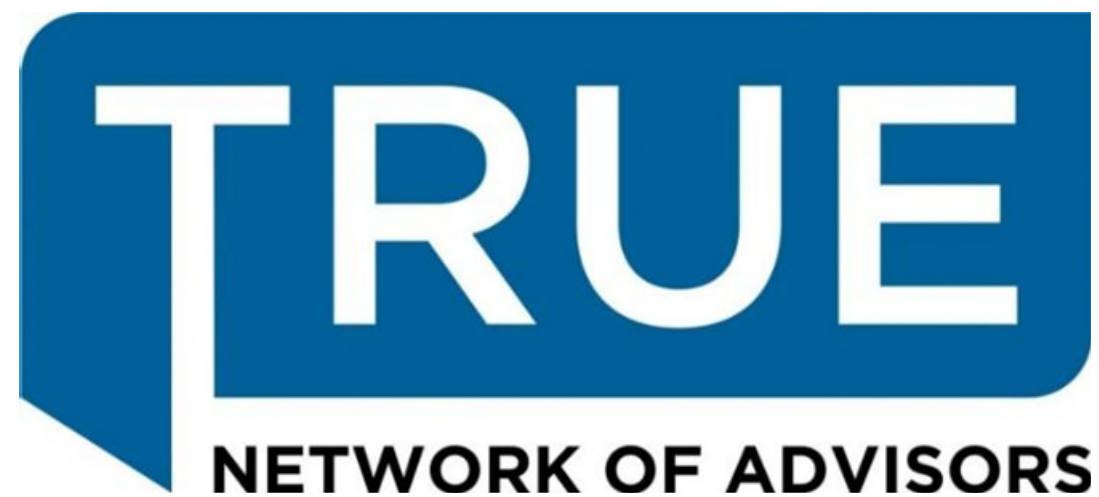


# COBRA: Primer and Common Issues



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# Agenda

Who is Subject to COBRA?

What Employers are Subject to COBRA?

What Plans are Subject to COBRA?

Who is covered by COBRA?

What Triggers COBRA Rights?

COBRA Elections, Length of Coverage, and Premiums

COBRA in Mergers & Acquisitions

State Continuation and Mini-COBRA Laws

Consequences of COBRA Failures

Examples – Common Issues and Mistakes



# Introduction

- ▶ **Under COBRA, an individual who might otherwise lose coverage under an employer's group health plan can pay to continue that coverage for a limited period of time**
- ▶ **Consolidated Omnibus Budget Reconciliation Act of 1985**
  - ERISA → Private Employers
  - Internal Revenue Code → Private Employers
  - Public Health Service Act → State & Local Governmental Employers
- ▶ **IRS and DOL Regulations**
  - IRS Regulations – Rules on COBRA coverage, eligibility, etc.
  - DOL Regulations – Notice and Disclosure requirements; avoiding the Constructive Receipt Doctrine

# COBRA-Covered Employers

- ▶ **Almost all private and public employers must comply with COBRA continuation coverage requirements**
- ▶ **Exceptions:**
  - **Small-Employers:**
    - Plans maintained by employers with fewer than 20 employees on a typical business day in the preceding calendar year
    - Must include related employers (*i.e.*, controlled group and affiliated service group members)
  - **Church Plans:**
    - Includes churches and other non-church organizations (*e.g.*, certain hospitals, clinics, schools/universities) if the other organizations are controlled by or associated with the church
  - **State and Local Governmental Plans**
  - **On-Site First Aid Clinics (under certain circumstances)**

# COBRA-Covered Plans

- ▶ Applies to all “group health plans” → An employee welfare benefit plan to the extent that it provides medical care to employees (current and former employees) or their dependents directly or through insurance, reimbursement, or otherwise
  - Medical Care = Care for the diagnosis, cure, mitigation, treatment, or prevention of disease and any other undertaking affecting any structure or function of the body
- ▶ Includes the following benefits:
  - Medical Plans
  - Dental Plans
  - Vision Plans
  - Health FSAs
  - HRAs
  - Gap/Bridge Plans
  - Telemedicine Programs
  - Many Employee Assistance Programs
  - Many Wellness Programs
  - Some Cancer & Disease-Specific Plans

