

Compliance Corner: COBRA and Medicare

CONEXIS Compliance

The Consolidated Omnibus Budget Reconciliation Act Of 1985 (COBRA) amends sections of the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Public Health Service Act (PHSA). COBRA requires group health plans to offer "each qualified beneficiary who would otherwise lose coverage under the plan as a result of a qualifying event an opportunity to elect, within the election period, continuation coverage under the plan.¹"

Medicare is a federal insurance program that provides benefits to individuals age 65 or over or who meet other special criteria.

Medicare entitlement can affect an individual's COBRA eligibility in several different ways. An overview of these various scenarios follows, as well as a brief review of some important COBRA basics.

Group Health Plan Defined

Generally, a plan is a group health plan if it provides health care and is "maintained" by the

1 Treas. Reg. §54.4980B-1,Q/A-1(a)

Halfway Knowing COBRA Can Get Employers in Trouble

Employee Benefit News

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Part stand-up act and employee benefits seminar, Ouida Peterson's session on COBRA administration at EBN's 20th Annual Benefits Management Forum & Expo in Dallas was insightful and straightforward - all in a down-home type of way. To some, the Texas native is a blend of Thelma Harper of the television sitcom "Mama's Family" with Molly Ivins, the late political journalist.

The vice president of education at CONEXIS, a Texas-based benefit consultancy firm, Peterson made her point clear: if straight talk gets employers to become more vigilant about keeping abreast of COBRA laws and producers, then so be it.

Administering COBRA "is simple if you know everything you need to know and when you need to know it," Peterson told attendees. Things get tricky when it comes developing a timeline and knowing what information has to

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employer. IRS COBRA regulations define a group health plan as "...a plan maintained by an employer or employee organization to provide health care to individuals who have an employment-related connection to the employer or employee organization or to their families.² "

Qualified Beneficiary Defined

Treasury Regulations §54.4980B-3, Q/A-1 defines a qualified beneficiary as an individual, who is, on the day before a qualifying event, a covered employee³, the spouse of a covered employee, or a dependent child of the covered employee; a child who is born to or placed for adoption with a covered employee during a period of COBRA continuation coverage; and, in the case of a qualifying event that is the bankruptcy of the employer, a covered employee who had retired on or before the date of substantial elimination of group health plan coverage⁴.

Qualifying Event Defined

ERISA defines a qualifying event as any of the events listed within the statute "which, but for the continuation coverage required under this part [COBRA], would result in the loss of coverage of a qualified beneficiary.⁵ "

Qualifying Events

COBRA specifies seven types of qualifying events⁶ :

- Termination
- Reduction in hours
- Divorce or legal separation
- Loss of dependent child status
- Employee's entitlement to Medicare
- Death of the covered employee/retiree
- Employer's bankruptcy (applies only to retirees)

An event is a qualifying event only "if, under the terms of the group health plan, the event causes the covered employee, or the spouse or a dependent child of the covered employee, to lose coverage under the plan.⁷ " Due to this requirement, the occurrence of one of the listed events will not always result in a qualifying event.

Medicare Entitlement Defined

Medicare entitlement is attained when an individual enrolls in either Medicare Part A or Part B. The IRS final COBRA regulations state that a "qualified beneficiary becomes entitled to Medicare benefits upon the effective date of enrollment in either part A or B, whichever occurs earlier. Thus, merely being eligible to enroll in Medicare does not constitute being entitled to Medicare benefits.⁸ "

² Treas. Reg. §54.4980B-2, Q/A-1(a)

³ See Treas. Reg. § 54.4980B-3, Q/A-2 for a definition of "covered employee"

⁴ See Treas. Reg. § 54.4980B-3, Q/A-1(2) for information regarding the spouse, surviving spouse, and dependents of such retirees

⁵ ERISA §603

⁶ Treas. Reg. §54.5980B-4, Q/A-1(b)(1) through (6)

⁷ Treas. Reg. §54.4980B-4, Q/A-1(c)

⁸ Treas. Reg. § 54.4980B-7, Q/A-3(b)

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Medicare Entitlement as a Qualifying Event

Although an employee's entitlement to Medicare is one of the listed events in the statute, it is rare that Medicare entitlement will cause a loss of coverage under a group health plan providing coverage to active employees. The Medicare Secondary Payer (MSP) rules prohibit most group health plans, in nearly all circumstances, from making Medicare entitlement an event that causes a loss of coverage. Therefore, Medicare entitlement is rarely a qualifying event.

