

# COBRA



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# 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.*

## OVERVIEW OF THE LAW

**I**n the early 1980s, the rising cost of health care and inability of employees to continue health insurance after changing jobs began to create public concern. In response, Congress passed the Consolidated Omnibus Budget Reconciliation Act, which came to be known as “COBRA.” The law was revisited and expanded by the Department of Labor in 2004 when it issued regulations addressing COBRA administration. The administration and notices required by these regulations are effective for all plan years beginning on or after November 26, 2004.

Briefly, COBRA requires employers who sponsor group health plans to offer employees and dependents the right to continue their group health coverage (including medical, dental, or vision care) if coverage is lost due to a **qualifying event** (defined in detail starting on page 5 of this booklet). The continuation coverage must be identical to the coverage offered to similarly situated active employees, and normally lasts up to 18 months after the qualifying event. There are also certain circumstances that result in continuation coverage for periods of 29 or 36 months.

Employers who administer covered plans are required by law to notify covered employees and their covered dependents of their COBRA rights. A notice must be provided when an individual first becomes covered under a group health plan and another notice given when the individual experiences a qualifying event. Covered employees and their covered dependents who wish to continue group health coverage under COBRA after a qualifying event must elect to do so within a specific election period. Those who are eligible to elect COBRA coverage are referred to as **qualified beneficiaries** (defined in detail on page 6 of this booklet).

Plan administrators and qualified beneficiaries have formal COBRA notice obligations to each other. Failure to meet these obligations may result in penalties for the plan administrator and termination of valuable rights for the qualified beneficiaries.

This booklet provides an overview of COBRA requirements imposed on group health plan sponsors, plan administrators and qualified beneficiaries. While an 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 primary information for busy executives and human resource professionals.

**Please also note that many states have continuation coverage laws which may apply even if federal COBRA rules do not.**

## COVERED EMPLOYERS

Generally speaking, private employers sponsoring group medical, dental, and vision care plans are subject to COBRA. However, small employers with fewer than 20 employees on 50% of typical business days during the previous calendar year, are exempt from COBRA.

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 (unless they are actually common law employees of the sponsor);
- non-employee directors;
- self-employed individuals; or
- independent contractors.

Part-time employees must be counted as partial employees. For example, if an employer requires employees to work eight hours per day to be considered full-time, employees who work only four hours per day 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, an employer is covered by COBRA in 2015 if it employed 20 or more employees on a typical business day in 2014. An employer would not be covered in 2015, however, if it employed fewer than 20 employees in 2014, even if it typically employed more than 20 employees in 2015. In that case, COBRA coverage would be required in 2016.

If a business is part of a controlled group of companies, it may be covered by COBRA even if it employs 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 employee populations for purposes of the 20-employee threshold. For example, if a company employs 15 employees and another company related through 80% common ownership employs 10 employees, both companies are covered under COBRA.

Even if a small employer is exempt from federal COBRA requirements, it may still have continuation coverage obligations under state law. Most states have enacted laws that are similar to COBRA.

## COVERED PLANS

Only group medical, dental, and vision care plans are subject to COBRA. Most health care flexible spending accounts (FSAs) and health reimbursement accounts (HRAs) are subject to limited COBRA requirements. Pension plans and other benefit arrangements such as life insurance, health savings accounts (HSAs), dependent care reimbursement accounts, disability, severance pay, profit sharing and 401(k) plans, are not governed by COBRA.

Employers sponsoring separate medical, dental, and vision plans must permit COBRA-qualified beneficiaries to elect coverage from any of these plans if the individuals were covered on the day before the qualifying event. However, if the employer offers only a single plan which contains all of these coverages, qualified beneficiaries may not pick and choose among coverages, but must elect the entire package.

## HEALTH FSA LIMITED COVERAGE

Employers need not offer COBRA coverage to employees, spouses or dependents who were not covered on the day preceding a qualifying event.

