

# COBRA Tips

## Administration

### Employer v. Plan Administrator

COBRA deals with the employer who may or may not be the plan administrator. COBRA wishes the *employer* to notify the *plan administrator*; COBRA anticipates them to be different though they may be the same.

### Gross Misconduct

Claiming gross misconduct when an employee resigned or was terminated for another reason is most difficult. A good guide is the state's unemployment compensation standards.

### Resident Aliens and Foreign Employees

Both types of employees must be covered. Plan maintained by U.S. employers outside the U.S., covering nonresident aliens and not involving U.S. W-2s, need not offer COBRA.

### Renewal With a Sick COBRA Participant

The renewal must include the sick COBRA participant, regardless of how bad the terms of renewal. Final option of the employer is to drop the plan altogether.

### Gross Misconduct

Participant resigned when a criminal indictment was given. COBRA was offered. Later, participant was convicted. COBRA cannot be rescinded. Gross misconduct must be determined at the time of the qualifying event on a *best judgement* basis; it cannot be reversed.

### Error in Offering COBRA

With a self-funded plan, COBRA that is offered in error (for any administrative reason) can be rescinded. An exception might be if the employer *promised* such coverage in which event the employer should pay, but the plan not pay.

### Administrative Errors

In most instances, COBRA administration errors are correctable so that a *glitch* will not expand COBRA coverage. If the error was such that it would be to the beneficiary's detriment to correct it, the employer will be prevented (estopped) from correcting it. The estoppel principle is not often applied.

## **Plan Administrator and COBRA**

COBRA does not define who is the plan administrator. The facts and circumstances of each plan will be the determinant.

## **Reinstatement During the Grace Period**

The beneficiary has the right to pay during the grace period and maintain coverage even if the plan administrator has been notified that coverage will be dropped.

## **Claims During the COBRA Premium Grace Period**

They may be pended until such premium has been paid.

## **Election Period – Payment of Claims**

The election period is similar to a grace period. Claims may be processed but pended (or denied) until the premiums for such period are paid. To do otherwise would put the plan in danger of paying the claim and being left *holding the bag* as far as the premiums are concerned. COBRA coverage should be treated as *contingent* during the election period.

## **Disability Extension**

COBRA is clear: to gain the disability extension there *must* be a Social Security approval of such disability prior to the end of the 18-month period. The only hope for relief to the beneficiary is to show that employer made an administrative error of some type.

## **COBRA Antiselection**

May a new hired employee refuse (or deny) coming on the employer's plan and elect to be covered under the old employer's COBRA? The answer is yes.

## **State Continuation Laws**

Over 40 states have a state continuation law that is applicable to fully insured plans only. These rules should be followed:

- Such laws impact on insurers, not employers.
- COBRA or state law most favorable to the beneficiary should be applied.
- Notification and administrative details vary widely by state.

## **Expanded COBRA Coverage**

Mary is a 20-year-old college student on the plan by being in school. Mary drops out of school and elects COBRA and becomes pregnant. While Mary's expenses are covered what about the child?

- Mary's child is a dependent of Mary as though Mary were an employee even though this means expanding plan coverage.
- Mary's child, however, does not have independent COBRA rights.

### **Source of COBRA Complaints**

Challenges to COBRA premiums (usually from disgruntled participants) are made to (a) the Internal Revenue Service or (b) the Department of Labor or are made by a former employee's attorney in an alleged wrongful employment termination suit. Usually the complaint is directly attributable to the beneficiary's lack of understanding or due to complexities involving (a) high-low plans, (b) core and noncore benefits or (c) multiple tiers. When the complaint goes to the IRS, such Department will make inquiry to see that its mandates are honored; similarly with the DOL. The attorney, in gathering background data, will attempt to find flaws in COBRA – particularly the premiums. The attorney will seek to find a reason to invoke either the federal or state RICO statute.

### **Extended Coverage Period**

The 18-month continuation period is a minimum, not a maximum, period.

