

Finding a COBRA Needle in a Legal Haystack

By Constance L. Gilchrest

Imagine having to really find a needle in a haystack. How would you go about handling this task? How large would the needle have to be to give you a chance of finding it? These may seem like silly questions; however, this issue seems to occur every time you try to find the COBRA law to learn how to handle to specific situations.

Search no more. Below are suggestions on finding the COBRA information you need on the Internet. (For convenience and ease-of-use, the most pertinent COBRA information discussed below is reprinted in the *Guide*, in Tabs 1300, 1600, 1700 and 1800.)

ARRA Subsidy

Have you been searching for answers for those difficult subsidy situations under the American Recovery and Reinvestment Act of 2009 (ARRA)? Look no further, you can obtain multiple question and answers provided by the IRS by going to: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>.

You will find COBRA guidance on topics such as:

- Administration and eligibility
- Form preparation
- Reporting and documentation
- Taxability and recapture

The U.S. Department of Labor (DOL) also provides ARRA information at: <http://www.dol.gov/COBRA>. Here you will find a multitude of information for both the employer and employee. This is also an excellent tool to find COBRA continuation coverage assistance under ARRA: <http://www.recovery.gov/>.

Another good Q&A resource is Notice 2009-27, which contains 58 answers to difficult ARRA questions: <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>.

The DOL and the Employee Benefits Security Administration (EBSA) provide more than 25 frequently asked questions-and-answers that pertain to the subsidy. One section pertains to the 2010 Department of Defense Act provisions. This helpful information can be found by going to: <http://www.dol.gov/ebsa/pdf/faq-cobra-premiumreductionEE.pdf>.

Premium assistance for COBRA and state continuation coverage due to ARRA can pose a lot of questions. The Centers for Medicare & Medicaid Services (CMS) provides a wealth of information and downloads that address the difficult situations. To find this information, go to: <http://www.cms.gov/COBRAContinuationofCov>.

Sometimes, you simply need to go to the source. For a copy of the ARRA law, go to the Public Laws website at <http://thomas.loc.gov/home/LegislativeData.php?&n=PublicLaws&c=111> and find Public Law 111-5. The law is 407 pages long, and the COBRA provisions start on page 341 (Sec. 3000).

COBRA Model Notices

The DOL provides their model notices, which can be obtained by going to: <http://www.dol.gov/ebsa/COBRAModelnotice.html>.

There is information regarding the following notices:

- ARRA notices
- General notice
- Notice of new election period
- Supplemental information notice
- Notice of extended election period
- Alternative notice

Employers are not required to use these notices, however they provide an outline and an overview of what should be included.

See *Haystack*, p. 8



Constance Gilchrest is the research and compliance specialist for Infnisource, 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 (CFCI) 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

Health Plans and Benefits

The DOL has a link “Find it by Topic” where you can find specific topics and subtopics, at <http://www.dol.gov/dol/topic/health-plans/cobra.htm>. The subtopics are listed to the right of the page. One is “Continuation of Health Coverage (COBRA).” When you click on this link, you can obtain information on ARRA, answers to commonly asked COBRA questions and fact sheets, among other items.

Another useful tool from DOL is the *Employer’s Guide to Health Continuation Coverage Under COBRA*: <http://www.dol.gov/ebsa/publications/cobraemployer.html>. A similar guide exists for employees who have general COBRA questions: <http://www.dol.gov/ebsa/pdf/cobraemployee.pdf>. These guides provide a lot of information starting with what group health plans are subject to COBRA, who is entitled, what are the qualifying events — including a chart showing the qualifying event — who qualified beneficiaries are and the

maximum coverage period. There is information regarding all the notice procedures, plus additional helpful information.

Laws & Regulations

Have you ever wanted to take a look at an electronic version of the actual COBRA law? It is actually located in two separate places (one for DOL, one for the IRS) in the United States Code. You can access the documents by going to <http://www.law.cornell.edu/uscode/#TITLES> and going to either Title 26 (IRS) or Title 29 (DOL):

- IRS version of COBRA law: 26 U.S.C. §4980B
- DOL version of COBRA law: 26 U.S.C. §1161

Likewise, there are two major sets of COBRA regulations (one from DOL focusing on notices, one from the IRS focusing on coverage). You can access the documents by going to the *Code of Federal Regulations* website (<http://ecfr.gpoaccess.gov>) and again going to either Title 26 (IRS) or Title 29 (DOL):

See *Haystack*, p. 9

Who’s Liable? (continued from p. 3)

included in coverage for fully insured accounts.” ASC contended that it should not be deemed the plan administrator based on this information.

In turn, Humana pointed to the application’s specific section regarding COBRA membership in support of its claim that ASC was the plan administrator, as follows: (1) in response to the question “COBRA Members?”, ASC marked an “X” in the NO column; and (2) in response to the question “COBRA administered by,” the options being Employer and Humana, ASC left this column blank. Humana claimed that because the application does not specifically designate a person as “administrator,” the plan sponsor — ASC — is the default administrator. The court noted that although this is a correct interpretation of the ERISA statute, Humana did not appropriately identify the “instrument under which the plan is operated” under which this analysis must take place.

