

The COMPLETE

COBRA and HIPAA Q & A

QUESTION: I heard that an employer must continue health coverage under COBRA for at least 45 days after termination of employment of any employee. This means that one's COBRA coverage option is open after the expiration of this 45-day period. Can you please elaborate on this?

ANSWER: One of COBRA's key principles is that a window of opportunity exists for a COBRA election many months after a qualifying event. That is, COBRA creates an adverse selection opportunity for qualified beneficiaries to see if they will be sick before electing COBRA coverage. However, this opportunity is broader than the questioner has assumed.

Upon a termination of employment, the employer has to notify the plan administrator of the qualifying event within 30 days. The plan administrator then has to notify the qualified beneficiaries of their COBRA rights within 14 days. The qualified beneficiaries then have 60 days from the date of that notice to elect COBRA coverage. If they elect COBRA coverage, the qualified beneficiaries then have 45 days to pay for the premium covering the period from the date of the qualifying event (or coverage loss, if later) until the date of the COBRA election.

If you add up all of those time periods, the COBRA adverse selection period following a termination of employment is 149 days (30+14+60+45). That is nearly five months during which qualified beneficiaries can see if they will be sick enough to justify payment of the COBRA premiums. Then they could retroactively pay the premium. (If the qualifying event is a divorce or legal separation from the covered employee or a dependent child ceasing to be a dependent child, the adverse selection window is another 30 days, for a total of 179 days, because qualified beneficiaries have 60 days to notify plan administrators of these events.)

From an administrator's perspective, nothing can be done to shorten the 60-day election period or the 45-day premium payment period. If a qualified beneficiary wants to take up to 105 days to elect and pay for COBRA coverage (60 days to elect plus 45 days to pay), that's the way it goes. However, the administrator should try to shorten the period before the COBRA election--and therefore the adverse selection period--as much as possible. By quickly sending COBRA notices after a qualifying event, the plan can start the "clock" running on the COBRA election period.

QUESTION: Can a person who declined to elect COBRA coverage change his or her mind as long as it is during initial 60-day election period? And is a COBRA election form then necessary?

ANSWER: Yes. The IRS final COBRA regulations of February 1999 provide that a qualified beneficiary who, during the election period, waives COBRA coverage can revoke the waiver at any time before the end of the election period. However, the employer is only obligated to provide continuation coverage prospectively from the date that the waiver is revoked. A new COBRA election form is not required (the old one could still be used), however, it would be prudent for record keeping purposes to obtain written verifications of any waivers or revocations.

Eligibility for Coverage

QUESTION: If medical benefits are extended to domestic partners, should COBRA also be extended to them?

ANSWER: Many group health plans provide coverage for domestic partners. The IRS has issued several private rulings on principal domestic partner coverage indicating that neither the employee nor the partner will be taxed on the coverage or benefits received as long as coverage for the non-employee domestic partner is paid for entirely on an after-tax basis. As a result of this increased extension of domestic partner coverage, questions come up about whether COBRA continuation coverage needs to be offered to domestic partners in cases where qualifying events might occur.

Technically, COBRA rights only apply to employees (in cases of terminations or reductions in hours of employment), and their covered spouses and dependent children. Domestic partners are technically not yet treated as "spouses." Furthermore, the federal Defense of Marriage Act of 1996 provides that the word "spouse" only refers to a person of the opposite sex who is a husband or wife, and the word "marriage" only refers to a legal union between a man and a woman. Based upon this federal law, the IRS has concluded that domestic partners cannot qualify as spouses under federal tax law. Therefore, under current law, if a domestic partner loses coverage due to what would otherwise be a qualifying event (such as an employee's termination), COBRA is not required to be offered. Note, however, in some cases, certain domestic partners may qualify as tax code dependents.

Nevertheless, many plans that offer domestic partner coverage also provide COBRA-like rights in cases of an employee's termination of employment, reduction in hours of employment or death. Divorce is trickier because if there is no legally recognized "marriage," it is difficult to determine when a domestic partner relationship legally ends.

Thus, although plans are not required to provide COBRA coverage to domestic partners, many plans provide comparable continuation rights as a contractual matter. Before designing such provisions, however, employers should consult with counsel. The law in this area is in a state of flux. Moreover, in writing plan provisions for domestic partners under the current law, a number of design issues must be considered. (That is, what is sufficient documentation of a relationship that will be treated as a domestic partner relationship? When is it ended? Will full COBRA-like rights be extended or only some modified version, such as only upon termination or reduction in hours of employment?)