# Account Based Plans

- ▶ **Health Flexible Spending Accounts (FSAs) are group health plans that are subject to COBRA**
  - Employees typically pay for their Health FSA coverage with pre-tax salary reductions under a Cafeteria Plan
  - If Health FSAs are designed to meet certain requirements, employers can limit COBRA coverage only to individuals who have “underspent” their Health FSA accounts, and only on a limited basis and for a limited period of time
- ▶ **This exception is not available for most Health Reimbursement Arrangements (HRAs)**
  - HRAs generally must offer COBRA to all qualified beneficiaries (not just those who have underspent their accounts) for the entire COBRA maximum coverage period
  - COBRA compliance can present difficulties for HRA sponsors

# COBRA-Covered Individuals

- ▶ **“Qualified Beneficiary”** → Certain individuals who lose coverage due to a **“Qualifying Event”** (the triggering event)
  - **“Covered Employees”** or their spouses or dependent children
    - Covered Employees include employees, retirees, independent contractors, self-employed persons, and partners of a partnership, if those individuals are covered under a group health plan because they are performing or have performed services for the employer
  - Must be covered by a group health plan immediately before the “Qualifying Event”
- ▶ ***Excludes*** → **Unmarried domestic partner; qualified beneficiaries who don’t elect COBRA coverage when election period expires**

# What Triggers COBRA?

- ▶ **A Qualified Beneficiary who loses group health plan coverage due to a Qualifying Event may elect to continue coverage for a limited time on a self-pay basis. In other words, the following three elements must exist:**

1. Qualified Beneficiary
2. Loss of Coverage
3. Due to a Qualifying Event

- ▶ **Common mistakes:**

- Qualifying Event occurs, but it does not result in the loss of coverage
- Loss of coverage occurs, but it is not the result of a Qualifying Event
- Qualifying Event occurs for the employee but not for the spouse/child (or vice versa)
- Termination of coverage due to extended leaves of absence (e.g., FMLA)

# COBRA Qualifying Events

Qualifying Event	Qualified Beneficiaries	Maximum Period of Coverage
Termination (for reasons other than gross misconduct) or reduction in hours of employment	Employee Spouse Dependent Child	18 months
Employee enrollment in Medicare	Spouse Dependent Child	36 months
Divorce or legal separation	Spouse Dependent Child	36 months
Death of employee	Spouse Dependent Child	36 months
Loss of “dependent child” status under the plan	Dependent Child	36 months

# COBRA Notices

<b>COBRA General Notice</b>	Must be provided to participants within 90 days after group health plan coverage begins.
<b>COBRA Election Notice</b>	Administrator must provide qualified beneficiaries with notice <u>within 14 days</u> after being notified of the qualifying event. If the employer is also the plan administrator, the administrator must provide the notice not later than 44 days after: (a) the date on which the qualifying event occurred; or (b) if the plan provides that COBRA coverage starts on the date of loss of coverage, the date of loss of coverage due to the qualifying event.
<b>COBRA Qualifying Event Notice</b>	In most cases, within 30 days after the date that a qualifying event occurs.
<b>Notice of Unavailability of COBRA Coverage</b>	Administrator must provide this notice that an individual is not entitled to COBRA generally within 14 days after being notified by the individual of the qualifying event.
<b>Notice of Early Termination of COBRA Coverage</b>	As soon as practicable following the administrator's determination that coverage will terminate.