Furthermore, the court indicated that none of the document submitted takes the place of the “instrument under which the plan is operated” needed to determine the plan administrator’s identity. Accordingly, the court declined to rule at that time on whether ASC or Humana was liable for the COBRA notice violations.

The ambiguity of the plan administrator’s status affected the penalty phase of the proceedings. A plan administrator that violates COBRA’s notice requirements

may, in a court’s discretion, be liable for up to \$110 a day from the notice failure date. (See ¶1520.)

ASC argued, among other things, that if it is ultimately deemed the plan administrator, penalties should not be assessed because courts have been reluctant to impose penalties without a showing of bad faith and prejudice to the plaintiff. The court agreed with this principle, but further noted it could not evaluate its application because the plan administrator has yet to be identified. Accordingly, it denied the plaintiffs’ motion for partial summary judgment on the penalty issue.

Implications

The *Agosto* opinion shows the critical importance of two things:

- 1) well coordinated and organized COBRA notification procedures; and
- 2) a clear set of plan and summary plan description documentation.

Had these steps been taken the case might never have gone to court. Instead, the plan administrator would have been trained in how to make sure notices were provided, and the plan documents would have clearly identified the plan administrator. Plan administrators and sponsors are well-advised to review this court opinion carefully. There are a number of valuable lessons to learn in monitoring and, importantly, fixing COBRA compliance systems. 🏠

New York: End of Subsidy Does Not Mean Reapplying for COBRA

An individual receiving premium subsidies for continuation coverage does not have to reapply for that coverage once the shorter subsidy period ends, the New York Insurance Department clarified in an Oct. 26 press release.

New Yorkers are entitled to up to 36 months of seamless COBRA/New York State continuation coverage. The 65-percent premium subsidy for continuation coverage provided for under the American Recovery and Reinvestment Act (ARRA) expires sooner, lasting a maximum of 15 months. (See ¶1286 of the *Guide*.)

A consumer contacted the insurance department, complaining that his insurer terminated his coverage and informed him that he would have to reapply for COBRA coverage since his subsidy assistance had ended.

The insurance department directed the insurer to offer to restore the coverage, and advised the insurer that while

consumers needed to pay the full cost of the premium without subsidy assistance, that did not mean they had to reapply for COBRA/New York continuation coverage. Subsequently, the department issued the press release to clarify what happens when the subsidy period ends.

“Consumers should understand that the federal subsidy is just that, it’s a subsidy. Eligible consumers don’t have to reapply for COBRA when the subsidy ends. They can continue coverage by electing to pay the cost of the premium,” Insurance Superintendent James Wrynn said.

While this press release was directed to New York consumers and insurers, the principle applies nationwide — an “assistance-eligible” individual whose subsidy period expires merely continues paying the full cost of continuation coverage and does not have to reapply for COBRA benefits. 📌

Haystack (continued from p. 8)

- IRS regulations: 26 C.F.R. §54.4980B-0 through B-10
- DOL regulations: 29 C.F.R. §2590.606-1 through 606-4

The *Federal Register* (<http://www.gpoaccess.gov/fr/index.html>) is published every day that the government is open and is the place where you can obtain the following:

- Proposed rules
- Final rules
- Notice
- Technical appendices

You can search by the date the regulations were posted or do a keyword search. The *Federal Register* is available electronically dating back to Jan. 2, 1998.

Not all COBRA-related guidance comes through the *Federal Register*. The IRS issues notices and revenue rulings on COBRA from time to time:

- Notice 2005-50 (COBRA and the Health Coverage Tax Credit): <http://www.irs.gov/pub/irs-drop/n-05-50.pdf>
- Revenue Ruling 2002-32 (health FSAs and asset sales): <http://www.irs.gov/pub/irs-irbs/irb02-23.pdf>

- Revenue Ruling 2002-88 (anticipation of a qualifying event): <http://www.irs.gov/pub/irs-irbs/irb02-52.pdf>
- Revenue Ruling 2003-70 (the small employer exception in asset and stock sales): http://www.irs.gov/irb/2003-27_IRB/ar10.html
- Revenue Ruling 2004-22 (Medicare entitlement as a secondary event): http://www.irs.gov/irb/2004-10_IRB/ar11.html

Introduced bills are found on the Library of Congress website at: <http://thomas.loc.gov/>. Under “Search Bill Summary & Status,” type in the word COBRA and you will find all the pending bills that relate to COBRA and will be able to follow the bills’ status.

The American Benefits Council provides COBRA information that includes a brief overview of the law’s text. To obtain this helpful information, go to: <http://www.americanbenefitscouncil.org/issues/health/cobra.cfm>.

Knowing the Available Resources

COBRA can be confusing and difficult to administer. Using all the available resources can cut down on research during your busy day. It will also increase the size of your COBRA library. And that’s where the *Guide* comes in handy — centralizing this information to make it easier to access the material you need and providing crucial analysis. 📌