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Q&A FROM ASSUREX GLOBAL WEBINAR

COBRA IS HERE TO STAY

JULY 27, 2017

Q. Are domestic partners covered as a qualified beneficiary under COBRA? Are the domestic partner's children considered a qualified beneficiary if they were covered under the health plan and lost coverage when aged off of the plan?

A. If a plan offers coverage to domestic partners, domestic partners are not considered a qualified beneficiary and will not have independent COBRA election rights, but may continue if the employee elects COBRA continuation coverage. That being the case, children of a domestic partner are considered qualified beneficiaries and would have independent COBRA election rights.

Q. Aren't limited purpose FSAs also subject to COBRA, as dental and vision are types of health coverage (for these purposes)?

A. Yes, a limited-purpose health FSA is also subject to COBRA.

Q. Can an employer charge for the EAP under COBRA if the EAP is currently free to all employees?

A. Yes. Not only for EAPs, but for any group health plan subject to COBRA, the employer may charge up to 102% (or 150% in the case of a disability-extension) of the premium for those who elect COBRA continuation coverage. This is true even if the employer pays 100% of the premium for active, eligible employees.

Q. If an employee leaves voluntarily would this qualify for a COBRA event?

A. Regardless of whether termination of employment is voluntary or involuntary, if there is a loss of coverage, a COBRA continuation right is triggered (assuming the plan is subject to COBRA).

Q. Can I put the initial (general) notice in the enrollment packet?

A. While it could be included in the enrollment packet, this method of delivery may not reach a covered spouse. Therefore, it is recommended that the initial notice be mailed to the home and be addressed to the employee and spouse (if applicable).

Q. Can you email the notice?

A. While electronic delivery of the initial notice is allowed so long as the DOL safe harbor criteria are met, this method of delivery may not reach a covered spouse. Therefore, it is recommended that the initial notice be mailed to the home and be addressed to the employee and spouse (if applicable).

Q. Does the spouse need to be named on the envelope or in the letter of the initial notice?

A. Yes, if the spouse is covered under the plan, the employee and spouse should both be named on the envelope and in the letter.



Q. Do you address the initial notice to the employee and spouse? Do you send two separate notices?

A. A single letter may be used for the employee and spouse if their coverage commences at the same time and the following criteria are met:

- The notice is addressed to both the covered employee and the covered spouse, and
- The employee and spouse reside at the same address based on the most recent information available

If coverage begins at a later date for the spouse, the spouse should receive a separate initial notice.

Q. Do you need to provide an initial notice upon every open enrollment?

A. No. An initial (general) notice is required no later than 90 days following enrollment in a plan. Thereafter a new notice is required only if there are changes in the law or under the group health plan which would affect COBRA continuation rights and requirements.

Q. Does an employer have to offer COBRA if they did not notify the administrator within 30 days of the employee's termination date? If so, what would the COBRA start date be if the carriers won't terminate benefits back to the original termination date? Example, employee terminates 3/31/2017, so benefits should have terminated 3/31/2017. However, employer did not notify carriers until 7/15/2017 so the carrier will not terminate medical until 7/31/2017.

A. An employer's failure to terminate coverage following a termination of employment does not change the requirement to offer COBRA continuation rights. The COBRA rules allow the maximum COBRA coverage period to run retroactive from the actual event date (i.e. reduction of hours or termination of employment), or from the loss of coverage date. How it is ultimately handled should be based on the facts and circumstances (e.g. carrier's willingness to retroactively terminate, length of time lapsed, responsibility for premiums). Whatever the employer decides should be coordinated with the carrier to ensure claims coverage, and the COBRA election letter will need to be tailored to address the situation. The individual must always be given the normal COBRA periods to make an election and payment.

Q. Even if we aren't required to offer COBRA for a Health FSA in that second example, can we still offer it? Is there any detriment to the company if we chose to do so?

A. If the employer chooses to be more generous than required and offer COBRA for overspent health FSAs, it should be done on a uniform basis. The employer is increasing the risk of having to pay out the full annual election amount without being able to recoup payment from the participant if choosing to do this.

