



LEGISLATIVE BRIEF

COBRA Common Questions: Administration

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires that covered employers provide former employees and dependents who lose group health benefits with an opportunity to continue group health insurance coverage. Individuals who are eligible for health coverage under COBRA are known as “Qualified Beneficiaries.”

This Alan Benoy Insurance Services Legislative Brief provides answers to commonly-asked questions regarding COBRA Administration.

How long are Qualified Beneficiaries entitled to COBRA?

18 Months

Where a loss of coverage is a result of an Employee’s termination of employment (other than by reason of Gross Misconduct) or reduction in hours, Qualified Beneficiaries are entitled to continue coverage for a maximum of **18 months**.

36 Months

Where a loss of coverage is a result of any of the following, Qualified Beneficiaries are entitled to continue coverage for a maximum of **36 months**:

- Death of a covered Employee,
- Divorce or legal separation of a covered Employee from the covered Employee’s spouse,
- A covered Employee becoming entitled to Medicare benefits, and
- A dependent child ceasing to be a dependent child under the terms of the Health Plan.

29 Months

Where a loss of coverage is a result of an Employee’s termination of employment (other than by reason of Gross Misconduct) or reduction in hours and a Qualified Beneficiary is determined by the Social Security Administration to be disabled (for Social Security disability purposes) before, at, or within 60 days of the date of the Qualifying Event, all Qualified Beneficiaries within that family are entitled to COBRA for a maximum period of 29 months. To benefit from this extension, any Qualified Beneficiary within the family must notify the Plan Administrator as required by the reasonable procedures established by the Plan Administrator.

Where a Qualified Beneficiary was determined disabled by the Social Security Administration prior to the Qualifying Event, the Qualified Beneficiary is considered to meet the statutory requirement of being disabled “within the first 60 days of COBRA coverage.”

Lifetime Benefits

Where a loss of coverage is a result of an employer’s filing for bankruptcy under Chapter 11, covered Employees who retired on or before the date of substantial elimination of group health plan coverage, the spouse, surviving spouse, or dependent child of such covered Employee covered under the plan on the day before the bankruptcy Qualifying Event

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are entitled to continue COBRA coverage for life. Where an employer has filed for Chapter 11 bankruptcy, but no longer sponsors a Health Plan, Qualified Beneficiaries are not entitled to continue coverage since no Health Plan exists.

How long are Qualified Beneficiaries entitled to COBRA when the Employee/Qualified Beneficiary was enrolled in Medicare prior to a termination or reduction in hours?

If the Employee was enrolled in Medicare prior to his or her termination or reduction in hours (i.e. retirement), the Employee is entitled to 18 months of COBRA continuation coverage.

Where the spouse or dependent is covered under the plan on the day before the Employee's termination or reduction in hours, the spouse and dependent are entitled to COBRA continuation coverage for the longer of:

- 18 months from the date of the Employee's termination or reduction in hours, or
- 36 months from the date the Employee became enrolled in Medicare.

How long are Qualified Beneficiaries entitled to COBRA when the Employee/Qualified Beneficiary was enrolled in Medicare after a termination or reduction in hours?

If the **employee** enrolls in Medicare after his or her termination or reduction in hours (e.g. retirement), the Employee loses COBRA continuation coverage.

A **spouse or dependent** covered under the plan at the time of the termination or reduction in hours is entitled to 18 months of coverage from the date of the termination or reduction in hours.

Under COBRA, is entitlement to Medicare a Second Qualifying Event?

In February 2004, the IRS released Revenue Ruling 2004-22, which intended to clarify when entitlement to Medicare is a Second Qualifying Event. Because the IRS ruling differs from case law on this same issue, many benefit experts were surprised by the IRS' conclusion.

The IRS held that Medicare entitlement of a covered Employee is not a Second Qualifying Event for a Qualified Beneficiary, unless the Medicare entitlement would have resulted (if COBRA continuation coverage, including COBRA continuation coverage due to the first Qualifying Event, is disregarded) in a loss of coverage for the Qualified Beneficiary under a Health Plan.

The IRS reasoned that the Medicare Secondary Payer (MSP) provisions of the Social Security Act prohibit an employer from terminating an Employee's participation in a Health Plan solely based upon the individual's eligibility for Medicare. Therefore, since an active Employee cannot be terminated from the Health Plan solely because he or she is age 65 or older, entitlement to Medicare is not a Qualifying Event when it does not cause a loss of coverage.

