[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG-209485-86]

RIN 1545-AI93

Continuation Coverage Requirements of Group Health Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance under section 4980B of the Internal Revenue Code on certain changes made by the Health Insurance Portability and Accountability Act of 1996, the Omnibus Budget Reconciliation Act of 1989, and the Technical and Miscellaneous Revenue Act of 1988 relating to the continuation coverage requirements applicable to group health plans. The regulations will generally affect sponsors of and participants in group health plans, and they provide plan sponsors and plan administrators with guidance necessary to comply with the law.

DATES: Written comments and requests for a public hearing must be received by April 7, 1998.

ADDRESSES: Send Submissions to: CC:DOM:CORP:R (REG-209485-86), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered

between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-209485-86), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax_regs/comments.html.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Russ Weinheimer, 202-622-4695; concerning submissions or requests for a hearing, LaNita VanDyke, 202-622-7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224. Comments on the collection of information should be received by March 9, 1998. Comments are specifically requested concerning the following:

Whether the proposed collection of information is necessary

for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How to enhance the quality, utility, and clarity of the information to be collected;

How to minimize the burden of complying with the proposed collection of information, including the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information is in proposed §54.4980B-1(a)(1)(iii). This collection of information is required by statute. The likely respondents are individuals. Responses to this collection of information are required in order to obtain the benefit of an extended period during which a group health plan must make COBRA continuation coverage available.
Estimated total annual reporting burden: 440 hours.
The estimated annual burden per respondent: 1 minute.
Estimated number of respondents: 26,400.
Estimated annual frequency of responses: on occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the

collection of information displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amended the Code to add health care continuation coverage requirements. These provisions, now set forth in section 4980B of the Code,[1] generally apply to a group health plan maintained by an employer with at least 20 employees, and require such a plan to offer each qualified beneficiary who would otherwise lose coverage as a result of a qualifying event an opportunity to elect, within the applicable election period, COBRA continuation coverage. The COBRA continuation coverage requirements were amended on various occasions,[2] most recently under the Health

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[1] The COBRA continuation coverage requirements were initially set forth under section 162(k) of the Code, but were moved to section 4980B of the Code by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). TAMRA changed the sanction for failure to comply with the continuation coverage requirements of the Code from a disallowance of certain employer deductions under section 162 (and denial of the income exclusion under section 106(a) to certain highly compensated employees of the employer) to an excise tax under section 4980B.

[2] Changes affecting the COBRA continuation coverage provisions were made under the Omnibus Budget Reconciliation Act of 1986, the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, the Omnibus Budget Reconciliation Act of 1989, the Omnibus Budget Reconciliation Act of 1990, the Small Business Job Protection Act of 1996, and the Health Insurance Portability and Accountability Act of 1996. The

Insurance Portability and Accountability Act of 1996 (HIPAA).

Proposed regulations providing guidance under the continuation coverage requirements as originally enacted by COBRA and as amended by the Tax Reform Act of 1986, were published as proposed Treasury Regulation §1.162-26 in the **Federal Register** of June 15, 1987 (52 FR 22716).

The new set of proposed regulations being published in this notice of proposed rulemaking reflects principally the most recent set of statutory changes -- those made by HIPAA -- but also reflects certain changes made by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) and by the Omnibus Budget Reconciliation Act of 1989 (OBRA '89).

Explanation of Provisions

Disability Extension; Permitted Premiums.

As originally enacted, the COBRA continuation coverage provisions required plans to make continuation coverage available for up to 18 months in the case of a qualifying event that is a termination of employment or reduction in hours of employment and for up to 36 months for all other qualifying events, such as death of the covered employee, divorce from the covered employee, or a dependent child ceasing to be a dependent under the generally applicable requirements of the plan. If someone became

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statutory continuation coverage requirements have also been affected by an amendment made to the definition of group health plan in section 5000(b)(1) by the Omnibus Budget Reconciliation Act of 1993; that definition is incorporated by reference in section 4980B(g)(2).

entitled to the 18-month maximum period of coverage and experienced a second qualifying event during that period of COBRA continuation coverage, then the law provided an extended period of coverage so that there would be a total of 36 months of COBRA continuation coverage measured from the date of the first qualifying event.

