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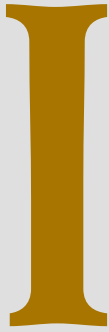
COBRA

COBRA

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.



In the early 1980s, there was considerable concern about the rising cost of health care and the inability of some employees, especially when changing employment, to be able to continue health insurance coverage for themselves and their families. In 1985, Congress passed the Consolidated Omnibus Budget Reconciliation Act, usually referred to as COBRA, aimed at helping this situation.

Briefly, COBRA requires employers who sponsor group health plans to offer participants and beneficiaries the right to continue their group health coverage (including medical, dental, or vision care) if coverage is lost due to a *qualifying event*. The continuation coverage must be the same as that offered to similarly situated active employees and normally will last for up to 18 months after the qualifying event, although there are certain circumstances that result in continuation coverage for longer time periods.

Employers who sponsor such plans are required by law to notify participants and their beneficiaries of their COBRA rights. This notice must be provided when an individual first becomes covered under a group health plan and again when the individual experiences a qualifying event. Participants and beneficiaries who wish to continue group health coverage under COBRA must elect it in writing within a specific election period; if they do so, they become *qualified beneficiaries*.

Plan sponsors and qualified beneficiaries have notice obligations to each other. Failure to meet these obligations may increase or decrease the length of COBRA coverage or may terminate COBRA coverage altogether.

This booklet provides an overview of the requirements, both coverage and notice, imposed on group health plan sponsors to comply with COBRA. While in-depth analysis of the many details of COBRA compliance is not possible in this brief format, this booklet can serve as a quick source of preliminary information for busy executives and human resource professionals. Please note that many states have their own continuation coverage laws which may apply if federal COBRA rules do not.

COVERED EMPLOYERS

Generally speaking, private employers who sponsor group medical, dental, and vision care plans are subject to COBRA. COBRA provides an exception, however, for small employers. The Act defines “small employer” as one that employs fewer than 20 employees on 50% of its typical business days during the previous calendar year.

All “regular” common law employees count toward the 20-employee threshold whether or not they actually participate in a group health plan. Plan sponsors generally do not have to count:

- leased employees;
- non-employee directors;
- self-employed individuals; or
- independent contractors.

Your part-time employees must be included — at least partially. For example, if you require employees to work eight hours per day to be considered full-time, employees who work only four hours per day will each count as half an employee for purposes of the 20-employee threshold.

The 20-employee coverage test addresses employment during the **prior** calendar year. In other words, you are covered by COBRA in 2000 if you employed 20 or more employees on a typical business day in 1999. You are not covered in 2000, however, if you employed fewer than 20 employees in 1999, even if you typically employ more than 20 employees in 2000. In that case, COBRA coverage is effective for the year 2001.

If your business is part of a *controlled group* of companies, you may be covered by COBRA even if you employ fewer than 20 employees. Companies that are in a parent-subsidiary or brother-sister relationship with at least 80% common ownership are considered part of such a controlled group and must combine their employee populations for purposes of the 20-employee threshold. Thus, if you employ 15 employees and another company related by 80% common ownership employs 10 employees, both you **and** the related company are covered under COBRA.

Even if you are a small employer and are exempt from federal COBRA requirements, you may still have continuation coverage obligations. This is because most states

have enacted laws that are similar to COBRA. In fact, as of the end of 1999, only Alabama, Alaska, Delaware and Michigan, as well as the District of Columbia, had *not* mandated some form of continuation coverage. All of the other states require small employers to provide some form of continuation coverage.

COVERED PLANS

Generally, group medical, dental, and vision care plans are subject to COBRA. Pension plans and other welfare benefit plans, such as life insurance, dependent care reimbursement accounts, disability, severance pay, profit sharing and 401(k) plans, are not subject to COBRA.