Employers and COBRA administrators are encouraged to consult their legal counsel prior to modifying their administration of COBRA as it relates to Medicare. Furthermore, employers should not voluntarily extend coverage to 36 months without first consulting their insurance carrier or stop loss carrier.

When may COBRA be terminated?

COBRA continuation coverage will terminate before the maximum coverage (i.e., 18, 29, 36 months) period if:

- COBRA premiums are not made in a timely manner,
- The employer ceases to provide a Health Plan to any Employee,
- After electing COBRA continuation coverage, the Qualified Beneficiary first becomes covered under any other Health Plan that does not contain a pre-existing condition limitation or where the plan's pre-existing condition limitation is satisfied as a result of the application of creditable coverage as required by HIPAA, or
- After electing COBRA continuation coverage, the Qualified Beneficiary first becomes entitled to Medicare (Part A or B).

Provided that a Qualified Beneficiary has received no less than 18 months of COBRA continuation coverage, COBRA continuation coverage will terminate where COBRA coverage was extended to 29 months due to a disability as

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determined by the Social Security Administration and the Social Security Administration later determines that the Qualified Beneficiary is no longer disabled.

Where an individual is covered under COBRA, but not a Qualified Beneficiary, the individual loses coverage when the Qualified Beneficiary is no longer covered under COBRA.

A Health Plan may also terminate a Qualified Beneficiary's COBRA continuation coverage on the same basis that the plan terminates, for cause, the coverage of similarly situated non-COBRA Qualified Beneficiaries. For example, if a Health Plan terminates the coverage of an active Employee for the submission of a fraudulent claim, then a Qualified Beneficiary's COBRA continuation coverage may be terminated for the same reason.

When can COBRA be terminated because a Qualified Beneficiary becomes entitled to Medicare?

COBRA may be terminated when a Qualified Beneficiary first becomes entitled to Medicare (Part A or B) after the date of his or her COBRA election. For purposes of COBRA, Medicare entitlement means that the Qualified Beneficiary is enrolled in Medicare Part A or B. When an individual applies for Social Security upon retirement, enrollment in Medicare Part A is automatic.

When can COBRA be terminated because a Qualified Beneficiary becomes covered under another Health Plan?

COBRA may be terminated when a Qualified Beneficiary first becomes covered under another Health Plan after the date of his or her COBRA election.

If a Qualified Beneficiary declines to enroll in a new employer's Health Plan, he or she continues to be eligible to continue COBRA coverage under the former employer's plan.

A Plan Administrator may terminate COBRA even where the other Health Plan is not as comprehensive as the existing employer's plan. For example, the Qualified Beneficiary has elected to continue coverage under the medical plan and dental plan. The Qualified Beneficiary becomes covered under his or her new employer's medical plan, but the new employer does not offer dental coverage. The Qualified Beneficiary's coverage under the former employer's medical and dental plans may be terminated.

Note: Prior to waiving coverage under a new employer's plan, a Qualified Beneficiary should be certain to understand his or her ability to enroll at a later date. HIPAA provides special enrollment rights to individuals that exhaust COBRA coverage. Voluntary cancellation of COBRA does not provide an individual with a special enrollment right.

What premium may be charged for COBRA coverage?

COBRA premiums may not exceed 102% of the cost to the plan for similarly situated beneficiaries with respect to whom a Qualifying Event has not occurred (without regard to whether such cost is incurred by the employer or Employee).

Where COBRA continuation coverage is extended due to disability, COBRA premiums may not exceed 150% of the cost to the plan for similarly situated beneficiaries with respect to whom a Qualifying Event has not occurred (without regard to whether such cost is incurred by the employer or Employee) for months 19 through 29. Where the disabled Qualified Beneficiary is no longer covered under the plan, the remaining Qualified Beneficiaries within the family are entitled to continue coverage for up to 29 months at an amount not to exceed 102% of the cost to the plan.

Note: certain Qualified Beneficiaries are eligible for a temporary premium subsidy if their Qualifying Event was an involuntary termination of employment.

When may COBRA premiums be changed?

