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COBRA After Health Care Reform

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Agenda



- ▶ COBRA Basics
- ▶ Special Issues
- ▶ ACA-Related Issues

COBRA Basics



- ▶ Covered Employers and Plans
- ▶ Qualifying Events
- ▶ Qualified Beneficiaries
- ▶ Maximum Coverage Periods
- ▶ Maximum COBRA Premium
- ▶ Notices
- ▶ Enforcement

Covered Employers

- ▶ All employers are subject to COBRA except
 - Those having fewer than 20 employees during prior calendar year (including entire controlled group)
 - Churches
- ▶ Governmental employers are subject to COBRA (via PHSA)

Covered Plans

- ▶ Any employer-sponsored plan providing “medical care” (as defined in Code Section 213(d))
- ▶ Common examples include medical, dental, vision, and prescription drug plans.
- ▶ *Not* long-term disability or life insurance
- ▶ Both insured and self-funded plans

Qualifying Events

- ▶ Events listed below constitute COBRA qualifying events only if
 - they would cause a loss of coverage (including any change in coverage) ...
 - within the maximum coverage period specified below.

- ▶ 18-month coverage events:
 - Termination of employment
 - Reduction in work hours

Qualifying Events

- ▶ 36-month coverage events:
 - Death
 - Divorce or legal separation
 - Child's ceasing to meet plan's definition of dependent
 - Employee's entitlement to Medicare benefits

- ▶ Note: Special rule for retirees losing coverage within one year before or after employer's bankruptcy

Termination of Employment as Qualifying Event

- ▶ May be either voluntary or involuntary
- ▶ Includes a strike or layoff
- ▶ Not a qualifying event (for any covered family member) if employee is terminated for “gross misconduct”

Gross Misconduct

- ▶ Requires intentional or willful misconduct, rather than ordinary negligence or incompetence
 - Example – failure to add onion powder to 11 batches of ravioli, and then failing to report that failure, did not constitute gross misconduct (*Lloyd v. Hanover Foods Corp.*)
 - Example – use of racial epithet and throwing of apple at co-worker in view of airline passengers did constitute gross misconduct (*Nakisa v. Continental Airlines*)

Gross Misconduct

- ▶ Violation of employer's defined "rules of conduct" likely constitutes gross misconduct
 - Example – managerial employee terminated for insubordination, which was one of 8 rules considered serious enough for immediate discharge without warning (*Bryant v. Food Lion, Inc.*)
 - Lesson – define and communicate these "rules of conduct" to all covered employees in advance of any incident

Qualified Beneficiaries

- ▶ Employees and former employees (e.g., retirees)
- ▶ Independent contractors receiving health coverage by virtue of their service
- ▶ “Dependents” (per Code Section 152 definition) of the above
- ▶ Newborns and children placed for adoption have independent COBRA rights

Disability Extension

- ▶ If disabled for Social Security purposes within 60 days after termination of employment or reduction in work hours:
 - Maximum coverage period extended from 18 to 29 months
 - Extension is available to all covered family members
 - Plan may require notice of SSA's disability determination within 60 days after its issuance

Second Qualifying Events

- ▶ If a second qualifying event occurs within 18 months after termination of employment or reduction in work hours (or during disability extension):
 - Maximum COBRA coverage period extended to 36 months from date of first qualifying event
 - But second qualifying event must be one that would otherwise entitle qualified beneficiary to 36 months of COBRA coverage

Medicare Extension

- ▶ Dependents of employee becoming entitled to Medicare within 18 months before termination of employment or reduction in work hours may continue their COBRA coverage until the later of:
 - 36 months after Medicare entitlement date, or
 - 18 months after termination of employment or reduction in work hours

Scope of Required Coverage

- ▶ COBRA coverage must be identical to that provided active employees
 - Should reflect any modifications made to active employee coverage
 - Premium may have to be reduced if modification reduces total cost of coverage
- ▶ Must provide any annual enrollment rights, including right to move between coverage options or to add dependents
- ▶ Must offer any available conversion option at end of maximum coverage period

Early Termination of COBRA Coverage

- ▶ Nonpayment of premium within grace period
- ▶ Medicare entitlement (though must have become entitled to Medicare after electing COBRA coverage)
- ▶ Coverage under other employer group health plan
 - Requires actual coverage, not mere eligibility.
 - Other coverage must have been obtained after electing COBRA coverage.
 - May not terminate COBRA coverage while other coverage remains subject to preexisting condition exclusion or limitation
- ▶ Termination of plan

Maximum COBRA Premium

- ▶ May charge up to 102% of total cost of providing coverage to “similarly situated” individuals
 - Insured plan may charge 102% of insurance premium
 - Self-funded plan must use actuarial estimate of cost
- ▶ May not charge single qualified beneficiary premium applicable to family coverage
- ▶ Premium amounts must be determined and fixed for at least a 12-month period
- ▶ During disability extension, may charge up to 150% of total cost