Most health flexible spending accounts (“FSAs”), which are accounts into which employees contribute pre-tax dollars to be used as needed to reimburse medical, dental, and vision care expenses not otherwise covered under a group health plan, qualify for exemption from COBRA requirements. For example:

- No COBRA coverage is required with respect to a health FSA in any plan year **after the plan year in which a qualifying event occurs** if (a) the benefits provided are “excepted benefits” under the Health Insurance Portability and Accountability Act (HIPAA) and not subject to HIPAA’s certification and other rules and (b) in the plan year in which the qualifying event occurs, the maximum amount that the health FSA could require to be paid for a full year of COBRA coverage equals or exceeds the maximum benefit available under the health FSA for the year. Health FSAs are excepted from HIPAA if the maximum benefit payable in a plan year does not exceed two times the employee’s annual contribution and the employer provides other health benefits.
- No COBRA coverage is required at all, **not even in the year in which the COBRA qualifying event occurs**, if as of the date of the qualifying event the maximum benefit available under the health FSA for the rest of the plan year is less than the

maximum amount the plan could require as payment for the remainder of that year to maintain coverage under the health FSA.

Example: Bob participates in a health FSA into which he contributes \$50 per month. Bob's employer also contributes \$50 per month. The total amount Bob may be reimbursed through the FSA in a given year is \$1,200. Bob terminates employment on July 31, after contributing \$350, and has been reimbursed \$700 in medical expenses through that date. Because Bob's contribution to continue his FSA under COBRA for the remainder of the plan year would be \$510 (i.e., his own \$50/month for five months, plus the employer's contribution, for which Bob is now responsible, plus a 2% administrative fee each month), and because that amount is greater than the amount of Bob's remaining benefit under the plan (i.e., \$500), the plan need not offer COBRA coverage.

Health FSAs present complex issues under COBRA, and the facts of each case should be examined carefully before making any determination of COBRA coverage.

If you sponsor separate medical, dental, and vision plans, you must permit COBRA-qualified beneficiaries to elect coverage from any of these plans under which they were covered on the day immediately before the qualifying event. For qualifying events that occurred before January 1, 2000, employers who sponsored group medical plans that included dental and vision coverage were required to allow qualified beneficiaries to elect medical coverage only. Since January 1, 2000, however, qualified beneficiaries no longer have the right to elect medical coverage only, if their employer's plan offers medical, dental, and vision coverage under a single plan.

You need not offer COBRA coverage to employees who were not covered on the day preceding a qualifying event.

QUALIFYING EVENTS

Certain events trigger a plan sponsor's obligation to issue COBRA notices and to offer COBRA continuation coverage. A *qualifying event* refers to a loss of insurance coverage for any of the following reasons:

- termination of employment (for reasons other than gross misconduct);
- reduction in working hours (such as a strike, lay-off, or leave of absence);
- a divorce or legal separation;
- the death of a covered employee;
- a dependent losing dependent status under the terms of a group health plan; and
- loss of coverage due to Medicare entitlement.

If you offer retiree medical benefits under your group health plan, your company's filing for bankruptcy is also a qualifying event with respect to affected retiree participants.

Any of the foregoing events is a qualifying event only if it causes participants to lose coverage during the initial COBRA continuation coverage period. Thus, if your company policy is to continue group health plan coverage for periods of disability for more than 18 months, the disability leave does not create a qualifying event because participants do not lose coverage due to their reduction in working hours.

Leave approved under the Family and Medical Leave Act (FMLA) is not a qualifying event. Thus, you should not issue a COBRA notice when an employee takes a qualifying FMLA leave. If the employee informs you that he or she will not return after FMLA leave, or in fact does not return from FMLA leave, this is a qualifying event. You should issue a COBRA notice on the earlier of the date when the employee on FMLA leave first informs you that he or she will not be returning to employment or on the date the FMLA leave period expires. (Other issues arising under the Family and Medical Leave Act are addressed in a separate booklet in this series).

On the other hand, you should issue a COBRA notice to employees who take any other leave of absence, including workers' compensation leave, if, pursuant to the Plan, the

leave causes a loss of coverage within 18 months. Unless it is your company's practice to continue coverage for periods of leave, or your group health or disability plan requires you to continue group health coverage, you should issue the notice when an employee begins the leave period. This will trigger all COBRA time periods and may reduce the plan's exposure for continuation coverage.

Covered individuals are obligated to inform the plan administrator of certain qualifying events. If a plan administrator is not notified within 60 days of an employee's death, divorce, legal separation, or entitlement to Medicare, the plan administrator does not have to offer COBRA coverage.

