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Top 10 COBRA Mistakes and How to Avoid Them

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires that employers provide former employees and dependents who lose group health benefits with an opportunity to continue group health insurance coverage for a limited period of time. Compliance with the complex rules regarding COBRA coverage can be difficult and mistakes can be costly. Penalties for noncompliance can include excise taxes and statutory fines. The risks also include lawsuits to compel coverage and costly adverse selection of COBRA coverage.

Most employer-sponsored group health plans are subject to COBRA's continuation coverage requirements. However, some employers, such as churches and small employers, are exempt from COBRA. In addition, certain welfare benefit plans, such as long-term and short-term disability plans, are not subject to COBRA because they do not provide medical care.

This Compliance Overview lists the most common mistakes made by employers and provides practical information and tips for avoiding the penalties and risks associated with these mistakes.

LINKS AND RESOURCES

- Employer's Guide to Group Health Continuation Coverage under COBRA, a DOL publication
- Frequently Asked Questions from the DOL on COBRA continuation coverage
- DOL's final rule on COBRA notice requirements

HIGHLIGHTS

PRACTICAL TIPS

- COBRA applies to employers that had 20 or more employees on typical business days during the preceding year.
- Qualifying events are events that cause loss of group health coverage and trigger COBRA coverage for qualified beneficiaries.
- Employers subject to COBRA must provide several notices to inform participants and beneficiaries of their rights.
- Plans subject to COBRA must have reasonable procedures in place for qualified beneficiaries to notify the plan administrator of certain events.

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MISTAKE #10 – ASSUMING COBRA DOESN'T APPLY TO YOU

A threshold issue for COBRA compliance is whether COBRA even applies to you as an employer. The general rule is that COBRA applies to group health plans maintained by employers that have 20 or more employees. This includes private-sector employers, as well as state and local government employers.

The rule includes a built-in exemption for those employers that have fewer than 20 employees. Employers may be aware that there is an exemption, but may not know exactly how it works. Depending on the circumstances, determining how many employees you have for COBRA purposes can be a complicated calculation.

In general, COBRA will apply to employers that have 20 or more employees on **more than 50 percent of the typical business days in the previous calendar year**. This means that the calculation will apply for the entire calendar year; it does not change if the number of employees goes up or down. Thus, it can be dangerous to assume that you don't have to offer COBRA if your staff levels decrease.

Also, take care to count employees of companies that are under common control, as well as both full-time and part-time employees. A part-time employee counts as a fraction: divide the number of hours the employee worked by the number of hours required to be considered full-time.

MISTAKE #9 – ASSUMING COBRA DOESN'T APPLY TO YOUR PLAN

Once you have determined that COBRA applies to you as an employer, the next step is to figure out whether your health plan is subject to COBRA. As noted above, COBRA applies to group health plans maintained by employers.

A group health plan is an arrangement established to provide medical care to employees and their families and can be provided in a number of ways, including through insurance or a self-funded arrangement. A key point to note is **whether the plan provides medical care**.

Examples of health plans that may be subject to COBRA include:

- Medical, dental, vision and prescription drug plans;
- Drug and alcohol treatment programs;
- Employee assistance plans (EAPs) or wellness programs that provide medical care;
- On-site health care;
- Health flexible spending accounts (FSAs) and health reimbursement arrangements (HRAs); and
- Self-funded medical reimbursement plans.

Examples of health plans that may NOT be subject to COBRA (if they do not offer medical care) include:

- Long-term care plans;
- Accidental death and dismemberment plans;
- Group term life insurance plans;
- Long-term and short-term disability plans;
- Wellness programs or EAPs that do not provide medical care;
- Exercise or fitness centers; and
- On-site first-aid facilities.

Another potential pitfall to keep in mind is assuming that cancelling or terminating a health plan means that COBRA obligations terminate as well. If an employer terminates one plan but continues to provide any group health plan, the obligation to provide COBRA coverage continues.

Determining COBRA obligations in this type of situation can be especially complex when there is a merger or acquisition involved.

MISTAKE #8—NOT KNOWING WHO GETS COBRA AND WHEN

Employers and plan administrators should know who is entitled to COBRA coverage. Problems can arise if COBRA is not offered to someone who is eligible or if it *is* offered to a person who is *not* eligible to elect COBRA coverage. Under the COBRA rules, a "**qualifying event**" triggers COBRA coverage for "**qualified beneficiaries**" (QBs).