Under OBRA ’89, provisions were added allowing the 18-month period to be extended to 29 months if a qualified beneficiary was disabled at the time of the qualifying event. Section 421 of HIPAA changed these provisions by requiring plans to allow the disability extension if a qualified beneficiary is disabled within the first 60 days of COBRA continuation coverage and by clarifying that nondisabled qualified beneficiaries with respect to the same qualifying event are also entitled to the disability extension.

Thus, under the current provisions in the Code, all qualified beneficiaries with respect to the same qualifying event are entitled to an extension of the maximum period of COBRA continuation coverage from 18 to 29 months, if three conditions are satisfied. First, each qualified beneficiary must be a qualified beneficiary in connection with a qualifying event that is a termination of employment or reduction in hours of employment. Second, a qualified beneficiary must be determined to have been disabled (within the meaning of title II or title XVI of the Social Security Act) within the first 60 days of COBRA continuation coverage. Third, the plan administrator must be

provided with a copy of the determination of disability on a date that is both within 60 days after the determination is issued and before the end of the initial 18-month period of COBRA continuation coverage. In the case of a disability extension, for any period after the end of the 18th month of COBRA continuation coverage, the plan may generally require payment for COBRA continuation coverage in an amount that does not exceed 150 percent of the applicable premium.

These proposed regulations clarify the statutory disability extension requirements in several respects. For example, the first 60 days of COBRA continuation coverage are generally measured from the date of the termination of employment or reduction in hours of employment. An exception applies if coverage would be lost (in the absence of an election for COBRA continuation coverage) after the date of the qualifying event and if the plan has elected to measure both the maximum coverage period and the period for providing notice upon the occurrence of a qualifying event from the date that coverage would be lost rather than from the date of the qualifying event. In such a case, the first 60 days of COBRA continuation coverage are also measured from the date that coverage would be lost.

In addition, these proposed regulations make clear that the disability extension applies to each qualified beneficiary, whether or not disabled, that each qualified beneficiary has an independent right to the disability extension, and that any of the qualified beneficiaries may provide the plan administrator

with a copy of the determination of disability.

Another clarification relates to the period during which the plan may charge 150 percent of the applicable premium. These proposed regulations make clear that the plan may require payment equal to 150 percent of the applicable premium if a disabled qualified beneficiary experiences a second qualifying event during the disability extension. In such a case (that is, where the disabled qualified beneficiary is entitled to a 36-month maximum coverage period only because a second qualifying event occurs during the disability extension), the plan may require payment of 150 percent of the applicable premium until the end of the 36-month maximum coverage period.

HIPAA also added provisions to the Code, in section 9802(b), that generally prohibit discrimination in premiums on the basis of health status, including on the basis of disability. These proposed regulations clarify that a plan that requires a disabled qualified beneficiary entitled to the disability extension to pay 150 percent of the applicable premium (as permitted by the proposed regulations) does not for that reason fail to comply with the nondiscrimination requirements of section 9802(b).

These proposed regulations do not address the extent to which a plan can charge 150 percent of the applicable premium to a qualified beneficiary who is not disabled. Comments are requested on this issue.

Newborn and Adopted Children Treated as Qualified Beneficiaries.

Section 421 of HIPAA also provides that a child born to or

placed for adoption with the covered employee during a period of COBRA continuation coverage is a qualified beneficiary. Such a child generally is eligible to be enrolled immediately for COBRA continuation coverage under the plan. These proposed regulations clarify that the maximum coverage period for such a child is measured from the date of the qualifying event that gives rise to the period of COBRA continuation coverage during which the child is born or adopted and not from the date of birth or placement for adoption. Thus, the child's maximum period of COBRA continuation coverage would end at the same time as the maximum period for other family members. In addition, the statutory term placement for adoption is clarified to include an adoption that is not preceded by a placement for adoption.

