

COBRA Issues Arise When U-Hauls Arrive

By Rich Glass, JD

These days, it seems that the only constant is that things are always changing. A person's residence is no exception.

And of course, COBRA issues can come into view. The scenarios may vary, but the proper course of action is to ask two basic questions and remember two core COBRA rules:

- *Who is the employer?* Under the Single Employer Rule (Treas. Reg. §54.4980B-2, Q&A-2) remember that the employer includes all entities within a controlled group, especially those with common ownership. See the July 2008 article in the *Guide: Determining Common Ownership: It's All Relative*.
- *Who is the most similarly situated active employee?* Under the Similarly Situated Rule (Treas. Reg. §54.4980B-5, Q&A-1) remember that COBRA qualified beneficiaries have the same coverage rights as those employees to whom they are most similar.

For example, a qualified beneficiary may have coverage restricted to a particular region or network area. A qualified beneficiary moving out of the area is not necessarily stuck with coverage that will be of little or no value. Instead, the COBRA regulations allow the qualified beneficiary to request the opportunity to elect other coverage that may be available.

Perhaps the employer may have a separate indemnity plan that has no region or network limitation. To the extent that the employer offers this other coverage to similarly situated employees, it must make that coverage available to the qualified beneficiary. That is the Similarly Situated Rule. This holds true even if the coverage is through another affiliated entity. That is the Single Employer Rule. These two rules combine to form the basis for a third applicable rule: the Region Specific Rule (Treas. Reg. §54.4980B-5, Q&A-4).

Region Specific Rule

The Region Specific Rule is not completely specific. It does not specify the time frame for qualified beneficiaries to notify the plan of their move. Is advance notice required? Or how about 30 days from when the move starts, or ends? No guidance exists. In addition, the employer must provide the opportunity to elect coverage "within a reasonable period after requesting other coverage." How long is a reasonable period? Again, no guidance exists.

Prudent employers should probably err on the side of granting an election of new coverage. To the extent that this new coverage is fully insured, coordination with the new insurer is vital, and you may see some resistance to adding a person or persons who never worked for the underlying employer. However, simply point out the three ironclad COBRA rules and look for language in the underlying insurance contract or policy that addresses adherence to COBRA laws and regulations.

Divorce Scenario

Another "U-Haul scenario" can occur in the event of a divorce. The ex-spouse may be moving to another location and therefore go out of network. Initially, the employer would send a COBRA election notice that offers the coverage that the ex-spouse had the day before the qualifying event. However, the relocating ex-spouse could inquire about other coverage if the offered coverage is region-specific.

Expatriate Employees

A further variation on the theme occurs sometimes with expatriate employees when they return to the United States and lose their jobs as a result. The coverage that they had is often some type of international health plan, perhaps specially designed for employees



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working in a foreign country. Even though this coverage might apply to expenses incurred in the United States, the qualified beneficiary would have a good argument that international coverage is in essence region-specific coverage. Thus, the qualified beneficiary's repatriation to the United States should result in the opportunity to elect alternative U.S.-based coverage sponsored by the employer.

Employer Changes

What if the situation is reversed and it is the employer that is backing up the U-Haul to leave the area? In other words, the employer (which is part of a controlled group) is closing a work location in a specific area or state and is terminating the group health plan. Three facts are in play. First, the employees working at that location will suffer a termination of employment for reasons other than gross misconduct. Second, they will lose their health coverage as a result of the termination. Third, the employer's affiliated entities offer health coverage in other parts of the country.

What do you do?

There is no clear answer. On the one hand, the employees are most similarly situated to themselves, and the plan is no more. The same would be said for any qualified beneficiaries who were on the plan when it terminated.

On the other hand, a court could rule that the most similarly situated employees are those who work for an affiliated entity within the controlled group. To further their argument, they could point to the fact that COBRA does not terminate early until "the employer ceases to provide any group health plan to any employee." As long as affiliated entities offer group coverage within the controlled group, coverage is arguably available. A prudent employer will try to find other group coverage offered by an affiliated entity for the affected population.

Some Guidance

The U.S. Department of Labor (DOL) has provided some guidance on this issue, but even that is not entirely clear. In an October 2010 publication — *Pension and Health Care Coverage ... Questions and Answers for Dislocated Workers* — DOL addresses the question, "What if the company closed or went bankrupt and there is no health plan?" The DOL answer seems to favor the "find other group coverage" option over the "sorry, you're out of luck" option:

If there is no longer a health plan, there is no COBRA coverage available. If, however, there is another plan offered by the company, you may be eligible to be covered under that plan.

However, in the same publication, DOL addresses a question on duration of COBRA coverage by stating COBRA can end early if the "former employer decides to discontinue a health plan altogether."

Case Law

In at least one case, the court forced the employer to go one step further and shop for new coverage for a terminated employee. In the case *Coble v. Bonita House*, 789 F. Supp. 320 (N.D. Cal., 1992), the employer had two work locations. The employer closed one location and ultimately terminated the plan covering that location because the insurer became insolvent. The other work location had a region-specific HMO.

The employer's view was that the HMO was now the only game in town, so to speak, and that was the qualified beneficiary's only choice. Two of the three qualified beneficiaries switched to the HMO because they lived in the HMO region. The third qualified beneficiary did not live in the HMO region and argued for a different outcome, focusing on the statutory definition of COBRA coverage in 29 U.S.C. §1162:

The [continuation] coverage must consist of coverage which, as of the time the coverage is being provided, **is identical** to the coverage provided under the plan to similarly situated beneficiaries under the plan with respect to whom a qualifying event has not occurred.

The qualified beneficiary argued that the employer had to find identical coverage, even if the coverage was just for one person. In an unusual ruling, the court weighed which of the two parties was better able to bear the cost and sided with the qualified beneficiary. The court found a "duty upon the employer to provide meaningful coverage to COBRA beneficiaries, identical to that provided to similarly situated employees, so long as the employer chooses to offer health care benefits to existing employees."

It should be noted that this ruling predates the COBRA regulations, which provide us with the rules already discussed. The ruling does show that an employer that has other coverage available will be hard pressed to deny that coverage to qualified beneficiaries when the U-Haul is parked out front. 🏠