Premium Payment

- ▶ Must allow monthly payments.
- ▶ Must provide grace period of at least :
 - 45 days after election of coverage
 - 30 days after first day of each month for which coverage is to be continued
- ▶ Payment deadline extended while qualified beneficiary is incompetent
- ▶ Plan may pend claims until election and payment are received

Required Notices



- ▶ General notice
- ▶ Employer's notice of qualifying event
- ▶ Qualified beneficiary notices
- ▶ Election notice
- ▶ Notice of unavailability of coverage
- ▶ Notice of early termination of coverage

General Notice

- ▶ Must describe COBRA coverage, including notice obligations and election rights
- ▶ DOL regulations include model notice
- ▶ Deadline = 90 days after commencement of coverage
- ▶ May use SPD as general notice, but only if sent to covered employee and spouse, and provided within 90-day deadline
- ▶ May send single notice (or SPD) to employee and spouse if both reside at same address

Employer's Notice of Qualifying Event

- ▶ Notice must be provided to plan administrator
- ▶ Relevant qualifying events:
 - Termination of employment
 - Reduction in work hours
 - Death
 - Medicare entitlement
- ▶ Deadline = 30 days after qualifying event

Qualified Beneficiary Notices

- ▶ Relevant qualifying events:
 - Divorce or legal separation
 - Child's loss of dependent status
- ▶ Second qualifying event (i.e., for extension of COBRA coverage)
- ▶ SSA's disability determination (or later determination that disability has ended)

Qualified Beneficiary Notices

- ▶ Deadline:
 - 60 days after qualifying event or SSA's determination of disability
 - 30 days after SSA's determination that disability has ended

- ▶ Plan must establish reasonable notification procedures
 - Must be explained in SPD
 - May require use of specific form if easily available without cost
 - If no procedures are specified, notices will be deemed delivered

Election Notice

- ▶ Plan administrator must provide to each affected qualified beneficiary
- ▶ May use single election notice if all qualified beneficiaries reside at same address
- ▶ Deadline = 14 days after receiving notice of qualifying event (44 days after qualifying event, if employer is also the plan administrator)
- ▶ DOL regulations include model notice

Notice of Unavailability of Coverage

- ▶ Required if administrator receives notice of qualifying event (including second qualifying event or disability), but individual is not entitled to COBRA coverage (or extension of COBRA coverage)
- ▶ Must explain why coverage is unavailable
- ▶ Deadline = same as for providing election notice

Notice of Early Termination of Coverage

- ▶ Required if COBRA coverage will end before maximum coverage period
- ▶ Contents:
 - Reason for termination of coverage
 - Effective date of termination
 - Any alternative coverage options (e.g., individual conversion policy)
- ▶ Deadline = as soon as practicable
- ▶ May be combined with HIPAA certificate of creditable coverage

Delivery of COBRA Notices

- ▶ Mailing by certified mail or 1st class regular mail to last known address is generally sufficient
- ▶ Good faith effort to provide notice is sufficient, even if notice is not actually received
- ▶ Must have adequate procedures in place to demonstrate notice was sent

Enforcement

- ▶ Affected individuals may file suit under ERISA (against private employer) or PHSa (against governmental employer)
- ▶ Available recovery may include:
 - Payment of otherwise-covered claims (offset by any premiums that could have been charged)
 - Attorneys' fees
 - Penalty of up to \$110 per day (to be awarded in court's discretion)
- ▶ IRS may also assess excise tax

Special Issues



- ▶ Special Types of Plans
- ▶ Wellness Programs
- ▶ Changes to COBRA Coverage
- ▶ FMLA Leaves
- ▶ Retiree Coverage
- ▶ Premium Issues
- ▶ Written COBRA Procedures / SPDs

Special Types of Plans



- ▶ Account-Balance Plans
- ▶ Employee Assistance Plans
- ▶ On-Site Clinics
- ▶ Wellness Programs

Account-Balance Plans

- ▶ HSAs – Not subject to COBRA
- ▶ FSAs – Subject to COBRA, but
 - Need not offer COBRA if employee is “ahead of the plan”
 - In any event, need not offer COBRA beyond end of plan year
- ▶ HRAs – Subject to COBRA, but may be linked to comprehensive health plan if linked for active employees

Employee Assistance Plans

- ▶ Subject to COBRA if provides “medical care” (e.g., counseling, rather than simply referrals)
- ▶ May be possible to link to comprehensive medical plan (in linked for active employees)
- ▶ If so, may include cost of EAP in COBRA premium
- ▶ Verify that EAP provider will provide COBRA coverage

On-Site Clinics

- ▶ Subject to COBRA, unless they provide only first aid for employees during working hours
- ▶ May be linked to comprehensive health plan, in which case COBRA premium may include cost of clinic
- ▶ However, this may result in plan being “disqualifying coverage” for HSA purposes (so may be necessary to treat as separate COBRA plan, with a separate COBRA premium)

Wellness Programs

- ▶ Subject to COBRA if they include “medical care”
 - Examples include biometric screenings (including diagnosis of conditions), disease management programs, smoking cessation programs, and (perhaps) weight loss programs’
 - Would not include health risk assessments, wellness educational campaigns, on-site fitness classes, or gym memberships