Long-term Care; MSAs.

Section 321(d) of HIPAA amended section 4980B of the Code to provide that a plan does not constitute a group health plan subject to the COBRA continuation coverage requirements if substantially all of the coverage provided under the plan is for qualified long-term care services, as defined in section 7702B(c). These proposed regulations permit a plan to use any reasonable method in determining whether substantially all of the coverage is for qualified long-term care services. Further, the proposed regulations reflect section 106(b)(5), added by HIPAA, which provides that COBRA continuation coverage is not required to be made available with respect to medical savings accounts (MSAs), as defined under section 220.

Good Faith/Reasonable Interpretations.

The effective date of these regulations, when made final, will not be earlier than the date of publication of final regulations in the **Federal Register**. For the period before the effective date of final regulations, plans and employers are required to operate in good faith compliance with a reasonable interpretation of the statutory requirements. Compliance with the terms of the proposed regulations concerning the matters addressed is deemed to be good faith compliance with a reasonable interpretation of the statutory requirements. Actions inconsistent with the terms of the proposed regulations will not necessarily constitute a lack of good faith compliance with a reasonable interpretation of the statutory requirements; whether there has been good faith compliance with a reasonable interpretation of the statutory requirements will depend on all the facts and circumstances of each case. Plans and employers may also continue to rely on proposed Treasury Regulation §1.162-26 (published on June 15, 1987 in 52 FR 22716), except to the extent that that proposed regulation is inconsistent with statutory amendments made after its date of publication.

Future Guidance Concerning COBRA Obligations in Certain Stock and Asset Sales.

Treasury and the IRS are currently considering the issuance of guidance concerning COBRA obligations in cases involving a sale of stock in an employer that causes the employer to become a member of another controlled group of corporations (a "stock

sale"), or a sale of substantial assets by an employer (such as a plant or division) to another employer outside the controlled group (an "asset sale").

The approach under consideration generally would provide, in the case of a stock sale to a buyer maintaining a group health plan, that the buyer's group health plan (and not a plan maintained by the seller) would be responsible, after the date of the sale, for complying with the COBRA continuation coverage requirements with respect to any covered employee (and associated qualified beneficiary) whose last employment was with the sold corporation. Thus, for example, the buyer's group health plan would have the obligation, after the date of the sale, to comply with the COBRA continuation coverage requirements with respect to those individuals regardless of whether their qualifying events were connected to the sale of stock or were in advance of and not connected to the sale. If the buyer did not maintain a group health plan, then a group health plan of the seller would continue to be responsible for complying with the COBRA continuation coverage requirements with respect to qualified beneficiaries associated with the sold corporation.

In the case of an asset sale, the approach under consideration generally would provide that a group health plan maintained by the seller (and not a plan maintained by the buyer) would be responsible for complying with the COBRA continuation coverage requirements with respect to any covered employee (and associated qualified beneficiary) whose last employment was

associated with the purchased assets. However, an exception would be provided if the buyer were a "successor employer," in which case a group health plan of the buyer would be responsible for complying with the COBRA continuation coverage requirements with respect to qualified beneficiaries associated with the purchased assets. Consideration is being given to treating a buyer as a successor employer in connection with an asset sale only if the buyer acquires substantial assets (such as a plant or division, or substantially all of the assets of a trade or business) and continues the business operations associated with those assets without interruption or substantial change, and only if, in connection with the sale, the selling employer ceases to maintain any group health plan. The approach might also include a presumption that the cessation is in connection with the sale if it occurs within 6 months of the sale.