Q. Hi, question about late notification for divorces. Will the carriers keep the divorced spouse on the insurance since they no longer meet the definition of a qualified member?

A. If an ex-spouse remains on the plan beyond the date of divorce, there is risk that the carrier could refuse to cover claims (assuming the individual no longer meets the plan eligibility requirements).



Q. I am very new so my question is very basic: Are all employers required to offer COBRA to their employees?

A. Employers with 20 or more employees are generally subject to federal COBRA continuation requirements and therefore must offer COBRA continuation coverage for group health plans when participants lose coverage due to experiencing a qualifying event. However, governmental and church plans are exempt from COBRA requirements. Fully-insured plans may be subject to state continuation requirements as well.

Q. If a company closes it's doors and cancels all benefits, there's no plan to continue on COBRA, is there?

A. When a group health plan terminates, there is typically no further COBRA obligation because there is no group health plan available to offer coverage under. NOTE, however, there are special rules that apply when there is a merger or acquisition.

Q. If an employer provides an onsite clinic free on a monthly basis and pays a PEPM. Is this saying that those terminated employees can come on campus for service on those days if they pay 102% of the PEPM the ER is paying

A. Assuming the employer is subject to COBRA, and the onsite clinic provides benefits subject to COBRA, yes. Those who lose access to the onsite clinic upon experiencing a qualifying event (e.g. termination of employment) should be offered ongoing access to the onsite clinic for the COBRA maximum coverage period if they are willing to pay a corresponding monthly premium.

Q. If EE is only enrolled in one plan, medical for example, then the ER only has to offer that for COBRA, correct? EE would not be offered dental, vision etc. if not previously enrolled?

A. Correct, at least initially. The general rule for COBRA is that the qualifying beneficiary may continue only the coverage in place immediately before the qualifying event. However, because COBRA qualifying beneficiaries must be granted the same rights provided to other similarly situated active employees under the plan, the qualifying beneficiaries must be provided with open enrollment rights, as well as HIPAA special enrollment rights, just like other similarly situated active employees under the plan. In other words, if the qualified beneficiary does elect to continue coverage under COBRA, at the next open enrollment the COBRA participant must be given the same choice of plan options (all group health plan options) and the ability to add dependents available to a similarly situated active employee.

Q. If you are a large employee and have a self-funded insurance plan, do the continuation laws still apply?

A. Employers with 20 or more employees offering either a self-funded or fully-insured group health plan is subject to federal COBRA continuation requirements (other than governmental or church plans) . Self-funded plans are not subject to state continuation requirements though...state continuation requirements typically apply only to fully-insured plans.



Q. Is a Cure's Act HRA subject to COBRA?

A. Qualified small employer health reimbursement arrangements (QSEHRAs), authorized under the 21st Century Cure's Act, may be offered by small employers (less than 50 FTEs) who do not offer a group health plan if the arrangement meets the following criteria:

- Funded solely by the employer, and no salary reduction contributions;
- Provides payment for or reimbursement of expenses for medical care (Code section 213(d)) incurred by eligible employees or their family members upon proof of coverage;
- Payments/reimbursements do not exceed \$4,950 for single or \$10,000 for family annually (with amounts to be indexed for increases in cost of living); and
- Available to all eligible employees.

QSEHRAs are NOT subject to federal COBRA continuation requirements.

Q. Is the eligibility based on 20 employees in the current year, or 20 employees at least 50% of the prior year?

A. A plan is subject to COBRA if the employer had 20 or more employees on more than 50% of the typical business days in the prior calendar year.

Q. Can a child who turns 26 elect COBRA?

A. Assuming the dependent loses eligibility upon achieving age 26, then yes (assuming the plan is subject to COBRA).

Q. My company is being purchased by a larger organization. We are going to keep coverage for all employees until the coverage from the larger organization begins. We will terminate the plan when our company is purchased. There will be no gap in coverage for employees, but they will no longer be on our company plan. Does this count as a qualifying event and should COBRA be offered to these employees.