QUESTION: An employee is eligible for medical coverage from her date of hire. She fills out the enrollment forms properly and they were sent to the insurance company. If the employee quits without notice before the enrollment forms are processed, do we have to offer her COBRA coverage?

ANSWER: To be eligible for COBRA coverage, a qualified beneficiary must be enrolled in the employer's group health plan on the day before the qualifying event took place. See ¶ 1100 of [Mandated Health Benefits--The COBRA Guide](#), published by Thompson Publishing Group Inc. To that end, the employee's eligibility for COBRA coverage will likely hinge on when your plan terms consider an individual to be enrolled. It could be when the forms are filled out, when they were submitted to the insurer or when they were processed -- it depends on the criteria spelled out in your plan, the enrollment form and other materials. As long as the employee was enrolled for

even one day, though, the employee is eligible for COBRA if coverage is lost due to the termination of employment.

QUESTION: What is considered "gross misconduct" for purposes of disqualifying an employee from COBRA rights?

ANSWER: Under COBRA, if a covered employee is terminated for "gross misconduct," the termination of employment is not considered a qualifying event. Therefore, the employer does not have to offer COBRA coverage to the ex-employee, as well as the covered spouse and dependent. Before defining the term gross misconduct, it is important to understand a few of its consequences.

If the employee resigns under circumstances that suggest a gross misconduct situation, it is unlikely that the employer can enforce this rule. Furthermore, making a gross misconduct determination after the employee is already terminated for other reasons may weaken a case for denying COBRA coverage due to gross misconduct.

Finally, COBRA rules are minimum requirements. Therefore, an employer can choose to be more generous than the law and offer COBRA coverage to the ex-employee despite the existence of gross misconduct. It can also choose to deny COBRA coverage to the ex-employee but still extend it to covered spouses and dependents. Note, however, that this will not really avoid giving coverage to the ex-employee because the spouse and/or dependents could elect COBRA and then add the terminated employee to their coverage as a "dependent" under the health plan.

But if the employer is applying the gross misconduct rule, then the question becomes, "what is gross misconduct?" This term is not defined in the statute or the IRS final COBRA regulations. However, COBRA's legislative history indicates that a relatively strict standard should be applied to gross misconduct determinations. Overall, the courts have taken the lead in defining gross misconduct. In most cases, they have looked at provisions in state unemployment compensation law for guidance.

To that end, the employer must analyze the applicable legislative, regulatory and legal guidance, and then determine what type of behavior is gross misconduct. In doing so, the employer and its legal counsel should consider at least the following five issues:

1. Was the conduct illegal?
2. Was the conduct disruptive or harmful to the employer's business or the workplace?
3. Was it a first offense?
4. Was the conduct condoned or tolerated by the employer?
5. Are there mitigating circumstances?

QUESTION: If an employee terminates employment, elects COBRA coverage, is later re-hired, then terminates employment again, is the employee still entitled to COBRA coverage?

ANSWER: Yes. COBRA does not establish limits on how many times a qualified beneficiary can elect COBRA coverage upon a change in his or her status and the occurrence of a new qualifying event. In other words, once the employee was rehired, the COBRA coverage based upon the first qualifying event ended, and he or she was no longer a qualified beneficiary. Instead, the employee once again became a plan participant. Then, once a new termination of employment occurs, as long as the individual was covered under the plan immediately before the qualifying event, the employer must offer a new 18-month period of COBRA coverage.

Employers Affected by COBRA

QUESTION: I run a small not-for-profit program which has fewer than 10 employees. I am being asked more frequently about COBRA coverage when employees terminate employment. Does COBRA only apply to group health plans with 20 or more employees? Can a smaller group of employees choose to be subject to COBRA's requirements?

ANSWER: COBRA only applies to employers that employ 20 or more employees during a typical business day in the preceding calendar year. (Note that this means that in the first year of an employer's existence (assuming it is not a successor to some other larger business).

For the purpose of the small employee exception, the IRS final regulations of February 1999 provide that an "employee" does not include self-employed individuals, independent contractors, leased employees and non-employee directors. Furthermore, while the term includes both full- and part-time employees, the IRS proposed regulations of February 1999 state that the latter is only counted as a fraction of an employee.

If an employer has always employed fewer than 20 employees, COBRA does not apply. That does not necessarily mean no continuation rights exist, however. If the plan is insured, state laws may require the insurer to offer continuation coverage. The rights under the policy may not be as extensive as COBRA or, depending on the state, they may not exist at all. Therefore, check with the insurer.