Generally, the limited COBRA requirements for health FSAs are as follows:

- No COBRA coverage is required beyond the plan year in which the qualifying event occurs.
- COBRA coverage is required for the remainder of the plan year in which the COBRA qualifying event occurs only 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 greater than the maximum amount the plan could require as payment for the remainder of that year to continue 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 (plus, \$350 contributed by his employer for a total contribution of \$700 through July 31). Bob has been reimbursed \$500 in medical expenses through that date and would have a maximum remaining benefit of \$700 (i.e., \$1,200 - \$500). Bob's contribution to continue his FSA under COBRA for the remainder of the plan year (i.e., his own \$50/month for 5 months, plus the employer's contribution, for which Bob is now responsible, plus a 2% administrative fee each month) is a total of \$510. Because that amount is less than the amount of Bob's maximum remaining benefit under the plan (\$700), the plan must offer COBRA coverage for the remainder of the plan year.

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

## QUALIFYING EVENTS

Certain events trigger a plan sponsor's obligation to issue COBRA notices and to offer qualified beneficiaries the opportunity to elect COBRA continuation coverage. These events are called **qualifying events**.

A qualifying event occurs if a **covered employee** loses coverage under the Plan because either one of the following happens:

- the employee's hours of employment are reduced, or
- the employee's employment ends for any reason other than his or her gross misconduct.

A qualifying event occurs if a **covered spouse** of an employee loses coverage under the Plan because any of the following happens:

- the employee dies;
- the employee's hours of employment are reduced;
- the employee's employment ends for any reason other than his or her gross misconduct;
- the employee becomes entitled to Medicare benefits (under Medicare Part A, Part B or both); or
- the employee becomes divorced or legally separated from his or her spouse.

A qualifying event occurs if the **covered dependent children** of an employee lose coverage under the Plan because any of the following happens:

- the parent-employee dies;
- the parent-employee's hours of employment are reduced;
- the parent-employee's employment ends for any reason other than his or her gross misconduct;
- the parent-employee becomes entitled to Medicare benefits (under Part A, Part B or both);



- the parent-employee becomes divorced or legally separated from his or her spouse; or
- the child stops being eligible for coverage under the Plan as a “dependent child.”

If an employer offers retiree medical benefits under its group health plan, 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 a covered employee or his or her covered dependents to lose coverage during the initial COBRA continuation coverage period.

A loss of coverage in a health plan occurs if the participant ceases to be covered under the same terms and conditions as in effect immediately before the qualifying event. Any increase in the premium or contribution that must be paid by the covered employee or qualified beneficiary for coverage under the health plan as a result of the qualifying event is considered a loss in coverage.

Leave approved under the Family and Medical Leave Act (FMLA) is not a qualifying event. If the employee informs the employer that he or she will not return after FMLA leave, or in fact does not return from FMLA leave, then a qualifying event takes place at that time. (Other issues arising under the Family and Medical Leave Act are addressed in a separate Fisher & Phillips booklet in this series).

Finally, some employees and eligible dependents may have a “second-chance” COBRA election if the employee’s termination of employment resulted in assistance under the Trade Act of 2002 (discussed in detail on page 16 of this booklet).

## QUALIFIED BENEFICIARIES

Employees, or their dependents who are covered under a group health plan, become **qualified beneficiaries** if they experience a qualifying event. Children born to or placed for adoption with a covered employee during a COBRA continuation period are also qualified beneficiaries. Individuals who have been covered by a plan for even one day are eligible for COBRA coverage

if they are covered under the plan on the day before the qualifying event. Employees or dependents who are not covered under a group health plan have no COBRA rights, and there is no need to send them a COBRA election notice.

Plan sponsors may deny COBRA coverage to any covered employee who is terminated for gross misconduct. In addition, sponsors may also deny COBRA coverage to any covered dependents of such employee. COBRA does not define “gross misconduct,” however, and courts have issued varying interpretations. Therefore, denying COBRA coverage based on the gross misconduct exception can be risky. Short of a felony conviction, employers may wish to use this exception sparingly.

COBRA qualified beneficiaries are subject to the same enrollment rights and limitations as active employees covered by the plan. Thus, during an open enrollment for active employees, a qualified beneficiary may add dependents to his or her COBRA coverage or a qualified beneficiary may add a spouse married during a COBRA continuation period, as long as the spouse is added during the same time frame allowed under the Plan for active employees. However, the added dependents (or spouse) do not in turn become qualified beneficiaries.

## NOTICE REQUIRE- MENTS

### A. Notice Contents and Requirements

COBRA notices generally inform covered employees and their covered dependents of their rights, and must be written in a manner calculated to be understood by an average plan participant.

