

SPECIAL REPORT

FAILURE TO COMPLY WITH COBRA COULD SUBJECT AN EMPLOYER TO TAXES AND PENALTIES UP TO \$200 PER DAY AND PAYMENT OF THE QUALIFIED BENEFICIARY'S CLAIMS THAT WOULD HAVE BEEN COVERED BY INSURANCE

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The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides employees and their dependents who have been covered by one or more employment related group health care plans with the opportunity to continue the coverage at the group rate under certain conditions where the group health plan coverage would normally be lost, such as in the event of job loss or a reduction in hours. COBRA's continuation coverage requirements apply to all employment related group health plans with the exception of small group health plans where the employer or employers maintaining the plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year.

The requirement that the employer pay the qualified beneficiary's claims creates enormous liabilities to the employer that is in violation of COBRA's continuation coverage requirements. For example, a serious health claim that is not covered by insurance because a qualified beneficiary was not notified of continuation rights could be hundreds of thousands of dollars in liability to the sponsoring employer. Importantly, your commercial general liability insurance does not automatically cover you for this exposure. Instead, a separate endorsement must be added.

A. Obligation To Provide Option For Continuation Coverage

COBRA provides qualified beneficiaries with the right to elect continuation coverage under a group health plan for a period of time at

their own expense when prior coverage under the group health plan has been lost due to a qualifying event. A qualified beneficiary is an individual who, on the day before a qualifying event, is a beneficiary under the group health plan. Qualified beneficiaries could include:

1. Current and former employees (note that a covered employee may be an independent contractor or business partner under the IRS regulations); or
2. The spouse of the covered employee or business associate; or
3. The covered employee's dependent child; and
4. A child born to or placed for adoption with the covered employee during the period of continuation coverage.

B. Qualifying Event

A qualifying event is any of the following events that, but for the continuation coverage required under COBRA, would result in a qualified beneficiary's loss of coverage.

1. The covered employee's death;
2. The voluntary or involuntary termination of employment (other than by reason of the employee's gross misconduct) or a reduction in hours;
3. The covered employee's divorce or legal separation;
4. The covered employee becoming entitled to Medicare;
5. A cessation of dependent child status; and
6. The employer's filing for bankruptcy.

The date of the qualifying event is the date that the employee's employment is terminated or his or her hours are reduced; the date the employee divorces, legally separates, dies, or becomes entitled to Medicare; the date of cessation of dependent care status; or the date the employer files for bankruptcy. The employer may, instead, consider

the date of the qualifying event as the date the qualified beneficiary actually loses group health care coverage.

In the case of an employee who has taken a leave pursuant to the Family and Medical Leave Act of 1993 (FMLA) the qualifying event occurs when the employee does not timely return from the FMLA leave and experiences a loss of coverage as a result of his or her failure to return.

The term continuation coverage means coverage under the plan that is identical to the coverage being provided to similarly situated beneficiaries with respect to which the qualifying event has not occurred. When the qualifying event occurs, the qualified beneficiary must be offered an opportunity to elect to continue to receive the group health care coverage that he or she was receiving immediately before the qualifying event.

C. Core and Non-Core Coverage

A qualified beneficiary who loses coverage because of a qualifying event does not have to elect to receive all of the coverage the plan provides. The regulations distinguish between core and non-core coverage. Core coverage means all of the coverage other than the non-core coverage that a qualified beneficiary was receiving under the plan immediately before the qualifying event. Non-core coverage means coverage for vision benefits and dental benefits.

A qualified beneficiary must be given the option to receive either both the core and non-core coverage that he or she was receiving immediately before the qualifying event or core coverage only. A qualified beneficiary need not be offered the opportunity to elect only non-core coverage unless the beneficiary has been covered by a non-core only plan at the time of the qualifying event, in which case he or she must be given the opportunity to continue coverage under the non-core only plan.

D. 60 Day Election Period

A qualified beneficiary must elect COBRA continuation coverage during a 60 day election period. The election period begins no later than the

date that coverage terminates under the plan due to the occurrence of a qualifying event and ends not earlier than 60 days after either the latter of the date plan coverage terminates due to a qualifying event or the date notice of COBRA rights is received from the plan. This 60 day election period is the statutory minimum period and can be extended by the plan itself or by circumstances that prevent a qualified beneficiary from making an informed choice during the election period.