Another kind of continuation right is a voluntary extension of coverage. COBRA is only a minimum requirement for those plans subject to its reach. COBRA does not prohibit employers from voluntarily extending coverage under any circumstances. Of course, employers tend not to provide for voluntary coverage extensions given the exposure to adverse claims experience. Nevertheless, it is possible to offer voluntary extensions of coverage. Before agreeing to such an extension, however, talk to the plan's insurer and the company's benefits counsel. If the insurer does not agree to the voluntary extension, the employer may be on the hook for all of the actual claims.

Length of COBRA Coverage

QUESTION: May an employer allow qualified beneficiaries to continue COBRA coverage beyond the 18-month mandated period?

ANSWER: Yes. COBRA coverage is a minimum legal requirement. Employers are allowed to do more than the law requires. However, before an employer decides to do so, it should consider the cost exposure of such a decision. If someone continued coverage for the full 18-month COBRA period at 102 percent of the applicable premium, odds are the person has significant medical claims. Therefore, continuing coverage beyond the 18-month period will subject the plan to even more claims. (Note that adverse claims history affects insured plans and self-insured plans alike. Do not assume that as long as the individual pays 102 percent of the applicable premium there is no "cost" to an insured plan.)

an employer decides to be more generous than COBRA, the employer should also consider the circumstances in which the offer will be made. Will all qualified beneficiaries be allowed to continue coverage for longer than the requisite period? If not, how will the employer distinguish those employees who can continue beyond the mandated period and those who cannot? There should be a clearly written policy on these decisions.

Therefore, the employer would be stuck with those claims. Furthermore, self-insured plans with stop-loss insurance should also make sure any contract with a stop-loss insurer notes that the employer is allowed to provide more generous COBRA coverage.

Premiums

QUESTION: An employee suddenly stopped sending in his COBRA premiums. I did not receive any notice from him on whether or not he wished to continue his COBRA coverage. His payment was already a month late when I phoned him to inquire about his status. It took several attempts to reach him until we finally discovered that he no longer wanted the coverage. What is the procedure for canceling COBRA coverage for non-payment? How long do you wait? To what lengths should an employer go to determine whether an ex-employee is still interested in the coverage?

ANSWER: Under COBRA, premiums must be paid by the appropriate due dates or else COBRA coverage may be terminated. The initial COBRA premium (for the period between the qualifying event and the COBRA election) is due within 45 days of the COBRA election. Regular monthly premiums are due within 30 days (or longer if allowed under the plan). For example, the premium for September is due by September 30. Assuming the premium due dates are clearly spelled out in COBRA notices and premium rate letters, an employer or administrator does not have to constantly remind qualified beneficiaries of the due dates. Some plans use monthly premium coupon books or other reminder letters; however, this is not required under COBRA.

An employer is also not obligated to go to any lengths to see if a qualified beneficiary still wants COBRA coverage. In this case, once the payments stopped and payment was late by more than the 30-day grace period, the administrator had no reason to phone the qualified beneficiary and find out what happened. Once payment is late, COBRA coverage may be terminated. A few more practical points:

- Premiums are made when they are sent, not when they are received by the administrator, according to the IRS final COBRA regulations of February 1999. So save the postmarks on the envelopes. If the payment was mailed during the grace period, it is timely even if received after the grace period.
- Sometimes third-parties pay COBRA premiums for qualified beneficiaries. For example, a hospital might pay a premium to ensure that it will be paid for rendering services. If that is the case, the qualified beneficiary will still lose coverage if that third party is late in payment. Administrators should make this clear in all communications to qualified beneficiaries.
- Generally, each month's premium should be paid in full for coverage to be current. However, the IRS final COBRA regulations of February 1999 provide that if a COBRA premium payment was short by an amount that is not significant, the plan must choose between one of two options: (1) treat the payment as satisfying the plan's payment requirement as payment in full for COBRA coverage; or (2) notify the qualified beneficiary of the amount of the deficiency and grant the qualified beneficiary a reasonable period of additional time to pay the shortfall. The final regulations provide that, as a safe harbor, a period of 30 days is deemed to be a reasonable period for this purpose.
- If a check bounces, the administrator should try to inform the qualified beneficiary as soon as possible to allow the qualified beneficiary to make the check good during the grace period. Some employers will extend the grace period in these cases, depending on the facts.
- Finally, once coverage is terminated due to non-payment, there might be conversion options available (if the plan is insured) and the employer should send a cancellation notice to the qualified beneficiary(ies). This is a precaution to make sure a qualified beneficiary does not seek treatment in reliance on any promise of coverage.