Wellness Programs

▶ Wellness Incentives

- Need not be offered to COBRA beneficiaries if paid in cash (i.e., outside of health plan)
- Probably need not reduce COBRA premium by amount of premium reduction offered to active employees
- But wellness program must be offered to COBRA beneficiaries
- And must offer COBRA beneficiaries any incentives such as lower deductibles, co-pays, or the like

Changes to COBRA Coverage

- ▶ Open Enrollment Rights – Must be offered to COBRA beneficiaries on same basis as active employees
- ▶ If active employees may add dependents outside of annual enrollment period, COBRA beneficiaries must have same right
- ▶ HIPAA “special enrollment” rules apply to COBRA beneficiaries

FMLA Leaves

- ▶ Commencement of FMLA leave is not a COBRA qualifying event (because employee must be offered continued health coverage at active-employee rates)
- ▶ But termination of FMLA leave is a qualifying event if employee does not return to work (even if employee did not maintain coverage during the leave)
- ▶ FMLA leave may terminate at end of 12-week maximum period or upon employee's statement that he or she will not return to work

Retiree Coverage

- ▶ May be offered as **alternative** to COBRA coverage
 - But dependents of retirees must still be offered COBRA (under retiree coverage) upon occurrence of qualifying event
- ▶ **Or** first 18 months of retiree coverage may satisfy employer's COBRA obligation
 - COBRA premium and other rules must be met

COBRA Premium Issues

- ▶ Premium may be changed during 12-month “determination period” only if
 - Disability extension applies
 - Plan has been charging less than the maximum
 - Qualified beneficiary changes to a more expensive coverage (for which a premium was set before the determination period began)
- ▶ Plan must reduce COBRA premium if beneficiary moves to a less expensive level of coverage

COBRA Premium Issues

- ▶ ARRA Premium Subsidy
 - 65% premium subsidy available for up to 15 months following an involuntary termination of employment
 - Applied only to terminations between 9-1-08 and 5-31-10
 - May continue to have subsidized coverage through 8-31-11 (i.e., 15 months after 5-31-10)

COBRA Premium Issues

- ▶ Upon receiving COBRA premium that is only an “insignificant shortfall,” plan may either
 - Accept this as full payment of the premium, or
 - Notify beneficiary of shortfall and provide reasonable period (e.g., 30 days) to pay the rest
- ▶ “Insignificant shortfall” is defined as the lesser of
 - \$50, or
 - 10% of the premium due

Written COBRA Procedures/SPD

- ▶ Although not legally required, strongly recommend written COBRA procedures
 - Will be helpful in the event of a DOL or IRS audit
 - May specify procedures to be followed by employees and other qualified beneficiaries in providing notices (otherwise, even informal notice may be deemed adequate)
 - May help reduce IRS excise taxes
 - May help in defending COBRA lawsuit

Written COBRA Procedures/SPD

- ▶ Written procedures should include
 - Circumstances under which COBRA must be offered
 - Mechanics of notices and elections
 - “Reasonable procedures” to be followed by employees and other qualified beneficiaries in providing required notices
- ▶ DOL regulations also require that similar information be included in plan’s SPD

ACA-Related Issues

- ▶ Enhanced importance of Correctly Calculating the “Applicable Premium”
- ▶ Applicable Coverage Mandates
- ▶ Effect of new Limitations on Preexisting Condition Exclusions
- ▶ Effect of “Exchanges”

Importance of “Applicable Premium”

- ▶ This amount will be used in reporting value of health coverage on W-2
 - Reporting requirement now optional for 2011
 - Will be mandatory in 2012
- ▶ Also relevant in determining portion of total premium paid by employer, for purposes of losing “grandfathered” status if employer’s share is reduced by more than 5%

Applicable Coverage Mandates

- ▶ Children of COBRA beneficiaries must be offered COBRA coverage through their 26th birthday
- ▶ May not rescind COBRA coverage retroactively, unless 30 days' notice is provided
 - This mandate does not apply to fraud, intentional misrepresentation, or failure to pay premiums

Applicable Coverage Mandates

- ▶ Subsidizing COBRA coverage (even if fully insured) may violate Tax Code's nondiscrimination rules (unless insured plan retains "grandfathered" status)
- ▶ Per informal guidance, availability of COBRA coverage does not relieve grandfathered plan of obligation to offer coverage to active employees' children through their 26th birthday

Effect of New Limitations on Preexisting Condition Exclusions

- ▶ COBRA coverage may be terminated if beneficiary obtains other employer coverage, **unless** that coverage is subject to a preexisting condition limitation or exclusion
 - HIPAA creditable coverage rules substantially reduced the applicability of this exception
 - Once the ACA rules are fully applicable, this exception will be obsolete

Possible Effect of “Exchanges”

- ▶ Guaranteed availability of coverage through an Exchange may render COBRA unnecessary
- ▶ This is particularly true if the Exchanges offer a wide variety of coverage options, at a competitive premium
- ▶ Will Congress then repeal COBRA?



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