A **QB** is an individual covered by a group health plan on the day before the qualifying event.

A QB can be:

- The employee;
- The employee's spouse; and/or
- The employee's dependent child(ren).

In some cases, a retired employee (and his/her spouse and/or dependent children) can be a QB. In addition, a child born to or placed for adoption with the covered employee during the COBRA coverage period will become a QB.

Depending on the plan's eligibility rules, agents, independent contractors and directors could also be QBs.

A **qualifying event** is a COBRA triggering event that:

- Is listed in the COBRA statute (see below); and
- Causes a loss of coverage under the plan.

The triggering events that will give rise to COBRA coverage depend on who is affected.

The following chart shows which events are qualifying events for each type of individual:

QUALIFYING EVENT	TRIGGERS COBRA COVERAGE FOR:
Termination of covered employee's employment (for reasons other than gross misconduct)	• Covered employee • Spouse • Dependent children
Reduction in hours of covered employee's employment	• Covered employee • Spouse • Dependent children
Covered employee becoming entitled to Medicare	• Spouse • Dependent children
Divorce or legal separation of covered employee	• Spouse • Dependent children
Death of covered employee	• Spouse • Dependent children
Loss of dependent child status under plan rules	• Dependent child

In addition to being familiar with the rules provided by the COBRA statute, it is important to look at the terms of the plan document. To be a qualifying event, the event must cause a loss of plan coverage. Just

because a certain event is permitted to be a triggering event under COBRA does not mean it will cause a loss of coverage under the plan.

For example, COBRA allows the legal separation of the employee and his or her spouse to be a qualifying event, but the plan may only terminate coverage if the employee and spouse are divorced.

MISTAKE #7—GIVING NO INFORMATION

Once it is determined that a plan has to provide COBRA coverage, it is important to make sure that plan participants and beneficiaries are given adequate information about COBRA. The COBRA notice rules are important to understand, because failure to comply with them can lead to penalties under ERISA. Also, if participants and beneficiaries are not notified of their obligations, the plan's rules cannot be enforced.

The following are the required COBRA notices:

- **General (or Initial) Notice**. This notice provides general information to plan participants regarding COBRA and the plan's procedures. It must be provided **within 90 days after plan coverage begins** and must be written to be understood by the average plan participant. It may be provided as part of a Summary Plan Description. The COBRA notice rules specify the required content (see below) and the Department of Labor (DOL) has provided a model notice.

- **Election Notice**. The election notice is the most important notice for participants and beneficiaries who will be electing COBRA. It provides information about a qualified beneficiary's rights and obligations regarding a specific qualifying event and available COBRA coverage. It must be provided to qualified beneficiaries **within 14 days after the plan administrator is notified of the qualifying event**. However, if the employer is the plan administrator, the notice must be provided **within 44 days of the qualifying event or the loss of coverage** (whichever is later). The DOL has provided a model election notice as well.

- **Notice of Unavailability**. If an individual gives notice of a qualifying event but for some reason is not entitled to COBRA coverage, the plan administrator must give the individual **an explanation of why coverage is not available**. The deadline for this notice is the same as for the election notice.

- **Notice of Early Termination**. Normally, COBRA coverage will terminate at the end of the maximum coverage period. If coverage terminates early, qualified beneficiaries must be notified. This notice must be provided "**as soon as practicable**" after it is known that coverage will terminate (or has terminated). It must contain the reason for the early termination, the date coverage terminated or will terminate and a description of any available conversion rights.

- **Employer's Notice of Qualifying Event**. For certain qualifying events, the employer has the responsibility to notify the plan administrator of the event's occurrence. However, if the employer is the plan administrator, this notice is not required. If the event is the employee's death, termination of employment, reduction in hours of employment or Medicare entitlement, the employer must notify the plan administrator **within 14 days of the qualifying event or the**

loss of coverage, whichever is later. The notice must include sufficient information to determine the plan, the employee, the qualifying event and the date it occurred.

MISTAKE #6—GIVING BAD INFORMATION

Unfortunately, making sure that you are providing notices in certain situations is not always enough. It is important to make sure that the notices you provide contain all the required information and that the information is accurate.

The following charts summarize the content requirements for the two major COBRA notices—**the general notice** and **the election notice**.