QUALIFIED BENEFICIARIES

Participants, or their dependents who are covered under a group health plan, become *qualified beneficiaries* if they experience a qualifying event and submit a completed COBRA election. Individuals who have been covered by a plan for even one day are eligible for COBRA coverage. On the other hand, employees or dependents who are never covered under your group health plan have no COBRA rights. You do not need to send a COBRA notice to these individuals.

COBRA provides that plan sponsors may deny COBRA coverage to any employee who is terminated for gross misconduct. Plan sponsors may also deny coverage to any such employee's dependents. The Act does not define "gross misconduct," however, and courts have issued varying interpretations. Thus, denying COBRA coverage based on the gross misconduct exception can be risky. Short of a felony conviction, you may wish to use this exception sparingly until one legal standard emerges or until Congress amends COBRA to define this term.

Qualified beneficiaries may add newly acquired dependents to COBRA coverage (such as children born or adopted during a COBRA continuation period or a spouse married during a COBRA continuation period). You need not cover these newly acquired dependents, however, if

qualified beneficiaries do not notify the plan administrator within 30 days after marriage, birth, or adoption of any dependent whom the qualified beneficiary seeks to add to coverage.

NOTICE REQUIRE- MENTS

A. Notice Contents

COBRA notices must inform participants adequately of their rights. Notices should include the date of the notice itself, the date the election period ends, the maximum COBRA coverage period, the events that will result in early termination of COBRA coverage, the required monthly premium payment, the due date and grace period for each premium, the effect of partial premium payment or a returned check, and the address where the participant should send the completed election form and premium payments.

Notices should also describe to participants the conditions under which they may receive extended coverage for disability or for multiple qualifying events. Finally, notices should explain the events that qualified beneficiaries must report to the plan administrator and warn that failure to report these events may result in immediate termination of coverage with no right to reinstatement.

You must ensure that your notices include all of the foregoing information, to the extent that it is available. Though COBRA affords an employer some rights and protections, you will be unable to enforce these rights if you fail to inform employees about their COBRA obligations and the consequences of not meeting them.

B. Initial Notice

COBRA requires employers to provide employees and their covered dependents with notice of their COBRA rights when they first become covered under a group health plan. You may satisfy this obligation by mailing the initial notice to the employee's and spouse's last known address, with the envelope addressed to "Employee and Spouse" or "Employee and Family."

Many employers hand the initial notice to an employee when plan coverage begins. Some employers simply include the notice in their summary plan description (SPD) for the group health plan. Either of these two methods satisfies the initial notice requirement, but you should be sure to get written acknowledgment of receipt from each employee *and* spouse or dependent. Spouses and dependents must receive notice and be informed of their individual election rights. You should not assume that an employee will provide the information to his or her spouse. If you choose to include the initial COBRA notice in your plan's SPD, you must remember to amend the SPD if and when you amend your COBRA notice.

C. Notice of a Qualifying Event

COBRA requires you to send a notice of COBRA rights and an election form to affected participants following a qualifying event. The Act requires the plan sponsor to notify its plan administrator within 30 days following a qualifying event. The plan administrator must then issue a COBRA notice and election form to affected participants within 14 days after the notification of the qualifying event is received. Thus, the maximum time COBRA allows for a participant to be provided COBRA notice is 44 days following a qualifying event.

The U.S. Department of Labor and the courts have held that plan sponsors who do their own COBRA administration have the entire 44-day period in which to issue COBRA notices and election materials. You will likely want to issue these materials as soon as possible following a qualifying event, however. This starts the COBRA election period and other deadlines running sooner and will reduce the overall time period during which your plan is subject to COBRA requirements.

A COBRA notice is considered given on the date it is mailed. Thus, you should send COBRA notices by certified mail, return receipt requested, retaining a copy of the notice and the return receipt card in each participant's COBRA file. Further, your COBRA compliance coordinator should annotate the participant's COBRA file to show who mailed the notice and when he or she mailed it.

COBRA does not require plan sponsors to ensure receipt of COBRA notices. Once you mail the qualifying

event notice and election materials, you generally need not take further steps to ensure delivery. If you know that a spouse and/or dependents live at a different address than the affected employee, however, you should mail separate notices to the spouse and/or dependents at their last known address.

