Employers Should ‘Anticipate’ COBRA Issues With Divorce

By Constance L. Gilchrest

Those who deal with COBRA know the phrases “black and white” and “cut and dry” rarely apply to this federal law. Take, for example, requests to drop spouses or dependents from a health plan. Should COBRA be offered?

The standard answer is no. Individuals who are removed from the plan usually do not experience a qualifying event even though they do experience a loss of coverage. That is because a COBRA qualifying event for employees or their covered spouse and/or dependents is one of the following:

- Termination of employment for reasons other than gross misconduct
- Reduction of hours
- Divorce or legal separation
- Employee’s Medicare entitlement
- A dependent child ceasing to be a dependent
- Death of employee

This article focuses on a major exception to the standard “no” answer. Carly Simon may have had foresight in anticipating the days of COBRA in her 1971 hit song, Anticipation: “We can never know about the days to come, but we think about them anyway.” Under COBRA, a qualifying event can occur when the loss of coverage is in “anticipation of a qualifying event” (the Anticipation Rule). This commonly occurs with divorces. A spouse and sometimes even dependents are dropped during open enrollment while the couple is separated and before a divorce is finalized.

Revenue Ruling 2002-88 and the Treasury Department’s earlier regulations bring clarity. First, the time between the spouse’s loss of coverage and the qualifying event is not covered by COBRA. Second, the qualified beneficiary is entitled to the same coverage that was in place the day before the qualifying event. Third, the employer need not offer COBRA if the divorced spouse’s notification is untimely. Finally, the maximum COBRA period is 36 months from the qualifying event date.

Five questions may occur in these situations.

1) What if the divorced spouse did not know about the 60-day notice obligation? The general notice should include this obligation. This notice must be sent to the covered employee and spouse when coverage commences. To the extent that the employer’s general notice addresses this obligation and is properly sent to them both (via first class mail), the divorced spouse is without excuse. However, if the divorced spouse never received the general notice or any other document containing the notice procedures (for example, a summary plan description), then the 60-day clock does not start until the divorced spouse receives such notice.

2) What coverage do you offer under COBRA if the employee changes coverage when dropping the soon-to-be divorced spouse (for example, HMO to PPO)? The divorced spouse receives the coverage that was in effect the day before the qualifying event. In other words, the divorced spouse would be offered the new PPO coverage.

3) Must you offer COBRA if there is an intervening qualifying event (for example, termination of employment)? The Anticipation Rule is premised on this assumption in the Revenue Ruling: “There are no facts to indicate that [the] spouse would have otherwise lost coverage under the plan before the divorce. Thus, if the elimination in anticipation of the divorce is ignored, [the]...

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spouse would have remained covered until the divorce and then lost coverage because of it” [Emphasis added]. If an intervening qualifying event takes place, the employer must determine whether the spouse would have had coverage (in this case, COBRA coverage) on the divorce date.

This is admittedly a subjective determination. The conservative approach is to assume the divorced spouse would have had coverage. However, one could argue that a spouse would not have elected coverage if he or she had other coverage at the time (for example, through an employer). Often, the employer will not have these facts available.

4) For an intervening qualifying event, when should COBRA begin? Under the Anticipation Rule, COBRA would typically begin on the divorce date. However, the divorce here is actually the second qualifying event, which extends the maximum COBRA period from 18 to 36 months. The conservative approach is to offer COBRA retroactive to the employment termination date.

5) If COBRA starts within the same plan year, can the plan restart the deductible and enforce pre-existing condition exclusions (PCEs)? The regulations clearly require plans to provide credit for pre-deductible expenses incurred while previously on the plan. It is unclear, however, whether expenses incurred between the loss of coverage and divorce dates deserve similar credit.

The issue is less clear regarding PCEs. If there is at least a 63-day gap in coverage, the plan could arguably apply the PCE. The U.S. Department of Labor has noted that where dependents are involved and a qualified medical child support order is issued, you would not count the period of lost coverage toward the 63-day requirement. In addition, the spouse might argue that enforcing the PCE again would mean the coverage is something less than what similarly situated active employees have.

The complexities of handling employees’ divorces were readily apparent in a recent case, Hall v. Hawbaker, Inc. The employee changed coverage to single status, based on a June 15 divorce date. The employer offered the spouse COBRA as of that date. Later, it came to light that the divorce was final on Sept. 9. The court ruled that the qualifying event occurred on the date the indicated by the employee. The employer had no duty to confirm that the divorce was indeed final.

In summary, employers should watch out for seven things. (See sidebar.)

Fully insured employers should check with their insurers to confirm how these situations should be handled.

