

## ***Cobra***

Congress passed the landmark Consolidated Omnibus Budget Reconciliation Act (COBRA) health benefit provisions in 1986. The law amends the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code and the Public Health Service Act to provide continuation of group health coverage that otherwise would be terminated.

COBRA contains provisions giving certain former employees, retirees, spouses and dependent children the right to temporary continuation of health coverage at group rates. This coverage, however, is only available in specific instances. Group health coverage for COBRA participants is usually more expensive than health coverage for active employees, since usually the employer formerly paid a part of the premium. It is ordinarily less expensive, though, than individual health coverage.

The law generally covers group health plans maintained by employers with 20 or more employees in the prior year. It applies to plans in the private sector and those sponsored by state and local governments. The law does not, however, apply to plans sponsored by the Federal government and certain church-related organizations.

Group health plans sponsored by private sector employers generally are welfare benefit plans governed by ERISA and subject to its requirements for reporting and disclosure, fiduciary standards and enforcement. ERISA neither establishes minimum standards or benefit eligibility for welfare plans nor mandates the type or level of benefits offered to plan participants. It does, though, require that these plans have rules outlining how workers become entitled to benefits.

Under COBRA, a group health plan ordinarily is defined as a plan that provides medical benefits for the employer's own employees and their dependents through insurance or otherwise (such as a trust, health maintenance organization, self-funded pay-as-you-go basis, reimbursement or combination of these). Medical benefits provided under the terms of the plan and available to COBRA beneficiaries may include:

- Inpatient and outpatient hospital care
- Physician care
- Surgery and other major medical benefits
- Prescription drugs
- Any other medical benefits, such as dental and vision care

## ***FAQ about Cobra***

### **How long must COBRA continuation coverage be available to a qualified beneficiary?**

- Up to 18 months for covered employees, as well as their spouses and their dependents, when workers otherwise would lose coverage because of a termination or reduction of hours.
- Up to 29 months is available to employees who are determined to have been disabled at any time during the first 60 days of COBRA coverage and applies as well to the disabled employee's nondisabled qualified beneficiaries.
- Up to 36 months for spouses and dependents facing a loss of employer-provided coverage due to an employee's death, a divorce or legal separation, or certain other "qualifying events".

### **What is a qualifying event?**

The qualifying event requirement is satisfied if the event is (1) the death of a covered employee; (2) the termination (other than by reason of the employee's gross misconduct), or a reduction of hours, of a covered employee's employment; (3) the divorce or legal separation of a covered employee from the employee's spouse; (4) a covered employee becoming entitled to Medicare benefits under Title XVIII of the Social Security Act; or (5) a dependent child ceasing to be a dependent child of the covered employee under the generally applicable requirements of the plan and a loss of coverage occurs.

### **Who is a Qualified Beneficiary?**

Under the statute, a qualified beneficiary is someone who "is a beneficiary under the plan" (i.e., is covered under the plan) immediately prior to the qualifying event and who is:

- The spouse or dependent child of a covered employee.
- A covered employee (but only if the qualifying event is a termination or reduction in hours of the covered employee's employment).

### **Are Newborns and Adopted Children considered "qualified beneficiaries"?**

Yes. A child who is "born to or placed for adoption with the covered employee during the period of continuation coverage under [Code §490B, the Code's COBRA provisions]" is also a qualified beneficiary regardless of whether the qualifying event occurred before, on, or after such date if they are enrolled within 30 days of birth or adoption.

### **What is the definition of a Covered Employee?**

Covered employee "means an individual who is (or was) provided coverage under a group health plan by virtue of the performance of services by the individual for 1 or more persons maintaining the plan. This definition is expansive and includes retirees, independent contractors, self-employed persons and partners of a partnership.

### **What is the definition of Dependent Child?**

COBRA does not define "dependent child." Who is a dependent child is determined by the terms of the group health plan.

### **What Plans Are Subject to COBRA?**

Virtually all group health plans maintained by employers for their employees are subject to COBRA's provisions, include group health plans of corporations, partnerships, tax exempt organizations, state and local governments. This also includes Health Care Spending Accounts.