# COBRA Elections



- ▶ **COBRA election process begins with a notice to the plan administrator that a qualifying event has occurred**
  - This is the Qualifying Event Notice
- ▶ **60-Day Election Period: Plans must establish a COBRA election period that begins when Qualified Beneficiaries receive the Election Notice (or the date when coverage is lost, if later) and lasts for at least 60 days thereafter**
  - Each Qualified Beneficiary has an independent right to elect COBRA

# What Must Be Offered?

- ▶ **Must be identical to the coverage provided to similarly situated beneficiaries under the plan(s) in which the Qualified Beneficiary was enrolled immediately before the Qualifying Event**
  - Generally, this will be the same coverage that the Qualified Beneficiary had before the Qualifying Event
- ▶ **Later change in COBRA coverage offerings are possible due to open enrollment or HIPAA Special Enrollment Rights**
  - If a plan has an open enrollment period for active employees, this must be made available to COBRA Qualified Beneficiaries as well
  - Once a Qualified Beneficiary is receiving COBRA coverage, he or she has the same rights to enroll family members under the HIPAA rules as a regular plan participant would have (e.g., to enroll certain family members upon the loss of other group health plan coverage or due to a new spouse or dependent)

# Length of COBRA Coverage

Qualifying Event	Maximum Length
Termination (other than for gross misconduct) or reduction in hours of employment	18 months
All others (except employer bankruptcy)	36 months

- ▶ **Once COBRA is timely elected and premiums are timely paid, COBRA generally must be provided retroactively back to the date that coverage was lost**
- ▶ **The maximum COBRA period is generally measured from the date of the Qualifying Event**
- ▶ **Employers may, instead, choose to measure from the date that coverage was lost**
  - Employers wishing to apply this measurement option should seek approval from medical or stop-loss insurers, as this would extend the maximum COBRA period

# Length of COBRA Coverage

## ▶ Extension of Maximum COBRA Coverage Period:

- Maximum COBRA coverage period for loss of coverage due to employment termination (or reduction of hours) could be extended to 36 months due to second Qualifying Event occurring during the initial 18-month period
- Applies only if the second qualifying event would have caused a loss of coverage for the qualified beneficiary under the terms of the plan if it had occurred first

## ▶ Early Termination of COBRA Coverage:

- A plan can terminate a Qualified Beneficiary's COBRA coverage early upon certain events
  - Premiums not timely paid; QB becomes covered under another group health plan or Medicare; employer ceases to maintain GHP; for cause

**Must be  
in the plan  
documents!**

# COBRA Premiums

- ▶ **Plans may, but are not required, to charge COBRA premiums**
- ▶ **Cannot be more than 102% of the “applicable premium” for the month**
  - Exception for COBRA during disability extensions: 150% of the applicable premium if the disabled qualified beneficiary is included in the COBRA coverage group
- ▶ **Premiums generally due on the first day of each month, subject to a grace period of at least 30 days**
- ▶ **No notice requirement for overdue premium payments, but if coverage is terminated due to nonpayment, then must send Notice of Early Termination of COBRA Coverage**

# COBRA Premiums

- ▶ Applicable COBRA premium is based on the “cost to the plan” for providing regular coverage:

## Fully Insured Plans

Based on monthly insurance premium paid to the insurer

## Self-Funded Plans

A more complex calculation, based on either (1) reasonable actuarial estimates of future costs, or (2) actual past costs, with cost-of-living adjustments

# COBRA Premiums: Self-Funded Plans

- ▶ COBRA premium must remain fixed for 12-month “determination period” (typically the plan year)
- ▶ **Past-Cost Method**
  - Cost for *preceding* determination period (adjusted by % change in the “implicit price deflator”)
- ▶ **Actuarial Method** (requires services of an actuary)
  - Plan claims data for prior review period of at least 12 months
  - Stop-Loss Premiums and Reimbursements
    - No explicit guidance, but likely answer is that both should be included in COBRA premium calculations
  - Administrative costs
  - Estimate of average covered lives during determination period
  - Actuarial trend factor