The Anticipation Rule can be tricky. An employer that suspects such a situation can tell the employee of

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**Seven Issues to Watch Out for**
**In Divorce/Legal Separation Situations**

1) The COBRA rules apply equally to legal separations. While most states recognize legal separations, they are not common in this age of no-fault divorces. Typically, a legal separation requires a court decree.

2) The general notice should include the 60-day notice procedures and be distributed to all who are covered under the plan.

3) Divorced spouses must report the divorce or legal separation within 60 days from the later of the event, loss of coverage or the date they are notified of this obligation.

4) An employee may be ordered by a divorce court to continue coverage for the spouse until the divorce is final.

5) Under cafeteria plan regulations, limited circumstances exist in which an employee can drop coverage outside of open enrollment.

6) When spousal coverage is dropped and/or the divorce becomes final, the employer should verify the spouse’s address so the required notices reach the spouse.

7) Whenever anyone loses plan coverage, the plan is required to issue a HIPAA certificate of creditable coverage. Some prudent employers include a separate notice that details the “in anticipation of” qualifying event rules.
Questions About Correct Mailing Address
Create Potential Liability for Plan Administrator

Plan administrators are required to mail COBRA notices to a qualified beneficiary’s last known mailing address. This means it is important to keep the mailing information for each employee up to date. If the administrator has accurate mailing information available but does not use that correct information (relying on an old address), it could be responsible for COBRA violations for failing to provide COBRA notices.

An employee claimed that she had informed her ex-employer of a more recent mailing address prior to the time the employer sent out a COBRA notice. Because her mail was forwarded to the correct address, a district court found that the employer/plan administrator substantially complied with COBRA’s notice rules by sending the notice to the old address. However, on appeal, the 1st U.S. Circuit Court of Appeals disagreed and found that the fact that the employer-administrator used the ex-employee’s old address was enough of a factual issue to preclude a summary judgment in the employer’s favor. The case is *Torres-Negrón v. Merck & Co., Inc.*, 2007 WL 1491875 (1st Cir., May 23, 2007).

**Facts of the Case**

Kathleen Torres-Negrón began working for a division of Merck & Co. in 1989. She alleged that after being transferred to another division, she experienced harassment and discrimination leading to headaches, hypertension and anxiety. Apparently, when she had contact with representatives at her old division, she never complained about her new work environment.

Merck had a business ethics policy, provided on a yearly basis, requiring that “[a]ll transactions ... be accurately reflected in the Company’s books and records to permit their audit and control. Managers at all levels are responsible for the completeness of the document and for ensuring that funds are spent for the described purposes.”

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potential consequences (for example, potential violation of a court order) and include a special notice to the spouse when sending the HIPAA certificate. Otherwise, unless the plan specifically prohibits it, the employee may go ahead and drop coverage. Employers should understand that the Anticipation Rule may apply because, as Carly Simon put it, “tomorrow we might not be together.”

Toward the end of August 2001, it was determined that Torres-Negrón had been misusing company resources by shipping personal packages using the company’s corporate courier account. She admitted this, and subsequently paid for her use of the courier service to ship personal packages. She was terminated from employment for violating company policy on Oct. 19, 2001.

Torres-Negrón claimed that after being terminated, Merck failed to take certain wage, tax and benefits-related actions, to include a failure to properly provide a COBRA election notice. (COBRA provides that a termination or reduction in hours of employment is a qualifying event that entitles qualified beneficiaries to up to 18 months of COBRA coverage. Under COBRA, an employer has 30 days from the qualifying event date to notify the plan administrator, who then must provide a COBRA election notice within 14 days. See ¶1122, ¶1312 and ¶1314 of the *Guide*.) She filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC) shortly after her termination. Subsequently, she sued the company in federal district court for various federal and state claims, including a retaliation claim under federal discrimination law and a COBRA notice claim. After the court ruled in Merck’s favor, Torres-Negrón appealed.

**COBRA Angle in Retaliation Claim**

Regarding her retaliation claim, Torres-Negrón alleged that the retaliatory “adverse employment action” consisted of Merck’s failure to, among other things, make a good faith effort to send her required COBRA notice.

The 1st Circuit noted that to establish evidence of retaliation, a plaintiff must prove that: (1) she engaged in protected activity (which in this case, was the filing of the EEOC claim); (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse employment action.

The lower court had dismissed her retaliation claim based on Merck’s alleged COBRA notice failure on the ground that the claim was preempted by ERISA. However, the 1st Circuit noted that ERISA preempts “state laws” that relate to an ERISA employee benefit plan. Because Torres-Negrón’s retaliation claim was brought under