If a qualified beneficiary chooses COBRA continuation coverage during the 60 day election period, the plan must provide coverage from the first date of loss of coverage resulting from the qualifying event. Each qualified beneficiary must be offered the opportunity to make an independent election to receive COBRA continuation coverage, to make an independent election between core and non-core coverage, if applicable, and to switch to another group health plan during an open enrollment period; however, if the qualified beneficiary is a covered employee or the spouse of a covered employee who makes an election to provide any other qualified beneficiary with COBRA continuation coverage, the election is binding on the other qualified beneficiary.

A plan must offer continuation coverage even if the qualified beneficiary already has coverage under another group health plan or Medicare at the time of the qualifying event. The plan may, however, terminate continuation coverage where a qualified beneficiary obtains such alternate coverage for the first time after the beneficiary elected COBRA coverage. COBRA continuation coverage cannot be conditioned on nor discriminate on the basis of evidence or lack of evidence of insurability.

E. Payment of Premiums for Coverage

The qualified beneficiary pays the COBRA premium for plan continuation coverage. The employer is not required to pay for any part of such coverage. The plan may not charge more than 102% of the applicable premium for the continuation coverage and the beneficiary may, at his or her election, make the payments in monthly installments. The premium must be equal to the cost to the plan for such period of coverage for similarly situated beneficiaries with respect to whom a qualifying event has not occurred.

A qualified beneficiary must pay the premium within 45 days of electing COBRA continuation coverage. Thereafter, the payment of any premium due is considered timely if made within 30 days after the due date or within such longer period as applies under the plan.

F. Termination or Extension of Coverage

Once a qualified beneficiary's COBRA continuation coverage begins, it must continue for the statutory minimum period or until the occurrence of an event that permits terminating the continuation coverage before the statutory period expires. If the qualifying period is termination of employment or reduced hours, the minimum statutory period is 18 months after the qualifying event; however, if any covered beneficiary, including the former employee, is determined to be disabled by the Social Security Administration within the first 60 days after COBRA continuation coverage begins, COBRA continuation coverage must continue for a minimum of 29 months.

For other qualifying events the COBRA statutory period is 36 months after the date of a qualifying event. If a second qualifying event occurs within the initial COBRA continuation coverage period, then COBRA coverage must be extended for 36 months from the date of the original qualifying event. When the qualifying event is the employer's bankruptcy, continuation coverage may be required for life or 36 months, depending on the particular qualified beneficiary.

A plan may terminate continuation coverage before the expiration of the statutory period in four situations:

1. A qualified beneficiary fails to make timely payment of any required premium;
2. The employer ceases to provide any group health plan to any employee, without success or coverage;
3. The qualified beneficiary becomes covered under a group health plan that does not include a preexisting condition provision; and
4. The qualified beneficiary becomes entitled to Medicare benefits under the Social Security Act.

In addition, extended continuation coverage for a disabled qualified beneficiary who is determined to be no longer disabled may be discontinued the month that begins more than 30 days after the date of the final determination of disability under the Social Security Act.

At the time a qualified beneficiary's COBRA continuation coverage terminates because the statutory period has expired, the group plan must provide the qualified beneficiary with the option of enrolling under a conversion health plan that is otherwise generally available under the plan. This option must be extended during the 180 day period ending on the continuation coverage expiration date.

G. Notice Requirements

COBRA's notice requirements are critical. It is the area that is most likely to be the cause of disputes among plan administrators, employers, and employees. COBRA imposes notice requirements on the group health plan, the employer, the covered employee or qualified beneficiary, and the plan administrator.

In addition to the notification of COBRA continuation coverage rights, ERISA requires plan benefit changes, premium adjustments, and other plan modifications to be communicated to all plan participants including COBRA continues. Furthermore, if open enrollment periods are available, then COBRA qualified beneficiaries have the same open enrollment rights that are afforded full time active employees.

H. The Duties of the Plan

At the time coverage begins, a group health plan must provide each covered employee and spouse with written notice of COBRA continuation coverage rights. If the spouse is not covered at the time the covered employee begins coverage under the plan, a separate initial notice must be given to the spouse when the spouse enrolls in the plan. COBRA does not specify which party to the group health plan, the employer, plan administrator, insurer, or another, has responsibility to provide the initial notice. Accordingly, all parties to a group health plan may have the responsibility to insure that such notice is provided. A plan

administrator that does not provide this notice, however, may be found liable and fined up to \$100 per day.

