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# When Individual Plans Are Subject to COBRA

*By Juli Hanshaw*

**Question:** When is an individual sometimes considered to be a group?

**Answer:** In the strange but true land of COBRA where some individual policies are considered to be group health plans.

The term *individual* is defined as a single human being, as distinguished from a group. This could be a helpful tip when reviewing whether a plan — considered an individual health plan — would be viewed as such or whether it would be deemed a group health plan, maintained by an employer group. Several other factors come into play when reviewing this distinction, including whether COBRA must be offered with individual plans when a qualifying event occurs.

Important differences exist between individual and group health plans. Individual health plans are designed to provide insurance to unemployed or self-employed persons not covered under an employer's plan. Group health plans provide health coverage for two or more individuals through their employer and can be provided through an insurer or through the employer itself (that is, self-insurance).

The difficulty in determining when and if an individual insurance plan is a group plan is that there are two sets of similar yet different rules with which to comply. The U.S. Department of Labor (DOL) has defined what constitutes a group health plan subject to ERISA (and thus COBRA), and the IRS has defined what plans are subject to COBRA.

## DOL's Perspective

The DOL has created a safe harbor for certain voluntary insurance programs that are not considered an employee welfare benefit plan under ERISA. Therefore, such safe harbor plans are not subject to COBRA. The key factor is the employer's involvement in the creation and/or administration of the plan. The employer neutrality is significant and evidence of substantial employer involvement, such as negotiating the policy terms

and the benefits provided or deciding which employees are eligible, shows the existence of an ERISA plan. These rules are found in 29 C.F.R. §2510.3-1(j).

## IRS' Perspective

The IRS, on the other hand, takes a more expansive view of what plans are subject to COBRA. In the 2001 final COBRA regulations (26 C.F.R. §54.4980B), a group health plan is defined as follows:

A plan maintained by an employer or employee organization to provide health care to individuals who have an employment-related connection to the employer or employee organization or to their families. Individuals who have an employment-related connection to the employer or employee organization consist of employees, former employees, the employer, and others associated or formerly associated with the employer or employee organization in a business relationship (including members of a union who are not currently employees).

These regulations go on to address individual policies:

Insurance includes not only group insurance policies but also one or more individual insurance policies in any arrangement that involves the provision of health care to two or more employees. A plan maintained by an employer or employee organization is any plan of, or contributed to (directly or indirectly) by, an employer or employee organization. Thus, a group health plan is maintained by an employer or employee organization even if the employer or employee organization does not contribute to it if coverage under the plan would not be available at the same cost to an individual but for the individual's employment-related connection to the employer or employee organization.

**See *Individual Plans*, p. 7**

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## Individual Plans (continued from p. 6)

Under COBRA, the plan sponsor of each group health plan must offer continuation coverage to each qualified beneficiary who loses coverage due to a qualifying event. It's important for an employer to determine whether the plan meets the definitions of a group health plan. Employers may overlook an individual policy provided to an employee. It could be viewed as a group health plan and in turn COBRA may need to be offered if a qualifying event develops. How can this be the case if it's individual and intended for just one or two employees?

An individual plan could meet the criteria to be defined as an employee welfare benefit plan even if the employer does not intend to establish it as such. Several factors make a difference in determining whether this type of plan would meet the criteria. One of those factors includes if the employer establishes or maintains the plan for employees with the sole purpose of providing participants with benefits such as medical, surgical or hospital care. This includes the employer providing information and paying the premiums, as well as the number of employees offered the individual plan.

### Case Law Examples

In one case, *Burrill v. LECO Corporation*, the employer (LECO) not only purchased the individual policies and paid the premiums, but also distributed policy claim forms. LECO thought it was just providing three new employees with individual policies to fill the gap for the waiting period until they were enrolled on the group health plan. LECO's actions, per a court's decision, were enough to appear as part of a scheme to provide health coverage to employees; therefore, the individual policies were considered to be a group health plan.

This caught LECO off guard as it terminated an employee before the 90-day waiting period. LECO did not provide an election notice to the employee. The employee took the decision to court as he claimed he should be offered COBRA coverage. The court agreed with the former employee and deemed the short-term medical policy was part of a group plan and the company was in violation of COBRA's notice requirements.

The employer in *Stange v. Plaza Excavating, Inc.* should have considered this as well. In this case, the employer provided employees with an individual policy and paid the premiums. Plaza believed this would not be considered a group health plan and therefore COBRA would not be required to be offered. In this dispute, the employee was not offered COBRA coverage following a termination of employment. The employer believed it had


no obligation as it did not provide a group health plan to employees.

This court examined the circumstances surrounding the individual policy and whether a reasonable person could establish the intended benefits, source of financing and procedure for receiving the benefits. The court determined the crucial factor in whether a group health plan was set up was if the individual policy constituted an express intention by the employer to provide benefits on a regular and long-term basis. The court concluded the purpose was such and therefore when an employee had a COBRA qualifying event a notice should have been provided and COBRA offered.

### Premium Reimbursement Accounts

Some employers have taken the benefit strategy of setting up a premium reimbursement account. Employees shop for their own individual policies and premiums are paid from the account on a non-taxable basis. Based on the above, a good argument exists that these plans are subject to ERISA and COBRA.

### Review the Situation

Therefore, if an employer offers individual health insurance policies to its employees, either directly or indirectly, it may be in the employer's best interest to review the facts and circumstances in light of the DOL and IRS requirements (see ¶1210 and ¶1211 of the *Handbook*). Discuss this issue with legal counsel to determine if compliance with COBRA is required. 

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