

How COBRA Interacts With Medicare and Medicaid

By Constance L. Gilchrest

COBRA is confusing on its own, but when you add Medicare and Medicaid it can become more confusing, and it is sometimes difficult to distinguish between the two. After all, both programs came to life on the same day — July 30, 1965, via the Social Security Act of 1965 — and are subject to rules from the same governmental entity, the Centers for Medicare and Medicaid Services (CMS).

First, it may be best to clarify the difference between Medicare and Medicaid.

Medicare

Medicare is a federally funded and administered insurance program. The program provides coverage for eligible individuals over age 65, individuals who are deemed disabled by the Social Security Administration and those with end-stage renal disease (ESRD).

Medicare comes in several parts:

- **Part A** is hospital insurance that provides institutional care. Participants typically do not pay a premium. Coverage is subject to deductibles and coinsurance.
- **Part B** is health insurance covering physician's services, outpatient care, physical therapy and other services not covered under Part A. Participants typically pay a premium and also are responsible for deductibles and coinsurance. When you become eligible for Part A, you automatically become eligible for Part B.
- **Part C** is an alternative insurance program (also known as Medicare Advantage) whereby participants entitled to Medicare Part A can enroll in a managed care program (offered by insurance carriers) instead of traditional Medicare coverage. Participants pay a premium and also are responsible for deductibles and coinsurance/copayments.
- **Part D** is prescription drug insurance offered by insurers to those individuals who are already on Medicare Part A or B. Participants pay a premium and also are responsible for deductibles and coinsurance/copayments.

Medicaid

Medicaid is a health program administered by the states and funded by federal and state governments within federal guidelines. It is for low-income individuals and families.

Impact on COBRA

While both Medicare and Medicaid are governmental medical programs, their impact on COBRA benefits is different in many respects.

HIPAA Special Enrollment

Under the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), there are two HIPAA special enrollment rights. These rights extend to employees and COBRA qualified beneficiaries, as well as their spouse and dependent children. The first special enrollment reason is a loss of eligibility for Medicaid or CHIP coverage. The second special enrollment reason is that a premium assistance subsidy under Medicaid or CHIP has become available. Unlike other HIPAA special enrollment opportunities (for example, birth and adoption), which have a 30-day notice period; these CHIPRA opportunities have a 60-day notice period.

COBRA Terminating Event

The COBRA law makes clear that a plan may terminate COBRA coverage when a qualified beneficiary becomes entitled to Medicare benefits under Title XVIII of the Social Security Act. Under the COBRA rules, Medicare entitlement requires enrollment. When someone is entitled to Medicare Part A



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and then becomes entitled to Medicare Part B, the later entitlement does not terminate COBRA.

The terminating event rule applies if the qualified beneficiary enrolls in Medicare after the date on which COBRA coverage was elected.

By contrast, if a qualified beneficiary first becomes entitled to Medicare benefits on or before the date that COBRA coverage is elected, then his or her entitlement to Medicare benefits *cannot* be a basis for terminating his or her COBRA coverage. (See chart on this page for a summary.) The issue of eligibility for other coverage was confirmed in the only COBRA lawsuit heard by the U.S. Supreme Court, *Geissal vs. Moore Medical Corp.* Enrollment in or eligibility for Medicaid, on the other hand, cannot terminate COBRA coverage. ERISA expressly prohibits it, as one employer learned last year in the case of *Mellor v. Wasatch Crest Mut. Ins. Co.*

COBRA Extending Event

With today's economy, many employees work past the age 65, which allows them to become entitled to Medicare and remain on their employer's group health plan. When an original qualifying event of termination of employment or reduction of hours occurs within the first 18 months of the Medicare entitlement date, the employee would receive up to 18 months of COBRA coverage, and all other qualified beneficiaries (spouse and dependents if any) would receive up to 36 months of coverage, measured from the Medicare entitlement date.

Enrollment in or eligibility for Medicaid does not extend COBRA coverage.

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Implications

The *Spinner* decision is technically not a COBRA case. The parties all acknowledged that COBRA did not apply as the employer involved was a small employer (fewer than 20 employees). Nevertheless, the case is a useful reminder of the application of equitable tolling principles. Yes, COBRA cases do allow for equitable tolling whereby a guardian or other party could represent the interests of an incapacitated COBRA qualified beneficiary. This can help protect individuals' rights from being lost due to a failure to act in a timely fashion. However, the tolling doctrine has its limits — once the third party is appointed, it has to act within the remaining time period or else the affected individuals will lose their statutory protections. 🏠

COBRA Qualifying Event

Medicare entitlement is listed as a COBRA qualifying event. However, it will rarely be one because Medicare Secondary Payer (MSP) rules prohibit COBRA-eligible plans from taking into account an employee's Medicare status for eligibility purposes. Thus, Medicare entitlement will rarely cause a loss of coverage. It could be a qualifying event, however, in the case of a retired employee because the MSP rules apply to coverage based on current employment.

