COMMONLY ASKED COBRA QUESTIONS

EMPLOYERS SUBJECT TO COBRA

Q: Which employers must comply with COBRA?
A: Basically, COBRA applies to employers that offer their employees health coverage and that employed 20 or more employees on 50 percent of the business days during the preceding calendar year. All full and part-time common-law employees are considered in determining whether an employer had fewer than 20 employees; however, each part-time employee counts as a fraction of a full-time employee.

Q: Last year for the first time our workforce dropped below 20 employees; therefore, we qualify for COBRA's small employer exception. Are we still responsible for administering COBRA for the period that we employed more than 20 employees?
A: Yes. Under the Internal Revenue Code (but not necessarily ERISA or the Public Health Service Act), once an employer is subject to COBRA, it continues to be responsible for qualifying events that occur while COBRA applies, regardless of whether or not the employer subsequently qualifies for COBRA's small-employer exception.

ELIGIBILITY FOR CONTINUATION COVERAGE

Q: Who must be offered COBRA continuation coverage?
A: Employees, spouses and dependent children who have been covered on an employer’s plan at least the day before the qualifying event, for which coverage would be lost.

Q: What are the events and time frames for which COBRA must be offered?
A: Termination of employment and reduction of hours for the employee qualify for 18 months of COBRA coverage; disability determined by Social Security qualifies for up to 29 months; divorce or legal separation, loss of dependent eligibility, death of or entitlement to Medicare for the employee qualify for 36 months for the spouse and/or dependent children.

Q: Is there a minimum waiting period before a covered employee is eligible for COBRA coverage?
A: To be eligible for COBRA coverage, an employee must be enrolled in the group health plan on the day before the qualifying event takes place. Beyond that requirement, no minimum waiting period exists under COBRA. (Note, however, that some state laws include minimum periods of participation in a plan.)

Q: A student lost dependent status when he stopped attending school and then elected COBRA coverage. The student later went back to school and was re-enrolled in the plan as an active dependent child. However, the student has again stopped attending school. Do we have to offer him COBRA coverage a second time?
A: Yes. COBRA does not set a limit on the number of times an individual can become a qualified beneficiary and offered COBRA coverage. As long as the basic criteria are met (that is, a qualifying event followed by a loss of coverage) the individual who goes from active coverage status to qualified beneficiary status and back to active coverage status again can elect COBRA coverage when another qualifying event is incurred.

NOTICE REQUIREMENTS

Q: How soon after a qualifying event do we have to notify qualified beneficiaries of their COBRA rights?
A: Once a qualifying event occurs, employers have 30 days to notify the plan service provider. Once notified, the plan service provider has 14 days to notify all affected qualified beneficiaries of their COBRA rights.
Q: What notices are employers required to send to qualified beneficiaries?
A: The employer is required to send the following notices – 1) the general notice advising covered employees and their spouses of their COBRA continuation rights, 2) the notice of election rights sent at the time of the qualifying event, 3) a notice of unavailability of COBRA provided when it is determined an employee or dependent are not eligible for continuation coverage, 4) a notice of early termination of COBRA is sent when COBRA coverage terminates before exhaustion of coverage, and 5) a notice advising COBRA participants of their conversion coverage rights, if applicable.

INCURRING CLAIMS DURING THE ELECTION PERIOD

Q: Are we required to pay medical bills incurred by qualified beneficiaries during the election period but before they elect to continue coverage?
A: Generally, the IRS final regulations of February 1999 state that two ways exist to deal with claims submitted during a COBRA election period: (1) the plan could automatically extend COBRA coverage during the election period, subject to retroactive termination; or (2) the plan could immediately terminate health coverage, subject to retroactive reinstatement if the qualified beneficiary elects and pays for coverage.

Q: A former employee has been having medical treatment during his COBRA election period, but has not yet elected or paid for COBRA coverage. What should we say when the provider contacts us about his coverage status?
A: The IRS final regulations of February 1999 require that a plan providing COBRA coverage must make a complete response to any provider inquiry regarding a qualified beneficiary's right to coverage during the election period. Therefore, a plan must either state that: (1) if the qualified beneficiary is covered, that coverage is subject to retroactive termination if the COBRA election and premium payment are not made; or (2) if the qualified beneficiary is not covered, coverage will be reinstated retroactively if the election and payment are made on time.

