

# Stated Another Way: A Mini-COBRA Review (Part 1)

By Rich Glass, JD



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If the well-known saying that “imitation is the sincerest form of flattery” is true, then COBRA is a thoroughly complimented law. More than 40 states and the District of Columbia have laws that provide continuation of health benefits in the event that employer-sponsored coverage is terminated.

Several issues can arise related to state continuation coverage. The *COBRA Guide* has extensive material in the State Laws tab (Tab 2000) on this topic. This month we will focus on three major areas of concern: federal preemption, small-group state continuation and post-COBRA state continuation. Next month's article will focus on two additional areas: the COBRA premium subsidy and health care reform.

## Federal Preemption

Because the goal of state continuation laws and COBRA is basically the same, there is considerable overlap between them. COBRA is a part of the broader ERISA law, which essentially has a referee for conflicts between COBRA and state laws. The referee is otherwise known as preemption, which is not a simple concept. In fact, it has three layers:

- 1) **Preemption layer.** Under ERISA preemption analysis, any state law that relates to employee benefits plans subject to ERISA is prohibited. This is the primary rule. What it means is that state laws cannot directly regulate employers that offer employee benefits.
- 2) **Savings clause layer.** States can regulate insurance, even if the insurance is offered by an employer. In essence, state insurance laws are said to be saved from preemption.
- 3) **Deemer clause layer.** Not all employer plans are considered insurance, though. Self-insured plans are NOT deemed to be insured plans. Therefore, states

cannot regulate them. Examples of self-insured health plans include health flexible spending accounts, health reimbursement arrangements and self-insured medical plans.

The comparison chart on page 11 provides a good summary of when state or federal law applies to a particular type of plan.

Even though the above three layers have existed for several decades, preemption remains a subject of debate. Preemption was the main litigated issue related to the San Francisco Health Care Security Ordinance in *Golden Gate Restaurant Assn. v. City and County of San Francisco*.

Even in the COBRA context, preemption occasionally arises as an issue of contention. For example, in *Aucoin v. RSW Holdings*, an employee resigned and then had surgery. The insurer preapproved the surgery but then denied reimbursement because the employer terminated its health plan. The individual sued and contended that he never received an election form from the employer, as required by Louisiana law. The employer argued preemption.

The district court agreed with the employer. The individual argued that any claim brought under a state insurance code was automatically saved from preemption. The court stated that this assertion “*could not be further from the truth.*” It concluded that the state-law notice requirement could only be specifically directed toward entities engaged in insurance, not employers.

The U.S. Department of Labor (DOL) reached a similar conclusion in 1996 regarding Minnesota's state continuation law when it concluded the notice and payment collection requirements imposed on employers were preempted by ERISA. This statement was in DOL Advisory Opinion 96-063A. This is

See *Mini-COBRA Review*, p. 11

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## Mini-COBRA Review (continued from p. 10)

an important point that bears repeating. State insurance continuation laws cannot enact requirements directly on employers, even if the plans are fully insured, even if the employer is considered a “small employer” as discussed below.

### Small Employer State Continuation

COBRA does not apply to small employers that “normally employed fewer than 20 employees on a typical business day during the preceding calendar year.” A small employer is often referred to as a “2-19 employer.” This is the so-called sweet spot of state continuation laws.

Typically, medical coverage is the only coverage available. Other types of stand-alone coverage (for example, dental, vision) might be eligible for a conversion policy. State laws will often mirror COBRA in terms of the major rules, but differences exist. The following are some examples:

- **Eligibility.** Utah requires a participant to have at least six months of coverage before the qualifying event instead of just one day with COBRA.
- **Notices.** In Arkansas, Iowa and Nebraska, the election notice period is a mere 10 days from the qualifying event instead of the 44 days with COBRA.
- **Coverage periods.** Connecticut provides a 30-month maximum coverage period for employment terminations and reductions of hours instead of the 18 months under federal COBRA.
- **Qualifying events.** Oregon has different rules in place for divorce and death of the employee where the ex-spouse or surviving spouse is age 55 or older. These events have open-ended coverage periods for the spouse and dependents until other coverage becomes available.

When an employer moves to small employer status at the start of a calendar year, those who are on COBRA already have the right to stay on COBRA. New events on or after Jan. 1 of the new year would be subject to state continuation. Similarly, an employer that grows out of the small employer exception would typically keep current

participants on state continuation, and new events would be subject to COBRA.

State continuation laws typically apply to policies issued in that particular state and those who are covered by those policies. Thus, Iowa employees covered under an Illinois-issued policy would have continuation rights under Illinois law. However, this is not always the case. For example, California has this rule for policies issued in other states: If 51 percent or more of the employees are in California and the principal place of business is also in California, the policy is subject to Cal-COBRA for its California employees.

### Post-COBRA State Continuation

In a way, state continuation is a gap filler. The small employer area is one gap that state continuation fills. Post-COBRA continuation is another.

