

# How the COBRA Period Can Be Extended

By Rich Glass, JD

One thing did not change amid the changes to COBRA resulting from the American Recovery and Reinvestment Act of 2009 (ARRA): The maximum COBRA coverage period of 18 months is not affected by the subsidy or the extended election right. However, the 18-month period can be affected by an individual's receipt of the Health Coverage Tax Credit (HCTC), as well as other events.

A COBRA basic is that termination of employment and reduction of hours are 18-month qualifying events. This period can be extended in the following circumstances:

- Receipt of the HCTC in 2009 and 2010
- A secondary event
- A disability extension
- Medicare entitlement before the initial qualifying event

## The ARRA HCTC Rule

The HCTC is a creation of the Trade Act of 2002. Initially, it provided eligible individuals with a refundable 65-percent tax credit that can be used to purchase health insurance, including COBRA. Generally, an eligible individual is one who is receiving trade adjustment assistance (TAA), alternative TAA (ATAA) or a pension payment by the Pension Benefit Guaranty Corporation (PBGC). From May 1, 2009, to Dec. 31, 2010, the HCTC is increased to 80 percent as a result of ARRA.

In addition, under ARRA TAA and ATAA recipients can now continue their COBRA coverage for as long as they remain TAA-eligible, but no later than Dec. 31, 2010. Also, PBGC recipients now have a COBRA benefit that extends for their lifetime or Dec. 31, 2010, whichever occurs first. Qualified family members of PBGC recipients can have COBRA for an additional 24 months after the recipient's death, but again no later than Dec. 31, 2010.

On a side note, anyone who elects to receive the 65-percent subsidy under ARRA is not eligible to receive the HCTC as well. In other words, you cannot receive both types of premium reductions.

## Secondary Events

A second qualifying event occurring in the initial 18-month period adds another 18 months to COBRA. This secondary event must be one of these events:

- Death of the covered employee
- Divorce or legal separation from the covered employee
- A dependent child ceasing to be a dependent
- The covered employee's Medicare entitlement (in rare cases)

To clarify, employment termination that follows a reduction of hours does not extend COBRA to 36 months. Recall that Medicare entitlement requires both eligibility and enrollment in Medicare.

This extension is not available to covered employee/qualified beneficiaries, but only to qualified beneficiaries who were covered dependents or covered spouses. Covered dependents include any child born to or adopted by the covered employee through HIPAA special enrollment during the COBRA period. If the plan has previously informed qualified beneficiaries about the obligation to notify the plan (for example, via the COBRA general notice), then qualified beneficiaries have 60 days in which to notify the plan of the secondary event. If the employer has not provided its notice procedures, the 60-day clock does not begin to tick until it does. Consider this scenario:

A former employee currently on COBRA calls human resources and says: "Let me tell you about my second marriage. I want to add



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my spouse during open enrollment.” The HR representative replies: “Before you do, please tell me about your first divorce.”

The central COBRA issue is whether the employer was notified on a timely basis of the secondary event. If timely notification did not occur, then the divorced spouse will not be eligible for an additional 18 months of coverage.

The secondary event must be one that would have caused a loss of coverage if it had been an original qualifying event. Therefore, a covered employee’s Medicare entitlement typically will not constitute a secondary event because the Medicare Secondary Payer rules prohibit most plans from taking into account a person’s Medicare status when determining plan eligibility. IRS Revenue Ruling 2004-22 (see ¶1810 of the *Guide*) provides excellent guidance on this point. Also, many plans do not terminate coverage for the spouse of an active employee when there is only a legal separation. If so, a later legal separation during COBRA would not be a secondary event.

### Disability Extensions

The 18-month period can be extended to 29 months if these requirements are met:

- The original qualifying event was employment termination or reduction of hours.
- A qualified beneficiary must have been disabled, according to the Social Security Administration (SSA), at any point up to the 60th day of COBRA coverage
- That qualified beneficiary must notify the plan administrator of the disability determination within 60 days after the latest of: (a) the determination date; (b) the qualifying event date; (c) the loss of coverage date; or (d) the date that the qualified beneficiary is informed of the duty to notify.
- The qualified beneficiary must notify the plan administrator of the determination before the end of the 18-month period.

During the disability extension period, the COBRA premium increases to 150 percent. All qualified beneficiaries may receive the extension, even if the disabled individual does not actually elect COBRA. The disability does not need to be for the covered ex-employee; it could be for any qualified beneficiary and could, in

theory, be for a disability that predates the original qualifying event.

In some cases, the SSA may deem the qualified beneficiary to be no longer disabled. When that happens, the qualified beneficiary must notify the plan administrator within 30 days after the date of that determination. The result is that extended COBRA coverage ends on the later of the first day of the month that is more than 30 days after the determination or the initial 18-month period.

What if a qualified beneficiary is approved for the disability extension but later has a secondary event (for example, a dependent child losing eligibility)? In that case, the non-employee qualified beneficiaries who are affected by the secondary event get the better of the two deals: 102 percent for 36 months, rather than 150 percent for 29 months.

### Pre-event Medicare Entitlement

It is not unheard of that some employees will continue to work past age 65, elect Medicare and continue employer-sponsored coverage until they retire. When the original qualifying event of employment termination or reduction of hours occurs within 18 months of the Medicare entitlement date, all non-employee qualified beneficiaries have 36 months of coverage, measured from the Medicare entitlement date. As with secondary events, this extension is available to HIPAA special enrollees by birth or adoption.

Timing is everything:

- 1) If the time between the Medicare entitlement date and qualifying event date is greater than 18 months, all qualified beneficiaries merely receive 18 months.
- 2) If the qualifying event date and Medicare entitlement date are the same date, again all qualified beneficiaries merely receive 18 months.
- 3) If the Medicare entitlement date occurs after the qualifying event date and COBRA election date, Medicare entitlement will serve as a terminating event for the COBRA of the Medicare-entitled qualifying beneficiary. COBRA for all other qualified beneficiaries may continue.

### Practical Implications


Although technically not an extension of COBRA, some qualified beneficiaries can qualify for more than 18 months of continuation coverage if they live in a state that allows for post-COBRA state continuation for health insurance. Examples of such states are California and Texas.

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### **COBRA Period** (continued from p. 12)

It is important for employers and COBRA administrators to understand how and when the initial 18-month period can increase. ARRA has provided an additional extension reason. One should also understand that the coverage period can be shortened by any of the standard terminating events (for example, failure to make a payment on a timely basis, or an employer ceasing to provide any group health plan coverage).

In most cases, the extension will be preceded by timely notice from the qualified beneficiary. It could be notice of a Social Security disability determination or a divorce. However, it is incumbent on employers to inform all qualified beneficiaries of the required notice procedures. Otherwise, the notice time frame can be delayed, and an employer might have to accept latent qualified beneficiary notices that would otherwise be denied because of their lateness. Thus, the COBRA general notice, which should contain these all-important notice procedures, becomes an important document for enforcing time frames relating to extensions of COBRA coverage. 

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