# COBRA Premiums: Self-Funded Plans

- ▶ **Health Flexible Spending Accounts (FSAs)**
  - Applicable premium generally is the annual benefit amount elected by the participant (divided by 12 to determine the monthly amount)
- ▶ **Health Reimbursement Arrangements (HRAs)**
  - Applicable premium generally based on the average cost to provide HRA coverage to non-COBRA participants
- ▶ **Employers with self-funded plans should carefully select and monitor COBRA administrators and discuss any questions regarding COBRA premium calculations with benefits consultants and/or legal counsel**

# COBRA in Mergers & Acquisitions

- ▶ **Who are the “M&A Qualified Beneficiaries,” and who bears responsibility for offering COBRA to these individuals?**
  - M&A Qualified Beneficiaries = Qualified Beneficiaries whose Qualifying Event occurred “prior to or in connection with the sale”
  - Form of the transaction (*i.e.*, stock deal vs. asset deal) is important for both questions
- ▶ **Default Rules for M&A COBRA Responsibility: (*non-exhaustive*)**
  - Selling Group maintains a plan after sale → Selling Group is responsible
  - Selling Group *does not* maintain a plan after sale:
    - If Buying Group maintains a plan, Buying Group is responsible
    - In an asset deal, if Buying Group is a “successor” employer, Buying Group is responsible
- ▶ **Parties can always contractually allocate the COBRA responsibility as they see fit**

# State Continuation & Mini COBRA Laws

- ▶ Many states have health continuation coverage statutes that are analogous to COBRA, but these laws may have requirements that differ from or are in addition to COBRA requirements
- ▶ Generally, these laws apply to insurers and may impose on insurers and their insurance products requirements that are different from or additional to the COBRA requirements
- ▶ To the extent that such laws attempt to impose their requirements directly on the employer or plan, they generally will be preempted by ERISA
  - *Note:* State and local governmental plans typically are not subject to ERISA; thus, ERISA preemption would not apply

# State Continuation & Mini COBRA Laws

- ▶ **Extending Continuation Coverage Requirements to Small Employers:**
  - Continuation coverage requirements that apply to small employers having fewer than 20 employees
- ▶ **Extending Continuation Coverage Period:**
  - May require a longer period of continuation coverage under insured group policies
- ▶ **Different Notice Requirements:**
  - May require election notices in shorter timeframes than COBRA
- ▶ **Required Conversion Option:**
  - May require that group health insurance provide a conversion option through which a covered individual may elect coverage under an individual insurance policy after group coverage terminates

# Consequences of COBRA Failures

## ERISA Penalties

- Up to \$110 per day for each COBRA Election Notice failure (court's discretion)
- 2-year statute of limitations often applies, but this varies by jurisdiction

## IRS Excise Taxes

- \$100 per day per qualified beneficiary for general COBRA failures
- Excise taxes capped at lesser of \$500K or 10% of total employer GHP cost for prior year

## Retroactive Coverage of Claims

- Courts may also impose other remedies, such as damages equal to QB's medical bills, reduced by costs of COBRA premiums

# Common COBRA Issues & Mistakes



# Common COBRA Issues & Mistakes

COBRA Notice  
Failures

COBRA and Extended  
Leaves of Absence

Failure to Offer COBRA  
for HRAs, Health FSAs,  
and Other Non-Major  
Medical GHPs

Calculating or  
Communicating  
Incorrect COBRA  
Premiums

# COBRA Notice Failures

- ▶ **COBRA Election Notices are the most important, and Election Notice failures can be the most problematic**
  - In addition to statutory penalties, failure to provide Election Notice enhances risk of adverse selection (only those incurring high claims may demand retroactive coverage)
  - Failing to provide Election Notice can mean a QB's right to elect COBRA never officially expires
- ▶ **Similar issues exist with failures to provide COBRA Termination Notices**
- ▶ **Health insurance carriers (for fully insured plans) or stop-loss carriers (for self-funded plans) may refuse to pay for coverage due to employer's COBRA failure**
- ▶ **COBRA Notice failures should be corrected immediately, typically by sending or re-sending late notices**