### **Preemption of State Continuation Laws**

Legal challenges to the amount of a COBRA premium is a federal, not a state court matter because of ERISA preemption.

### **Notification – Proper Addresses**

If a family terminates the *preferred* notification is as follows:

- Mailing 1 – Participant
- Mailing 2 – Spouse/Children

Some argue that it is also *acceptable* to mail to participant and dependents.

### **Notification – Who are Employees?**

For COBRA notification purposes, an employee is any participant be they common law employee, agent, independent contractor or self-employed.

### **Notification Failure**

When the failure to notify is discovered, COBRA must be offered retroactively back to the date when it should have been offered. COBRA must never be offered beginning with

the date of the discovery/correction. There must never be a break in coverage. The COBRA premium must track the period of coverage.

### **Eligibility for COBRA**

To be eligible, such participant must be actually covered under the plan; being in the probationary period does not count as being covered.

### **Branch Office Closure**

If the branch is closed, and the group plan continues, the terminated employees from the branch office must be offered COBRA. If the plan, under which the branch office exists, is terminated, such is not a qualifying event and COBRA need not be offered.

### **Switching Insurers or Plans**

Insurer or plan switching is not a qualifying event. Existing COBRA must be fairly treated under the similarly situated rules. This includes coverage upgrades, new options, etc.

### **Union Decertification**

The employer, and its employees decertify the union under which they were provided their health care coverage. This act of decertification is not a qualifying event but rather a change of employee classification. Therefore the employees do not have to be offered COBRA.

### **Reacquiring COBRA Rights**

A person quits, takes COBRA and is rehired. Then after such rehire quits again. Does person have a new *shot* at COBRA? The answer is yes.

### **Open Enrollment Period**

A COBRA beneficiary may add new benefits just the same as an active participant. This is because of the similarly situated rule.

### **COBRA – New Plan Transition**

John, with COBRA family coverage, gets a new job; the new plan has a 90-day waiting period. During this 90-day period John's wife gets pregnant. Who pays?

- John may defer coverage under the new plan (new employer paying his COBRA premium, e.g.). In this event the old plan would pay.
- John may become a participant of the new plan with the preexisting waived by HIPAA. In this case, the new plan would pay.

## **Eligibility for Benefits Issues**

Jim, on COBRA, ceases COBRA premiums because he is covered under another plan as an independent contractor. When his job as an independent contractor is terminated several weeks after being hired he needs help. What are Jim's options?

- He cannot reinstate his COBRA which was lost anyway when he became covered under his new plan.
- He can elect COBRA under his second job even as an independent contractor.

## **Eligibility for COBRA**

An employee is eligible for COBRA the moment such employee is eligible for regular coverage, even if the enrollment forms are in the processing stage.

## **Voluntary Offering of COBRA**

A small employer may offer COBRA on a voluntary basis if it wishes.

## **Coverage Beyond COBRA Minimum**

It is permitted and there are no tax consequences as long as it is nondiscriminatory. It could be deemed to be a post-termination benefit to be accounted for under AICPA FAS 112 if it uses material in an accounting sense.

## **Early Retirement as Qualifying Event**

Such is a qualifying event if the employer does not have any special early retirement program. If such early retirement program is offered, the extended health coverage would be provided by that program.

## **Employer Size and COBRA**

During its first year in business, an employer averages 100 employees. It had a health care plan. Need it offer COBRA during this first year? No – because it had zero (0) employees during the previous year.

## **Status Change is Not a Qualifying Event**

In a salaried-only plan, the participant was declassified to an hourly worker thereby losing coverage. Is such participant eligible for COBRA? No. Status change is not a qualifying event.

## **Domestic Partners and COBRA**

If a domestic partner is on the plan, such person is eligible for COBRA.

## **Changing Covered Dependents**

The eligible beneficiaries can pick and choose who is or is not to be covered when COBRA commences; once the COBRA continuation has begun, such status election may not be changed.