#### 1. Plan Administrator Notices

There are four notice requirements imposed on plan administrators.

- the “general” notice is designed to inform covered employees and their covered dependents about their COBRA rights and obligations. This notice is discussed further in Section B on page 9 of this booklet.
- the “continuation coverage election” notice informs qualified beneficiaries who have had a qualifying event of

their right to elect coverage and how to make the election. This notice is discussed further in Section C on page 9 of this booklet.

- the “unavailability of continuation coverage” notice is used when a plan administrator receives a request for COBRA continuation coverage from an individual, and determines that the individual is not eligible for COBRA coverage. This notice is discussed further in Section D on page 10 of this booklet.
- the “termination of continuation coverage” notice is used by the plan administrator to notify an individual who is receiving COBRA coverage that coverage will end prematurely before the 18, 29, or 36 month eligibility period expires. This notice is discussed further in Section E on page 11 of this booklet.

The Department of Labor (DOL) has prepared model forms for the initial notice and election notice which are available on its website. The forms were updated in 2013 and 2014 to include information related to healthcare reform and the availability of coverage on the Health Insurance Marketplace created by the Patient Protection and Affordable Care Act.

## **2. Covered Employee, Covered Dependent or Qualified Beneficiary Notice**

There is also a notice requirement which is imposed on individuals rather than the employer or plan administrator. This notice is from the covered employee, covered dependent or qualified beneficiary and informs the plan administrator that certain qualifying events have occurred, or that the individual is no longer eligible for COBRA because he or she has been determined by the Social Security Administration to no longer be disabled. Again, the Department of Labor has not provided a form for this notice. Plans also are required to maintain “reasonable” written procedures governing provision of this notice by the covered employee, covered dependent or qualified beneficiary. Administrators who fail to develop reasonable procedures for individuals to follow when giving this notice run the risk of having oral notice to local human resources personnel constitute actual notice, even if never communicated to the plan.

This notice is discussed further in Section F on page 11 of this booklet.

## **B. The Initial General Notice**

COBRA requires employers to provide employees and their spouses with the initial General Notice of COBRA rights within 90 days after they first become covered under a group health plan. You may satisfy this obligation by mailing this General Notice to the employee's and spouse's last known address, with the envelope addressed to "Employee and Spouse" or "Employee and Family." This notice can also be provided in a summary plan description (SPD) as long as the SPD is provided within the time limits required for providing the General Notice and is provided to the employee's spouse as well as to the employee.

Some employers hand the General Notice to an employee when plan coverage begins. This will satisfy the General Notice requirement as to an employee, but not as to a spouse. If this procedure is used, administrators should be sure to get written acknowledgment of receipt from each employee and spouse. You cannot assume that an employee will provide the information to a spouse. Further, employers choosing to include the General Notice in an SPD must remember to amend the SPD if and when the General Notice is amended.

Regulations require that the General Notice contain a number of specific items, although a detailed listing is beyond the scope of this booklet. You can review the contents of DOL's model notice at [www.dol.gov.ebsa](http://www.dol.gov.ebsa).

## **C. Continuation Coverage Election Notice**

COBRA requires plan administrators to send a notice of COBRA rights and an election form to the covered employee and qualified beneficiaries following a qualifying event. This is known as the Election Notice. The Act requires that the plan sponsor notify its plan administrator within 30 days following a qualifying event. The plan administrator must then issue an Election Notice to the covered employee and other qualified beneficiaries within 14 days after it receives notice of the qualifying

event. Thus, the maximum time allowed for a covered employee or other qualified beneficiary to be provided the COBRA Election Notice is 44 days following a qualifying event.

Plan sponsors who do their own COBRA administration also have the entire 44-day period in which to issue the COBRA Election Notice, although it is wise to issue these materials as soon as possible following a qualifying event. This starts the COBRA election period and other deadlines running.

A COBRA Election Notice is considered given on the date it is mailed. Accordingly, it is important to keep records proving when and to whom Election Notices were mailed, and who mailed the Notices. It is not necessary to mail Election Notices by certified mail, return receipt requested, although some plan administrators do so. We do not recommend this practice because this procedure also informs the plan administrator that an Election Notice did not reach its intended recipient. This may require additional steps to be taken, since a court could look harshly on an administrator who did not follow up on knowledge that delivery failed.