QUESTION: If a qualified beneficiary (QB) elects COBRA coverage (within the 60-day election period), the first COBRA premium payment is not due for 45 days. If the QB's FIRST month's premium is not due for 45 days, when is the SECOND month's premium due? If the premium payment for every month after the initial coverage period is subject to a 30-day grace period, it would seem that the SECOND month's premium is due before the FIRST month's premium. Is this possible?

ANSWER: To answer this question, let's put down some dates and dollars:

- Qualifying event date is Jan. 1.
- Jan. 31--the administrator sends a COBRA notice to the QB.
- March 29--the QB elects COBRA coverage (within 60 days of the administrator's notice).
- The QB has 45 days, until May 13, to pay for the period of coverage for January, February and March.
- In the meantime, the April premium will come due. Is the April premium due April 30? If so, does that mean that the payment for the first period of COBRA coverage (for January, February and March) is due AFTER the payment for the next monthly premium?

As originally enacted, COBRA could have been read to mean that the April premium would be due before the premium for the initial period. In a 1989 budget act, however, Congress changed the statute. Under the current COBRA provision:

In no event may the plan require the payment of any premium before the day which is 45 days after the day on which the qualified beneficiary made the initial election for continuation coverage.

This means that the plan cannot force the QB to pay the April premium any earlier than May 13, the end of the initial 45-day premium payment period. Of course, the May premium will then be due by May 31 (presuming regular monthly premium grace periods apply for active employees).

QUESTION: An employee terminated employment from his job and elected to continue COBRA coverage for six months. He allowed his coverage to lapse for three months and now wants to reinstate his coverage by paying the back premiums. We have the following questions: (a) Is he eligible to do so? (b) During his coverage lapse, he had another job (as an independent contractor) which provided him with health benefits. Does that affect his ability to reinstate prior coverage? (c) Is the new employer obligated under COBRA to offer coverage when he loses his independent contractor job?

ANSWER:(a) Assuming the COBRA language is properly drafted into the plan documents, once someone fails to pay for COBRA coverage on a timely basis, their coverage may be terminated and does not have to be reinstated (as long as the premium payment is not short by an amount that is not significant, as provided in the IRS final COBRA regulations of February 1999).

Generally, regular monthly premiums are due within 30 days of the first day of the month to be timely. Also, the IRS final regulations indicate that payments are generally considered "made" when the sender postmarks them, not when they are received.

However, in the absence of any specific guidance to the contrary, many plans treat payments as timely only if they are received within the COBRA grace periods. One non-scientific 1992 survey revealed that 208 out of 364 administrators treated COBRA premiums as timely if they were received within the grace period. IRS regulations suggest (without a specific requirement) that payments are timely if sent within the grace period.

(b) Obtaining other group health coverage after the date of the COBRA election can terminate a qualified beneficiary's right to COBRA coverage.

Note that in the question, the existence of other coverage is irrelevant--the COBRA coverage could be cut off due to premium non-payment. Even in those cases where the existence of other

coverage is relevant, however, COBRA does not require that COBRA coverage be terminated. On the contrary, COBRA merely allows plans to terminate COBRA coverage if the technical rules are met. Before terminating anyone's COBRA coverage due to the existence of other employer-provided coverage, the COBRA plan administrator must consider factors such as:

- When was that other coverage obtained? If before the COBRA election, the coverage cannot be used to terminate COBRA coverage.
- What type of coverage is provided by the other plan? If the other employer plan excludes or limits coverage for the qualified beneficiary's pre-existing conditions, it may not be used to terminate COBRA coverage. This is the source of much confusion and litigation under COBRA.
- What does the COBRA plan provide? Some plans are not specific on when COBRA coverage may be terminated. If the COBRA termination provision is not properly worded in the plan document, it may not be enforceable.

(c) If the individual in question becomes covered by another employer, even as an independent contractor, and obtains coverage under that employer's plan, the individual may become entitled to COBRA coverage on a subsequent termination of employment. (This assumes that the employer is not otherwise exempt from COBRA's reach due to the small-employer exception or some other exception from COBRA coverage.) Under COBRA, a covered employee is defined as anyone who is or was provided coverage under a group health plan by virtue of providing services for the employer sponsoring the plan.

Notice Requirements

QUESTION: Is it up to the administrator to offer COBRA coverage to qualified beneficiaries who already know about their COBRA rights? Or, can the administrator rely on the fact that the individuals know about their COBRA rights and leave it up to them to ask for COBRA benefits?

ANSWER: Under COBRA, the notification system is specified by the statute. When a qualifying event occurs, either the employer or the affected qualified beneficiaries must notify the plan administrator of the event. Which party is responsible depends on the event. If the qualifying event is a termination or reduction in hours of employment or employee death, for example, the employer must notify the plan administrator of the event. On the other hand, if the qualifying event is a divorce, legal separation or cessation of dependency status, the qualified beneficiaries must notify the plan administrator of the event.

