



Why Consider Outsourcing COBRA?



Written by **Rich Glass, JD**

“CAUTION! Handle With Care!” This warning is typically seen with fragile packages, but it also applies to an important area of benefits law:

COBRA administration. While COBRA is not nuclear physics, its complexity has grown since 2008, and mistakes are not cheaply forgiven.

The ARRA subsidy, the Health Coverage Tax Credit expansion and more rules, model notices, forms and court decisions have rendered the COBRA headache a serious health condition for many HR, insurance and benefits professionals. As a result, more employers are

evaluating whether to outsource this important task. What should they look for in a COBRA administrator?

Consider four factors in making this critical decision to seek the assistance of a COBRA third-party administrator (TPA):

1. The TPA’s ability to provide a comprehensive, IRS and DOL compliant program, especially with self-funded health plans
2. The commitment to customer service
3. The level of technology to facilitate interactions between TPA and employer
4. The extent of indemnification protection should something go wrong

1. A Comprehensive, Compliant Program

The IRS uses the 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" can indicate 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. They should have proper back-up. This "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 must 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 Economic Analysis. A competent TPA should be able to guide an employer through maze that is §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 COBRA? A good TPA should have a ready (and correct) answer for all of these questions.

2. Commitment to Customer Service

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 the DOL or of threatened legal action.

3. Availability of Technology

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 (e.g., electronic data transmission, website, fax 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.

4. 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.

In making the ultimate decision about whether to outsource and to whom to outsource, fees and costs are a consideration. However, if the above four factors are not fully in place, the decision to opt for the cheapest alternative may be a regrettable one.

About the Author

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More information on Infinisource is available at <http://infinisource.net>