In the rare case that Medicare entitlement is a qualifying event, it is a qualifying event only for the covered spouse and covered dependents. This is true because the covered employee can only be a qualified beneficiary if the qualifying event is termination or reduction in hours⁹.

Medicare Entitlement as a Second Qualifying Event

The IRS clarified that a covered employee's Medicare entitlement cannot be a second qualifying event for the employee's spouse and dependents unless the entitlement would have caused a loss of coverage under the plan¹⁰.

As discussed above, Medicare entitlement will rarely cause a loss of coverage. Therefore, Medicare entitlement will rarely be a second qualifying event.

Limited Scenarios in Which Medicare Can Cause Loss of Coverage

As stated above, the MSP rules generally prohibit an employer from terminating an employee's coverage due to Medicare entitlement. However, Medicare entitlement may cause a loss of coverage in limited scenarios.

Multiemployer Plans. Generally, COBRA does not apply to employers with less than 20 employees¹¹. This provision is typically referred to as the "small employer exception." However, small employers that participate in a multiemployer plan are subject to COBRA when another member of the multiemployer plan is subject to COBRA¹².

The MSP rules contain a different small employer exception that applies to individuals entitled to Medicare due to age. Under this rule, a multiemployer plan may choose not to have the MSP rules apply to plan participants of employers with fewer than 20 employees. Under such a plan design, a plan may treat Medicare entitlement due to age as a loss of coverage under the plan. Note that although this plan may treat Medicare entitlement as a loss of coverage, this loss of coverage is a qualifying event only for the employee's spouse and dependents (if any).

⁹ Code §4980B(g)(1)

¹⁰ Rev. Rul. 2004-22, 2004-10 I.R.B. 533

¹¹ Treas. Reg. §54.4980B-2,Q/A-5

¹² Treas. Reg. §54.4980B-2,Q/A-5(a)

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Disability-based Medicare Entitlement.

Employers with fewer than 100 employees on at least 50% of its regular business days in the preceding calendar year are exempt from the MSP rules prohibiting the termination of coverage due to disability-based Medicare entitlement. Under these circumstances, a plan may terminate coverage for an individual that is entitled to Medicare due to disability.

Although the above examples are rare, they do represent two of the possible scenarios in which Medicare entitlement may cause a loss of group health plan coverage.

Special Extending Rule for Spouses and Dependent Children

When a covered employee experiences a qualifying event within the 18-month period following the employee's entitlement to Medicare, the employee's spouse and dependent children become eligible for COBRA coverage for a maximum period of 36 months. This period is measured from the date of the employee's Medicare entitlement, not from the date of the employee's qualifying event ¹³.

This extended coverage does not apply to the employee, who remains eligible for the standard

18-month period of coverage available after the termination or reduction in hours qualifying event.

Medicare Entitlement Prior to the COBRA Election

An employer must offer COBRA continuation coverage to any qualified beneficiaries (including the covered employee) that are entitled to Medicare prior to electing COBRA continuation coverage. This continuation coverage cannot be terminated early due to the Medicare entitlement.

Early Termination of COBRA due to Medicare Entitlement

COBRA generally permits a plan to terminate COBRA continuation coverage "early" (i.e. prior to the exhaustion of available coverage) if the qualified beneficiary first becomes entitled to Medicare after electing COBRA continuation coverage.

Although the MSP rules generally prohibit an employer from terminating an individual's active group health plan coverage due to Medicare entitlement, the MSP regulations specify that COBRA continuation coverage may be terminated early due to Medicare entitlement ¹⁴.

Therefore, an employer may terminate the COBRA continuation coverage of a qualified beneficiary when that beneficiary first becomes

¹³ Code §4980B(f)(2)(B)(i)(V)

¹⁴ 42 CFR §411.108(a)(3)

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entitled to Medicare after that individual has elected COBRA continuation coverage. However, as previously discussed, if a qualified beneficiary is already Medicare entitled prior to electing COBRA continuation coverage, then that beneficiary can maintain both coverages and the payment of any benefits will be subject to coordination of benefit rules as discussed below.