# COBRA and Extended Leaves of Absence

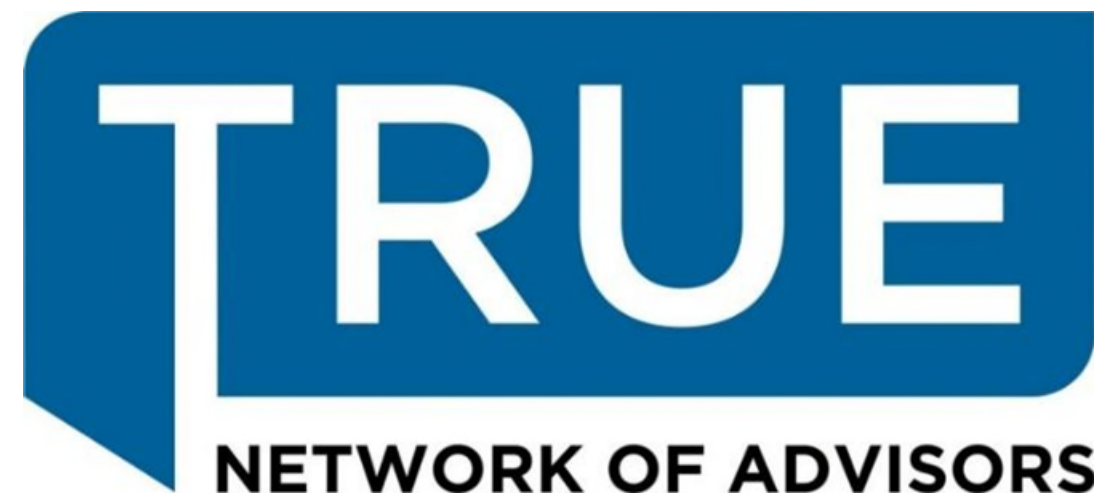
- ▶ **Example**: Employee goes on FMLA leave, which allows for leave period of up to 12 weeks. Employee is not able to return after 12 weeks, and Employer allows Employee to remain on unpaid leave for additional time.
- ▶ **Problem**: Terms of the health plan provide that this employee is no longer eligible
  - Eligibility determinations generally are left to the employer, but medical carrier (for fully insured plans) or stop-loss carrier (for self-funded plans) will base coverage on plan terms
- ▶ **Employers should seek pre-approval from carriers to allow individual to stay on plan; otherwise, COBRA should be initiated**

# Failure to Offer COBRA for FSA, HRA & Others

- ▶ **Special Rule: Limited COBRA obligation for some Health FSAs**
  - To qualify, FSA must be an “excepted benefit” and max annual COBRA premium must equal or exceed max benefit available for the year
  - If applicable, COBRA need not be provided to “overspent” accounts, and for “underspent” account, COBRA need only be provided through end of year (and grace period, if applicable)
- ▶ **HRAs typically do not qualify for any special limited COBRA obligations like Health FSAs**
  - COBRA premium calculations for HRAs can be complicated
    - Similar to calculating premiums for other self-funded plans (*i.e.*, generally based on average costs to provide HRA to non-COBRA participants), but account-based nature of HRAs presents complications
  - QBs must be given annual increases in max reimbursement account just like non-COBRA participants
- ▶ **Other benefits likely subject to COBRA → Telemedicine, Wellness, EAP**

# Calculating or Communicating Incorrect Premiums

- ▶ **Errors in calculating applicable COBRA premiums for self-funded plans**
  - If plan overcharges QBs, then it could result in excise taxes and/or statutory penalties
  - If plan undercharges QBs, then it results in the plan absorbing costs that should have been paid by the QBs
- ▶ **Failures to notice QBs of premium increases (including regular increases at start of new plan year) could prevent termination due to nonpayment**
- ▶ **IRS COBRA regulations also provide that when premium payment is short by an insignificant amount, plans must provide additional payment grace period**



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