## **Covered Dependents – Election Rights**

Each covered dependent has a right to be a COBRA beneficiary in such person's own right.

## **Family Status May Not be Unelected**

Once participant and covered dependents elect family coverage and commence COBRA coverage, they may not *un-elect* to individual status thereafter.

## **Medicaid and COBRA**

Absence or presence of Medicaid will have no effect on whether or not COBRA is or is not offered.

## **Early Retirees on COBRA**

Use of COBRA, in lieu of an early retirement benefit, for the so-called *60 and out* plans has merit in that such coverage, from an accounting standpoint, is deemed *post-coverage* as opposed to *post-retirement*. That is, FAS No. 112 will apply and not FAS No. 106. A clear plan amendment supporting this change from *retiree* to COBRA is required.

## **COBRA and Part-Time**

John was a 25-hour per week employee and qualified to be on his employer's plan. When the plan was switched, the new carrier put in a 30-hour limit. John, as a consequence, lost his coverage. Is John eligible for COBRA? No. A change of plan terms is not a qualifying event.

## **Beneficiary's Rights**

Always rely on the similarly situated rule. Whatever rights and privileges and duties that the active participant has, so the COBRA beneficiary has.

## **Dependents Not Covered by the Plan – Rights Of**

Bill is an employee with a family who has single coverage. If Bill quit, his dependents have no COBRA rights.

## **Newborns Under COBRA**

Participant and spouse with family coverage have a baby but fail to timely enroll the baby within 31 days as required by the plan document. Is the child covered? Yes; this is because a child (natural or adopted) becomes a COBRA beneficiary regardless of whether or not the child is timely enrolled.

## **Benefits**

### **Dental Benefits**

If dental coverage is employee-pay-all, is it still subject to COBRA? Yes.

### **Non-Core Benefits**

Where non-core benefits (dental, e.g.) are an integral part of the basic benefit package, a COBRA beneficiary may request medical-only COBRA. Where an active participant may *pick or choose* medical or dental, the COBRA beneficiary *must* be given medical only if such is requested. A COBRA beneficiary need never be given a dental-only benefit.

### **MSA and COBRA**

Since an MSA is not a group plan, there is no COBRA continuation for an MSA. This is not the case for an FSA.

### **COBRA and Preexisting**

Participant is completing 29 months of COBRA as a disabled beneficiary. Participant goes to work with new employer. Does he go on the new plan without preexisting presuming he timely enrolls? Yes.

### **Benefit Additions**

New benefits offered to participants must also be offered to existing COBRA beneficiaries under the similarly situated rules so long as it is to be the same plan. A newly established dental plan offered separately from the medical plan, with its own identity, would not have to be offered to the existing COBRA beneficiaries.

## **Other Coverages and COBRA**

Post-*Giessal*, the logic of other coverages (which includes Medicare) is this:

- If Beneficiary Has Other Coverage at the Time of COBRA Eligibility, COBRA must be offered.
- If Beneficiary Elects Other Coverage After the Election of COBRA Eligibility, Existing COBRA coverage may be terminated.

## **EAP**

An EAP is generally a welfare benefit for COBRA purposes. An exception would be where the counseling is telephone only. The way most plans are written, the EAP is continued only if the base medical is continued. A stand-alone EAP is not contemplated.

## **CHAMPUS and COBRA**

The *other coverage* rules do not apply to CHAMPUS because CHAMPUS is not deemed to be another group plan. Similar logic applied to VA and Medicaid.

## **COBRA and Premium Plan Option**

May a participant have his first COBRA premium deducted from his last pay period by means of the IRC §125 Premium Option Plan? Yes.

## **FSAs and COBRA**

John becomes a COBRA beneficiary with an FSA with a \$2,000 balance. John has a covered spouse. John and his wife wish to elect COBRA individually. Does the \$2,000 balance become \$4,000 (i.e., \$2,000 for John and \$2,000 for Mary)? Answer is not clear as of this writing. Ongoing pay reductions to complete the year's obligation to maintain the FSA need not be made when the participant terminates and elects an FSA COBRA.