### **What Plans Are Not Subject to COBRA?**

#### Small Employer Plans:

Small employer plans are entirely exempt from COBRA. If all employers maintaining the plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year, the plan falls within the "small employer plan exception"

#### The Federal Government's Group Health Plan:

The Federal government's group health plan is not subject to COBRA. However, a separate law, the Federal Employees Health Benefits Amendments Act of 1988 requires the Federal government to offer its employees continuation coverage effective January 1, 1990.

#### Certain Church Plans

Certain church plans also are not subject to COBRA. The IRS has concluded that a plan for employees of an institute of higher learning under church auspices was a church plan, and that plan was accordingly not subject to COBRA.

### **What is the definition of Group Health Plan?**

Under the COBRA statute the term "group health plan" is defined in Code § 5500 (b)(1) as follows: a plan (including a self-insured plan) of, or contributed by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to employees, former employees, the employer, other associated or formerly associated with the employer in a business relationship, or their families.

### **Can a qualifying event result from a voluntary termination of employment?**

Yes. Apart from gross misconduct, the facts surrounding a termination or reduction of hours are irrelevant. It does not matter whether the employee voluntarily terminated or was discharged.

### **What triggers the obligation to offer COBRA coverage?**

COBRA requires employers to offer a COBRA election to qualified beneficiaries when there is: (1) a triggering event; and (2) the triggering event causes (or will cause) a loss in plan coverage that occurs within the maximum coverage period for that event. When both elements (1) and (2) exist, there is a COBRA "qualifying event." A COBRA "qualifying event" is a specified triggering event, "which, but for the continuation coverage required (by COBRA), would result in the loss of coverage of a qualified beneficiary." An event is a qualifying event if it (a) is one of the specified events ("triggering events"), (b) causes the covered employee, spouse or dependent child to lose coverage and {c} occurs while the plan is covered by COBRA. If a qualified beneficiary experiences a triggering event, but there is no loss in coverage attributable to the triggering event, there is no qualifying event and COBRA coverage does not need to be offered.

### **What Specific Events ("Triggering Events") can be Qualifying Events?**

The statute specifies six triggering events that, if they result in a loss of coverage, can be qualifying events:

- Death of the covered employee;
- Voluntary or involuntary termination of the covered employee's employment other than by reason of gross misconduct (note that a retirement is considered a termination of employment);
- Reduction in hours of the covered employee's employment;
- Divorce or legal separation of the covered employee from the employee's spouse;
- Dependent child ceasing to be a dependent child under the generally applicable requirements of the plan; and
- An employer's bankruptcy, but only with respect to health coverage for retirees and their families.

### **What events are not considered Triggering Events?**

If an employer terminates a group health plan or amends it to reduce coverage, neither the termination nor the amendment is a qualifying event. The following events are not considered triggering events:

- A change in insurance carriers. Replacement of one insured health plan with a less generous plan is not a qualified event.
- Tendering a resignation. Only when an employee actually terminates does a qualifying event occur.
- Filing for divorce. The entry of the decree is the triggering event; however, if legal separation precedes the divorce and results in a loss of coverage, then the legal separation will become the triggering event.
- Employee drops coverage for spouse or dependents.
- Employee's resignation from Union.
- Termination of Employment After Insurer Cancels Group Health Plan.

### **What are the two mandatory items that must be sent to an employer to its employees regarding COBRA?**

The initial notice and the qualifying notice are the most two important COBRA notices. They communicate to plan participants and to qualified beneficiaries their COBRA rights and obligations generally (the initial notice) and with reference to a specific qualifying event (qualifying event notice). The mishandling of these notices (either because the notices are not delivered or their content is deficient) is a significant source of litigation and liability for plans.

### **When must the Initial Notice be sent to Covered Employees and Spouses?**

The initial notice must be sent by the "group health plan" to the covered employee and spouse upon first becoming covered by a group health plan.

### **What is the purpose of the Initial COBRA Notice?**

The Initial COBRA notice informs the plan participants (and his or her spouse if any) their rights under COBRA "at the time of commencement of the coverage under the plan."