Once the plan administrator is notified of the qualifying event, the administrator must notify all affected qualified beneficiaries of their COBRA rights. This notification must be sent even if the administrator knows that the individual involved knows everything about COBRA. Consider the example of a COBRA administrator that terminates employment with the employer. The fact that the individual knows everything about COBRA does not mean that a COBRA notice does not have to be sent.

In two litigated cases this specific issue was raised. In one case, the qualified beneficiary knew enough about COBRA to elect COBRA coverage for two months. She then stopped paying for COBRA coverage and when the employer would not reinstate coverage, she sued. The court found that she was not able to continue COBRA coverage because she had allowed the coverage

to lapse. Nevertheless, because she had not received a COBRA notice from the plan administrator, the court fined the administrator \$36,500 -- \$100 per day (the ERISA penalty at that time; now it is \$110 per day) for one year -- due to the failure to comply with COBRA notice rules.

In another case, the federal district court rejected a similar argument. In that case, the terminated employee was responsible for sending out COBRA notices. He was ostensibly terminated for reasons of gross misconduct. The court found that the employee was not terminated due to gross misconduct and that COBRA notices had to be provided to the employee and his spouse. The employer's argument that a notice did not have to be provided to the spouse because the employee knew about COBRA did not prevail.

QUESTION: An ex-employee was terminated from the health plan due to a qualifying event. His coverage was canceled and not reinstated because he never sent back a COBRA form with a proper COBRA election. He claims that he never received a COBRA notice. Does he now have the right to re-enroll? Are there any specific notification regulations or requirements regarding COBRA? If our system automatically generates a letter to a COBRA qualified beneficiary, is that considered appropriate notification or is the company better off hand delivering the notice?

ANSWER: In this case, if the plan administrator can prove that a COBRA notice was provided (sent) in a timely fashion (that is, sent by first-class mail to the qualified beneficiary's last known mailing address), the administrator will not be required to reinstate COBRA coverage. This is the case even if the individual claims that he did not receive a COBRA notice.

No specific regulations exist regarding a proper notification system. (Any such guidance affecting private employers would have to be provided by the Department of Labor (DOL and not the Internal Revenue Service. The DOL has indicated that it does intend to issue notice regulations.) However, this is an area that is very heavily litigated under COBRA and about which the courts seem to be in agreement.

Essentially, COBRA does not require that administrators must prove that qualified beneficiaries actually received their COBRA notices. Instead, it is enough if the administrators can prove they sent the notices to the qualified beneficiaries. (Of course, other means of delivery, like personal delivery, are acceptable. But they are not required.)

If the administrator can prove that the COBRA notices were sent properly to the last known mailing address, the courts will apply a "mailbox" rule and presume that the qualified beneficiary received the notices. The qualified beneficiary can overcome this legal presumption by demonstrating that the administrator did not send the notices properly (or did not follow its procedures for sending notices properly) or did not send them to the individual's last known mailing address.

Establishing and monitoring a COBRA notification system is the most important way to avoid liability under COBRA. Many COBRA disputes seem to start when a qualified beneficiary claims never to have received the proper COBRA notices. If the employer or administrator can prove that such a statement is false, most of these claims will likely be dropped.

The precise method of notice cannot be described as a generic matter. Rather, each administrator should review its system and determine whether it can be improved. Nevertheless, there are a few points to consider:

- COBRA notices need to be provided to all affected qualified beneficiaries. Therefore, even if a COBRA notice is hand-delivered to an employee, say at an exit interview, that

will not meet the requirement that the employee's spouse and/or dependent children be notified of COBRA rights. Further, providing COBRA notices at an exit interview could lead to misleading information being provided to the interviewee. Therefore, it is generally not a recommended form of notice.

- Certified mail with a return receipt requested is not required. First class mail will suffice.
- Check addresses to make sure they are current. Ex-employees and other potential qualified beneficiaries may provide updated address information to a department other than employee benefits and assume this notice of address is sufficient. Depending on how the administrator and employer function, such notice may indeed be sufficient. Therefore, a COBRA system should try to coordinate the availability of all information among departments.

QUESTION: Is it acceptable to mail one COBRA election notice to a household, addressed to "John/Jane Doe (employee) and covered dependents," if all of the covered plan participants are known to reside at the same address?

