

# Correct — Don't Ignore — Major COBRA Failures

By Constance L. Gilchrest

Doesn't it seem difficult to correct a mistake? This could become even more complex when you add COBRA into the mix. There is rarely a fool-proof, guaranteed solution. COBRA failures often fall into four categories:

- An incorrect offer of COBRA
- A failure to offer COBRA
- A premature termination of COBRA
- A failure to terminate COBRA

## COBRA Was Offered When It Should Not Have Been

The first step would be for the employer to review the relevant documents: the general notice, the election notice, the summary plan description (SPD), the plan document and the plan's insurance contract. Hopefully, these documents did not contain any wording that would lead an individual to believe that COBRA offering was authorized. The employer should withdraw the coverage retroactively if it is clearly determined that COBRA should not have been offered or allowed.

If the plan is insured or self-insured with a stop-loss insurer, the employer should contact the insurer to confirm if any claims were paid. If not, the insurer may refund premiums that were submitted; some insurers will refund for a limited period, generally up to 60 days. The employer could be responsible for the full amount of the refund and possibly have to reimburse the insurer for any paid claims. It is advisable to work closely with the insurer to avoid this.

There are times when a plan will withdraw coverage only prospectively due to litigation risks. The plan should give the individual sufficient notice of the coverage withdrawal to allow time to find other coverage.

## COBRA Was Never Offered When It Should Have Been

Failure to provide the COBRA election notice is a time-sensitive issue due to the penalties. The proverbial clock is ticking. The IRS excise tax could quickly add up: up to \$100 per day, per violation and up to \$200 per day if more than one qualified beneficiary is involved.

The ERISA penalty for failure to provide the required COBRA notices within the proper time frame could result in a daily assessed penalty of up to \$110 per day, per violation when COBRA is the subject of a lawsuit. This penalty can be levied per qualified beneficiary with no family maximum.

In *Hamilton v. Sears Roebuck and Co.*, the court ruled in favor of the employer that escaped the fines and penalties. The third-party administrator delayed sending the COBRA election notice by 13 months after Hamilton's resignation of employment. The employer kept coverage in force without any cost to Hamilton, who submitted some expenses to the plan, but didn't submit other expenses because she was uncertain about coverage.

Sears proved that the error was not made in bad faith and that Hamilton did not suffer any harm due to the notice violation. Therefore, the court refused to award fees, costs and penalties since the mistake was inadvertent. Even though it appears that Sears got away "scot-free," it incurred time in court plus costs and attorney's fees.

One recommendation is to mail all COBRA election notices via first class mail with proof of mailing, which is clear evidence the notice was mailed and to what address.

If a qualified beneficiary claims to have never received the notice, resending would



*Constance Gilchrest is the research and compliance specialist for Infinisource, Inc., which provides COBRA, flexible benefits and other administrative services to more than 15,000 employers nationwide. She has more than 15 years of experience with COBRA and is certified for Flexible Compensation Instruction (FCI) through the Employers Council of Flexible Compensation and is CDHC Certified through the National Association of Health Underwriters (NAHU).*

See *COBRA Failures*, p. 6

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depend on the circumstances, especially the timing. If the qualified beneficiary is still within his or her election period, the notice should be resent. However, if the election period has expired, the plan administrator may decide not to resend the notice because it would open a new 60-day election period. This would only be the proper procedure if the plan administrator has proof that the notice was sent to the *last known address*, which is all the law requires.

### **COBRA Is Terminated When It Should Not Have Been**

Calculating and collecting COBRA premiums can become quite confusing. It isn't as easy as counting 1-2-3. Even one penny can make a difference when it comes to the insignificant premium rule. An underpayment is insignificant if it is less than \$50 or 10 percent of the required payment, whichever is less. COBRA law states an employer must either accept the insignificant underpayment or send a notice to the qualified beneficiary, requesting the correct payment, which opens up a new 30-day grace period. One thing to keep

in mind is that whichever avenue is taken, the employer needs to be consistent for payments from all COBRA participants.

If an individual is terminated from COBRA for the incorrect premium and then later it was determined the premium was correct, the employer could be responsible for incurred claims. If the insurer is not willing to reinstate coverage, the employer would be self-insured for the remainder of the COBRA time frame.

A qualified beneficiary is allowed to remain on COBRA for his or her full time frame as long as the correct premiums are paid within the 30-day grace period or longer if the plan allows. It doesn't seem difficult to properly count to 30, however errors have occurred regarding this issue. The last day of the grace period should be included in computing, unless it is a Saturday, Sunday or a legal holiday. The postmark date on the envelope is the best proof of when the payment was sent. Retaining the envelope is highly recommended.

### **COBRA Was Not Terminated When It Should Have Been**

With the high cost of insurance and claims, it doesn't seem likely that someone could remain on COBRA past his or her 18-, 29- or 36-month time frame; however, it does occur.

Assuming that the COBRA notices, SPD and plan documents were correct and sent on a timely basis, coverage should be terminated after properly notifying the qualified beneficiary that coverage will be ceasing.

Nothing in the COBRA law addresses this issue. However, due to HIPAA, as long as an individual has not had more than a 63-day gap in coverage under a group health plan, a pre-existing condition cannot be imposed. The best action may be to notify the individual at least 60 days prior to the coverage ceasing. If a premium is received after coverage has ceased, return the payment as soon as possible. Cashing the check is looked at as accepting the payment, which makes it appear that coverage remains in force.

"Let it be" is a famous Beatles song. However, when it comes to COBRA, saying "let it be" would *not* be akin to speaking words of wisdom. It won't go away; it cannot be swept under the rug. It can surface while the fines and penalties continue to mount. Employers need to take immediate action by consulting with their insurers(s) and legal counsel to avoid COBRA failures. 🏠

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