### **Who must provide the Initial Notice?**

The statute requires the "group health plan" to provide notice. The definition of group health plan, however, does not identify any particular party. Most commentators have assumed that the plan administrator has the obligation to provide the initial notice, because ERISA § 502 {c}(1) makes the plan administrator liable for a \$110 per day for failure to distribute the initial notice. The Department of Labor assigns the responsibility to the plan administrator.

### **What is the Qualifying Event Notice regarding COBRA?**

Upon the occurrence of a qualifying event and notice to the plan administrator of that event, the plan administrator must send a qualifying event notice to each qualified beneficiary advising them of their rights under COBRA and offers them the right to elect COBRA.

### **What is contained in the Qualifying Event Notice?**

The qualifying event notices typically consists of (i) a cover letter explaining to the qualified beneficiary his or her COBRA rights and obligations, as well as all election, payment and notice deadlines; (ii) an election form; (iii) a premium schedule; and (iv) an ACH notice.

### **When must the employee or qualified beneficiary notify the plan administrator of any triggering events?**

The covered employee or qualified beneficiary must notify the plan administrator within 60 days of the occurrence of these triggering events:

- divorce or legal separation of covered employee from his or her spouse; and
- dependent child ceasing to be a dependent under the plan.

The proposed regulations expand this rule to provide that the notice period is 60 days after the triggering event or, if later, the date coverage would be lost. "If the notice is not postmarked and sent to the employer or other plan administrator [within the 60 day period], the group health plan does not have to offer the qualified beneficiary the opportunity to elect COBRA continuation coverage."

### **When must the Employer notify the Plan Administrator of COBRA qualifying events?**

The employer "must notify the plan administrator...within 30 days...of the date of" the following qualifying events:

- death of a covered employee;
- termination or reduction of hours of the covered employee;
- the covered employee becomes entitled to Medicare; and
- the commencement of a bankruptcy proceeding of the employer

The "qualifying event" in this context means the date of the triggering event, not the date that coverage is lost.

### **When must the Qualifying Event Notice be Sent to the Qualified Beneficiaries notifying them of their right to elect COBRA?**

The plan administrator must notify "any qualified beneficiary" with respect to a qualifying event of his or her COBRA election rights within 14 days after it has been notified (by the employer or by a qualified beneficiary) that the qualifying event has occurred. If the plan administrator has not received notice that a qualifying event has occurred, they are not obligated to provide notice of COBRA election rights to the qualified beneficiary.

### **Within what time period does the Qualified Beneficiary have the option of electing COBRA?**

A qualified beneficiary may elect COBRA coverage at any time within 60 days after the date plan coverage terminates, or, if later 60 days after the date of the notice to the qualified beneficiary from the plan administrator. The 60-day period permits a qualified beneficiary to "adopt a wait-and-see approach to continued coverage, and then elect if and when medical care is required during the election period. If the plan administrator has not sent the notice of qualifying event, the election period remains open. The 60 day period is a minimum.

### **Does each Qualified Beneficiary have Independent Election Rights under COBRA?**

Yes. COBRA requires that "each" qualified beneficiary be entitled to elect COBRA coverage. If there is a choice among types of coverage under the plan, each qualified beneficiary is entitled to make a separate election among the different types at open enrollment.

**What are the Premium Payment Deadlines regarding COBRA coverage?**

A plan may not require any payment until 45 days after the qualified beneficiary's initial election. If a qualified beneficiary fails to make the initial premium payment within the 45-day period, the plan administrator may terminate the COBRA coverage. Thereafter, payments are due on the first of each month, subject to a 30-day grace period.

**How does the COBRA continuation coverage requirements apply to Cafeteria Plans and other Flexible Benefit arrangements?**

The provision of medical care through a cafeteria plan (as defined in Section 125) or other flexible benefit arrangement constitutes a group health plan. However, the COBRA continuation coverage requirements of section 162(k) apply to those medical benefits under the cafeteria plan or other arrangement that a covered employee has actually chosen to received. Furthermore, except in cases where the plan is exempt from HIPAA, COBRA need only be offered in cases where the participant has a positive balance at the time of termination and only for the remainder of the current plan year.