ANSWER: Not necessarily. To understand the answer to this question, consider the different COBRA notices that are involved. First, there is the initial COBRA notification sent out when an employee and spouse first become covered by a group health plan. This notice is not sent to dependent children. Regarding this COBRA notification, the Department of Labor (DOL) has indicated that a first class mailing to covered employees and their spouses would constitute a good faith effort by a plan administrator to comply with COBRA's notice requirements. The notice should be sent to the last known mailing address. Significantly, the DOL indicated that this good faith approach only applies if the plan administrator determines that the employee and spouse live at the same address. If the employee and spouse live at separate addresses, separate first-class mailings should be made.

Next, consider actual qualifying event notices. Four issues should be considered before mailing one notice to the entire affected household:

6. Under COBRA, each qualified beneficiary has a separate and independent right to elect COBRA coverage. Therefore, one notice to the entire family might not be good faith compliance because it might not indicate that these separate rights are available.
7. COBRA provides that notice to a qualified beneficiary who is the spouse of a covered employee is deemed to be notice to everyone living with the spouse. However, notice to the employee is not deemed to be notice to everyone living with the employee. So any single notice should probably be specifically addressed to the spouse as well as covered dependents and the employee.
8. Consider the evidence problems that may arise when a qualified beneficiary complains that he or she never received notice. If the address label sent by the administrator simply reads: "Jane/John Doe (employee) and covered dependents," a spouse could argue that the administrator never really notified the spouse. Proof is clearer if the single envelope is addressed to each qualified beneficiary.
9. In all cases, check the address records. If the administrator has knowledge that any qualified beneficiaries do not live at that listed address, a separate notice has to be sent to affected qualified beneficiaries.

QUESTION: Our employee handbook, which every new employee gets, includes COBRA information. The employee must sign off that he or she has received the handbook. Is this sufficient for the initial notice of COBRA rights?

ANSWER: If the notice adequately explains a person's rights to COBRA coverage, then the information in the employee handbook would likely be sufficient initial COBRA notice to the

new employee. However, it would not be considered sufficient notice to any spouses, who also must be notified of their COBRA rights once they first become covered under the plan.

To review the "in the door" notice requirements, once an employee becomes covered by the plan, he or she must receive a notice of COBRA rights. The employee's spouse must also receive a separate in-the-door notice when the spouse first becomes covered by the plan (for example, a single employee becomes married or a married employee decides to add a spouse during open enrollment). To that end, the Department of Labor has advised that a first-class mailing to the last known mailing address of employees and their spouses would constitute good faith compliance with this notice requirement. If an employee and spouse live at the same address, the notice may be a single mailing addressed to both the employee and spouse. If they live at different addresses, however, separate mailings should be made.

In this situation, because the COBRA notice was provided to the employee through the employee handbook, only the notice to the spouse, once he or she becomes covered under the plan, needs to be mailed. The employer should keep records indicating that the proper notices were provided to the employee and spouse.

Finally, it is not legally required to have employees "sign off" on receipt of the employee handbook. COBRA only requires that employers prove that notices were sent to employees and spouses--there is no requirement that employers have to prove receipt of the notices. Sometimes, employers can get into disputes with employees over whether COBRA notices were provided properly when the employee in question refused to sign off on receipt. These disputes are avoidable if employers keep proof of mailing notices rather than proof of receipt. These issues are explained in Tab 1300 of the Guide.

Qualifying Events

QUESTION: In our company, only salaried employees are entitled to group health coverage. The position of one of our salaried employees was recently changed to an hourly status. Her job is the same, it was just re-classified. Therefore, she will lose health coverage. Is this a qualifying event?

ANSWER: No. To have a qualifying event, two things must occur: an event and a loss of coverage due to that event. The relevant issue in this case is whether the employee's re-classification (which clearly caused a loss of coverage) is a termination or reduction in hours of employment.

In this example, the employee's employment status changed; however, she did not terminate employment with the employer and neither were her hours of employment reduced. Thus, her loss of coverage will not be a qualifying event for COBRA purposes.

On a related point, however, employers must note that they cannot drop coverage for employees through a re-classification and, immediately thereafter, terminate their employment. For example, assume that the employee discussed above was re-classified so she would become ineligible for coverage. Assume that the employer did this knowing that the employee was to be terminated. That way the employer thought it could avoid offering COBRA coverage due to the later termination -- it will not have caused a loss of coverage. This will not work under COBRA. Terminating someone's coverage in anticipation of what would otherwise be a qualifying event is still a "loss of coverage" for COBRA purposes.