Comments are requested on this possible approach to assigning responsibility for compliance with the COBRA continuation coverage requirements in the context of stock sales and asset sales and on any related issues that should be addressed.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collection-of-information requirement in these regulations will not have a

significant economic impact on a substantial number of small entities. This certification is based on the fact that the collection-of-information requirement is imposed on individual qualified beneficiaries and not on small businesses or other small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (a signed original and eight (8) copies) to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Russ Weinheimer, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 54

Excise taxes, Health insurance, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR Part 54 is proposed to be amended as follows:

Paragraph 1. The authority citation for Part 54 is amended in part by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 54.4980B-1 also issued under 26 U.S.C. 4980B. * * *

Par. 2. A new section 54.4980B-1 is added to read as follows:

§ 54.4980B-1 Certain changes to the continuation coverage requirements of group health plans.

(a) Disability extension--(1) In general. Paragraphs (a)(2), (3), and (4) of this section (describing qualified beneficiaries entitled to a disability extension, the length of the extension, and the amount that a plan can require qualified beneficiaries to pay during the extension) apply to a group health plan only if all three of the conditions of this paragraph (a)(1) are satisfied.

(i) A termination-of-employment qualifying event occurs.

(ii) An individual (whether or not the covered employee) who is a qualified beneficiary in connection with the termination-of-employment qualifying event is determined under title II or XVI of the Social Security Act to have been disabled

at any time during the first 60 days of COBRA continuation coverage. For this purpose, the first 60 days of COBRA continuation coverage are measured from the date of the termination-of-employment qualifying event, except that if a loss of coverage would occur at a later date in the absence of an election for COBRA continuation coverage and if the plan provides for the extension of required periods (as permitted under section 4980B(f)(8)), then the first 60 days of COBRA continuation coverage are measured from the date on which the coverage would be lost.

(iii) Any of the qualified beneficiaries affected by the termination-of-employment qualifying event provides notice to the plan administrator of the disability determination on a date that is both within 60 days after the date the determination is issued and before the end of the original 18-month maximum coverage period that applies to the termination-of-employment qualifying event.

(2) Maximum coverage period--(i) The maximum coverage period ends--

(A) 29 months after the date of the termination-of-employment qualifying event; or

(B) 36 months after the date of the termination-of-employment qualifying event if a qualifying event (other than a bankruptcy qualifying event) occurs during the 29-month period that begins on the date of the termination-of-employment qualifying event.

(ii) If, in the absence of an election for COBRA continuation coverage, coverage under the group health plan would be lost after the date of the termination-of-employment qualifying event and the plan provides for the extension of the required periods, as permitted under section 4980B(f)(8), then the dates or periods in paragraph (a)(2)(i) of this section are measured from the date on which coverage would be lost and not from the date of the termination-of-employment qualifying event.

(iii) Nothing in section 4980B or this section prohibits a group health plan from providing coverage that continues beyond the end of the maximum coverage period.

(3) Application to all qualified beneficiaries. Paragraph (a)(2) of this section applies to all qualified beneficiaries entitled to COBRA continuation coverage because of the same termination-of-employment qualifying event. Thus, for example, the 29-month period applies to each qualified beneficiary who is not disabled as well as to the qualified beneficiary who is disabled, and it applies independently with respect to each of the qualified beneficiaries.

(4) Payment during disability extension--(i) Disabled qualified beneficiaries--(A) A group health plan is permitted to require a disabled qualified beneficiary described in paragraph (a)(1) of this section, for any period of COBRA continuation coverage after the end of the 18th month, to pay an amount that does not exceed 150 percent of the applicable premium. However, the plan is not permitted to require a disabled qualified

beneficiary described in paragraph (a)(1) of this section to pay an amount that exceeds 102 percent of the applicable premium for any period of COBRA continuation coverage to which the qualified beneficiary is entitled without regard to the application of this paragraph (a). Thus, if a disabled qualified beneficiary described in paragraph (a)(1) of this section experiences a second qualifying event within the original 18-month period of COBRA continuation coverage, then the plan is not permitted to require the qualified beneficiary to pay an amount that exceeds 102 percent of the applicable premium for any period of COBRA continuation coverage. By contrast, if a disabled qualified beneficiary described in paragraph (a)(1) of this section experiences a second qualifying event after the end of the 18th month of original COBRA continuation coverage, the plan may require the qualified beneficiary to pay an amount that is up to 150 percent of the applicable premium for the remainder of the period of COBRA continuation coverage (that is, from the beginning of the 19th month through the end of the 36th month).