CONTINUING COVERAGE UNDER COBRA

A. Electing Coverage

Affected participants must be given at least 60 days in which to make a COBRA election. The 60-day period generally begins to run on the later of the date plan coverage would be lost due to a qualifying event or the date the COBRA notice and election form are sent.

Affected participants may return their COBRA election forms in person or through the mail. If mailed, you should save the envelope containing the election form — this postmark will prove the date of mailing. If the postmark is more than 60 days after the date of the COBRA notice, the election is invalid and should be returned to the affected participant with a letter stating that the attempted election is untimely and invalid. Although it may be tempting to do so, you should not make any exceptions to this rule. Making even one exception increases risks associated with litigation based on claims of discrimination.

Each participant has separate election rights and should receive a separate notice (or notice mailed to “Employee and Spouse” or “Employee and Family.”) An employee may decline coverage, but elect coverage for a spouse or dependent(s) or vice versa. You should require spousal consent whenever a married participant with dependent coverage chooses not to elect dependent COBRA coverage, however. This will help avoid liability for self-insuring a spouse’s claims in the event an employee attempts to drop dependent coverage to lessen his or her liability for spousal support in any legal separation or divorce proceeding.

Participants may affirmatively waive COBRA coverage during the election period. These participants must be

allowed to rescind a waiver and elect COBRA coverage, however, if they do so before the end of the original 60-day election period. In this case, the plan does not have to cover any claims for expenses incurred between the qualifying event and the date the participant rescinds the waiver.

Technically, the Act prohibits plans from rejecting coverage to plan participants during their COBRA election periods. This presents a problem for employers who cover claims and never receive the premium payment from a qualified beneficiary. You should be cautious in this area, but you may wish to consider holding all of a qualified beneficiary's claims in abeyance until you actually receive COBRA premium payment. As long as coverage is retroactively reinstated with no gaps, this policy will not violate COBRA.

B. Duration of Coverage

As shown in the following chart, COBRA coverage is available for 18 months from the date of a qualifying event, if the initial qualifying event is a termination of employment or reduction in hours worked. If the initial qualifying event is a divorce, legal separation, loss of dependent status, an employee's entitlement to (i.e., actual enrollment in) Medicare coverage, or the plan sponsor's bankruptcy, the maximum COBRA period for spouses and dependents is 36 months from the date of the qualifying event.

Qualifying Event	Length of Employee's Coverage	Length of Beneficiary's Coverage
Termination of Employment	18 months*	18 months*
Reduction in Hours	18 months*	18 months*
Divorce	None	36 months
Legal Separation	None	36 months
Employee's Death	None	36 months
Loss of Dependent Status	None	36 months
Employee's Entitlement to Medicare	None	36 months

*If the Social Security Administration determines that an employee or a dependent was disabled at any time during the first 60 days following a qualifying event, however, the employee and dependent and all related qualified beneficiaries may extend COBRA coverage to 29 months from the date of the qualifying event. A qualified beneficiary must provide the plan administrator with written certification of the disability within 60 days of the Social Security Administration's determination and before the end of the initial 18-month COBRA period.

EXAMPLE: Carol terminates employment on December 1. She applies for Social Security disability benefits and receives a notice dated June 1 of the following year that she is deemed to have been disabled as of December 15. Carol and all of her related covered dependents are entitled to a maximum of 29 months of COBRA coverage if Carol presents the written notice of disability to the plan administrator by July 30.

COBRA coverage may be extended for spouses and dependents if they experience a second qualifying event (e.g., the employee's death or a divorce) following an employee's termination of employment or a reduction in hours that originally resulted in COBRA coverage. The extended coverage will last for up to 36 months from the date of the initial qualifying event. For example, if an employee terminates employment, he and his covered dependents may elect up to 18 months of COBRA coverage. If during this 18-month period, the former employee dies, a spouse and dependent(s) who elected COBRA coverage may extend that coverage to a total of 36 months from the date of the former employee's termination of employment.