Texas, for example, provides an additional six months of coverage after COBRA is exhausted, regardless of the COBRA maximum coverage period. Other states like California and New York simply provide that all events have a maximum duration of 36 months. Thus, a termination of employment from a Sacramento employer would have 18 months of COBRA followed by 18 months of Cal-COBRA.

The transition from COBRA to post-COBRA state continuation can be bumpy. In most cases, the qualified beneficiary will need to reelect coverage. Sometimes, coverage available under COBRA is not available under

See *Mini-COBRA Review*, p. 12

### Which Employer Plans Have to Comply With Federal or State Law

Plan Type	Federal COBRA Law Applies	State Continuation Laws Apply
Fully insured medical plan (2-19 employer)	N/A	<input checked="" type="checkbox"/>
Fully insured medical plan (20+ employer)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> (post-COBRA)
HRAs and Health FSAs (2-19 employer)	N/A	N/A
HRAs and Health FSAs (20+ employer)	<input checked="" type="checkbox"/>	N/A
Other self-insured medical plans (2-19 employer)	N/A	N/A
Other self-insured medical plans (20+ employer)	<input checked="" type="checkbox"/>	N/A

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# The Impact of the ARRA Premium Subsidy: ‘Report Card’ Looks at First Year

COBRA “take-up” rates among eligible individuals increased substantially after the enactment of the premium subsidy law according to a July 2010 research report by the Urban Institute (UI). While take-up rates still could be higher, such a result would likely require a higher subsidy and changes to the enrollment mechanism, the report indicated.

## Varying Experience With Take-up Rates

The subsidies under the American Recovery and Reinvestment Act of 2009 (ARRA) have increased COBRA participation, but to different extents in different populations, according to the report. The first impact was a doubling of take-up, as reported by Hewitt Associates in August 2009 and updated in December 2009. Hewitt estimated that the pre-ARRA average COBRA take-up rate was 19 percent, a value in the upper middle of the range of values reported during earlier pre-ARRA years. Hewitt’s average take-up among involuntarily laid-off people doubled to 39 percent after ARRA. The Hewitt data come from large firms, averaging 40,000 workers each. (See story on page 7 for newer Hewitt data.)

Data from other sources also showed wide variation:

- Aon Consulting reported only a 2-percent increase after ARRA, from 14.1 percent to 15.9 percent,

## Mini-COBRA Review (continued from p. 11)

state continuation (for example, stand-alone dental or vision and self-insured plans). Premiums may change. For example, the Cal-COBRA premium is 110 percent of the cost of coverage, not 102 percent with COBRA. Depending on who handles your COBRA administration, you may have to transition the premium collection function directly to the insurer.

When the COBRA premium subsidy under the American Recovery and Reinvestment Act (ARRA) was passed in 2009 (see ¶1286 for details), many states amended their state continuation laws, increasing their coverage periods to match the initial nine-month subsidy period (which was eventually extended to 15 months). Therefore, you should be sure that you are current on the applicable continuation rules in your state. This website has a listing of all state departments of insurance: [http://www.naic.org/state\\_web\\_map.htm](http://www.naic.org/state_web_map.htm). Of course, stay tuned next month for more on the ARRA subsidy and its application to state continuation laws. 🏠

based upon data from about 60 firms, averaging about 6,000 employees each.

- Ceridian, a third-party administrator (TPA), reported a 5-percentage point increase, a rise from 12.4 percent to 17.7 percent. The UI report stated that Ceridian’s covered employee population is almost as large as Hewitt’s but is spread across far more and far smaller firms, averaging fewer than 150 workers.
- Deseret Mutual, a non-profit TPA that insures a grouping of affiliated firms, experienced a rise of 17 percentage points in COBRA take-up, starting from a relatively low baseline rate, from 5.3 percent to 22.5 percent. Its 22 firms average 4,000 employees each.
- A survey of unemployment recipients by the U.S. Department of Treasury estimated that at least a quarter to a third of ARRA-eligible individuals elect COBRA coverage.

## Other Observations About Take-up Estimates

The UI report observed that one problem with the take-up rate data is the lack of an apples-to-apples comparison. Until ARRA, businesses tended not to distinguish between those who incurred a voluntary versus involuntary separation of employment (job leavers versus job losers). And even post-ARRA, results presented may mix the two categories; for example, the Ceridian and Deseret figures include both types of job separations. The report noted that “this mixing could well bias estimates downward” and therefore, ARRA’s effects on its target population of job losers could be underestimated.

Another observation: the special election period for individuals previously laid off between Sept. 1, 2009, and ARRA’s Feb. 17, 2010, effective date may have been less effective than intended.

“This provision added to the complexity of administering ARRA subsidies and occasioned some complaints from benefits administrators about higher costs,” the report indicated. “But what were the benefits of the provision? Deseret data show that its COBRA take-up rate for involuntary layoffs in late 2008 was under 5 percent, a little below the rate for voluntary terminations and little

See *Impact of ARRA*, p. 13

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