plans, who have exhausted continuation coverage under federal COBRA, the opportunity to continue coverage for up to 36 months from the date the enrollees' continuation coverage began. The new law, therefore, applies to plans covering California employers with 20 employees or more. Notification of the extended coverage must be included in the notice of pending termination of COBRA coverage that is already required by both Cal-COBRA and federal COBRA.

Application of the New Law to HMOs And Health Insurance Carriers

The new law imposes the duty to provide continuation coverage on "health care service plans." A "health care service plan" is generally a health maintenance organization ("HMO") and is defined in California's Health and Safety Code to include (1) "Any person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees"; or (2) "Any person, whether located within or outside of this state, who solicits or contracts with a subscriber or enrollee in this state to pay for or reimburse any part of the cost of, or who undertakes to arrange or arranges for, the provision of health care services that are to be provided wholly or in part in a foreign country in return for a prepaid or periodic charge paid by or on behalf of the subscriber or enrollee."

Case law in California has held that an employer is considered a "subscriber" when the employer is responsible for payment to the plan. The employer is not, for purposes of Cal-COBRA (which is contained in California's Knox-Keene Health Care Service Plan Act) a "health care service plan." Accordingly, Cal-COBRA, as amended by Assembly Bill No. 1401, does not require *employers* to provide continuation coverage beyond the period required under COBRA; rather, it requires health care service plans (HMOs) to provide such coverage.

Assembly Bill No. 1401 made parallel amendments to the California Insurance Code. Insurance Code Section 10128.59 provides that a health insurer that provides coverage under a group benefit plan to an employer shall offer an insured who has exhausted continuation coverage under COBRA the

opportunity to continue coverage for up to 36 months from the date the insured's continuation coverage began if the insured is entitled to less than 36 months of continuation coverage under COBRA. A related provision of the Insurance Code, Section 10128.51, excludes from the definition of "employer" any person or entity covered by federal COBRA.

Thus, HMOs and insurers providing group health plans or coverage for employers need to extend their offered continuation coverage to 36 months. The new law does not, however, require employers to provide the extended continuation coverage. The only obligation the new law arguably imposes on employers is the obligation to notify COBRA beneficiaries of their rights under AB 1401, as discussed below.

Application of the New Law to Self-Insured Plans

The new law does not apply to self-insured health care plans that are covered by the Employee Retirement Income Security Act ("ERISA"). In *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985), the U.S. Supreme Court ruled that state laws governing self-insured benefit plans are subject to ERISA preemption.

Will AB 1401 Be Preempted by ERISA?

A healthcare plan operated by a private employer will normally be governed by the provisions of ERISA. ERISA generally preempts state laws that "relate to any employee benefit plan." However, there is an exception to preemption, known as the ERISA "savings clause," which provides that any state law which regulates the business of insurance is "saved" from preemption. We believe that the new law would be pre-empted by ERISA with respect to self-insured plans. However, we do not believe the new

law is subject to preemption with regard to HMOs and insured plans as a result of the savings clause.

Employers May Want to Notify Federal COBRA Recipients of Their Cal-COBRA Continuation Rights Under the New Law

The new law provides that notification of the availability of extended COBRA coverage to 36 months shall be included in the notice of pending termination of COBRA coverage that is required to be provided to federal COBRA beneficiaries and that is required to be provided under Cal-COBRA. However, this notice requirement falls on the insurer or HMO, and not the employer, under the express terms of the new law. Though there is no obligation to do so, employers may wish to include in coverage termination notices a statement of the availability of the additional continuation coverage under Cal-COBRA.

If you have questions about the new law, please contact **Terri Wagner Cammarano** or **Richard Albert** in our Los Angeles office, **Robert Goldstein** in our San Diego North office, **Sam Hoffman** or **Marian Dodson** in our San Diego South office, or the member of the firm who normally handles your legal matters.

This *Law Watch* was authored by Terri Wagner Cammarano of the Los Angeles office. *Law Watch* is a review of recent legal developments prepared by the law offices of Foley & Lardner. The information reported should not be construed as legal advice, nor utilized to resolve legal problems. Recent issues of *Law Watch* are also available on our web site at:

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Editor: Clare Richardson.

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Brussels

Avenue Lloyd George 6
B-1000 Brussels, Belgium
011-32-2-639-2710

Chicago

One IBM Plaza
330 North Wabash Ave., Suite 3300
Chicago, IL 60611-3608
(312) 755-1900
Three First National Plaza
70 West Madison St., Suite 4200
Chicago, IL 60602-4204
(312) 558-6600

Denver

1999 Broadway, Suite 2270
Denver, CO 80202
(303) 294-4400

Detroit

150 W. Jefferson Ave., Suite 1000
Detroit, MI 48226-4443
(313) 963-6200

Jacksonville

The Greenleaf Building
200 Laura Street
Jacksonville, FL 32202-3510
(904) 359-2000

Los Angeles

2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3021
(310) 277-2223

Madison

150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035

Milwaukee

777 East Wisconsin Ave., Suite 3800
Milwaukee, WI 53202-5367
(414) 271-2400

Orlando

111 North Orange Ave., Suite 1800
Orlando, FL 32801-2386
(407) 423-7656

Sacramento

300 Capitol Mall, Suite 1125
Sacramento, CA 95814-4339
(916) 443-8005

San Diego

402 West Broadway, Suite 2300
San Diego, CA 92101-3542
(619) 234-6655
11250 El Camino Real, Suite 200
San Diego, CA 92130
(858) 847-6700

San Francisco

One Maritime Plaza, Sixth Floor
San Francisco, CA 94111-3409
(415) 434-4484

Tallahassee

106 East College Ave., Suite 900
Tallahassee, FL 32301-7732
(850) 222-6100

Tampa

100 North Tampa Street, Suite 2700
Tampa, FL 33602-5810
(813) 229-2300

Washington, D.C.

3000 K Street, N.W., Suite 500
Washington, D.C. 20007-5143
(202) 672-5300

West Palm Beach

777 South Flagler Dr., Suite 901
West Palm Beach, FL 33401-6195
(561) 655-5050