

COBRA - What Every Employer Should Know

By Thomas C. Senter

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") was signed into law on April 7, 1986. Although the law has been in effect for over nine years, many employers remain unaware of its basic requirements. As a result, many employers continue to maintain group health plans which do not comply with the law and are therefore subject to significant liability exposure. The purpose of this article is to make its readers aware of COBRA's basic requirements and of the steps which they should take to help ensure that their group health plans comply with the law.

COBRA requires certain employers to offer former employees and their spouses and dependent children ("qualified beneficiaries") the opportunity to continue participation in their group health plan for a certain period of time upon the occurrence of a "qualifying event", provided such individuals were covered by the plan at the time of the qualifying event. The continued participation may be provided at the expense of the electing individuals. COBRA does not require an employer to provide any minimum level of medical benefits for its employees nor does it require an employer to provide coverage for its former employees or qualified beneficiaries which is more favorable than the coverage provided by it for its active employees.

The Employees and Plans Covered

COBRA generally requires the plan sponsor of a "group health plan" to allow each qualified beneficiary who would lose coverage as a result of a qualifying event in the absence of COBRA to elect continuation coverage under such plan. The term "group health plan" encompasses an employee welfare benefit plan providing medical care to participants or beneficiaries, directly or through insurance, reimbursement, or otherwise. COBRA does not apply to any group health plan for a calendar year if all employers maintaining such plan normally employed less than twenty employees on a typical business day during the immediately preceding calendar year. For purposes of this "small employer" exception, all members of a controlled group or an affiliated service group are treated as a single employer. Similar aggregation rules also apply with regard to leased employees.

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When And For How Long Must Continuation Coverage Be Offered And When May It Be Terminated?

Continuation coverage under COBRA must be offered to a qualified beneficiary who would otherwise lose coverage upon the occurrence of any of the following qualifying events: (a) the death of the covered employee; (b) the termination (other than by reason of such employee's gross misconduct) or reduction of hours of the covered employee's employment; (c) the divorce or legal separation of the covered employee from the employee's spouse; (d) the covered employee becoming entitled to benefits under Title XVIII of the Social Security Act; (e) a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan; or (f) a proceeding in a case under Title 11, United States Code, commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

Any action taken by an employer in reducing or eliminating coverage in anticipation of what would otherwise be a qualifying event, is disregarded in determining whether the event causes a loss of coverage. Thus, for example, an employer's elimination of health coverage at a facility in anticipation of the closing of such facility would be disregarded for COBRA purposes and the previously covered employees at such facility would be entitled to elect continuation coverage when their employment is terminated in connection with the closing of the facility.

Eighteen months of continuation coverage is available to employees, former employees and certain dependents if coverage would otherwise be lost as a result of termination of employment (other than in the event of gross misconduct) or a reduction in the hours of employment beneath that which is required to participate in the employer's group health plan. The eighteen month period is extended to twenty-nine months in the case of those qualified beneficiaries who are determined under the Social Security Act to have been disabled at the time of a termination or reduction in hours of employment. While the actual disability must have existed when there was a termination or reduction in hours of employment, the determination of disability may be made at any time during the initial eighteen months of continuation coverage. Thirty-six months of continuation coverage is available to an employee's spouse and certain dependents of the

employee if coverage would otherwise be lost as a result of the death of the covered employee, the divorce or legal separation of the covered employee from his or her spouse, the covered employee becoming entitled to Medicare, a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan, or an employer from whose employment the covered employee retired at any time, commencing certain bankruptcy proceedings.

The continuation periods set forth above may be terminated prematurely in certain circumstances. These include the termination of the employer's plan without a successor plan being adopted, a qualified beneficiary's failure to make timely payment of premiums under the plan or becoming entitled to Medicare, or when the qualified beneficiary becomes covered, after the date of the election, as an employee or otherwise, under another group health plan that does not contain any exclusion or limitation with respect to any pre-existing condition of such qualified beneficiary.

Notice Provisions

In order to comply with COBRA and help insulate itself from significant liability exposure under both ERISA and the Internal Revenue Code, it is critical for an employer to understand and comply with the numerous COBRA notice requirements. An initial notice must be issued to all covered employees and their spouses, advising them of their rights to elect continuation coverage. A first-class mailing to an employee and his or her spouse at their last known address constitutes good faith compliance with this notice requirement. If, however, the employer or plan administrator determines that the employee and spouse live at different addresses, separate mailings to each party would be appropriate.

A subsequent notice must also be distributed upon the occurrence of a qualifying event. In the case of an employer's bankruptcy filing, the covered employee's death, termination or reduction in the covered employee's hours of employment, or Medicare entitlement, the employer must notify the plan administrator (if a separate entity) of such event. The plan administrator (or employer) must then notify the qualified beneficiaries of their right to elect continuation coverage. In contrast, qualified beneficiaries are required to notify the plan administrator upon the occurrence of a divorce, legal separation or termination of dependency status. If this notice is not given in a

timely manner, and assuming the initial COBRA notice was properly distributed by the employer, the group health plan does not have to offer continuation coverage to the qualified beneficiary.

What Should An Employer Do To Comply?

There are certain basic steps which all employers should take to help insure compliance with COBRA. An employer must have proper procedures in place for distributing the initial COBRA notice to an eligible employee as well as to his or her spouse and family members. It is virtually impossible for an employer to comply with COBRA upon the occurrence of certain subsequent qualifying events if it previously failed to properly distribute the initial COBRA notice. In addition, an employer must have proper procedures in place to comply with COBRA's notice requirements upon the occurrence of qualifying events. All of the required notices should be prepared with the particular terms of the employer's plan in mind as it is often not sufficient to merely utilize the standard forms of COBRA notices which may be made available by an insurance company or third party administrator. The terms of the notices must also be consistent with the terms of any other employer documents concerning the group health plan to which they relate. Such documents would include the Summary Plan Description and the relevant sections of any Employee Handbook.

An employer must also properly integrate its COBRA procedures with the requirements of the insurance companies and third party administrators involved with its group health plans. Such coordination is necessary to insure that there will be an insurance policy as well as an administrator, in the appropriate cases, standing behind any COBRA coverage offered by the employer and that the employer does not inadvertently have to underwrite or administer the COBRA continuation coverage on its own. Finally, a prudent employer should periodically undertake a COBRA audit on its own initiative to help insure that it has proper compliance procedures in place for all of its group health plans and that such procedures are actually being followed. Such steps should go far in helping an employer comply with COBRA. In addition, and in the event of an inadvertent violation, such steps should help establish good faith compliance and therefore limit an employer's liability exposure in this area.

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