PROVIDING COVERAGE TO EMPLOYEES ON MILITARY LEAVE

Q: Do we have to offer COBRA coverage to employees on military leave?
A: Yes. A federal law enacted in 1994 requires employers to offer up to 18 months of continuation coverage to employees and their dependents who take military leave. Furthermore, IRS Notice 90-58 and IRS regulations, also provide that employers offer COBRA coverage due to military leave. Though not a requirement under COBRA, the Veterans Benefits Improvement Act was signed into law in December of 2004. It requires under the Uniform Services Employment and Reemployment Act that continuation of employer provided health coverage be offered for up to 24 months of coverage for employees who are called into active military service.

OFFERING COVERAGE DUE TO DIVORCE OR LEGAL SEPARATION

Q: An employee and her spouse recently annulled their marriage. Is this a qualifying event?
A: COBRA only specifies that divorce and legal separation are qualifying events. However, before applying the statute narrowly, employers may want to consider factors such as: (1) congressional intent — to protect plan participants and their family members from loss of coverage; (2) state law regarding the dissolution of marriage; and (3) plan documents. Therefore, employers should obtain the advice of legal counsel before any determination is made not to offer COBRA coverage in cases of annulment.

DEFINING GROSS MISCONDUCT

Q: COBRA allows employers to deny continuation coverage to former employees who are discharged for gross misconduct. What actions constitute gross misconduct?
A: The courts and the U.S. Office of Personnel Management have issued limited guidance concerning the definition of gross misconduct under COBRA. The IRS has issued no guidance in this area, and has indicated that it does not intend to do so. Therefore, employers have to judge for themselves what constitutes gross misconduct. Crimes committed in the workplace, such as embezzlement or theft, could constitute gross misconduct, depending on the severity of the conduct in question. However, discharges for poor performance or incompetence are probably not adequate grounds to deny former
employees continuation coverage. Employers must carefully evaluate each case to determine if the conduct in question constitutes gross misconduct.

**Q:** A former employee was terminated for gross misconduct. He is not being offered COBRA coverage; however, could we still offer it to his spouse and dependent children?

**A:** COBRA's statutory language provides that if an employee is terminated for gross misconduct, a qualifying event has not occurred. Therefore, COBRA coverage would not have to be offered to the employee, the spouse or any dependent children. COBRA is a minimum requirement, however. The employer can voluntarily provide COBRA coverage to the ex-employee's spouse or dependent children — or even to the former employee — if it so chooses.

**OFFERING LESSER OF DIFFERENT COVERAGE**

**Q:** Can we require qualified beneficiaries to elect continuation coverage that is not as good as what they had as active employees?

**A:** The law specifies that qualified beneficiaries must be allowed to continue coverage that is identical to the coverage that they received before the qualifying event occurred. This means that if an employee was covered under a special type of plan, such as one that provided annual physicals, he or she would have to be allowed to continue that coverage.

**COORDINATING MEDICARE ENTITLEMENT AND COBRA**

**Q:** A qualified beneficiary has become entitled to Medicare. Can we drop this former employee’s coverage for herself and her husband, who is covered under her family coverage?

**A:** The former employee can be dropped from COBRA as a result of becoming entitled to Medicare after the date of her COBRA election. However, her husband must be allowed to stay on COBRA for up to 36 months from the date of the termination of employment or reduction in hours provided the original event would have been considered a loss of coverage. Note that if the qualified beneficiary had become entitled to Medicare before she elected COBRA coverage, she could still maintain the COBRA coverage.

**Q:** A qualified beneficiary who has COBRA coverage under our medical and dental plan has become entitled to Medicare. We plan to terminate his medical coverage, but do we have to keep him on the dental plan because Medicare doesn't cover dental benefits?

**A:** The statute does not distinguish between core and non-core benefits when it allows COBRA coverage to be cut off once a qualified beneficiary becomes entitled to Medicare after the date of the COBRA election. Therefore, employers can drop dental or any other non-core benefits in such situations. However, some employers do choose to continue those benefits because they are not provided under Medicare.

**COORDINATING COBRA WITH OTHER COVERAGES**

**Q:** When coordinating COBRA and other coverage under the pre-existing condition rule, which employer's plan is primary and which is secondary?

**A:** The statute fails to address this subject, and the IRS has not issued any guidance. However, under general coordination-of-benefits guidelines developed by the National Association of Insurance Commissioners, the COBRA provider would pay claims related to the pre-existing condition and the new employer's plan would pay any other claims.

**Q:** What do we do if we have discovered that after electing COBRA coverage, a qualified beneficiary became covered under another group health plan that covers all of the individual's pre-existing conditions and the individual has not informed us of that coverage?

