

Appendix E to Part 825—IRS Notice Discussing Relationship Between FMLA and COBRA

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Part III. Administrative, Procedural, and Miscellaneous

Effect of the Family and Medical Leave Act on COBRA Continuation Coverage

Notice 94-103

The Family and Medical Leave Act of 1993 ("FMLA"), P.L. 103-3, imposes certain requirements on employers regarding coverage, including family coverage, under group health plans for employees taking FMLA leave. Many employers have raised questions about how the requirements under FMLA affect their obligation to provide COBRA continuation coverage in accordance with the requirements of section 4980B of the Internal Revenue Code. This notice addresses a number of the principal questions that have been raised.

The requirements pertaining to FMLA leave, including the employer's obligation to maintain coverage under a group health plan during FMLA leave, are established under FMLA, not under the Internal Revenue Code. The U.S. Department of Labor has published rules interpreting the requirements of FMLA in part 825 of title 29 of the Code of Federal Regulations. The determination of when FMLA leave ends is relevant to the guidance provided in this notice. Although this notice makes several references to the first day or the last day of FMLA leave, the notice does not purport to provide guidance on when FMLA leave begins or ends or on any other aspect of FMLA leave; instead, the notice provides guidance on the COBRA continuation coverage requirements that may arise once FMLA leave has ended (as determined under FMLA and the Labor Regulations thereunder). See, e.g., 29 C.F.R. § 825.209(f) and (g).

Q-1: In What Circumstances Does a COBRA Qualifying Event Occur If an Employee Does Not Return from FMLA Leave?

A-1: The taking of leave under FMLA does not constitute a qualifying event under section 4980B of the Code. A qualifying event under section 4980B(f)(3)(B) occurs, however, if (1) an employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a

group health plan of the employee's employer, (2) the employee does not return to employment with the employer at the end of the FMLA leave, and (3) the employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan (i.e., cease to be covered under the same terms and conditions as in effect for similarly situated active employees and their spouses and dependent children) before the end of what would be the maximum coverage period. However, the satisfaction of the three conditions in the preceding sentence does not constitute a qualifying event if the employer eliminates, on or before the last day of the employee's FMLA leave, coverage under a group health plan for the class of employees (while continuing to employ that class of employees) to which the employee would have belonged if the employee had not taken FMLA leave.

Q-2: When Does the COBRA Qualifying Event Occur, and How is the Maximum Coverage Period Measured?

A qualifying event described in Q&A-1 occurs on the last day of FMLA leave. The maximum coverage period is measured from the date of the qualifying event (i.e., the last day of FMLA leave). If, however, coverage under the group health plan is lost at a later date and the plan provides for the extension of the required periods, as permitted under section 4980B(f)(8) of the Code, then the maximum coverage period is measured from the date when coverage is lost.

Example 1: Employee A is covered under the group health plan of Employer X on January 31, 1995. A takes FMLA leave beginning February 1, 1995. A's last day of FMLA leave is 12 weeks later, on April 25, 1995, and A does not return to work with X at the end of the FMLA leave. If A does not elect COBRA continuation coverage, A will lose coverage under the group health plan of X on April 26, 1995.

A experiences a qualifying event on April 25, 1995, and the maximum coverage period (generally 18 months) is measured from that date. (This is the case even if, for part or all of the

FMLA leave, A fails to pay the employee portion of premiums for coverage under the group health plan of X and is not covered under X's plan. See Q&A-3 below.)

Example 2: Employee B and B's spouse are covered under the group health plan of Employer Y on August 15, 1995. B takes FMLA leave beginning August 16, 1995. B informs Y less than 7 weeks later, on September 28, 1995, that B will not be returning to work. Under the FMLA regulations published by the Department of Labor in part 825 of title 29 of the Code of Federal Regulations, B's last day of FMLA leave is September 28, 1995. B does not return to work with Y at the end of the FMLA leave. If B and B's spouse do not elect COBRA continuation coverage, they will lose coverage under the group health plan of Y on September 29, 1995.

B and B's spouse experience a qualifying event on September 28, 1995, and the maximum coverage period (generally 18 months) is measured from that date. (This is the case even if, for part or all of the FMLA leave, B fails to pay the employee portion of premiums for coverage under the group health plan of Y and B or B's spouse is not covered under Y's plan. See Q&A-3 below.)

Q-3: Can a COBRA Qualifying Event Occur If an Employee Failed to Pay the Employee Portion of Premiums for Coverage Under a Group Health Plan During FMLA Leave or Declined Coverage Under a Group Health Plan During FMLA Leave?

A-3: Yes. Any lapse of coverage under a group health plan during FMLA leave is irrelevant in determining whether a set of circumstances constitutes a qualifying event under Q&A-1 of this notice or when such a qualifying event occurs under Q&A-2.

Q-4: Are the Foregoing Rules Affected by a Requirement of State or Local Law to Provide a Longer Period of Coverage Than That Required Under FMLA?

A-4: No. Any State or local law that requires coverage under a group health plan to be maintained during a leave of absence for a period longer than that required under FMLA (for example, for 16 weeks of leave rather