## **COBRA and Medicare**

James, at 65 is an active employee with his spouse covered. When James gets his Medicare card he wished to opt out of the health care plan and look to Medicare as his primary health payer. He expects to have his spouse elect COBRA. Is this possible? No, if Medicare is as a result *dumped on*.

## **Special Coverage Plans**

An employer is considering such plans as cancer/dread disease, critical illness and organ transplant. Do such plans qualify for COBRA? Yes.

## **Non-Health Benefits**

COBRA continuation coverage does not extend to disability benefits, death benefits, MSAs or long-term care benefits.

## **Out-of-Network COBRA**

Where plan varies benefits between in and out of the network, what about the COBRA beneficiary who moves to a city out of the network? As an active, there would be much reduced coverage. As a COBRA, there would also be much reduced coverage.

## **Illegal Alien and COBRA**

Alien lied to gain access to the plan. Is it needful to offer COBRA? If the alien successfully gains access to the plan, access to COBRA will follow. If the plan is prudently written, it will say that access to the plan at the outset was prohibited in such circumstances. This means that the plan and COBRA are both denied.

## **Vision as a Non-Core Benefit**

If the cost of vision is less than 3% of the total cost, it may not be deemed a non-core benefit. This is the so-called *de minimis* rule.

# **Premiums**

## **Premiums In-Transit – Plan Assets?**

COBRA premiums in-transit (not yet received by the plan sponsor) do *not* exist (are in *limbo*) for plan asset purposes.

## **Premium Billing – Coupon or Otherwise**

For control purposes, the employer may bill for COBRA premiums by either the coupon or the monthly billing method. Formal notification that coverage has ceased due to non-payment may be sent to a COBRA beneficiary as a plan administrator option. However, generally it is not provided nor required.

## **Premiums – Age/Geography Shadow Pricing**

Where both the plan document and the certificate booklet are amended to reflect a change in funding methodology, the plan may vary COBRA premiums by: (a) geographical cost areas; (b) attained ages of covered beneficiaries (c) whether stop-loss specifics have been *lasered* or increased for certain persons of poor health and (d) whether there is added employer exposure due to the so-called aggregating specific option. Such practices are

acceptable only if adopted such as a plan funding modification and so stated in the plan document.

### **COBRA Premium – Determination Thereof**

Federal law requires that, for self-funded plans, COBRA premiums shall be determined on an actuarial basis and shall take into account such factors as the Secretary of the Treasury shall proscribe by regulations. Such regulations have not yet been issued. There appears to be little likelihood that such will be issued in the near future.

### **Dependent COBRA Premiums**

An employee with family coverage (e.g., a wife and three children), may elect a family COBRA premium or may elect five individual COBRA premiums where each family member elects coverage in such family member's own name. If a man and wife are covered as a family and only the wife elects COBRA, she should be charged the individual rate and not the dependent rate. An employee, a dependent spouse or a child who elects single coverage would each pay the individual rate. Similar logic applied to an employee and spouse.

### **Premium Changes – Employer Options**

When COBRA premiums are increased, the plan may (a) require that all existing COBRA beneficiaries pay the increased amount or (b) may allow such beneficiaries to continue at their lower premiums. Such (a) or (b) practice must be consistently applied to all beneficiaries for all periods regardless of whether the premium change is an increase or decrease. Many employers do not change COBRA premiums for existing COBRAs as a policy matter.

### **Premiums – Increases**

The COBRA beneficiary must be given at least a 30-day grace period. Unless the benefits or plan terms change, no COBRA premiums may be increased for any one COBRA beneficiary more often than annually. An employer may permit, but not require premiums to be paid less often than monthly.