A. The IRS has issued detailed regulations regarding the handling of COBRA liability in the case of a merger or acquisition (26 CFR 54.4980B-9). The rules are fairly complex, therefore the legal advisors involved in the business transaction should be prepared to address these issues in detail. Under the regulations—in somewhat oversimplified form—the responsibility for making COBRA coverage available to M&A qualified beneficiaries is determined according to the following rules:

1. If the seller maintains a group health plan after the sale, then a group health plan of the seller must provide COBRA coverage.
2. If the seller ceases to maintain any group health plan in connection with the sale, then a group health plan of the buying group must provide the COBRA coverage if: (i) the buying group maintains a group health plan; and (ii) in the case of an asset sale, the buyer is a successor employer.
3. The parties may contractually allocate the responsibility to make COBRA coverage available. However, if the party that is contractually assigned responsibility for COBRA fails to perform, then the party that has the obligation to provide COBRA coverage under the regulations remains responsible for making COBRA coverage available.



Q. Reduction in hours question—if an employee chooses to lower their hours, would this still be a COBRA event?

A. If the reduction in hours causes a loss of coverage, then a COBRA continuation right is triggered (assuming the plan is subject to COBRA) regardless of whether it was the employee or employer's choice to make the change in employment status.

Q. So are we required to offer EAP through Cobra if it offers counseling sessions and not just a referral? Is it a law or a choice?

A. If the EAP provides significant medical benefits (beyond merely referrals), the EAP is likely subject to federal COBRA requirements and therefore required to offer COBRA continuation coverage upon the occurrence of a qualifying event triggering a loss of the EAP coverage. It is not a choice.

Q. So what if you had an employee sign that they have received it and had their spouse sign as well?

A. While requiring signature upon receipt is certainly adequate proof of delivery, it is not a recommended practice as it can be administratively burdensome to ensure receipt from every covered employee and spouse, and any failure to obtain a signature may falsely indicate a failure to deliver.

Q. So would you recommend us to send those certified mail so we would then have a signature of them actually receiving the notices? The certified mail question is referring to the notices sent to the spouses.

A. The DOL's disclosure regulations require that the COBRA General Notice be furnished using "measures reasonably calculated to ensure actual receipt of the material". It is not necessary to provide proof of receipt, but rather proof of mailing to the last known address. We generally recommend first-class mail, which may be accompanied by a "certificate of mailing." This is a service provided by the USPS by which it is certifying the notice was in fact mailed on the date indicated. These certificates (which are a fraction of the cost of certified mail and can be secured on a "list" rather than individual basis) in conjunction with the legal concept of "presumed receipt" provide the evidence an employer would need if ever challenged.

Q. What about a plan that is over the phone. We currently have something called Healthiest You where 24hours a day 7days a week 365 days a year you can call with general medical issues and a doctor will get back to you and possibly prescribe antibiotics or guidance as to whether you need to go to the hospital?

A. Since telemedicine (or teledoc services) will generally meet the definition of a group health plan, COBRA requirements likely apply. If the telemedicine services are integrated with the employer's group medical plan and offered only to those participating in the medical plan, then it may simply be bundled with the medical when offering COBRA (the employer can restrict offering COBRA for the telemedicine services to only those who elect COBRA for the medical plan). On the other hand, when the telemedicine services are available to all employees, or all eligible employees regardless of whether they actually enroll in the medical plan, there is an obligation to offer COBRA as a separate continuation option. In regard to a COBRA premium, the plan can charge the cost of the program coverage plus 2%.



Q. Is the notice of termination time sensitive considering there is a 30 grace period for payment?

A. A notice of termination must be provided when COBRA coverage terminates before the end of the maximum coverage period. A notice of termination must be furnished by the plan administrator “as soon as practicable” following its decision to terminate COBRA coverage, so in some cases, the notice may be provided after the coverage terminates.