I. The Employer's Duties

The employer must notify the plan administrator of a number of qualifying events within 30 days of occurrence. In cases where the employer is not the plan administrator, an employer's timely notification of a qualifying event to the plan administrator relieves the employer from any liability for the administrator's failure to provide such notice to the COBRA beneficiary; however, the employer's failure to meet this notice requirement may result in liability for the payment of benefits as well as COBRA penalties.

J. The Employee's and Qualified Beneficiary's Duties

The employee and qualified beneficiary must notify the plan administrator of the qualifying events of divorce, separation or a dependent ceasing to have dependent status within 60 days after the date of occurrence. In addition, disabled qualified beneficiaries must notify the plan administrator that the beneficiary was found to be disabled under the Social Security Act within 60 days after the date of the disability determination and within 30 days of any final determination that the qualified beneficiary is no longer disabled. Where there is a divorce or legal separation, a timely notice sent by a qualified beneficiary preserves the rights of all qualified beneficiaries affected by the divorce or separation.

K. The Plan Administrator's Duties

The plan administrator must notify all qualified beneficiaries of their right to continuation coverage within 14 days after receiving notice of a qualifying event. Where the employer also serves as a plan administrator, the Department of Labor has indicated that the notice period is 44 days, thus combining the 30 days that the employer has to notify a plan administrator with the 14 day period that the administrator has to notify qualified beneficiaries.

L. Contents of the Continuation Notice

The notice must accurately describe the qualified beneficiary's COBRA continuation rights and contain sufficient information to enable the beneficiary to make an informed decision regarding an election under COBRA. This should include information on the length of the continuation coverage, when the 60 day election period begins, when the 45 day period for paying the initial coverage premium begins, and the amount of the premium.

A qualified beneficiary who is the spouse of an employee has a right to notice of COBRA coverage and rights independent of the employee. The statute expressly provides that notice to a qualified beneficiary who is the spouse of a covered employee is treated as notice to other qualified beneficiaries residing with the spouse at the time of notice.

M. Delivery of Notice

The method to notify beneficiaries must reasonably insure that the qualified beneficiary actually receives the notice. Notice by first class mail to the employee's last known address has been held to be sufficient. Hand delivery of COBRA notices at the work premises has also been held to be sufficient. It should be noted, however, that hand delivery of a notice to an employee may not be effective notice as to the employee's spouse or other qualified beneficiaries residing with the spouse.

ERISA imposes a record keeping requirement on plan administrators that includes the obligation to maintain sufficient records, to establish that the plan administrator has met all notice requirements, and imposes the burden of proving compliance on the plan administrator. It is recommended that notice of the right to continuation coverage after a qualifying event be sent by certified mail or such other means that it insures documentation that the notice has, in fact, been sent to all qualified beneficiaries.

N. Enforcement and Penalties

As we indicated at the beginning of this report, the consequences for failure to comply with COBRA's continuation coverage requirements are

severe. ERISA's enforcement mechanism is to provide a variety of civil actions that may be initiated by private litigants or the Department of Labor in both the state and federal courts. Remedies that may be obtained include damages such as, but not limited to, the qualified beneficiary's applicable medical expenses, injunctive relief, and attorney's fees.

In addition if the plan administrator fails to comply with COBRA requirements to notify qualified beneficiaries of continuation coverage, the administrator may be subject to personal liability of up to \$100 per day. The Internal Revenue Service may impose an excise tax on the employer or the plan itself in the amount of \$100 per day during the noncompliance period. Where the failure is not corrected before the date that notice of examination of income tax liability is sent to the employer, the amount of the excise tax is \$2,500 or the amount that would be imposed under the \$100 a day rule, whichever is greater. Under certain circumstances, the minimum excise tax could be \$15,000.

O. Three Things You Can Do to Limit Your Exposure

Become familiar with the COBRA law and cognizant of its requirements. Consider using an outside company for COBRA benefit compliance letters. Be certain your commercial general liability insurance provides coverage for employee benefit errors and omissions liability.

We recommend that employers use a specialized company to provide COBRA notices to employees. These companies are experienced at sending technically correct forms. One such company is Infnisource at 800-300-3838 or www.benefitsolved.com.

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