QUESTION: An employer recently changed carriers to provide a broader, more cost-effective health plan for its employees. My understanding of COBRA is that this constitutes a new "qualifying event." Notices were sent to existing COBRA enrollees accordingly. Must the employer enroll these enrollees immediately, that is, as of the effective date of the new plan, even though they have not responded to the notification prior to the effective date? Also if the employer does enroll them (using prior COBRA forms, etc.) is the insurance carrier required to accept them on the same basis as the "active employees"?

ANSWER: This question must be re-phrased to be accurately stated. Changing coverage IS NOT a qualifying event for COBRA purposes. There are, indeed, COBRA implications to changing a group health plan; however, the implications are not based on the change in carriers being a qualifying event, because it is not. This means that no special COBRA notices must be provided due to a change in insurer.

Therefore, two key questions must be answered.

1. *Do we have to offer new coverage to existing qualified beneficiaries?*
Yes--if a new plan is offered to "similarly situated" active employees, it must also be offered to qualified beneficiaries. This includes both existing and potential qualified beneficiaries--those who are in the middle of an election period when the new coverage is being offered.
2. *If we do have to offer new coverage, and the new coverage comes into effect during someone's COBRA election period when the qualified beneficiary has forms used for the old coverage, does the new carrier have to accept a COBRA election on the old forms?*
This is more difficult to answer. Generally, qualified beneficiaries have to elect the new coverage at the same time and in the same manner as similarly situated active employees. So if an existing covered qualified beneficiary has old coverage and the new coverage must be elected by all active individuals by a certain date and on a certain form, the existing qualified beneficiaries have to make the election for new coverage on the same form by the same time.

The COBRA rules must be adapted, however, for qualified beneficiaries who are in the middle of an election period when the new coverage is offered. Under COBRA, qualified beneficiaries have an election period of at least 60 days to elect COBRA coverage retroactively to the qualifying event date. Therefore, if new coverage will go into effect during or soon after the election period, the qualified beneficiary may have to elect both old coverage and new coverage to continue to have new coverage available.

For example, assume the qualifying event occurs on May 1 and the qualified beneficiary must elect COBRA coverage by August 1. Assume further that new coverage will take effect on June 1 and active employees must elect into the new coverage by May 15. If the qualified beneficiary wants COBRA coverage, he or she must elect to continue coverage retroactively to May 1. That means the qualified beneficiary will need to elect old coverage for May before becoming entitled to new coverage June 1. Moreover, this COBRA election right extends until August 1, the end of the COBRA election period, even though active employees must opt into the new plan by May 15. Note that this same problem arises during annual open enrollment periods when COBRA election periods could overlap the period during which individuals may change their coverage elections.

Now, let's consider what forms are required to be used. Before going any further, if the plan is insured, check with the insurers--both old and new. Will the old carrier still accept retroactive

COBRA elections? To use our example, if the qualified beneficiary elects old coverage after it expires but before the end of the COBRA election period (say on July 15), will the old carrier honor the election? Separately, the new carrier should be contacted. If the new insurer will only accept an application on a new form, the employer should make sure qualified beneficiaries have the proper forms in time to make the proper elections. The new insurer technically could refuse to accept any applications not made on the new insurer's forms. However, this could put the employer in an awkward legal position because a timely COBRA election is binding on the employer whether or not the insurer will accept the form. For this reason, many carriers will accept any valid timely COBRA elections regardless of the form.

The bottom line is that coordination is key. Before changing carriers you should consult with an expert advisor. Also, make sure you at least do the following:

- contact the old carriers, HMOs, TPAs, etc., to see whether they will continue to administer benefits for old qualified beneficiaries as well as qualified beneficiaries within an election period during the switch;
- contact the new carriers, HMOs, TPAs, etc. to see if they will administer benefits for that same group if the old entities will not; and
- determine what type of coverage will be offered to qualified beneficiaries who will lose out on coverage altogether due to the change.

QUESTION: A company provides health coverage for a division of employees through an HMO contract. The contract indicates that if the company closes that division or moves it out of the network, the HMO policy is terminated. If the company sells or closes its division, and the HMO contract is terminated, does the company have to offer COBRA to the affected individuals? If so, how?

ANSWER: This is a very typical scenario that occurs in many different ways. It could also occur where an insurance policy covers one group out of several groups of active employees. When the one group of actives is let go and the contract terminates, the question arises as to whether and how to offer COBRA coverage to the affected individuals.

First, the basic rule is that before COBRA coverage is required there must be a "qualifying event," that is, an event (such as termination of employment, death, divorce, etc.) that causes a loss of coverage. Mere termination of an HMO contract or insurance policy without an associated event does not mean that COBRA coverage has to be offered.