The General Notice must contain the following information to be compliant:
• The plan name; • The name, address and phone number of a contact person who can provide information about the plan and COBRA; • A description of COBRA coverage under the plan (including who can be a qualified beneficiary, the types of qualifying events under the plan, a description of the maximum coverage period and ways to extend it, and the plan's requirements for payment); • The plan's procedures for qualified beneficiaries to provide notice of certain qualifying events or Social Security Administration (SSA) disability determinations; • A statement that the notice does not fully describe COBRA coverage or other rights under the plan and that more information is available from the plan administrator or the Summary Plan Description (SPD); and • A statement regarding the importance of advising the plan administrator of any change of address.
The Election Notice is the most detailed notice, since it relates to a specific qualifying event for specific QBs. It must contain the following elements:
• The plan name; • The name, address and phone number of a contact person who can provide information about the plan and COBRA; • Identification of the specific qualifying event; • The date plan coverage will terminate; • Identification of the QBs by status or name;

- A statement that each QB has an independent right to elect COBRA coverage;
- A description of the COBRA coverage under the plan;
- The amount that each QB is required to pay for coverage and the procedures for making payments;
- An explanation of how to elect coverage and the date by which the election must be made;
- The consequences of failing to elect or of waiving COBRA coverage;
- The duration of COBRA coverage and how coverage may be extended;
- An explanation of the QB's responsibility to provide notice of a second qualifying event or SSA disability determination (or determination that the QB is no longer disabled), including a description of the procedures for providing notice;
- A statement that the notice does not fully describe COBRA coverage or other rights under the plan and that more information is available from the plan administrator or the SPD; and
- A statement regarding the importance of advising the plan administrator of any change of address.

MISTAKE #5—NOT FOLLOWING YOUR OWN RULES

There are several COBRA rules that require a plan to have procedures in place, whether by statute or necessity. Not following its procedures can put a plan in the position of being out of compliance with COBRA's requirements or of extending coverage for too long or unnecessarily.

Notice Procedures

With respect to the notice rules, plans must have reasonable procedures in place for covered employees and QBs to notify the plan administrator of certain events, such as:

- Qualifying events that are the divorce or legal separation of the covered employee or a dependent child losing dependent status under the plan;
- Second qualifying events (triggering events that occur during the period of COBRA coverage that would have caused a loss of coverage under the plan if the QB were still covered); and
- SSA disability determinations (or cessation of disability).

In general, individuals must provide a notice of a qualifying event or disability determination within 60 days. Disability determination notices must also be given before the end of the original 18-month COBRA coverage period. In addition, QBs must notify the plan administrator within 30 days of a determination that they are no longer disabled.

If the plan does not have reasonable procedures for these notices, a QB may be deemed to have given notice if he or she has communicated a specific event in a manner reasonably calculated to inform those customarily considered responsible for the plan.

In order to be reasonable, COBRA notice procedures must:

- Be described in the SPD;
- Specify the individual or entity that should receive the notice;
- Specify how notice is to be given (for example, in writing or on a specific form);
- Describe the information required (such as the QBs involved, the date of the event, the nature of the event, the plan name and any additional documentation the plan administrator might want, such as a copy of a divorce decree);
- Specify the timeline for giving notice; and
- Provide for the proper handling of incomplete notices.

Election Procedures

A plan should also have procedures in place for complying with rules for election of COBRA coverage. For example, a QB must be given at least 60 days to elect COBRA. The election period begins on the date the election notice is provided or the date on which coverage would be lost (whichever is later).

Also, each QB has an independent right to elect COBRA, a covered employee or spouse can elect on behalf of all other QBs, and a parent or guardian can elect on behalf of a minor child. A QB may also revoke a prior waiver of COBRA coverage during the election period. A plan administrator that fails to follow the election procedures is at increased risk for claims by QBs.

Payment Procedures

As discussed below, a plan may charge a premium for providing COBRA coverage. QBs must make premium payments in a timely manner and a plan administrator has some leeway in designing its procedures. However, the COBRA rules set some guidelines for payments. The initial premium is due **45 days** after the COBRA election is made. After that, the premium due date is usually the first day of the month. However, the plan must allow a 30-day payment grace period.

In addition to complying with the COBRA rules, a plan should have procedures in place for dealing with issues that may arise in the day-to-day administration of COBRA coverage. For example, a plan will need a process for ensuring that premium payments are forwarded to insurers in a timely manner. Also, it should prepare for a situation where a QB makes late payments or short payments.