(B) A group health plan does not fail to comply with section 9802(b) and §54.9802-1T(b) (which generally prohibit an individual from being charged, on the basis of health status, a higher premium than that charged for similarly situated individuals enrolled in the plan) with respect to a disabled qualified beneficiary described in paragraph (a)(1) of this section merely because the plan requires payment of a premium in an amount permitted under paragraph (a)(4)(i)(A) of this section.

(ii) Nondisabled qualified beneficiaries. [Reserved].

(b) Newborns and adopted children. A child who is born to or placed for adoption with a covered employee during a period of COBRA continuation coverage is a qualified beneficiary and generally is eligible to be enrolled immediately for COBRA continuation coverage under the plan. See section 4980B(g)(1)(A), section 9801(f)(2) and §54.9801-6T(b) (relating to special enrollment rights of dependents of employees), and Q&A-31 of §1.162-26 of this chapter (relating to the right of qualified beneficiaries to have new family members covered to the same extent that similarly situated active employees can have new family members covered under the plan). Such a child has the same open-enrollment-period rights as other qualified beneficiaries with respect to the same qualifying event (see Q&A-30(c) of §1.162-26 of this chapter) and would be entitled to a 36-month maximum coverage period if a second qualifying event occurred while the child was in a period of COBRA continuation coverage resulting from a termination-of-employment qualifying event. The maximum coverage period for such a child is measured from the same date as for other qualified beneficiaries with respect to the same qualifying event (and not from the date of the birth or placement for adoption). In contrast, neither the covered employee, the spouse of the covered employee, nor any other dependent child of the covered employee is a qualified beneficiary unless that person is covered under a group health plan on the day before a qualifying event. See also Q&A-31 of

§1.162-26 of this chapter.

(c) Plan providing long-term care. A plan is not subject to the COBRA continuation coverage requirements if substantially all of the coverage provided under the plan is for qualified long-term care services (as defined in section 7702B(c)). For this purpose, a plan is permitted to use any reasonable method in determining whether substantially all of the coverage under the plan is for qualified long-term care services.

(d) Medical savings accounts. Under section 106(b)(5), amounts contributed by an employer to a medical savings account are not considered part of a group health plan that is subject to section 4980B. Thus, a plan is not required to make COBRA continuation coverage available with respect to a medical savings account. However, a high deductible health plan that covers a medical savings account holder may be a group health plan and thus may be subject to the COBRA continuation coverage requirements.

(e) Definitions. For purposes of this section --

Applicable premium is defined in section 4980B(f)(4).

Bankruptcy qualifying event is a qualifying event described in section 4980B(f)(3)(F) (relating to certain bankruptcy proceedings).

Covered employee is defined in section 4980B(f)(7).

Group health plan is defined in section 4980B(g)(2).

High deductible health plan is defined in section 220(c)(2).

Medical savings account is defined in section 220(d).

Placement, or being placed, for adoption means the assumption and retention by the covered employee of a legal obligation for total or partial support of a child in anticipation of the adoption of the child. The child's placement for adoption with the covered employee terminates upon the termination of the legal obligation for total or partial support. For purposes of this section and section 4980B, a child who is immediately adopted by the covered employee without a preceding placement for adoption is considered to be placed for adoption on the date of the adoption.

Qualified beneficiary is defined in section 4980B(g)(1).

Qualified long-term care services is defined in section 7702B(c).

Termination-of-employment qualifying event is a qualifying event described in section 4980B(f)(3)(B) (relating to qualifying events that occur as a result of a termination of employment, other than for gross misconduct, or reduction of hours of employment).

/s/ Michael P. Dolan
Deputy Commissioner of Internal Revenue