**A:** IRS regulations do not address this point. Certainly, an employer would be justified in terminating a qualified beneficiary's coverage in such a situation. However, an employer would first have to analyze the other employer's plan to verify whether or not it covers the individual's pre-existing conditions. Once verified, an employer must then determine if claims have been paid while the beneficiary was covered under another plan. If claims have been paid, the employer or its insurance carrier would probably have to sue the individual involved to recover any money paid under that claim if the
qualified beneficiary refused to return the payments. In certain situations, an employer may be limited in its ability to obtain such amounts.

COORDINATING COBRA WITH RETIREMENT, SEVERANCE, STATE CONTINUATION OR OTHER ALTERNATIVE COVERAGE

**Q:** We offer a severance or retirement package that includes health insurance, but it is not as comprehensive as COBRA coverage. What does COBRA require in that instance?

**A:** If the alternative coverage is not identical to COBRA coverage or costs more than the active coverage, the IRS final regulations of February 1999 provide that a qualified beneficiary must be allowed to elect COBRA coverage. However, if the qualified beneficiary rejects the COBRA coverage in favor of alternative coverage, the alternative coverage is not treated like COBRA coverage.

**Q:** Do we have to offer COBRA coverage after the alternative coverage period has expired?

**A:** When the alternative coverage period expires, the covered individual does not have to be offered a COBRA election. If one of the individuals receiving alternative coverage is an employee participant, and the spouse or dependent child would lose that alternative coverage as a result of a qualifying event (such as death of the employee or divorce), the spouse or child must be allowed to elect to continue that alternative coverage. The maximum period would be for 36 months (like COBRA), and the start date of the 36 months would be from the date of the qualifying event, rather than from the date the alternative coverage started for the employee participant (unlike COBRA).

Finally, the employer may also offer alternative coverage that is identical to “regular” coverage as part of the COBRA eligibility period. For instance, as part of a severance package, an employer may pay for 3 months of coverage, than offer the employee COBRA. If the coverage is identical, except for the cost of the premium, the employer may start the “COBRA clock” ticking on the date of the qualifying event, not when coverage is lost …3 months later.

**Q:** How do I coordinate both the state continuation coverage law and federal COBRA law?

**A:** Generally, in coordinating COBRA and a state law, whichever provision gives qualified beneficiaries the best benefits or most rights is the one that takes precedence. For example, a state law may require employers to give terminated employees 24 months of continuation coverage but may not require them to extend continuation rights to their spouses and dependents. However, employers in that state would also have to allow those spouses and dependents to continue coverage for at least 18 months, as required by federal COBRA law.

DETERMINING AND COLLECTING PREMIUMS

**Q:** Can an employee elect COBRA but request that premium payment begin at a later time?

**A:** To be considered timely, a qualified beneficiary's first payment for COBRA coverage must be made within 45 days after the date of the election. Employees cannot be required to pay more frequently than on a monthly basis. An employer can offer, but not require, qualified beneficiaries to pay for COBRA coverage at various intervals other than monthly (for example, quarterly or semiannually).

**Q:** Our insurance carrier is adjusting the premium rates downward. Are we required to lower the COBRA rates accordingly?

**A:** As a general rule, qualified beneficiaries must be treated the same way as active employees. This suggests that if the employer passes through the premium adjustment to active employees, qualified beneficiaries must be treated in the same fashion. The IRS final regulations of February 1999 provide that if a premium increase occurs, however, the employer may only pass that through once during each 12-month period. This suggests that the premium decrease might not need to be passed through until the end of the determination period. No clear answer exists, the safest course is to pass a decrease through to qualified beneficiaries to the same extent that it is passed through to active employees. That way, if the employer decides to pass through a premium increase as well, the employer will be able to argue that it is merely passing through actual costs imposed by a third party, whether they are increases or decreases.
Q: Out of an entire family that was covered under our group health plan, only the dependent is electing COBRA coverage. Should we charge him a portion of the family rate or the rate for single coverage?
A: Because there will be one person — the dependent — electing COBRA coverage, generally (and absent detailed regulatory guidance to the contrary), that person should be charged the premium rate for a similarly situated active employee. Therefore, in this case, you would charge the premium rate for single coverage.

EXTENDING COVERAGE BEYOND THE REQUIRED PERIOD

Q: Can we offer COBRA coverage for longer than the required period?
A: COBRA's coverage requirements are intended to be minimum standards. Employers are permitted to offer qualified beneficiaries more extensive coverage or coverage for a longer duration if they choose to do so. Remember you should always treat similarly situated employees in the same manner as not to discriminate.

