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Retirement – No Pleasure Cruise For Employers

By Juli Hanshaw

Employees look forward to retirement where plans are made to do all the things they couldn't do while attending to job demands. What may not be considered until right before that time is what happens with health care after retirement? This also stumbles up some employers — what do they do when an employee retires? Is retirement a qualifying event? Does COBRA need to be offered if the employee is going on a retiree plan? What happens if the employee is entitled to Medicare prior to retirement; does COBRA still need to be offered?

To assist with the issues, let's review what makes an employee eligible for COBRA. According to COBRA guidelines, a covered employee is an individual who has been covered on the group health plan. Additionally, a retiree who is covered by a group health plan from previous employment status is considered a covered employee.

A qualifying event is defined as an event that, under the group health plan terms, causes the covered employee to lose coverage. Events that affect an employee include termination of employment or reduction of hours. If a retirement (a voluntary termination) causes a loss of coverage under the group health plan, the retirement is considered a qualifying event.

A loss of coverage means to cease to be covered under the same terms and conditions that were in effect immediately prior to the qualifying event. Therefore, any increase in premium or contributions made by a covered employee for coverage would be considered a loss of coverage on the plan. Furthermore, a loss of coverage does not need to occur immediately after the event; however, it must occur prior to the end of COBRA's maximum coverage period; retirement would be an 18-month coverage period.

With all this information available, employers need to review a couple factors when

determining if an employee's retirement is a COBRA qualifying event and whether a loss of coverage has occurred. Is this a covered employee? Did the employee have a qualifying event that caused a loss of plan coverage?

Four Scenarios

Here are some scenarios that could happen for an employer:

- **Scenario 1.** An employee, who was covered by the group health plan, retires. Upon retirement the employee will be required to pay an increased amount for the same group health coverage that the employee had before retirement.

Result. The increase in the premium contribution required after retirement would then be considered a loss of coverage. Therefore, the retirement is considered a qualifying event and the employer must offer COBRA.

- **Scenario 2.** An employee and spouse are covered by the group health plan before retirement. The employee is provided with identical coverage for life; however, the spouse's coverage will not continue beyond six months unless a higher premium is paid to the plan.

Result. The requirement for the higher premium for the spouse is a loss of coverage — even though it is delayed. The retirement would then be a qualifying event and the spouse would be given an opportunity to elect COBRA. The employee would not be losing coverage and would not need to elect COBRA.

- **Scenario 3.** An employer maintains a group health plan for both active employees and retired employees (and their families). The coverage for both active and retired employees is identical and there is no requirement for

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retirees to pay more for coverage than active employees.

Result. The employer would not be required to offer COBRA when an employee retires because there was no loss of plan coverage.

- **Scenario 4.** The employer amends the plan to eliminate coverage for retired employees effective Jan. 1, 2010. On that date, several retired employees (plus spouses and dependents) have been covered under the plan since retirement, less than the maximum coverage period that would apply to them in connection with their retirement.

Result. The elimination of retiree coverage under these circumstances is a deferred loss of coverage for the retiree; therefore, the retirement is a qualifying event. The plan would be required to offer COBRA for the balance of the maximum coverage period that applies — which for retirement would be the balance of 18 months.

What About Medicare?

What does an employer do when the retiree has Medicare? The first COBRA lawsuit to be heard by the U.S. Supreme Court, *Geissal vs. Moore Medical Corp.*, involved Medicare. The court determined that an individual covered under another group health plan, including Medicare, prior to the COBRA election, *could not* be denied COBRA coverage.

But what do you do when the Medicare entitlement occurs prior to the termination of employment or reduction of hours? Do you know how much time the employee and/or spouse and dependents have available for COBRA? If retirement occurs less than 18 months after the employee's Medicare entitlement, qualified beneficiaries (other than the covered employee) must be allowed 36 months of COBRA coverage from the date of the Medicare entitlement. If the 18 months from the termination allows for more time on COBRA, then it would be offered from that date. What an employer needs to do is figure out the expiration date for the spouse and/or dependents based upon both events — Medicare entitlement date and the termination date. The employee would not be allowed anything longer than 18 months of COBRA.

If the Medicare entitlement occurs after the COBRA election date, this would be a terminating event and COBRA coverage would no longer be available for the person receiving Medicare.

Would an employee's Medicare entitlement qualify as a second qualifying event for a spouse and any dependents? This is a tricky one. Unless the Medicare entitlement would have resulted in a loss of coverage under the group health plan, then no, that would not be a secondary event.

In short, if the original qualifying event (termination or reduction of hours) had not occurred, would the employee's Medicare entitlement cause a loss of coverage per the group health plan terms? If so, the spouse or dependents would receive the additional 18 months of COBRA, giving a total 36 months from the original qualifying event. If not, the employee's Medicare entitlement *would not* be a secondary event and the spouse or dependents would only be able to complete their original 18 months of COBRA.

While an employee prepares for the wonders of retirement, the employer has much to review to determine if COBRA is required and the amount of time available for the qualified beneficiaries.

No time to dream of retirement and engaging in leisure activities (for example, a daily round of golf or travel), it's back to COBRA rules and requirements. 🏠

Faulty Notice (continued from p. 7)

In a footnote, the court rejected another argument from Robinson-Reeder — that ACE did not comply with its COBRA obligations because her son did not receive the required notice. The court pointed out that the plan administrator satisfied its notice duty for her dependents by providing a notice to her husband.

Implications

As this case points out, plan administrators are entitled to a very important legal presumption in their favor — known as the “mailbox rule.” Under this rule, if the administrator can prove that a notice was mailed by first class mail to the recipient's last known address, a legal presumption is established in favor of proving that the notice was actually received by the intended recipient. It is not enough for the recipient to claim non-receipt. Rather, to overcome this legal presumption additional evidence that the wrong address was used or that established procedures were not followed must be shown. Absent this type of showing, the plan administrator will have the legal “upper hand” in any litigated case. Therefore, administrators should review their COBRA notice delivery procedures and make sure that they are maximizing their legal protection in the case of any contemplated notice delivery. 🏠

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