### **COBRA Premiums – Participant Contributions**

The actuarially-determined COBRA premiums may, at the Plan Sponsor's option, be used to determine participant contributions. Such contributions may also be determined independent of COBRA premiums. Care should always be taken to avoid a covered person's contribution being in excess of a COBRA premium.

### **Employer-Paid COBRA Premiums**

Such can and often is done without tax consequences. This is in effect, the employer charging a COBRA premium less than permitted by the law. Such payment will possibly qualify as a severance benefit in which event it may have to be recognized as post-termination benefits under AICPA FAS 12. Care must be taken that the employer-provided is not discriminatory in favor of the prohibited, against the protected or age-related.

### **Returned Check Fees**

Must charges for returned checks be included in the 2% or may they be charged additionally? COBRA is silent. Best guess is that additional fees are not permitted.

### **Employer-Paid COBRA Premium – New Employees**

In managing its medical plan risks, the employer may, with due consideration, become the premium payer and beneficiary of the COBRA coverage of a newly-hired employee. Such assignment of rights may be useful in transferring coverage of a new employee from the old to the new plan with due regard to such facts as (a) preexisting conditions, (b) health condition, (c) managed care choice limitations, (d) personnel considerations, etc.

### **Premiums and Plan Tiering**

Two-tier plans (individual, family, e.g.) should consider going at least three tier to avoid being selected against. Where the COBRA premiums are \$150 for individual, \$420 for family, a participant and spouse might each elect individual thereby paying \$300 as opposed to \$420. They forfeit the secondary benefit (additional extension to spouse if participant dies, e.g.). The actuarial value of such secondary benefit is very small.

### **Premium Payment – Wife's Coverage by Ex-Husband**

Where divorced wife is depending on her former husband to pay her COBRA premiums, such wife's coverage may be in peril due to his potential non-payment of premium,

### **Late Premium Relief – Incapacity or Coma**

Failure to timely pay a COBRA premium because of participant's lack of understanding is no defense; relief would be provided were the participant to be incapacitated or in a coma.

### **Premiums – Impermissible Variations**

Within a single plan, where benefits are the same and claims experience is *pooled*, different COBRA premiums are not permitted even if claims costs are different. Employer's plant A, with bad experience has the same COBRA premiums as plant B,

with good experience. Varying COBRA geographic area, or age, may be a partial solution; such variations require a plan amendment.

### **Premium Increases**

COBRA premiums may not be increased during any 12-month determination except for these reasons:

- Benefit or plan provision changes
- Advancing to disability status
- Prior COBRA premiums were lower than permissible.

Devices used to ease the premium increase processes:

- Vary the determination period by block of beneficiaries
- Use a determination period of less than 12 months.

### **Premiums Paid by Bad Checks**

Bad checks equate to non-payment. Employer must give a beneficiary *some slack* if the COBRA premium is substantially paid.

### **Return of Unearned COBRA Premiums**

Such return is not contemplated because COBRA premiums, attach, in full, at the beginning of the month involved. Unearned premiums could be required if such COBRA premiums were for a period such as six months, e.g.

### **Return of COBRA Premiums**

Participant quit, took COBRA for three months (with no claims), came back on the plan as an early retiree. Participant wants his COBRA premiums refunded. Such refunds are not required by the COBRA law.

### **COBRA Premium – Paid by Employer in Error**

In such instance does COBRA prevent the employer from going against the beneficiary to recover such mispayment? No.

### **Employer Embezzlement of COBRA Premiums**

While the insurer ceases to be liable, the employer does become liable. An employer would be *daft* to risk such a huge liability for so little gain.

### **Nonpayment of COBRA Premium**

Nonpayment of a COBRA premium is sufficient to terminate COBRA. No follow-up confirmation or notice of termination is needed. Tolling of COBRA payments track the

postmark date, not the date received. COBRA premiums may be paid by anyone (a hospital assignee, e.g.). Partial payments do not count. Employers should give a COBRA beneficiary the chance to *cover a bad* check. A conversion benefit is often available if COBRA is terminated for any reason.