

A Day Late or a Dollar Short

By Constance L. Gilchrest

Most individuals have experienced what it is like to be a day late or a dollar short. Typically, when it comes to COBRA time frames, a day late or a dollar short indicates the end of COBRA coverage or the failure of COBRA coverage to start.

This is not always the case, however. Three primary exceptions to this rule exist:

- Insignificant premium underpayments
- Physical or mental incapacitation (a.k.a. incapacity)
- The weekend/holiday rule

Insignificant Premium Underpayments

This situation often occurs at the start of the COBRA determination period when insurance premiums typically increase. The premium payment will cross in the mail with the plan's notice (or invoice) of the premium increase. The IRS' 2001 final COBRA regulations made it clear that "a shortfall is not significant if it is no greater than the lesser of \$50 or 10 percent of the required amount."

The IRS became aware of situations where a qualified beneficiary was terminated from COBRA for sending payments that did not quite total his or her full monthly premium. On certain occasions, the IRS considered the difference between the amounts owed versus paid to be an "insignificant" amount. COBRA mandates that before a plan can terminate coverage due to an insignificant underpayment, the plan must provide a notice to the qualified beneficiary. The notice must inform the qualified beneficiary of the underpayment amount and the fact that coverage will terminate if the payment's balance is not received. The plan must allow the qualified beneficiary at least 30 days from the notice date to make the correct payment.

Alternatively, a plan may accept the insignificant premium underpayment as payment in full. This is not generally recommended because it sets a precedent for that qualified beneficiary and others, and the employer will be stuck with making up the difference.

Physical or Mental Incapacitation

There are times that employers or insurers may extend a premium payment grace period and/or election period due to the qualified beneficiary becoming incapacitated. Even though neither the COBRA statute nor its regulations addresses tolling a grace period due to incapacitation, many courts have ruled this way.

The primary case on incapacitation is *Sirkin v. Phillips Colleges, Inc.* The court extended the COBRA premium payment period due to Sirkin being incapacitated, resulting in cerebral atrophy and memory impairment. Sirkin's legal guardian sent a check to Phillips to bring the coverage up to date. Phillips refused to accept the payment and the guardian filed suit on Sirkin's behalf. The court stated:

Where an insured misses a premium deadline under COBRA due to the insured's incapacity to know of or meet her obligation, the deadline for that premium payment is tolled for a reasonable time until the insured or her legally appointed guardian is able to cure the deficiency.

The judge ordered Phillips to accept the premium payment and reinstate Sirkin's COBRA coverage back to the loss of coverage date.

Incapacitation can occur in a variety of contexts. It can involve hospitalization or a inpatient psychiatric care. It can involve situations where a qualified beneficiary dies and an executor to the estate needs to be appointed. However, mere illness or sickness will not typically justify a deadline extension due to incapacitation.

A recent court case is instructive on incapacitation: *Manthos v. Jefferson Parish Library*.

During a grace period for timely payment, Manthos experienced a head injury and was found to have a mental impairment

See *Day Late*, p. 10



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).

Learn wellness strategies that improve your bottom line. Go to www.thompson.com/welln

and therefore deemed incapacitated. After submitting a doctor's note, Manthos was notified by Jefferson that both the law and their policy prohibited late premium payments.

Manthos argued that mental impairment was an incapacity that justified tolling his monthly premium grace period. The court found that this was a fact issue and denied the employer's motion for judgment.

The Weekend/Holiday Rule

This rule is based on Rule 6(a) of the Federal Rules of Civil Procedure. It pertains to when an affected period ends on a Saturday, Sunday or legal holiday and the necessity to carry over that period to the next business day.

This rule was cited in *Andre v. Salem Technical Services and Stepan Co.* Andre elected COBRA coverage through his former employer, Stepan, and paid for coverage through the end of January 1991. He did not pay for February's coverage period. From Feb. 17 to Feb. 24, Andre took a week-long bereavement leave to attend his mother's funeral. On Feb. 26, he suffered a heart attack and was hospitalized for six days.

At the time of his hospitalization, he believed he was covered under his new employer, Salem's plan. On March 4, 1991, Andre found out that since he did not complete a form that had been mailed to him, he never became covered.


Andre contacted Stepan that same day to see if his COBRA coverage could be reinstated. He was told they would look into the matter and call him back. Andre never received a return call, so on March 12, he sent a check for the premium to Stepan. On March 22, Stepan returned the check to Andre and refused to re-enroll him on the plan. Andre filed suit.

During the court case, the judge ruled Andre's inquiry on March 4 was timely enough to allow his reinstatement of COBRA coverage. The court found that since Andre called Stepan on March 4, it was reasonable to assume he would have tendered a check the same day, had Stepan informed him that he could have done so. The question for the court then became whether the March 4 payment would have been timely enough to allow Andre's reinstatement of COBRA.

The grace period for Andre's coverage normally would have ended on Saturday, March 2 (30 days from the beginning of the coverage period and in this case, the due date). Invoking Rule 6(a) of the Federal Rules of Civil Procedure, the court ruled that payment on Monday, March 4 would have been timely and ordered Stepan to reinstate the coverage for Andre.

As a standard method of doing business, plans should consider how to treat grace period and election period end dates when they fall on a weekend or holiday. While this rule is not found in the COBRA law or regulations, it is consistent with the COBRA mailbox rule, which states that elections and payment are effective on the date that they are sent (that is, postmarked).

To prove when the COBRA notice is sent, it is important to mail the notice via the U.S. Postal Service, using first class mail with a certificate of mailing. This method proves that an actual notice was sent on a certain date to certain individuals and could avoid time in court where a qualified beneficiary claims they never received the notice.

In summary, coming up short on premium payments or proper time frames is not necessarily the end of the COBRA game for qualified beneficiaries. An employer that does not consider the exceptions to the rules could spend time in court and possibly be imposed fines and penalties. A penny for your thoughts will not hold up in the court of law. 

 **THOMPSON**

1


Learn Step-by-Step
Wellness Strategies that
Improve Employee Health
and YOUR Bottom Line.

2

Call 1-800-677-3789
for more information on *Wellness Programs: Employer Strategies and ROI* — Thompson's NEW guide to choosing and implementing wellness plans, selling them to employees and management and measuring their ROI.

3

Plus, EARN 1.5 HRCI CREDITS.
Upon payment you'll get an exclusive CD recording of our accredited audio conference "Best Practices for Wellness Programs: How to Motivate Employees to Make Lifestyle Changes"



BRAND NEW!

Disability bias claims up 10%. Find out how to protect yourself at www.thompson.com/disability