Generally, however, once the administrator mails the Election Notice and accompanying election materials, he or she is not required to take further steps to ensure delivery. If the administrator knows that a covered spouse or dependents live at a different address than the covered employee, separate notices must be mailed to the spouse or dependents at their last known addresses.

As with the General Notice, regulations require that the Election Notice contain a number of specific items. DOL's model Election Notice can be viewed at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

#### **D. Unavailability Of Continuation Coverage Notice**

If an administrator receives a request for COBRA continuation coverage from a covered employee or qualified beneficiary or a notice relating to a qualifying event, second qualifying event, or a determination by the Social Security Administration pertaining to disability, and determines that the individual is not entitled to a COBRA election, then the administrator is required to notify the individual and explain why he or she is not entitled to COBRA.

The unavailability of continuation coverage notice must be written in a manner which can be understood by the average covered employee or covered dependent and must be provided within 30 days of the request for COBRA continuation coverage.

The notice of unavailability can be hand delivered or mailed, although it is not necessary to send it certified mail, return receipt requested. As with other notices, plan administrators are advised to keep full records detailing the notice, when it was furnished, how it was furnished, and by whom.

### **E. Termination Of Continuation Coverage Notice**

A plan administrator must furnish a notice to each qualified beneficiary in the event his or her COBRA coverage terminates before the end of the qualified beneficiary's maximum period of coverage. This notice must explain why the coverage is terminating, state the date of termination, and describe any rights the qualified beneficiary may have to elect alternate coverage such as conversion. This notice must be furnished as soon as practicable following the administrator's decision that COBRA coverage will terminate. The notice is to be written so the average qualified beneficiary can understand it and may be furnished by hand or by mail.

### **F. Notice From Covered Employee, Covered Dependent Or Qualified Beneficiary**

A covered employee, covered dependent or qualified beneficiary is required to notify the plan administrator of certain events which relate to his or her eligibility for COBRA coverage. These include the covered employee's divorce or legal separation from his or her covered spouse, the employee's child ceasing to be covered under a plan as a dependent child, notice of a second qualifying event, and notice that a qualified beneficiary has been determined to be disabled (or no longer disabled) by the Social Security Administration. Generally, this notice must be provided to the plan administrator within 60 days of the date of the event, or the date the qualified beneficiary would lose coverage because of the event, if later.

Although plans are not required to have a form notice for qualified beneficiaries to use for this purpose, it is advisable to do so in order to ensure that complete information is provided.

If a plan does require a form, then the form must be easily available, without cost, to covered employees, their covered dependents and qualified beneficiaries.

Plans are required to establish reasonable procedures which individuals must follow when notifying the plan administrator of one of these events. At a minimum, these procedures must be disclosed in the plan SPD, specify the individual or entity that must receive the notice and the means by which it must be given, describe necessary information concerning the event, describe relevant time periods, and state who must provide the notice.

Failure to maintain “reasonable” procedures means that a notice will be deemed to have been received when a written or oral communication identifying a pertinent event is made in a manner “reasonably calculated” to bring the information to the attention of the person or group that customarily handles the employer’s benefit matters, or if the plan is insured or administered by an insurer, to the attention of the insurer or one of its officers.

## CONTINUING COVERAGE UNDER COBRA

### A. Electing Coverage

Covered employees and their covered dependents (qualified beneficiaries) 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.

Qualified beneficiaries may return their COBRA election forms in person or through the mail. If mailed, the plan administrator should save the envelope containing the election form in order to prove the date of mailing. If the postmark is more than 60 days after the date the COBRA election notice was initially sent, the election is late and a copy should be returned to the sender with a letter stating that the attempted election is untimely and invalid. Although it may be tempting to do so, you should not make exceptions to this rule. Making even one exception increases risks associated with litigation based on claims of discrimination.

Each qualified beneficiary has separate election rights and should receive a separate notice (or notice mailed to “Employee and Spouse” or “Employee and Family.”) A covered employee may decline continuation coverage for himself or herself, but elect coverage for a spouse or dependent(s) or vice versa.