CANCELING COVERAGE IN ANTICIPATION OF A QUALIFYING EVENT

Q: Can we be held liable if a covered employee drops his or her spouse from our plan in anticipation of a divorce or other qualifying event?
A: Just as employers cannot negate their COBRA responsibility by canceling the coverage of covered employees in anticipation of a qualifying event, covered employees are not permitted to drop family members from their coverage in similar situations. If an employer learns that this has occurred, it should offer the dropped family member continuation coverage from at least the date on which coverage was lost due to the qualifying event. For example, if a covered employee dropped his wife from his employer-provided family coverage two weeks before their divorce became final, the employer should offer the employee's wife coverage at least from the date on which she would have lost coverage due to the divorce.

TERMINATING A GROUP HEALTH PLAN

Q: We have separate group health contracts for each of our four different office locations. We recently closed one of those offices. If the insurers at each of the other three locations won't pick up COBRA-eligible persons from the closed office, are we in violation of COBRA?
A: A COBRA violation occurs if an employer does not offer continued health benefits to employees who are terminated because of an office or plant shut-down. COBRA coverage is generally the employer's responsibility. However, if the insurer failed to cooperate in providing COBRA coverage, the insurer could be liable for an excise tax. The continuation of coverage should be explored with the carrier that insured the closed office or plant. (Note: This type of situation, in which insurers have refused to accept COBRA beneficiaries into a new plan, appears to be a growing problem. Employers should review their plan contracts and determine where their insurers stand on this matter. Also, the COBRA excise tax sanction could apply to certain noncompliant insurers).

Q: We want to terminate our current group health plan and contract with another insurance carrier, but the new carriers we talk to say they won't take our COBRA qualified beneficiaries. Is this legal?
A: More and more employers wanting to change insurance carriers are discovering that potential insurers only want to cover active employees. Unfortunately, because the insurance company and employer are not yet under contract, companies may find it difficult to require potential insurance carriers to cover qualified beneficiaries. An employer may want to make the insurance carrier aware that they can be liable for excise tax sanctions for making the employer out of compliance with COBRA regulations. However, it is important to remember that it is the employer who has the ultimate responsibility to provide coverage and therefore it may be prudent to make arrangements to keep the qualified beneficiaries covered under the current benefit plan.
REINSTATING COVERAGE AFTER IT ENDS

Q: Can someone who has been on COBRA for several months end their coverage — because of failure to pay, for example — and later be reinstated?
A: Generally, once a qualified beneficiary fails to pay a COBRA premium by the end of the 30-day grace period for premium payment, an employer is allowed to drop that person permanently from COBRA coverage. However, that is not a requirement, and employers may make arrangements that temporarily suspend or extend the COBRA coverage period. Many employers will allow qualified beneficiaries to be late with some COBRA premium payments, depending on the facts involved.

COMPLIANCE AND PENALTIES

Q: Who exactly is liable for COBRA violations?
A: Generally, under ERISA, an employer may be liable for medical expenses and other fines and penalties if it fails to provide notice(s) to qualified beneficiaries on a timely basis. Failure to provide a COBRA election notice within the required timelines could expose the employer to statutory penalties of up to $110 per day. Under the Internal Revenue Code, excise tax sanctions can be imposed against the employer, the insurer, the TPA or other plan fiduciaries (such plan fiduciaries may also incur liability under ERISA). ERISA penalties can also include lawsuits and the payment of attorney's fees. Other penalties may be assigned at the court’s discretion and can include any unpaid claims, the value of future coverage and even awards for pain and suffering.

Q: Once we recognize our noncompliance, apart from complying in the future, should we retroactively rectify the situation by providing notices and honoring elections?
A: Employers that find they have committed violations should make efforts to correct them as quickly as possible. Not only must employers make available all of the coverage lost, but also it is essential that they make the qualified beneficiaries whole with regard to health care claims. This means that employers may have to pay any medical expenses that would have been covered had benefits been continued in accordance with the law. Employers may want to discuss these options with their carriers, attorneys or other advisors. Employers should establish "good faith" procedures to demonstrate compliance to avoid the various penalties for violating COBRA.

Q: What should we do if our benefit provider is unwilling to provide COBRA coverage?
A: The excise tax sanctions for non-compliant employers could also apply to benefit providers, as well as ERISA penalties. This could give employers some additional bargaining power with reluctant providers. Ultimately though, complying with COBRA remains the employer's responsibility. The best way for employers to protect themselves is to enter into a written, legally enforceable agreement with the provider that spells out each party's responsibilities.