Second, assuming that an event such as a closure of a division has occurred and caused the loss of coverage, COBRA coverage must be offered. The issue to resolve, however, is what coverage to offer. Under COBRA, coverage generally must be identical to coverage in effect immediately before the qualifying event. The problem here is that the pre-qualifying event coverage has ceased to exist. In these cases, COBRA requires that the qualified beneficiaries be offered the same coverage offered to similarly situated individuals with respect to whom a qualifying event has not occurred. (This is based on the statute as well as the IRS final COBRA regulations of February 1999.) So if other similarly situated employees have other coverage available, this other coverage must be extended to qualified beneficiaries.

This is easier to say than to implement, depending on the facts. In some cases, it may simply be that no other active employees are similarly situated. For example, suppose the employer has employees in Northern California and in Oregon and that each group is in a separate region-specific HMO. If the employer closes the Oregon location and has to offer COBRA coverage to

the affected employees, the only other option is the California HMO. This may not mean much to the Oregon terminated employees.

Further, there may be existing qualified beneficiaries to think about. For example, if the closed division in Oregon already is extending COBRA coverage to certain ex-employees, the employer is not absolved of offering COBRA coverage merely by terminating its Oregon location. Again, though, the only option available is the California coverage, which may be of limited utility to the affected employees. In one case, *Coble v. Bonita House, Inc.*, 789 F. Supp. 320 (N.D. Calif. 1992), the court decided that the employer would have to continue the discontinued coverage just for qualified beneficiaries because of this problem.

QUESTION: An employee terminates employment, and both the employee and spouse elect COBRA coverage. Sometime during the 18-month period, the employee and spouse divorce. Is the divorce a second qualifying event? It is not clear that the employee and spouse would lose COBRA rights just because of the divorce since both were qualified beneficiaries at the time of the first qualifying event.

ANSWER: Under COBRA, a divorce or legal separation from a covered employee can be an initial qualifying event for the spouse and any dependent children, entitling them to up to 36 months of COBRA coverage from the date of the divorce. Also, under COBRA's multiple qualifying event rule if, during an original 18-month period, certain multiple qualifying events occur, including divorce or legal separation from the covered employee (or covered former employee) coverage can also be extended to a total of 36 months from the date of the original qualifying event. The intent of this rule is to prevent spouses and dependent children from losing the 36 months of coverage merely because the covered employee terminated employment before he or obtained a divorce.

It is important to understand, however, that even though there is literally no such thing as a second "qualifying event," the multiple qualifying event rule will apply. (There is no qualifying event because the affected qualified beneficiaries do not lose coverage due to that second event. Their coverage is only lost because of the expiration of the time for COBRA coverage due to the first event.)

Furthermore, the rule was not designed to give covered employees a period of COBRA coverage longer than 18 months from termination or reduction in hours of employment. Therefore, only the covered spouse and/or dependent children would be entitled to the extended coverage.

Question: Under what circumstances can my COBRA be canceled?

ANSWER: Employers can cancel your COBRA coverage if they eliminate their group health coverage completely (or go out of business). In addition, your COBRA coverage will be canceled if you:

- Fail to make full and timely payments. Although short payments are allowed as long as they're short by an "insignificant amount."
 - Become entitled to Medicare.
 - Obtain coverage under another group health plan after electing COBRA.
- Move out of the health plan's service area.

Question: Can somebody else pay for my COBRA premiums?

ANSWER: Yes, as long as your payments are made in full and on time, it doesn't matter who or what entity pays them. For example, if you get a divorce, your spouse might agree to continue your payments, for instance.

Question: If I relocate out of the area served by my health plan under COBRA, does my former employer have to offer me the option of switching to another plan so I can keep my benefits?

ANSWER: If you are moving to an area not covered by a health plan your employer already holds, your employer is not required to make any additional coverage available to you. But if your employer makes other forms of health coverage available to its active employees, and one or more of those plans already serves the area to which you are moving, you would also have to be offered that coverage.

Question: If my former employer holds an open enrollment period for active employees, allowing them to switch health plans if they choose, do I and my family, who are covered under COBRA, have the right to switch to another plan, too?

ANSWER: Yes, open enrollment rights must be made available to every one of your family members covered under your COBRA plan. During the open enrollment period, each member of our family could choose coverage under a separate plan if the employer offers more than one health plan to active employees.

Question: My spouse and I separated, but before the actual date of the divorce my spouse cut off my health coverage through their employer. My divorce won't be final for many months. Am I entitled to get my benefits back under COBRA?

ANSWER: Yes, as soon as the employer or plan administrator receives notice of your divorce (or legal separation), they are required to make COBRA available to you. The coverage would be effective as of the date of the divorce or separation.