Preventing Common COBRA Mistakes

COBRA is a complex law that places numerous demands on employers. Preventing mistakes before they happen can keep plans in compliance with the law and avoid costly penalties.

The following is a list of common mistakes that plans make when administering COBRA. If there is any question as to how COBRA applies to a particular plan, consult with a trusted attorney or benefits professional.

1. Thinking Your Group Plan is Not Subject to COBRA (or That You Don’t Have a Group Health Plan)

Both full- and part-time employees are counted to determine whether a plan meets COBRA's 20-employee threshold. Each part-time employee counts as a fraction of a full-time employee, equal to the number of hours the part-time employee worked divided by the hours an employee must work to be considered full-time.

Some employers who meet this threshold mistakenly believe that COBRA does not apply to arrangements outside of major medical coverage. Keep in mind that for purposes of COBRA, a group health plan includes any arrangement an employer establishes or maintains to provide employees or their families with medical care, such as hospital and physician care, prescription drugs and dental and vision care. The definition of "group health plan" is also broad enough to include, in many instances, Health Reimbursement Arrangements and Health Flexible Spending Arrangements offered by an employer.

2. Forgetting About State Law

Many states have enacted what are commonly referred to as "mini-COBRA" laws, which typically require continuation of group health plan coverage provided by employers with fewer than 20 employees. States may also have different requirements for employee eligibility and different maximum periods of coverage. Employers of all sizes should consult with employment law counsel and/or their state insurance departments to determine if a state mini-COBRA law applies to their plans and if so, how the state’s law differs from federal COBRA.

3. Not Sending Required Notices or Providing Inaccurate or Insufficient Information in the Notices

Group health plans are required to provide qualified beneficiaries with specific notices explaining their COBRA rights, with very specific requirements as to what information must be included in these notices. One way to avoid mistakes is to use the Model General Notice and the Model Election Notice provided by the U.S. Department of Labor, filling in the blanks with your plan information. Other notices, such as the Notice of Unavailability of Continuation Coverage and the Notice of Early Termination of COBRA Coverage, should be sent to qualified beneficiaries as necessary.

It is also important to have procedures in place for keeping track of when and to whom notices are sent. Consider using a form of delivery that will provide documentation that the notice was delivered (such as a return receipt or other written proof of delivery). In the event a qualified beneficiary asserts that he or she did not receive a required COBRA notice, these records can provide evidence of your compliance.

4. Failing to Include the Spouse (and Other Qualified Beneficiaries) When Sending Required Notices

In certain circumstances, a COBRA notice must be given not only to the employee but also to the spouse and/or other qualified beneficiaries. A plan may generally satisfy the requirement to provide notices
under COBRA to a covered employee and his or her spouse by furnishing a single notice addressed to both if, on the basis of the most recent information available to the plan, the two reside at the same location. Similarly, there is typically no requirement to provide a separate notice to dependent children who share a residence with a covered employee or the employee's spouse to whom proper notice is provided.

To minimize the possibility of errors involving notice recipients, employees should be required (and periodically reminded) to notify the plan administrator promptly of a separation, divorce, or any other event that results in a spouse and/or dependents no longer living at the same address as the employee. The plan should also have procedures in place to ensure that any changes in address are promptly and accurately recorded.

5. Not Recognizing When a Qualifying Event Has Occurred

The employer is responsible for notifying the plan administrator (if other than the employer) within 30 days of the following qualifying events:

- Termination or reduction in hours of employment of the covered employee;
- Death of the covered employee; or
- The covered employee becoming entitled to Medicare.

A reduction of hours occurs whenever there is a decrease in the hours that a covered employee is required to work or actually works (such as an absence from work due to disability or a temporary layoff but not including absences due to FMLA leave), but only if the decrease is not accompanied by an immediate termination of employment. If a group health plan measures eligibility for coverage by the number of hours worked in a given time period, and an employee covered under the plan fails to work the minimum number of hours during that time period, the failure to work the minimum number of required hours is a reduction of hours of that covered employee’s employment and a COBRA qualifying event.

Note that the plan must have established procedures for how qualified beneficiaries can provide notice of a divorce, legal separation or child’s loss of dependent status, including how, and to whom, notice should be given, and what information must be included in the notice.

6. Miscalculating the Period of COBRA Coverage

Employers must offer employees and other qualified beneficiaries the maximum period of COBRA coverage to which they are entitled. The type of qualifying event determines who the qualified beneficiaries are and the amount of time the plan must offer health coverage to them under COBRA.

