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Tricks When Offering COBRA Are Not Always Magical Acts

By Juli Hanshaw

If COBRA was as easy as one, two, three and A, B, C, then you could just wave a magic wand and know exactly when COBRA coverage should be offered. But it's not always that easy and sometimes it takes a magical potion to understand when COBRA should and *should not* be offered.

Three elements should be considered when reviewing whether COBRA should be offered:

- 1) **Employee count.** Not all employers must comply with COBRA. It is required for an employer that has “20 or more employees on 50 percent of its typical business days during the preceding calendar year.”
- 2) **Qualified beneficiaries.** To be eligible for COBRA an individual must be a qualified beneficiary (QB). This is the employee, the employee's spouse or employee's dependent child who was covered by the group health plan on the day before the qualifying event. HIPAA special enrollees are also considered qualified beneficiaries.
- 3) **Qualifying event.** Certain events cause individuals to lose health coverage. These are referred to as qualifying events and determine the length of time offered under COBRA.

The trick is learning what a qualifying event is and making sure you only offer COBRA to someone who is legally entitled. Juggling a COBRA trick outside those parameters can be a costly mistake. The insurer may not allow coverage, and the employer would be liable to pay the medical expenses incurred by the QB during the COBRA period.

It's best to have a good understanding of the qualifying events as defined by the regulations. The following are qualifying events (if they cause a loss of coverage):

- 1) **Termination of employment.** The employee's employment is voluntarily or involuntarily terminated with the employer, other than gross misconduct.
- 2) **Reduction in hours.** The number of hours the employee is working has been reduced below the level allowed on the health plan.
- 3) **Divorce or legal separation.** The employee legally divorces or separates from a spouse. COBRA is offered to the spouse and dependents, not the employee.
- 4) **Death of the employee.** The employee's death is an event for the covered spouse and dependents.
- 5) **Dependent ceases to be a dependent.** Under the plan terms, a dependent is no longer eligible for coverage.
- 6) **Medicare entitlement.** A covered employee becomes entitled to benefits under Medicare (this is rarely a qualifying event due to the Medicare Secondary Payer [MSP]) rules.
- 7) **Bankruptcy.** An employer's bankruptcy under Title 11, but only regarding health coverage for retirees and their families.

What's difficult and looks like hocus pocus is when something appears to be a qualifying event even with a loss of coverage, but instead it is just an illusion. Here are some examples of when COBRA should *not* be offered:

- **Terminating a health plan.** If an employer no longer continues health coverage due to a group contract ending or the insurer stopping the contract because of lack of payment, this will cause the employees to lose coverage, but does

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not create a qualifying event for employees covered under the plan.

- **Changing provider contracts.** An employer changes an insurer or third-party administrator and beneficiaries lose coverage due to plan limitations.
- **Terminating coverage for a class of employees.** If an employer terminates a health plan for a specific group or class of employees, but still maintains a plan for other employees, this does not meet the requirements for a qualifying event.
- **Voluntary removal.** A qualifying event does not occur when an employee voluntarily drops coverage on himself or any dependents either at open enrollment or anytime during the plan year. If coverage is dropped in anticipation of a qualifying event, such as divorce, and the employer is notified within 60 days of the event date, then COBRA must be offered.
- **Turning age 65.** When an employee removes himself or a spouse from the group health plan because of turning age 65 and enrolling in Medicare, this does not qualify as a COBRA qualifying event. MSP rules generally prohibit a plan subject to COBRA from terminating coverage due to Medicare entitlement.
- **Failing to meet performance goals.** Some plans require employees to meet certain performance goals in order to be eligible for health plan coverage. A loss of coverage due to an employee failing to meet those goals would not constitute a qualifying event.
- **Failing to notify the plan within 60 days.** When an employee or dependent fails to notify the plan administrator of a qualifying event, such as a divorce or dependent ceasing to be a dependent, within the 60-day notification period, the employer is not required to offer COBRA.
- **Legal separation.** Legal separation is only considered a qualifying event when the plan explicitly states that it causes a loss of coverage. While most plans include divorce in the list of events, few include legal separation.
- **Family and Medical Leave Act (FMLA) leave.** Employers are required to maintain coverage during FMLA under the same conditions as before

the leave, including the same arrangements for payments of coverage. If the employee fails to pay their portion of contributions during the leave, the employer can remove the employee from the plan.

- **Plan fraud.** An employer can terminate health plan coverage for an employee for cause, such as fraud.
- **Gross misconduct.** When an employee is terminated for gross misconduct, the employee, covered spouse and dependent children are not entitled to COBRA benefits. However, the term *gross misconduct* is not defined by COBRA law, regulations or other guidance. Employers should be cautious when dealing with this option, even if an employee appears to have acted in a manner that constitutes gross misconduct.

You cannot simply say “abracadabra” and make all of these events subject to COBRA. Remember the magic formula: A triggering event plus a loss of coverage. If those elements are present — then voila — offer COBRA. If those elements are absent, offering COBRA is a bad trick, played on the employer. 🏠



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