Q. What about EAPs baked into the life or LTD plans?

A. If the EAP provides significant medical benefits (beyond merely referrals), and therefore is subject to COBRA, there is an obligation to offer COBRA as a separate continuation option. In regard to a COBRA premium, the plan can charge the cost of the program coverage plus 2%.

Q. How does the HRA work if the EE has ES coverage, but the HRA only covers EE expenses. Would the spouse be eligible for the HRA in the event of a divorce?

A. No. If the HRA is designed to reimburse only expenses of the employee, COBRA continuation rights would apply only for the employee and only if the employee experiences a qualifying event triggering the loss of coverage under the HRA.

Q. Do we send notice upon newly eligible employee/spouse? Or newly enrolled employee/spouse?

A. The initial (general) notice is required within 90 days of enrollment. It is not required for those who are eligible and choose not to enroll.

Q. Grace period is 45 for initial payment. Can this go beyond the 60 days? I can receive the election notice the day I leave, but I may take my sweet time to elect the COBRA.

A. Yes. An individual entitled to COBRA continuation coverage has 60 days in which to elect COBRA, and another 45 days in which to remit the premium(s) once COBRA is elected. IRS COBRA regulations (Treas. Reg. §54.4980B-8, Q/A-5(c)) indicate the plan has two options with respect to COBRA coverage during election and premium payment periods:

1. The plan may continue coverage during the election or payment period and then retroactively cancel coverage if either the COBRA election or premium payment is not timely made; or
2. The plan may cancel coverage as of the date that it would otherwise be lost and retroactively reinstate it upon a timely election and payment for COBRA coverage.

However, the regulations make it clear that claims incurred by a qualified beneficiary during the election and 45-day initial premium payment periods need not be paid until COBRA coverage is elected and any required premium payment for coverage has been made.

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Q. If we cannot make COBRA contingent on the employee paying premiums due to FMLA leave, how do we collect those missed premiums?

A. COBRA continuation coverage begins following FMLA leave. This is true even if coverage is discontinued during FMLA (due to employee election or due to termination for nonpayment). If the employer decides to maintain the employee's health coverage by paying the employee's share of any premiums missed during the FMLA leave, the employer may generally recover this amount from the employee whether or not the employee returns to work after the FMLA leave, but COBRA coverage may not be conditioned upon reimbursement by the employee of any premiums paid by the employer for coverage during the FMLA leave. In other words, the employer would need to separately attempt to collect for premiums missed during FMLA or terminate coverage for such period of time without changing COBRA continuation rights.

Q. What I found out is that my employees could be on COBRA for 18 months, but the former spouse was eligible for 36 months. (We are self-funded)

A. While COBRA maximum coverage periods may be expanded in some circumstances, the following are the general rules:

- 18 months for the employee's termination of employment or reduction in hours
- 36 months for the employee's death, divorce or separation, employee's entitlement to Medicare, or loss of dependent status

NOTE - state continuation rights (applicable to fully-insured plans) may extend maximum coverage periods."

Q. Please confirm. Your slides states if I elect COBRA I cannot enroll on the individual exchange during the federal OE.

A. Typically once COBRA continuation coverage is elected, an individual does not qualify for a special enrollment period for coverage through a public Exchange until the maximum coverage period is exhausted. Because rules and administration do vary a bit from state to state, we also advise checking on special enrollment rights through the individual's local Exchange.

Q. What should we do if an Election Notice is returned in the mail? (Either the employee moved or gave a bad address.) What is considered a good faith effort to obtain a good address, or is that even necessary?

A. The employer is obligated to send the notice to the last known address. If the notice is returned, the employer should verify the address was sent to the last known address on file, but then no further action is required.

Q. With HRA Cobra eligibility, if the benefits were already utilized for the year, when the person goes on COBRA, do they get a new pot in that same year, or the following year? Thanks.

A. If COBRA continuation coverage is elected for the HRA, the individual will receive access to reimbursement only to the extent of the balance remaining for the plan year (minus any reimbursements already provided for the plan year); however if the HRA coverage is continued into the next plan year, the full amount would then be available for the next plan year.

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