Employers Must Offer Voluntary Plans under COBRA in Some Cases

By Connie Gilchrest

Employers and administrators may assume just because a health benefits program is labeled as “voluntary” that means it is not required to be offered as COBRA coverage. Such an assumption is a mistake. Federal rules are the real measuring rod for COBRA purposes, and those rules require an analysis of various factors, including whether a health plan is “maintained” by an employer. Knowing the particulars of these rules is important as employers look more to “voluntary plans” to minimize their obligations under health care reform.

Defining a Group Health Plan

Generally, employers that maintain “group health plans” must comply with COBRA’s coverage requirements. IRS rules define a group health plan for COBRA purposes as a plan maintained by an employer or employee organization to provide medical care to individuals who have an employment-related connection to the employer or employee organization or to their families.

Medical Care

One may be asking, what is considered medical care? Under Code Section 213(d), it includes the diagnosis, cure, mitigation, treatment or prevention of disease; as well as any other undertaking for the purpose of affecting any structure or function of the body. It also includes the costs of transportation incurred primarily for, and essential to, medical care. For example:

- An employer maintains a health fitness club that offers a spa, swimming pool and an exercise or fitness program to all its employees. If the club is normally accessible to and used by the employees for reasons other than for relief for health or medical problems, such a facility would not constitute medical care and would not be a group health plan. [§54.4980B-1, Q&A 1(d)].
- In contrast, if the employer maintains a drug or alcohol treatment program, a health clinic or any other facility or program that is intended to relieve or alleviate a physical condition or health problem (whether chronic or acute), the facility or program is considered to be the provision of medical care and hence, would qualify as a group health plan. [§54.4980B-2].

Maintained by the Employer

The next question is, what is considered “maintained by the employer”? The IRS expanded the rules for determining whether plans are subject to COBRA by focusing on if the plan is maintained by the employer. The IRS regulations clarified under §54.4980B-2, Q&A-1(a): if plan coverage would not be available at the same cost to an individual except for the individual’s employment-related connection to the employer/employee organization, it would be subject to COBRA.

For example, when an employer offers dental coverage to non-employees at the same cost, this would not be considered coverage maintained by the employer. The dental plan would not be subject to COBRA.

How Voluntary Plans Can Fall Under COBRA

There are two ways a voluntary plan would become subject to COBRA:

1) Coverage is not available to individuals at the same cost if they were not employed.

2) The employer has too much involvement with the plan. This would cause the plan to fall outside the U.S. Department of Labor exception causing the plan to be subject to ERISA and COBRA. Per 29 C.F.R. §2510.3-1(j), any of the following activities will constitute too much employer involvement and render the plan subject to ERISA and COBRA:

See Voluntary Plans, p. 8
• The employer contributes to the plan.
• Participation is not voluntary.
• The employer endorses the program by performing functions beyond merely allowing the insurer to publicize the program, collecting premiums and remitting them to the insurer.
• The employer receives consideration in the form of cash or otherwise, other than reasonable compensation for performing administrative services.

The final 2004 HIPAA portability regulations addressing the HIPAA nondiscrimination issue further emphasized this point. Three federal agencies (including the IRS) stated this in the preamble:

If an employer provides coverage to its employees through two or more individual policies, the coverage may be considered coverage offered in connection with a group health plan and, therefore, subject to the group market provisions under HIPAA. A determination of whether there is a group health plan depends on the particular facts and circumstances surrounding the extent of the employer’s involvement. For example, one significant factor in establishing whether there is a group health plan is the extent to which the employer makes contributions to health insurance premiums.

Voluntary Plans Subject to COBRA
These voluntary plans are subject to COBRA:
• Dental
• Vision
• Health insurance plans, HMOs and self-funded plans
• Disease-specific policies such as cancer that provide medical treatments
• Prescription drugs
• Health flexible spending accounts
• Health reimbursement arrangements
• Wellness programs
• Drug and alcohol treatment
• Hearing care

Voluntary Plans Not Subject Under COBRA
On the other hand, here are some voluntary plans that are not subject to COBRA:

See Voluntary Plans, p. 9
Voluntary Plans (continued from p. 8)

- Accidental death and dismemberment plans
- Group term life insurance plans
- Health savings accounts
- Long- and short-term disability plans, assuming they do not provide medical care
- Long-term care plans

However, special attention needs to be taken regarding an ERISA safe harbor that precludes an employer’s minimal involvement from triggering ERISA and COBRA obligations in these two categories:

- a plan offered by the employer under a Code Section 125 cafeteria plan where the employee pays on a pre-tax basis; or
- a post-tax fund taken as a payroll deduction.

These categories appear to follow an employer involvement standard that does not meet the ERISA safe harbor requirements.

The Rules and the Penalty for Not Meeting Them

So to sum it up, if the below requirements are met, COBRA must be offered even for voluntary plans:

1) The program provides medical care.

2) The program is maintained by the employer even if the employer does not contribute directly to the cost of care. The coverage would not be available at the same cost to an individual except for the individual’s employment-related connection to the employer.

With these requirements, also consider that DOL guidance in 29 C.F.R. §2510.3-1(j) and the IRS COBRA regulations also explain what plans should be offered to COBRA qualified beneficiaries. It is imperative to remember that qualified beneficiaries must be offered coverage identical to similarly situated beneficiaries who are not receiving COBRA coverage under the plan (generally, the same coverage that the QB had immediately before qualifying for continuation coverage).

Employers that fail to comply with the COBRA requirements could face penalties under the Internal Revenue Code, as well as ERISA penalties that can take several forms:

- $110 per day statutory penalties for the COBRA notice failure. The notice penalty is separate from any other judgments, costs or damages that the court could impose against the employer.
- Audit or enforcement action by DOL.
- Court costs that on an average are $50,000 or higher, plus attorney’s fees.

Conclusion

The Affordable Care Act has changed the health insurance industry. Due to higher deductibles, copays, co-insurance and possibly premiums, employers are trying to calm the adjustment to the law by boosting or implementing voluntary plans. Employers shouldn’t proceed hastily in determining if their voluntary plans are not subject to COBRA. Many issues should be considered and caution should be taken.

Individual Policy Arrangements With Employer Involvement

- Employer contributes any portion of premiums
- Making a cafeteria plan available for individual policies
- Participation by the employer for ongoing administration of the arrangement
- Employer endorsement