COBRA premiums must be established before a 12-month determination period. A determination period must be applied consistently from year to year. During a determination period, COBRA premiums may only be increased in the following three cases:

- COBRA premiums were set below the maximum amount permitted (i.e. 102% of the plan's cost),
- COBRA premiums are increased to 150% of the plan's cost as permitted during disability extensions, or

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- The Qualified Beneficiary has changed his or her election (i.e. single to family, HMO plan to PPO plan).

Qualified Beneficiaries are entitled to change elections for coverage on the same terms and conditions as similarly situated active Employees. Therefore, if active Employees are permitted to change their elections annually, Qualified Beneficiaries must be permitted to do the same. For example, some employers offer its Employees a choice between an HMO plan and a PPO Health Plan. Employees currently covered under one of the employer's Health Plans are permitted to change plans at the beginning of each plan year. In this example, Qualified Beneficiaries must also be permitted to change elections at open enrollment.

Note: If an insurance carrier increases rates mid plan year, COBRA premiums may not be increased during the determination period, unless COBRA rates were set below the maximum amount permitted (i.e. 102% of the plan's cost).

What is timely payment for COBRA continuation coverage?

The Qualified Beneficiary's first COBRA premium payment is due within 45 days of the date of his or her COBRA election.

For subsequent COBRA premiums, a Qualified Beneficiary's payment is considered timely if made on the later of the following:

- Within 30 days of the beginning of the coverage period (i.e. the beginning of the month),
- The date on which similarly situated active Employees are required to pay for coverage, or
- The date on which the plan is permitted to pay the insurance company, HMO, or other entity that it pays for coverage.
- The time periods listed above are commonly referred to as the grace period.

Payment is considered made on the date it was sent by the Qualified Beneficiary. COBRA premiums may be paid by any third party on behalf of the Qualified Beneficiary. For example, a Qualified Beneficiary's new employer may pay COBRA premiums to the former employer on behalf of the Qualified Beneficiary.

What if a Qualified Beneficiary fails to pay the entire COBRA premium?

If a Qualified Beneficiary makes timely payment in an amount that is not significantly less than the amount due, the payment is deemed to meet the Qualified Beneficiary's payment obligation, until the plan notifies the Qualified Beneficiary and grants a reasonable amount of time to correct the deficiency. For this purpose, 30 days is considered reasonable.

Under COBRA, what coverage must be offered to a Qualified Beneficiary?

Each Qualified Beneficiary must be offered an opportunity to elect the same coverage that was provided on the day before the Qualifying Event.

Note: If an employer offers additional coverage options to active employees, the employer may (but is not required to) allow Qualified Beneficiaries who are eligible for the premium subsidy to switch the coverage options they had when they became eligible for COBRA. To retain eligibility for the premium reduction, the different coverage must have the same or lower premiums as the individual's original coverage. The different coverage cannot be coverage that provides only dental, vision, a health flexible spending account, or coverage for treatment that is furnished in an on-site facility maintained by the employer.

Example of Benefits Offered Under Separate Plans:

A Qualified Beneficiary was covered under the employer's medical plan and dental plan on the day before the Qualifying Event. Similarly situated active Employees are not permitted to elect dental coverage unless they also elect medical coverage. The medical and dental benefits are offered under two separate plans. These fully-insured plans are insured by two separate carriers. In this example, the Qualified Beneficiary may choose to elect:

- Medical coverage,

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- Dental coverage,
- Medical and dental coverage, or
- Waive his or her COBRA rights.

Example of Benefits Offered Under One Plan:

A Qualified Beneficiary was covered under the employer's plan which provides coverage for both medical and dental benefits. Similarly situated active Employees are not permitted to elect dental coverage unless they also elect medical coverage. The instruments governing the plan make clear that medical and dental benefits are offered under one plan. In this example, the Qualified Beneficiary may elect:

- Medical and dental coverage, or
- Waive his or her COBRA rights.

If it is not clear from the instruments governing the health benefits whether the benefits are provided under one plan or more than one plan, or if there are not instruments governing the arrangement, all such health care benefits provided by a single entity constitute a single Health Plan.

Qualified Beneficiaries must be given the same rights as similarly situated active Employees. Where similarly situated active Employees are permitted to change between Health Plans or add dependents to the plan during an annual open enrollment, Qualified Beneficiaries must be permitted to do the same.