Coordination of Benefits

Generally, when an individual is covered under a group health plan and Medicare, the group health plan is the primary payer for individuals that are entitled to Medicare due to age or disability, and Medicare is the secondary payer. Conversely, when an individual is covered under both Medicare and COBRA continuation coverage, Medicare is the primary payer and the COBRA plan is the secondary payer.

If an individual is Medicare entitled due to end stage renal disease (ESRD), Medicare will generally be the secondary payer for the first 30 months of the individual's Medicare entitlement and will then be the primary payer thereafter. There are special circumstances that may apply in ESRD situations, based on a variety of factors.

The MSP rules and coordination of benefits issues can be very complex. As with all such matters, employers and plan administrators should consult with competent legal counsel when facing such scenarios. 🚫

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be shared. What's more, federal laws pertaining to COBRA keep changing and the person assigned to administer it is probably busy with other HR and benefits projects.

Peterson believes most employers are confused about COBRA and benefit offerings. For instance, they think workers can continue the same coverage they had as an active employee.

"The COBRA law has never said that," she explained.

"It is not the same benefits they had as an active employee, but the same benefits that are available to active workers."

If an employer decides to redesign its dental benefits for active workers, then the new offerings must also be available to COBRA participants.

Nevertheless, COBRA costs for employers continue to rise, averaging \$9,914 per participant per year in 2006, up from \$5,721 in 2004, according to Spencer's Benefits Reports.

The average claims cost for COBRA users exceeded the average claim cost for active employees by 45% in 2005.

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The survey polled plan administrators representing 122 U.S. organizations with more than 441,000 employees.

Among the companies that could compare COBRA costs and active employee costs, just 13% reported COBRA costs that were lower than active employee costs.

Meanwhile, Peterson contends employers sometimes don't gather all of the facts before addressing a COBRA inquiry.

She told a story of a former worker who called the HR department and said, "My husband and I are on COBRA and we are getting a divorce."

She wanted to know whether her husband could continue without her.

"It's a simple question, but the problem is that there are two or three different answers," Peterson said.

Many HR folks will say the husband is eligible for 36 months, even though they don't have enough information about the situation, Peterson noted.

That answer is incorrect.

"If the husband was not on the active coverage, and he was added to COBRA after it started,

then he is not eligible for a second qualifying event. I get that question at least once a week," Peterson told the conference attendees.

She is all too familiar with hearing stories about how a HR/benefits manager answered a COBRA question and the worker kept talking and made the HR rep change his or her mind.

"That's not the way it should work. The person doing the answering is supposed to gather all the information before they even try to utter an answer," she asserted.

Anything the HR/benefits manager says before reviewing the worker's COBRA files is most likely inaccurate, and that's a compliance liability for the employer.

New Guidelines

Almost everything changed in the COBRA world in 2004, especially with coverage election and general notice letters, Peterson says.

"And here we are fixing to come upon 2008, and you still have employers using old letters."

The new regulatory guidelines improved, in part, how an employee was required to notify

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an employer about a qualifying event, such as a divorce or a child who is no longer eligible for coverage as a dependent.

The proper procedure for notification, including the general notification letter, better protects employers by mitigating confusion about whether an employer was actually informed about the qualifying event.

"Because many times it's not the employee that is notifying the employer, but an ex-spouse," she explains.

Still, employers express concerns about affordability for their former workers.

About 74% of the companies had COBRA costs between 100% and 200% of active employee costs, and 13% had COBRA costs that were more than double the active employee costs, the Spencer study found.

Some 10.1% of workers and dependents were eligible for COBRA coverage during the 2005 plan year, and 26.6% of them signed up for COBRA coverage, the survey indicates.

Some of the others may have been able to find coverage through a spouse's plan or a parent's plan, rather than COBRA.

Common COBRA Mistakes

Not sending the Initial Right Notice

Not sending the Qualifying Event notice

Not maintaining accurate archives

Making a decision simply because it "feels right"

Making exceptions

Not maintaining an accurate, up to date policy and procedure manual

Not gathering all of the facts before addressing an inquiry

Overlooking the COBRA continuants at annual enrollment



Source: Conexis

To learn more about COBRA and its notices, visit www.dol.gov/ebsa/consumer/info/health.html#cobra.

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