In certain circumstances, qualified beneficiaries entitled to 18 months of COBRA coverage may be entitled to a disability extension of 11 months (for a total maximum period of 29 months), or an extension of an additional 18 months due to the occurrence of a second qualifying event (for a total maximum period of 36 months). Your plan rules, as well as your election notice for any offer of an 18-month period of COBRA, should describe the notice required in either instance for the qualified beneficiary to request an extension of COBRA.

Also keep in mind that certain events, such as failure to pay premiums, may justify termination of COBRA before the end of the maximum period of coverage.

7. Ignoring Incorrect Premium Payments
Qualified beneficiaries may be required to pay the full premium for COBRA continuation coverage, even if the employer made a contribution prior to the loss of benefits. The premium cannot exceed 102% of the cost to the plan for similarly situated individuals who have not incurred a qualifying event (for qualified beneficiaries receiving the 11-month disability extension of coverage, the premium for those additional months may be increased to 150% of the plan’s total cost of coverage). A plan must allow premiums to be paid on a monthly basis.

If the amount of a premium payment made to the plan is wrong, but is not significantly less than the amount due, the amount paid will be deemed to satisfy the plan’s requirement for the amount that must be paid, unless the plan notifies the qualified beneficiary of the amount of the deficiency and grants a reasonable period of time (not less than 30 days) to pay the difference. Even if your plan does not send monthly premium notices, it must provide this notice of underpayment or the amount submitted will be treated as full payment.

8. Treating Employees on COBRA Different from Similarly Situated Employees Who Are Not on COBRA

The continuation coverage offered under COBRA must be identical to the coverage that is currently available under the plan to similarly situated individuals who are covered under the plan and not receiving COBRA. (Generally, this is the same coverage that the qualified beneficiary had immediately before the qualifying event.) Qualified beneficiaries must receive the same benefits, choices, and services as similarly situated non-COBRA participants and beneficiaries under the plan, such as the right during an open enrollment season to choose among available coverage options. Any changes made to the plan’s terms that apply to similarly situated active employees and their families will also apply to qualified beneficiaries receiving COBRA continuation coverage.

9. Terminating COBRA Continuation Coverage Too Early

There are very specific rules regarding when COBRA coverage may terminate prior to the expiration of the maximum period of coverage. In general, a group health plan may terminate COBRA coverage earlier than the end of the maximum period only for the following reasons:

- Premiums are not paid in full on a timely basis;
- The employer ceases to maintain any group health plan;
- A qualified beneficiary begins coverage under another group health plan after electing COBRA (as long as that plan doesn’t impose an exclusion or limitation with respect to a preexisting condition of the qualified beneficiary);
- A qualified beneficiary becomes entitled to Medicare benefits after electing COBRA;
- A qualified beneficiary engages in conduct that would justify the plan in terminating coverage of a similarly situated participant or beneficiary not receiving COBRA (such as fraud).

If continuation coverage is terminated early, the plan must provide each qualified beneficiary with an early termination notice. The notice must be given as soon as practicable after the decision is made and it must describe the date coverage will terminate, the reason for termination, and any rights the qualified beneficiary may have under the plan or applicable law to elect alternative group or individual coverage (such as a right to convert to an individual policy).

10. Failing to Understand the Relationship Between Medicare and COBRA

Whether an employee or family member is covered by Medicare may affect the right to continuation coverage. Note the following general rules:
- An employee's spouse or child who loses group coverage because the employee becomes entitled to Medicare may elect up to 36 months of COBRA continuation coverage.
- Where a spouse or child is already receiving COBRA due to the employee's termination or reduction in hours, the employee's becoming entitled to Medicare may be a second qualifying event that would allow the 18-month maximum period of continuation coverage to be extended for an additional 18 months, for a total of up to 36 months.
- If a qualified beneficiary first becomes entitled to Medicare benefits on or before the date that COBRA is elected, the qualified beneficiary's entitlement to Medicare benefits cannot be a basis for terminating his or her continuation coverage.
- If a qualified beneficiary first becomes entitled to Medicare benefits after the date on which COBRA continuation coverage is elected, the plan may terminate the qualified beneficiary's COBRA coverage upon the date on which the qualified beneficiary becomes so entitled.
- 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.

Additional issues related to coordination of benefits (i.e., who pays first) may also need to be addressed.