Qualified beneficiaries may affirmatively waive COBRA coverage during the election period but must be allowed to rescind a waiver and elect COBRA coverage, if they do so before the end of the original 60-day election period.

Employers are often faced with coverage issues during the COBRA election period. An individual may have elected coverage but not yet paid for it, or may simply seek covered services before making the election. Employers can always provide coverage in these instances, although that may risk never receiving payment from the qualified beneficiary. As an alternative, employers may provide coverage but pend claims until payment is received, or decline coverage with the understanding that it will be retroactively reinstated if the proper election and premium is paid. In these instances, full disclosure regarding the status of the qualified beneficiary is required upon an inquiry by a service provider.

## **B. Initial Duration Of Coverage**

As shown in the following chart, the maximum COBRA coverage period depends on the initial qualifying event. If the initial qualifying event is a termination of employment or reduction in hours worked, COBRA coverage is available for 18 months from the date of the qualifying event. If the initial qualifying event is the covered employee’s death, divorce or legal separation from a covered spouse, a covered child’s loss of dependent status or a covered employee’s entitlement to (i.e., actual enrollment in) Medicare coverage without terminating employment, the maximum COBRA period for the covered spouse and dependents is 36 months from the date of the qualifying event.



Qualifying Event	Length of Covered Employee's Coverage	Length of Employee's Covered Dependent'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

### C. Extension Of Coverage Period

If the initial qualifying event is the covered employee's reduction in hours or termination of employment, the COBRA coverage period may be extended under the following circumstances:

If the Social Security Administration determines that a qualified beneficiary was disabled at any time during the first 60 days following a reduction in hours or termination of employment qualifying event, the COBRA coverage period may be extended to 29 months from the date of the qualifying event for the covered employee and all related qualified beneficiaries. 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 qualified beneficiaries 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 all qualified beneficiaries if a second qualifying event occurs (e.g., the former covered employee's death or divorce) following the covered 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. Qualified beneficiaries must be allowed at least 60 days to notify the plan administrator of the second qualifying event; however, a plan may provide for a longer notification period.

**EXAMPLE:** If a covered employee terminates employment, covered dependents may elect COBRA coverage for a maximum period of up to 18 months. If during this 18-month period, the former covered employee dies, his/her spouse and dependent(s) who had elected COBRA coverage are entitled to a maximum COBRA coverage period of 36 months from the date of the former covered employee's termination of employment.

If the qualifying event is the bankruptcy of the employer, the maximum COBRA coverage period for a retired covered employee is the date of the retired covered employee's death. The maximum COBRA coverage period for the qualified beneficiaries of the retired covered employee is the earlier of the date of death of the qualified beneficiary or 36 months from the date of the retired covered employee's death.

If a qualifying event does not result in a loss of coverage under the plan until a later date, the maximum coverage period is still measured from the date of the qualifying event.

However, if an employer wants to measure the maximum coverage period from the date of loss of coverage rather than from the earlier date of the qualifying event (which, for example, could occur if the employer elects to continue coverage during a leave of absence, other than an FMLA Leave, which will result in a loss of coverage within 18 months) the plan must provide for this extension and must:

- provide that the 30 day notice from the employer to the Plan Administrator that a qualifying event has occurred be measured from the date coverage is lost; and

- provide that the end of the maximum coverage period is measured from the date of loss of coverage rather than the date of the qualifying event.

#### **D. Second-Chance COBRA Election**

In certain cases, employees who are eligible to receive trade adjustment assistance under the Trade Act of 2002 are entitled to a “second-chance” COBRA election. To be eligible, the individual must have lost plan coverage due to a job loss that resulted in trade adjustment assistance, and failed to elect COBRA during his or her initial COBRA election period. In addition, the petition for trade assistance benefit certification may not have been filed before November 4, 2002.

The new election period begins on the first day of the month in which the individual is certified for trade adjustment benefits, and must be made within six months of the initial loss of health coverage. The election period runs for 60 days, and if chosen, coverage begins on the first day of the election period. The maximum period of coverage is based on the date of the original qualifying event.

