

# COBRA, Common Law Spouses and Domestic Partners — Not an Easy Mix

By Juli Hanshaw

Health plans are shifting based upon our changing society. The norm is no longer the same as it was 50 years ago. One of these transformations is the number of households that includes domestic partners or common law marriages. Accordingly, this modifies how employers offer a health plan to employees and COBRA qualified beneficiaries.

Thirty-one percent of employers allow employees to choose health benefits that cover opposite-sex domestic partners, while 21 percent allow it for same-sex domestic partners, according to the Kaiser Family Foundation Employer Health Benefits 2009 Annual Survey. While this is an allowable benefit for active employees, the trouble for these household units is when the employee leaves the company and COBRA comes into the mix. COBRA requires that a group health plan provide continuation coverage when a qualifying event occurs triggering a loss of coverage to the employee, the employee's spouse and/or dependent children.

A common law marriage, which is only permitted in a minority of states, typically occurs when two parties agree that they are married, live together and hold themselves as husband and wife but without the ceremony or marriage license to make it official. The specific requirements of a common law marriage vary by state. States that recognize common law marriage include: Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas and Utah. The District of Columbia also has a common law marriage statute.

On the other hand, a domestic partnership generally occurs when an unmarried couple of the same or opposite sex lives together and shares a common domestic life without having a formal marriage or civil union. Several states recognize these arrangements, calling them either domestic partnerships or civil unions, including: California, Connecticut,

Hawaii, Maine, New Hampshire, New Jersey, Oregon, Vermont and Washington. Again, the District of Columbia also has a domestic partnership law. Many cities and counties do as well.

Domestic partners and common law spouses may share common characteristics, but their rights under federal law, including COBRA, vary greatly.

## No Federal Requirement To Offer COBRA

While an increasing number of plans have allowed domestic partners on the health plan, there is no federal requirement to offer COBRA when coverage is lost due to a qualifying event. COBRA is a federal law. ERISA, the federal law that regulates COBRA in conjunction with the Internal Revenue Code, permits only qualified beneficiaries (QBs) to receive COBRA benefits. Under IRS 1999 final regulations, a QB is defined only as a covered employee, the spouse of a covered employee or the dependent child of a covered employee. Therefore, when offering COBRA coverage, employers are not required to include domestic partners because they do not meet the above definition.

Many states have allowed same-sex marriages; therefore, there could be arguments that a same gender spouse should be considered a QB for COBRA purposes because of local laws that consider them a legal spouse. However, the federal Defense of Marriage Act (DOMA), enacted in 1996, states that the word "marriage" only means a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. DOMA supersedes any state domestic partner law when it comes to federal COBRA. Therefore, domestic partners cannot be guaranteed federal benefit rights, such as COBRA, because a domestic

See *Common Law Spouses*, p. 8



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partner does not meet the definition of a spouse when the couple marries under state law. However, a common law spouse, who has a state-recognized common law marriage, is a QB under COBRA.

A QB, meaning the covered employee, could add a domestic partner during open enrollment under COBRA to the same extent the domestic partner of an active employee may be added. It is very important to check with the insurer regarding the terms of the group health plan to confirm that the plan would allow this type of arrangement.

### The ARRA Twist

ARRA has also added another twist to this subject matter. Domestic partners who are on the plan as COBRA-covered individuals are *not* eligible for the 65-percent premium subsidy under the American Recovery and Reinvestment Act of 2009. (See ¶1286 of the *Guide*.) The subsidy is only available to federally eligible COBRA participants, former employees, spouses and dependent children. Therefore, if a domestic partner is allowed on COBRA, then the premium would need to be figured based upon one person not being subsidy-eligible. This subsidy rule also applies to state continuation coverage, even in states where domestic partnerships are recognized.

Let's review an example of how this would be figured with the subsidy.

**Example.** An employee is assistance eligible and elects COBRA. The COBRA coverage also covers a domestic partner, who is not an assistance eligible individual. How much would be required to be collected for a premium with one subsidy-eligible person and one non-eligible person?

The amount the plan requires for COBRA two-person coverage is \$800 per month. The full COBRA rate for employee-only is \$450. With one person eligible, this rate is important. Due to the subsidy, the employee would be required to pay **\$157.50** (35 percent of the \$450). The domestic partner is not assistance eligible. The amount that would be paid for the domestic partner is **\$350** per month (\$800 less the single rate for COBRA or \$450). The final amount required to be paid for the employee and the domestic partner equals **\$507.50** (\$350 + \$157.50). The employer's resulting payroll tax credit is \$292.50 (65 percent of \$450).