Under COBRA, what coverage must be offered to a Qualified Beneficiary who is relocating?

If a Qualified Beneficiary participates in a region-specific benefit package (such as an HMO) that will not service his or her health needs in the area to which they are relocating (regardless of the reason for the relocation), the Qualified Beneficiary must be given an opportunity to elect alternative coverage that the employer makes available to active Employees. While the employer is not required to put a plan in place to accommodate the relocated Qualified Beneficiary, it must make available coverage which it has available, even if that Qualified Beneficiary was not eligible for that coverage while an active Employee.

How are COBRA rights impacted when an Employee terminates a spouse's or dependent's coverage in anticipation of divorce?

Where a covered Employee discontinues the coverage of a spouse in anticipation of a divorce or legal separation, the plan is required to make COBRA coverage available effective upon the date of the divorce or legal separation. The plan is not required to make coverage available for any period before the date of the divorce or legal separation.

The Qualified Beneficiary must notify the plan administrator within 60 days of the divorce or legal separation in order to be eligible for COBRA continuation coverage.

Are health savings accounts subject to COBRA?

Health savings accounts are not subject to COBRA. In December 2003, the U.S. Department of Treasury released Notice 2004-2, which states that "Like Archer MSAs, health savings accounts are not subject to COBRA continuation coverage."

However, employer-sponsored high deductible Health Plans offered together with a health savings account are subject to COBRA.

Are health flexible spending accounts subject to COBRA?

The 1999 Proposed COBRA Regulations contain some guidance on whether a health flexible spending account satisfies the definition of "group health plan" for purposes of COBRA. Where an Employee has underspent their account at the time of the Qualifying Event, the Employee is entitled to elect to continue the health flexible spending account under COBRA for the remainder of the Section 125 Plan year. However, the Employee is not entitled to continue their contributions to the health flexible spending account during the full period of COBRA continuation coverage (ie. 18 months). According to the Internal Revenue Service "the purposes of COBRA are not furthered by requiring an employer to offer COBRA for a plan year if the amount that the employer could require to be paid for COBRA coverage

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for the plan year would exceed the maximum benefit that the Qualified Beneficiary could receive under the health flexible spending account.”

Example:

Under a Section 125 Plan, an employer offers its Employees a traditional medical insurance plan and allows its Employees to contribute pre-tax dollars to a Health FSA. Employee elects to contribute \$2,000 during the 2000 calendar year. Employee terminates his employment effective July 1, 2000. To date, Employee has not sought reimbursement from his Health FSA. Under COBRA, this Employee is entitled to continue his Health FSA through the end of December 2000.

Can a Qualified Beneficiary revoke a COBRA waiver?

If a Qualified Beneficiary waived COBRA continuation coverage, he may revoke his or her waiver at any time during the initial Election Period. COBRA continuation coverage is effective on the date the waiver is revoked.

What penalties exist for COBRA non-compliance?

COBRA provides civil and tax penalties for noncompliance. COBRA's civil sanctions allow participants and beneficiaries recourse if the plan fails to provide continued coverage to which the participant or beneficiary is entitled. Additionally, a plan administrator may be personally liable to a plan participant or beneficiary for up to \$100 per day for noncompliance.

COBRA's tax sanctions include a nondeductible excise tax of \$100 per day for each beneficiary affected by a failure during the noncompliance period. The noncompliance period begins on the date of the failure and ends six months after the last day of the otherwise applicable COBRA coverage period or the date when the failure is corrected, whichever is earlier. The maximum tax is \$200 per day if multiple violations occur as a result of a single qualifying event involving more than one qualified beneficiary.

The excise tax does not apply if a failure is due to reasonable cause and not willful neglect, provided the failure is corrected within 30 days of when the failure was or could have been known.

Additionally, a tax is not imposed if individuals liable for the tax did not or could not have known, by exercising reasonable diligence, that a failure existed.

May COBRA continuation coverage be conditioned upon reimbursement of the premiums paid by the employer for coverage under a group health plan during FMLA leave?

The right to COBRA coverage cannot be conditioned upon the employee's reimbursement of the employer for premiums the employer paid to maintain coverage under a group health plan during FMLA leave.