#### **E. Termination Of Coverage**

COBRA coverage may be terminated 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:

- the employer or a related company no longer provides group health coverage to any employees, including any employees of another employer within the same controlled group;
- a qualified beneficiary’s premium for continuation coverage is not timely paid;
- a qualified beneficiary becomes covered by Medicare after the date of the COBRA election;
- a qualified beneficiary who extended coverage for up to 29 months due to a disability is determined by the Social Security Administration to be no longer disabled; or

- a qualified beneficiary first becomes covered (after the date of the COBRA election) under another group health plan (as an employee or otherwise).

Insured plans may be required under state law to offer individual conversion coverage to qualified beneficiaries who exhaust the maximum COBRA continuation period. Employers who sponsor insured plans should inform participants of applicable individual conversion rights in the initial COBRA notice. Employers should also inform these individuals that they will not receive 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, unless they voluntarily include them.

## **F. Paying For Coverage**

Generally, qualified beneficiaries must pay the entire cost of COBRA continuation coverage. Plan sponsors may charge up to 102% of the premium attributable to similarly situated active employees. Even if the employer pays a portion of the premium for active employees, it 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 qualified beneficiary receives a COBRA 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 later premiums, COBRA requires a 30-day grace period. Thus, in the previous example, the qualified beneficiary's January premium must be paid by January 31, and his or her February payment is due by February 28, and so on. Note, however, that plans may be more generous with grace periods if they so desire. Grace periods should be spelled out clearly in plan documents and COBRA notices.

As with COBRA notices and election forms, the date of premium payment is crucial. Employers should save all envelopes containing premium payments 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, the payment should immediately be returned along with a request for payment in full. If the payment is significantly less than the amount owed, the employer 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. If the payment is not significantly less than the required premium, the person should be told that he or she has another 30 days to make up the difference.

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, employers should not make any exceptions with respect to premium grace periods, partial payments, or insufficient fund checks. Exceptions to these rules may expose the employer 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 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, employers should maintain a consistent policy for all untimely payments.

# ENFORCE- MENT

If a plan fails to comply with COBRA requirements, the Internal Revenue Code subjects the plan sponsor or the plan to an excise tax and ERISA provides for fines and/or personal liability. The federal courts have jurisdiction to hear COBRA lawsuits, including those filed by individual participants or the DOL.

## A. DOL Enforcement

Under ERISA, the Department of Labor (DOL), on behalf of participants, may assess a fine of up to \$110 a day for a COBRA notice violation. Penalties accrue until an employer issues a complete and accurate COBRA notice. Each notice failure carries its own fine, so these amounts can become significant in the event of faulty notice procedures, 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.

The DOL will typically assess this fine as part of a COBRA audit following a participant complaint. Generally, the DOL will not agree to waive or reduce COBRA penalties, and may also institute court proceedings on behalf of participants to enforce these fines. One recent case fined an employer over \$300,000 for failing to provide notices to two individuals.

## B. IRS Enforcement

COBRA also authorizes the IRS to levy a \$100 per day excise tax (\$200 per day if more than one qualified beneficiary is affected) against the plan or 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 (\$310 per day if more than one qualified beneficiary is affected).

## C. Enforcement Through The Courts

Covered employees and their covered dependents 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 are 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 impose the ERISA penalty of up to \$110 per day of noncompliance to each affected qualified beneficiary. Courts will typically reduce the \$110 maximum 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. This is because insurance carriers may refuse to reinstate COBRA beneficiaries for whom a plan sponsor has not continued premium payments. An employer in this situation may 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, employers can eliminate many of the risks associated with COBRA. First and foremost, implement a careful recordkeeping system to track all required notices, election forms, and premium payments. Next, you should make sure to follow those procedures to the letter in each case. Establish a file for each covered employee and his or her covered dependents and keep every COBRA-related document sent to, or received from, each of them.

You should also consider designating someone who will be primarily responsible for COBRA compliance at each business center. This individual should be familiar with standard COBRA procedures, and should initial each COBRA action in every participant's COBRA file. This COBRA compliance coordinator will be an important witness if litigation arises from any alleged COBRA violation.

It is also crucial to audit your COBRA compliance program periodically. Be sure that you have updated notice materials and that these materials have been sent on time. If untimely notices are discovered, proper notices should be sent immediately.

Employers who contract with a third-party COBRA administrator should audit the administrator's procedures to ensure that they are current. You cannot afford to assume that the provider is properly administering COBRA, because your company may still face COBRA liability for a third-party administrator's error.

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

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



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