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# COBRA Tasks: Should They Stay Or Should They Go?

*By Rich Glass, JD*

After more than a quarter of a century, you might think that COBRA administration is getting easier.

Actually, the reverse is true.

Recent COBRA developments include the premium subsidy and the Health Coverage Tax Credit expansion. These have resulted in more rules, model notices and forms, not to mention the many court decisions that continue to be published every month. The COBRA headache is a serious health condition for many HR and benefits professionals.

As a result, more employers are evaluating whether to outsource this important task, particularly as they focus more attention and resources on the health care reforms that will arrive in 2013 and 2014. This is borne out by a 2009 survey indicating that third-party administrators (TPAs) handle COBRA billing in 63 percent of the cases, up from 38 percent in 2004 and 35 percent in 1994.

What should employers look for in a COBRA administrator? Consider examining potential COBRA TPAs as a five-step exercise:

- 1) Compliance with applicable rules from the IRS and U.S. Department of Labor (DOL), especially for self-funded health plans
- 2) Customer service focus
- 3) Technology commitment, especially for employer-TPA interactions
- 4) Indemnification protection should something go wrong
- 5) Availability of other related services

## **Compliance With Applicable Rules**

The IRS has COBRA Examination User's Guidance assistance for plan audits and examining compliance. Four criteria found in a Senate report on COBRA often guide these IRS audits. This report was for a law called

the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). The "TAMRA criteria" are a good indicator if the IRS will waive an excise tax of \$100 per day for COBRA mistakes:

- **Training.** The best practice is to designate the person(s) responsible for COBRA and ensure they are fully and properly trained. Once trained, the employer should retain evidence of this fact. Employers should have proper backup. The "one sheriff-several deputies" rule applies well here.
- **Written instructions.** An employer must have written procedures that are followed. The TPA should be able to provide these instructions if and when needed.
- **Design and updates.** The COBRA program must be designed based on competent professional advice. The advice should include legal and actuarial resources.
- **Monitoring.** Independent auditors should monitor the program. They must be well versed in COBRA law. Employers handling COBRA in-house often miss this step.

The importance of compliance is increased when an employer is responsible for one or more self-funded plans. Examples include a health flexible spending arrangement (FSA), a health reimbursement arrangement (HRA) and self-funded medical and/or dental plans (common in the government sector). The premium calculation rules are founded on the simple COBRA concept of determining the premium based on the "total cost of coverage." However, the methodology is difficult to understand, requiring calculations based either on reasonable actuarial estimates or past costs, adjusted by the implicit price deflator as published by the Bureau of

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## **COBRA Tasks** (continued from p. 12)

Economic Analysis. A competent TPA should be able to guide an employer through the maze that is Section 4980B(f) of the Internal Revenue Code.

The tricky issues don't stop with calculating the premium for self-funded health plans. Health FSAs may qualify for a limited offering of COBRA (or in some cases, no COBRA at all) if they satisfy a three-part test that incorporates a HIPAA-excepted benefits test. Finally, how much coverage do you offer when multiple qualified beneficiaries elect health FSA under COBRA? A good TPA should have a ready (and correct) answer for all these questions.

### **Customer Service Focus**

COBRA situations typically involve former employees who are upset about a variety of coverage and premium payment issues. A TPA should have a well-trained call center that answers the phone promptly and resolves issues quickly and accurately. The call center should be open extended hours to allow qualified beneficiaries to call outside of normal business hours and to accommodate those in other time zones. Secure web access to vital information is also helpful. HIPAA standards suggest that the optimal level of security for electronic data is encryption.

A TPA that promptly addresses issues with a sense of urgency can lower an employer's risk of complaints to DOL or of threatened legal action.

### **Technology Commitment**

An employer will usually retain some role in the COBRA process. After all, the employer must report when a qualifying event occurs and what the plan's premiums are. A TPA should provide a variety of means for providing this information (for example, electronic data transmission, website, fax and/or paper). As mentioned above, the electronic means should be fully secure and encrypted. In addition, a TPA should be able to provide a variety of activity reports, available through a secure website at any time.

The technology should have a robust reporting mechanism so that employers can use the needed information for other purposes. This might include insurance carrier communications, payroll administration and eligibility management.

### **Indemnification Protection**

Accidents happen. When a TPA accidentally makes a mess, you should count on the TPA to clean it up.

Examine the indemnification verbiage in the service agreement to ensure that the TPA will take responsibility for its mistakes and will take appropriate corrective actions. Many TPAs insert a clause that limits liability to a low dollar amount or multiple of the monthly fees.

A 2006 COBRA case showed how messy indemnification disputes between an employer and TPA can be. In *Linden v. Harding Tube Corp. and ADP*, a COBRA coverage failure resulted in the TPA and employer each pointing the finger at the other. The only thing certain was the \$62,000 judgment that one or both of the parties would have to pay.

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In reviewing a TPA, consider what other services it provides that might further lessen the administrative load.

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### **Availability of Related Services**

The popularity of supercenters and malls is due in no small part to the fact that you can purchase a lot of related items in one trip. One-stop shopping also works with COBRA. In reviewing a TPA, consider what other services it provides that might further lessen the administrative load.

Examples of related services include:

- Payroll
- Flexible benefits
- Enrollment and eligibility administration
- FMLA and other leave administration
- Workers' compensation
- 401(k) and pension administration

Once you have evaluated the possible COBRA TPAs along these five lines, you can also compare costs. Be sure that any agreement accurately describes all costs, including those that may be "hidden" or not clearly included in a proposal. Then, you can make the ultimate decision about whether to outsource and to whom. ⬆

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