### Voluntarily Offering Continuation Coverage

While domestic partners have no legal rights to COBRA coverage, some employers may choose to offer the option of continuation coverage to domestic partners. Others may offer domestic partner benefits that are similar to COBRA benefits or the employer may be required by state and local regulations to offer health benefits. While this is not required, more than 500 companies, including more than 200 of the Fortune 500 corporations, voluntarily make COBRA-like

See *Common Law Spouses*, p. 9

## No Penalty (continued from p. 6)

judgment on the COBRA claim of former employee Kirk Spangle because: (1) he entirely and undisputedly failed to elect coverage; and (2) it was undisputed that the third-party administrator (TPA) sent notice on a timely basis to Spangle's physical address. The court noted that the undisputed facts did show the address on file was Spangle's physical address, which was identical to the address provided on his W-4 wage withholding form and 401(k) account statements. Accordingly, in ruling in Ferguson's favor, the court held no evidence existed that Ferguson or its TPA acted in bad faith, and sending a timely notice to Spangle's address on file seemed "entirely reasonable."

### Implications

Although both *Hack* and *Spangle* are different cases with different fact patterns, they have one fundamental point in common. Where an employer and plan administrator act in good faith compliance with COBRA's

requirements, it is not likely that a court will seek to penalize them even if relatively minor violations occur. In *Spangle*, it is hard to see what, if any, specific violations occurred other than, perhaps, an alleged failure to send notice to the qualified beneficiary's last known address. Based on the court's summary, however, it seems that the administrator was able to prove that the address used was the same as other important employee communications and that was sufficient to rebut the allegations.

In *Hack*, there were more clear facts of an alleged violation. At a minimum, the employer did send notice to the plan administrator more than 30 days after the qualifying event. Nevertheless, in light of the documented evidence of good faith compliance, the court was reluctant to penalize the employer and plan administrator for relatively technical and non-prejudicial COBRA violations. 🏠

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# Two Million Benefited From ARRA, At Cost of \$2 Billion Plus, Says Report

As many as two million households have benefited from the COBRA premium subsidy in 2009 at a cost of slightly more than \$2 billion, according to a June 2010 report from the U.S. Department of the Treasury.

## Background

The American Recovery and Reinvestment Act of 2009, as amended, provides for a 65-percent subsidy to “assistance-eligible individuals” (AEIs) who terminate employment involuntarily and qualify for continuation coverage. Here’s a summary of the law (see ¶1286 of the *Handbook* for more details):

- An “assistance-eligible individual” (AEI) is entitled to receive a 65-percent subsidy for continuation coverage premiums for up to 15 months.
- An AEI is any qualified beneficiary who elects COBRA coverage and: (1) has a qualifying event of involuntary termination of employment (other than by reason of gross misconduct) between Sept. 1, 2008, and May 31, 2010; or (2) has a reduction in hours of employment between Sept. 1, 2008 and May 31, 2010 and is involuntarily terminated between March 2, 2010 and May 31, 2010.
- Certain high income AEIs cannot benefit from the subsidy.

- An AEI can be any qualified beneficiary — the covered employee, spouse and dependent child. Each individual can independently benefit from a subsidy.
- Continuation coverage includes federal COBRA, state law that provides continuation coverage comparable (that is “substantially similar”) to COBRA and continuation coverage that applies to health plans maintained by federal and state governments.
- Eligibility for the subsidy can terminate early if the AEI: (1) ceases to be entitled to COBRA coverage; or (2) becomes eligible for Medicare or other group health coverage (other than certain excepted coverage).
- The person to whom premiums are payable is to be reimbursed by the amount of the COBRA premium that is not paid by an AEI on account of the premium reduction. An entity is not eligible for subsidy reimbursement, however, until it has received the AEI’s reduced premium payment.

Generally, the subsidy program is administered by the IRS through payroll tax withholding as follows: Workers eligible for the subsidy send a premium payment to

See *ARRA*, p. 10

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coverage available to the domestic partners of employees. An employer should first check with the insurer before offering this, as insurers are not required to extend the coverage to domestic partners.

While COBRA has not been available to domestic partners for quite awhile, at the time of this writing, a bill was introduced by Sen. Barbara Boxer (D-Calif.), called the Equal Access to COBRA Act (S. 3182). This legislation would change the federal law to allow equal access to COBRA coverage for all individuals who are covered by an employer’s health plan. The bill would guarantee same-sex spouses, domestic partners and other beneficiaries such as parents, grandparents or siblings the opportunity to elect COBRA coverage.

There appears to be a national trend toward making health coverage and other employee benefits available to domestic partners of unmarried employees. It is advantageous of employers to consider a few things when

offering this coverage to employees. Establish a company position on the issue, document it and consistently follow that stance. Remember, COBRA does not apply to domestic partners, so be cautious when writing plan documents that could mislead employees into thinking it would be available for domestic partners. Additionally, employers should be cautious when providing COBRA-equivalent coverage without the approval of their insurers.

This topic will continue to be discussed as family units change and more employers continue to allow domestic partners or common law spouses on the health plan. Until DOMA is repealed or a law like the Equal Access to COBRA Act is enacted, the bottom line is that COBRA law does not require domestic partnership coverage (and ARRA does not subsidize it) but it does allow it. Time will tell if that continues to be the way it remains for the future. 🏠

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