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## The Benefits Brief...

# COBRA: From Basics To FSAs And Health Care Reform

COBRA continuation, with all of its rules and regulations, may be hard for employers to understand and execute in an accurate and timely manner. This is a broad overview of the subject that highlights triggering events and timing deadlines, and discusses how COBRA applies to health care flexible spending accounts (FSAs) and health reimbursement arrangements (HRAs).

### Employers That Must Comply

Regardless of the entity type—regular C corporation, sub chapter S corporation, partnership, nonprofit organization or limited liability company—any public employer that offers ERISA (Employee Retirement Income Security Act of 1974) group health benefits must offer COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985). However, there are a few exceptions—employers with 20 or fewer employees are exempt, as well as church-controlled and federal government entities.

To be considered church-controlled, substantially all covered individuals (or spouses/dependents) are employees or clergy for a church that is an approved tax-exempt place of worship or a tax-exempt organization controlled by or associated with the church. “Controlled” means that officers/directors are appointed by a church board, and “associated with” means that the employees share the same religious convictions. A detailed analysis is required to substantiate a church-controlled plan and

the Internal Revenue Service (IRS) provides a private letter ruling, giving all the facts and circumstances.

A federal government plan means the government of the United States. However, the Federal Employees Health Benefits Amendments Act of 1998 (FEHBA) has requirements similar to COBRA that government plans must offer to their employees.

### Plans That Must Comply

Group health plans, which include health FSAs, HRAs, vision, dental and prescription drug plans, must comply with COBRA as well as wellness programs if they go beyond merely the promotion of good health. On-site clinics are required to offer COBRA if the plan goes beyond treating minor injuries and illnesses. And, employee assistance programs (EAPs) must offer COBRA if there is a visit component that provides care.

Plans exempt from COBRA include qualified long term care plans, short and long term disability, group term life policies, health savings accounts (HSAs) and Archer medical savings accounts (Archer MSAs). Fitness centers, fixed indemnity or hospital indemnity plans and accidental death and dismemberment policies are also exempt. However, a hospital rider on any of these policies could trigger a COBRA obligation.

The best advice is for employers to seek legal counsel if they are in doubt about when to offer COBRA continuation.

### Terminology and Conditions

Some of the words and phrases used when discussing COBRA can be confusing, so we'll spell these out.

A *qualified beneficiary* is someone covered by a group health plan who has an independent right to elect continuation of that plan on COBRA.

A qualified beneficiary can also participate in open enrollment at the beginning of each plan year, as covered under a plan by virtue of employment, or if the beneficiary was a spouse or child of a covered employee on the day before a qualifying event.

A *covered individual* is defined as someone who is covered by a group health plan, but has no independent right to initially elect COBRA or re-elect at open enrollment (e.g., parent, domestic partner or a spouse added after COBRA continuation is elected).

### Deadlines

After a qualifying event or being notified of a qualifying event, plan administrators have 14 days to send out COBRA notices or 44 days if the employer is also the plan administrator and the qualifying event is termination, reduction of hours or the covered employee's death. The COBRA beneficiary then has an election period of 60 days from either the qualifying event or from the date the notice was sent, whichever is later. Sending the COBRA rights notice in a timely manner is of utmost importance, since there is no limit on the election period if the rights notice is not sent.

Once a beneficiary elects COBRA continuation, he has 45 days to make a premium payment. Basically, a beneficiary can wait and see if health coverage is needed for this period of time. If coverage is anticipated from other employment or a similar situation, he may wait 59 days to elect COBRA coverage and another 44 days to submit a COBRA payment. If a beneficiary does not require medical attention and has procured other coverage, he is under no obligation to make the initial COBRA payment.

After a beneficiary begins COBRA coverage, he has an ongoing monthly premium payment due, generally at the beginning of

the month. Full payments must be received within a 30-day grace period following the date the premium was due.

### Triggering Events That Result in Loss of Coverage

Different events warrant different COBRA coverage periods. Most qualifying events provide an 18-month coverage period: termination of employment—voluntary or involuntary—for reasons other than gross misconduct, or reduction in hours of employment. An employer does not have to offer COBRA when gross misconduct occurs.

Some qualifying events allow for a 36-month period of coverage and apply to the spouse and dependent(s) only in the case of divorce, legal separation, death of the employee, loss of dependent status, or employee's Medicare entitlement (rarely a triggering event due to Medicare secondary payer rules).

In the case of bankruptcy proceedings of the employer that causes substantial elimination of coverage under the plan for retirees, a retiree can be covered for their lifetime.

Qualified beneficiaries may lose elected COBRA coverage if they fail to make timely premium payments, become covered by a group health plan without pre-existing condition limitations or become entitled to Medicare after electing COBRA. Cancellation of all group health plans by employer, for cause and at the first of month following 30 days after being deemed no longer disabled by the Social Security Administration (SSA) can also cause termination of COBRA.

### Health FSAs

Existing regulations do limit the circumstances in which COBRA must be offered to participants in a health FSA. COBRA need not be offered for the balance of the plan year in which the qualifying event occurs if the FSA is exempt from the following HIPAA certification requirements.

1. The maximum benefit paid is not greater than two times the salary reduction amount or, if greater, the employee's salary

reduction election plus \$500.