Medicaid coverage cannot be a COBRA qualifying event.

COBRA Secondary Event

Medicare entitlement can also be a secondary event for a covered spouse and dependent children, extending the maximum coverage period from 18 to 36 months. However, similar to the rationale for COBRA qualifying events, Medicare entitlement will rarely cause a loss of coverage because of the MSP rules. Per IRS Revenue Ruling 2004-22, Medicare entitlement can only be a secondary event in cases where it could be a qualifying event.

Medicaid coverage cannot be a COBRA secondary event.

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Timing Is Everything

- 1) If the time between the Medicare entitlement date and the later qualifying event date is longer than 18 months, all qualified beneficiaries have a maximum coverage period of 18 months.
- 2) If the time between the Medicare entitlement date and the later qualifying event date is shorter than 18 months, the covered spouse and dependent children have a maximum coverage period of 36 months from the Medicare entitlement date, and the covered employee has a maximum coverage period of 18 months from the qualifying event date.
- 3) If the Medicare entitlement date occurs after the qualifying event date and COBRA election, the Medicare entitlement is a COBRA terminating event for the Medicare entitled individual only.
- 4) If the Medicare entitlement date occurs after the qualifying event date but before the COBRA election, COBRA coverage is unaffected.

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Legal Briefs

QB WINS DEFAULT JUDGMENT AGAINST EMPLOYER

An employer’s failure to respond to a COBRA notice claim resulted in a default judgment against it. The case is *Cirigliano v. Village of Afton, N.Y.*, 2010 WL 2735706 (N.D.N.Y., July 9, 2010).

Scott R. Cirigliano, Sr. was an employee with the Village of Afton as a police officer. Both he, his wife and children were covered under the Village’s group health plan. The Ciriglianos alleged that a COBRA qualifying event occurred on or about Sept. 1, 2004, but the Village failed to notify them of their COBRA rights. Under COBRA, an employer has 30 days from the qualifying event date to notify the plan administrator, who then must provide a COBRA election notice within 14 days.

(See ¶1312 and ¶1314 of the *Guide*.) The Ciriglianos alleged that this notice failure was done in retaliation for an investigation that Cirigliano, who was a police officer, was conducting on a political official. The Ciriglianos further contended that as a result of the notice failure, they “suffered extreme prejudice and severe financial damages” due to substantial medical expenses they incurred but could not afford, which eventually led to them losing their home. They sued the Village, which failed to respond to their complaint, and then filed for a default judgment, seeking nearly \$919,500 in damages.

Procedurally, the court granted the default judgment due to the Village’s lack of response, accepting the Ciriglianos’ arguments as true. However, it noted that the Ciriglianos must still prove damages, and ordered that

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Effect on Premium Subsidy

The American Recovery and Reinvestment Act (ARRA) allows a 65-percent subsidy on COBRA coverage for involuntary terminations of employment occurring on or after Sept. 1, 2008, and on or before May 31, 2010. In addition, reductions of hours that occur in the March 2, 2010 to May 31, 2010, time frame followed by an involuntary termination of employment during the same period qualify for the subsidy. The maximum period is 15 months, but can be terminated early if and when an individual becomes *eligible* (not enrolled) in Medicare or other group coverage.

COBRA Payments

While the Medicare program does not pay individuals for other coverage, the Medicaid program sometimes does. In such cases, employers must accept payments

from Medicaid to pay for COBRA coverage. Under CHIPRA, there is expected to be an expanded use of government-provided premium assistance.

Termination of Health Coverage Tax Credit

Under the Trade Act of 2002, the Health Coverage Tax Credit (HCTC) is available through the trade adjustment assistance program for eligible individuals. Through the end of 2010, it is an 80-percent credit. The HCTC can be used for qualified health insurance, including COBRA coverage. Medicare entitlement and Medicaid enrollment terminate the HCTC.

Conclusion

Similar but different: this describes the relationship between Medicare and Medicaid. (See chart for a summary.) The last two letters of each program make a huge difference on how COBRA coverage is affected. 🏠

Medicare and Medicaid: Similar, Yet Different

Aspects	Medicare	Medicaid
Source of Law	Title XVIII of the Social Security Act	Title XIX of the Social Security Act
Effect on COBRA Coverage Period	Yes	No
Effect on COBRA Payments	No	Yes
Effect on ARRA Subsidy	Yes	No
HIPAA Special Enrollment Rights	No	Yes
Effect on HCTC	Yes	Yes

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