C. Termination of Coverage

COBRA coverage may terminate before the end of the maximum 18-, 29-, or 36-month periods under certain circumstances. Coverage will end early if any of the following events occurs:

1. You no longer provide group health coverage to **any** of your employees, including any employees of another employer within the same controlled group of companies;

2. A qualified beneficiary's premium for continuation coverage is not timely paid;
3. A qualified beneficiary becomes covered by Medicare;
4. A qualified beneficiary who extended coverage for up to 29 months due to a disability is deemed by the Social Security Administration to be no longer disabled; or
5. A qualified beneficiary is covered or becomes covered (after the date of the qualifying event) under another group health plan (as an employee or otherwise) unless that plan contains an exclusion or limitation with respect to any pre-existing condition that the qualified beneficiary has, and the qualified beneficiary cannot meet the pre-existing condition exclusion through the Health Insurance Portability and Accountability Act of 1996 (HIPAA) creditable coverage rules.

EXAMPLE: Ted has been covered under COBRA for 12 months. He accepts a job through which he is immediately eligible to participate in a group health insurance plan. Ted's new plan does not pay claims for pre-existing conditions for the first 12 months of a participant's coverage. HIPAA, however, states that plans must offset their pre-existing exclusion periods by the amount of any creditable coverage, including COBRA coverage. Thus, Ted's new plan may not exclude any of his pre-existing conditions because he had 12 months' creditable coverage through COBRA. Ted may be dropped from your plan upon his first day of coverage under the new plan.

Insured plans may be required under state law to offer individual conversion coverage to qualified beneficiaries who exhaust the maximum COBRA continuation period. If you sponsor an insured plan, you should inform participants of applicable individual conversion rights in the initial COBRA notice. You should also inform them that they will not receive any further reminders at the end of the COBRA continuation period and that they are responsible

for requesting individual coverage from the insurance company. Self-insured plans are not subject to individual conversion rights.

D. Paying for Coverage

Generally, qualified beneficiaries must pay the entire cost of COBRA continuation coverage. You may charge up to 102% of the premium attributable to similarly situated active employees. Even if you pay a portion of the premium for coverage for active employees, you need not do so for qualified beneficiaries. For extended COBRA coverage due to a Social Security qualifying disability, employers may charge up to 150% of the premium cost for the additional 11 months of COBRA coverage.

Qualified beneficiaries must pay their initial COBRA premium payment within 45 days following their COBRA election. This initial payment must include an amount to cover the premium cost for all coverage retroactive to the date of the qualifying event. For example, if a participant receives COBRA notice and an election form on October 1, the election must be made by November 29. The qualified beneficiary then has 45 days — until January 13 — to pay the initial premium which must include October through December premium payments.

For all subsequent COBRA premiums, the Act requires a 30-day grace period. Thus, in the previous example, the qualified beneficiary's January premium is due by January 31, his or her February payment is due by February 28, and so on.

As with COBRA notices and election forms, the date of premium payment is crucial. Thus, you should save all envelopes containing premium payments, especially if the payment date is critical. The postmarks will serve as the effective date of a premium payment. A premium payment not timely mailed should be rejected and returned to the qualified beneficiary. At that point, continuation coverage would terminate as of the last date for which the applicable premium had been paid.

If a qualified beneficiary remits a partial premium payment, you should immediately return the payment with a request for payment in full. You should inform the person that his or her deadline for premium payment will not be

extended and that coverage will be terminated automatically if full payment is not received on time.

You should also consider how to handle insufficient fund checks. Many employers return these checks, charge the appropriate processing fee, and refuse to accept any future COBRA premium payments by personal check. Again, a consistent treatment of all qualified beneficiaries is critical.

As with election notices, you should not make any exceptions to the policies you develop with respect to premium grace periods, partial payments, or insufficient fund checks. Exceptions to these rules may expose you to liability based on discrimination claims.

Qualified beneficiaries may have someone else pay their COBRA premiums. For example, state Medicaid authorities may pay COBRA premiums. Also, in the case of a divorce, one spouse may be responsible pursuant to court order to remit COBRA premiums on behalf of the other spouse. Regardless of who actually pays the premiums, however, you should maintain a consistent policy for all untimely payments.