2. The employee has other health coverage available through the employer and future COBRA premiums (contributions) to the health FSA equal to or exceeding potential future benefits (disbursements).

Let's look at an example that illustrates the HIPAA certification exemption requirements. An employer sponsors a health care insurance plan and a health FSA with a maximum reimbursement amount of \$1,200 and contributes \$400 to the plan annually, leaving the employee with a maximum election of \$800.

This benefit would be exempt from HIPAA certification because the maximum benefit paid (\$1,200) is not more than two times the employee's maximum reimbursement (\$800 times 2 equals \$1,600) and the employer offers other health coverage.

If the maximum reimbursement amount is greater than two times the salary reduction amount, move on to part two of the equation.

This example starts with an employer who sponsors a health care insurance plan and a health FSA with a maximum reimbursement amount of \$800. The employer contributes \$450 to the plan annually, leaving the employee with a maximum election of \$350.

This benefit would be exempt from HIPAA certification because the maximum benefits paid (\$800) is not greater than the employee's salary reduction election plus \$500 (\$350 plus \$500 equals \$850) and the employer offers other health coverage.

COBRA need not be offered in a subsequent year if a health FSA is exempt from HIPAA and contributions for the plan year equal or exceed the annual election amount. By plan design, this could always be the case.

The regulations also emphasize that health FSAs required to offer COBRA must abide by all the other COBRA requirements applicable to group health plans.

### Health Reimbursement Arrangements

Although health FSAs have an exception to offering COBRA, no such exception applies to HRAs. HRAs are considered self-funded welfare benefit plans that provide

medical coverage and are subject to the COBRA continuation rules.

### COBRA Premiums for FSAs and HRAs

Another quandary faces plan sponsors once they realize that COBRA continuation coverage must be offered for their HRAs and FSAs. What is the premium required in order to continue a participant's health FSA or HRA? The answer differs for each plan.

Generally, health FSA monthly COBRA premiums are determined by the following formula: annual election amount divided by 12 months.

COBRA premium must be actuarially determined prior to the beginning of the first plan year of a new HRA. In subsequent plan years, the premium may be determined based on the HRA's past claims experience.

In no case can *similarly situated* participants be charged different COBRA premiums. For example, a participant with a \$30,000 account balance in his HRA must be charged the same monthly COBRA premium as a participant with a \$5,000 balance. *Similarly situated* does not refer to an account balance, but rather to facts such as family versus single coverage or annual limits.

Keep in mind that a two percent administrative fee may be added to the participant's continuation coverage premiums. This fee helps offset any additional costs borne by the employer.

Each qualified beneficiary has an independent right to elect coverage for the remaining uniform coverage balance of the health FSA or HRA on the day before the qualifying event. Notices need to be sent to employees, spouses and dependents. In the case of a divorce, the spouse and each dependent is

provided with a notice. And each spouse and dependent may independently elect the cash balance in the account.

### HIPAA Certification of Creditable Coverage Requirements

HIPAA certification requirements that ensure *portability* of insurance from one plan to the next, certify specific creditable coverage for a stated period of time. This enables those with what would be considered pre-existing conditions to continue coverage for those conditions.

Health care reform prohibits group health plans from imposing pre-existing condition exclusions, making certificates of creditable coverage unnecessary after January 1, 2015, when this ACA provision has been instituted in all health plans. Of course, guidance should be forthcoming confirming when the HIPAA certificates of creditable coverage are no longer needed.

### COBRA and the Affordable Care Act (ACA)

We receive plenty of questions every day about the ACA, but one of the most frequently asked questions is whether the ACA eliminates COBRA. *COBRA is not dead*, thus plans must offer COBRA continuation following a qualifying event—even after 2014. It may be that coverage will be purchased through the health care marketplaces rather than continued under COBRA, but that's one to watch and see what happens.

*What are an employer's COBRA obligations if a qualified beneficiary enrolls in an exchange or individual market before electing COBRA or if a qualified beneficiary enrolls in an exchange or individual market after electing COBRA? The same obligations and rules apply as with any other insurance coverage.*

A COBRA election does not impact eligibility for exchange coverage, either. Qualified beneficiaries eligible for or enrolling in COBRA are still generally eligible for exchange coverage. *However*, qualified beneficiaries who enroll in COBRA instead of exchange coverage cannot enroll in the exchange until the next annual open enrollment rolls around. When COBRA is elected, the next special enrollment opportunity occurs when COBRA is exhausted.

*What about the eligibility for a subsidy in an exchange?* The qualified beneficiaries who elect COBRA are treated as having an *eligible employer sponsored plan* and are not eligible for the subsidy. However, if qualified beneficiaries do not elect COBRA, they may be eligible for a subsidy even if their employer's coverage is affordable and meets the minimum value criteria.

We'll continue to watch the future of COBRA continuation coverage. For now, it still must be offered, but whether anyone enrolls once marketplace coverage and subsidies are available is to be determined.

### Does This Affect Your Employer/Clients?

**Yes!** Be sure your employers understand that COBRA obligations continue in 2014 and beyond. Ensure that your employers understand the ramifications of COBRA continuation on all their welfare benefit plans. Also, encourage employers to review and update their COBRA forms and procedures now. ☺

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