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California Extends Cal-COBRA Coverage

The California Legislature recently passed a new law, Assembly Bill 1401 (AB 1401), which will significantly expand COBRA coverage for California employees ("Cal-COBRA"). The new law applies to individuals who begin receiving COBRA or Cal-COBRA coverage on or after January 1, 2003. Employers will not feel the effects of the new law, however, until July 1, 2004, or 18 months after the effective date.

Overview of Federal COBRA

Under existing federal law, the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), employers with 20 or more employees must make continued health coverage available to employees and their dependents who lose coverage under the employer's group health plan due to the occurrence of certain qualifying events (such as divorce, termination of employment, and ceasing to meet the requirements to be considered a dependent). Employees and beneficiaries are eligible for continuation coverage for up to 18 months, 29 months or 36 months, depending on the event that caused the individual to lose coverage, and whether the individual is disabled. Employers may charge for COBRA coverage.

Overview of Previous Cal-COBRA

California previously had its own version of COBRA, which imposed on certain plans of small employers not subject to federal COBRA (with 2 to 19 employees) continuation coverage requirements that are very similar to federal COBRA requirements. Whether the California Legislature has the authority to regulate in this area remains an open question. However, since Cal-COBRA originally affected only insured small employer plans, its impact has been limited.

The New Extended Cal-COBRA Law

The enactment of AB 1401 is a dramatic expansion of the Cal-COBRA program that will significantly affect both small employers who sponsor plans subject to Cal-COBRA and larger employers, with California employees, who sponsor plans subject to federal COBRA. Specifically, AB 1401 extends Cal-COBRA in two important respects. First, the maximum coverage

period for all individuals eligible for Cal-COBRA has been extended to 36 months. Second, individuals in California who are eligible for less than 36 months of federal COBRA, and who exhaust their coverage under COBRA, will then have the opportunity to continue coverage under Cal-COBRA for up to a total of 36 months.

Types of Plans Subject to the New Law

The new Cal-COBRA provisions, like the original law, apply to "health care service plans," which are defined under California law to include insured plans (including HMOs and insured PPOs), but do not apply to self-insured plans. Therefore, this new law affects insured options offered by larger employers subject to COBRA, but does not change the maximum COBRA continuation period applicable to their self-insured options.

For Cal-COBRA beneficiaries who become eligible for extended coverage under the new law, the extension of coverage will apply to plans providing both "core" (i.e., medical and hospital benefits) and "non-core" (i.e., dental and vision benefits) coverage. However, for federal COBRA beneficiaries who elect to continue coverage under the new Cal-COBRA law, the additional coverage only applies to plans that offer "core" coverage, or medical and hospital benefits. Therefore, plans that provide "non-core" coverage only, such as vision and dental, are not required by AB 1401 to provide extended coverage to federal COBRA beneficiaries.

Effective Dates

AB 1401 applies only to those federal COBRA or Cal-COBRA beneficiaries who begin receiving continuation coverage on or after January 1, 2003. Therefore, the extended coverage requirements of the new Cal-COBRA law will not have a practical effect earlier than July 1, 2004, when the 18-month coverage period under federal COBRA or the previous Cal-COBRA law has expired for an individual beginning such coverage on January 1, 2003.

Premiums for Continuation Coverage

Federal COBRA permits a plan to charge an individual receiving

COBRA coverage 102% of the cost of such coverage under the employer's plan. The plan may also charge up to 150% of the cost of coverage under the employer's plan for individuals who qualify for an extension of coverage from 18 to 29 months due to disability. Cal-COBRA allows the plan to charge 110% of the cost of coverage (150% for individuals whose coverage is extended due to disability). Therefore, if a federal COBRA beneficiary elects to extend his or her coverage under Cal-COBRA, the beneficiary could be charged more for such coverage.

Also, based upon the disparities in the rates permitted under federal and state law, the advantage for disabled individuals eligible for extended COBRA coverage under federal law is lost. It appears that if disabled individuals do not apply for a disability extension (an extra 11 months of coverage) to which disabled individuals are entitled under federal COBRA, the disabled individuals now can qualify for the entire additional 18 months under Cal-COBRA at a lower cost.

Notice Requirement

AB 1401 requires that the Cal-COBRA notice be revised to reflect the extension of the maximum coverage period to 36 months. This notice is separate from the federal notice requirement. The new law also requires a "notice of pending termination of COBRA coverage that is required to be provided to COBRA beneficiaries . . ." contain notification of the extended coverage available under Cal-COBRA. However, this last requirement is confusing because COBRA does not require that a notice of pending termination of coverage be provided. Still, it is clear that the intent of the law is that notice should be provided prior to the expiration of a federal COBRA beneficiary's coverage. The notice of the new Cal-COBRA coverage could be included with the initial COBRA notice; however, technically that is not what the new law requires. Hopefully, this issue will be clarified before the first COBRA beneficiaries become eligible for extended coverage under Cal-COBRA. Generally, the Cal-COBRA notice requirements apply to the plan's insurance carrier and not to the employer. It remains to be seen, however, whether California courts will find that the notice requirements apply to an employer who serves as the plan administrator as well.

ERISA Preemption

Finally, there is a question as to whether the new law may be preempted altogether by ERISA, and therefore unenforceable. In a recent case in Maryland, a court determined that a law very similar to Cal-COBRA was preempted by ERISA. Even though, as with Cal-COBRA, its application was limited to insurers, rather than directly applying to employers, the court held that it was a law that "mandate[d] an employer's obligation to its employees," and therefore was preempted by ERISA. However, until this issue is resolved by the courts in California, we recommend that insured health plans comply with the new law.

Conclusion

The California Legislature is clearly looking to expand the availability of continuation coverage to California health plan participants. Whether the Legislature has the authority to do so remains to be seen. It is likely, however, that so long as AB 1401 is in effect, employers can expect further increases in insurance premiums to cover the cost of the extended coverage required by the new law.

If you have any questions about the application of this new law to your health plan, including how it may affect the disclosure documents sent to employees, please contact the Seyfarth Shaw employee benefits attorney with whom you work or any employee benefits group attorney listed on the website at www.seyfarth.com.

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