ENFORCEMENT

The U.S. Department of Labor (DOL) and Internal Revenue Service (IRS) each have enforcement authority for COBRA violations. The federal courts also have jurisdiction to hear COBRA lawsuits, including those filed by individual participants.

A. DOL Enforcement

COBRA authorizes DOL to impose a fine of up to \$110 a day for a COBRA notice violation. Each notice failure carries its own fine, so these amounts can become significant in the event of faulty notice procedure, a large reduction in force with multiple erroneous COBRA notices, or if notices do not go to multiple dependents living at an address that differs from that of the terminated employee. Penalties accrue until an employer issues a complete and accurate COBRA notice. DOL will typically

assess this fine as part of a COBRA audit following a participant complaint. Generally, DOL will not agree to waive or reduce COBRA fines.

B. IRS Enforcement

COBRA also authorizes IRS to levy a \$100 per day excise tax against plan sponsors who do not adhere to COBRA's notice requirements. Though less common than DOL penalties, IRS will levy taxes for any COBRA violations it uncovers during a regular payroll audit. These excise taxes are not offset by DOL fines. Thus, plan sponsors who do not issue timely COBRA notices run a risk of paying \$210 per day for each day of noncompliance.

C. Enforcement Through The Courts

Participants may sue plans for benefits that they feel they have been denied through untimely or incorrect COBRA notice or administration. COBRA preempts claims based on state law (except for claims against an insured plan based on state continuation coverage law), so most COBRA lawsuits must be filed in federal court. The courts will not award punitive or compensatory damages in these cases, and jury trials are not available. The courts may, however, order plan sponsors to reinstate coverage, pay for any unpaid and outstanding claims, and order payment of \$110 per day of noncompliance to each affected qualified beneficiary who prevails in court. Courts will typically reduce the \$110 penalty unless they find that the COBRA notice violations are intentional, willful, or egregious.

Employers with insured group health plans who fail to comply with COBRA notice obligations run an even greater potential risk than DOL, IRS, or court-imposed penalties. This is because insurance carriers may refuse to reinstate COBRA beneficiaries for whom a plan sponsor has not continued premium payments. Thus, an employer in this situation will have to self-insure all medical claims for these qualified beneficiaries. If these individuals have catastrophic injuries or illnesses and extraordinarily large medical claims, such COBRA errors can prove to be extremely costly.

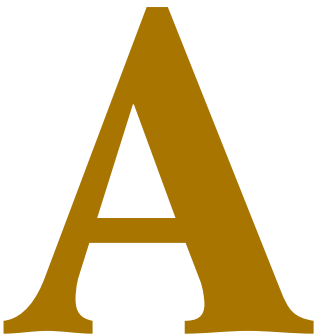
PREVENTING PROBLEMS

COBRA compliance can be a complicated jumble of paperwork and deadlines. But with a few simple preventive steps, you can eliminate many of the risks associated with COBRA. First and foremost, you must implement a meticulous recordkeeping system to track all required notices, election forms, and premium payments. Next, make sure you follow your procedures to the letter in each case. Establish a file for each plan participant and keep every COBRA-related document sent to, or received from, each participant. You should also consider designating someone who will be primarily responsible for COBRA compliance at each of your business centers. This individual should be familiar with your standard COBRA procedures, and should initial each COBRA action in every participant's COBRA file. This COBRA compliance coordinator will be your star witness if litigation arises from any alleged COBRA violation.

If you sponsor a group health plan, it is crucial that you audit your COBRA compliance program periodically. You must be sure that you have updated notice materials and that these materials have been sent on time. If you discover untimely notices, send proper notices immediately.

If you have contracted with a third-party COBRA administrator, you should audit its procedures to ensure that the provider is current with recent COBRA legislation. You cannot afford to assume that the provider is properly administering COBRA, because you may still face COBRA liability for a third-party administrator's error.

Attention to detail and timeliness are the essential elements of COBRA administration. You can greatly reduce the likelihood that you will be subject to DOL penalties, IRS excise taxes, and the potentially enormous expense of self-insuring catastrophic medical claims by following these COBRA compliance measures.



For further information about this topic, please contact any office of Fisher & Phillips LLP.

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