MISTAKE #4—NOT GIVING ENOUGH COVERAGE

The continuation coverage provided to QBs under COBRA must be the same as coverage provided to "similarly situated" individuals who are covered under the plan (not through COBRA). This is intended to be the same coverage the QB had before the qualifying event.

Thus, COBRA coverage cannot be scaled back just for QBs and not for other plan participants. QBs are also entitled to the same benefits, rights and privileges that similarly situated participants and beneficiaries receive under the plan, such as special enrollment rights and the ability to make changes at open enrollment. If the plan's terms are amended, those amendments apply equally to active participants and QBs.

MISTAKE #3—CHARGING TOO MUCH (OR NOT ENOUGH)

A health plan may charge COBRA QBs for the cost of providing COBRA coverage. It may require QBs to pay **up to 102 percent** of the "applicable premium" for the plan. In the case of a disability extension, it may charge up to 150 percent of the applicable premium for certain QBs.

For insured plans, the applicable premium is usually equal to the insurance premium paid to the insurance carrier. However, the calculation can be more difficult for self-funded plans and can be determined using past costs or an actuarial estimate of future costs. The applicable premium is the total cost to the plan for providing coverage, so it includes both employer- and employee-paid portions and can also include the administrative cost of providing COBRA coverage.

The plan must calculate the COBRA applicable premium in advance for a 12-month "determination period." The plan can choose any 12-month period to be the determination period, but it must remain consistent every year. The COBRA premium may be changed for a new determination period if the applicable premium changes and there are certain limited situations where the COBRA premium may be changed during the determination period (for example, if the QB changes coverage to another benefit package with a higher applicable premium).

The plan administrator should use caution in calculating the COBRA premium as well as in communicating that premium to QBs. Fixing mistakes that result in over- or undercharging QBs for COBRA premiums can be administratively burdensome and raise COBRA compliance issues.

MISTAKE #2—NO DOCUMENTATION

No matter how good your COBRA compliance track record is, you can still run into trouble if you can't prove it. Adequate documentation is important because it brings together all other elements of COBRA administration and compliance. Having thorough and accurate records will help streamline administration and support the plan in the event of a claim.

There are many different areas where documentation can help avoid COBRA compliance issues. For example, a plan's COBRA notice information and procedures can be documented in the SPD and notice documents themselves, as well as the plan document if necessary.

A plan administrator should also keep records of notices sent to and received from participants and QBs. Keeping track of payments received from QBs and made to insurers, as well as the deadlines for payments, will also assist in the proper administration of COBRA coverage.

MISTAKE #1—BAD TIMING

In the context of COBRA, paying attention to the timing of providing coverage can be crucial for reducing exposure to COBRA costs and being compliant with the rules. The duration of COBRA coverage is controlled by the COBRA statute. Complying with these rules by providing the length of coverage required is important. At the same time, many plan sponsors want to minimize the likelihood of being responsible for large claims made by COBRA QBs by only providing the minimum duration of coverage.

The period of COBRA coverage offered to QBs is known as the **maximum coverage period**.

The length of the maximum coverage period depends on the type of qualifying event that has occurred. The maximum coverage period is **18 months** for a termination of employment or reduction in hours and **36 months** for all other qualifying events. There are situations where the maximum coverage period can be extended or terminated early.

Expanding COBRA Coverage

There are several ways that the standard maximum coverage period can be extended. The following chart provides a summary of the available methods.

Disability Extension Rule	Extends 18-month period to 29 months for all related QBs
Multiple Qualifying Event Rule	Extends 18-month coverage period to 36 months for spouse and children when a second qualifying event (such as divorce from or death of the covered employee or loss of dependent status) occurs during the initial 18-month coverage period
Medicare Entitlement Rule	Extends 18-month period for spouses and children when the covered employee becomes entitled to Medicare within 18 months before the qualifying event

Terminating COBRA Coverage

COBRA coverage usually terminates at the end of the maximum coverage period. It is important to keep track of each QB's period of coverage to be able to tell when coverage should be terminated. In addition, coverage can be terminated early for the following reasons:

- The QB fails to make timely premium payments;
- The employer ceases to make any group health plan available to any employee;

- The QB becomes covered under another group health plan;
- A disabled QB is determined not to be disabled; or
- For cause.

If coverage is to be terminated before the end of the maximum coverage period, notice to the QB is required.