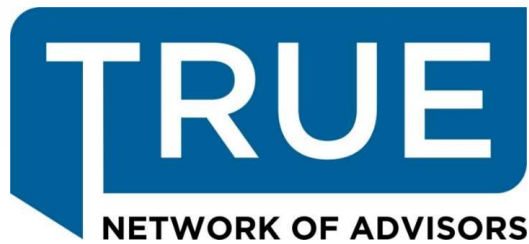


Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) 101



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Today's Agenda

- ❖ **Basic Legal Framework of COBRA**
- ❖ **Who is Covered?**
 - **What Employers are subject to COBRA?**
 - **What Plans are subject to COBRA?**
 - **Who is covered by COBRA?**
- ❖ **What Triggers COBRA?**
- ❖ **Employer Process - Compliance Steps**
 - **Elections & Premiums**
 - **Consequences for Failure to Comply**
- ❖ **State Continuation and Mini-COBRA Laws**

COBRA – Basic Legal Framework

- ❖ Under COBRA, an individual who might otherwise lose coverage under an employer's group health plan can pay to continue that coverage for a limited time
- ❖ Consolidated Omnibus Budget Reconciliation Act of 1986
 - ERISA – Private Employers
 - Internal Revenue Code – Private Employers
 - Public Health Service Act – State and Local Governments
- ❖ IRS and DOL Regulations
 - IRS Regulations – Rules on COBRA coverage, eligibility, etc.
 - DOL Regulations – Notices and Disclosure requirements Avoiding the Constructive Receipt Doctrine

COBRA – Covered Employers

- ❖ **Almost all group health plans of private and public employers must comply with COBRA**
- ❖ **Exceptions: small employers, church plans & federal government plans**
 - **Small = fewer than 20 employees on a typical business day during previous calendar year**
 - **Controlled group/related employers included**
 - **E.g., if fewer than 20 during 2023, exempt for 2024**

COBRA – Covered Plans

- ❖ **COBRA applies to group health plans:**
 - Provide medical care and
 - Are maintained by an employer
- ❖ **Medical Care = care for the diagnosis, cure, mitigation, treatment, or prevention of disease and any other undertaking affecting any structure or function of the body**
 - **Medical, dental, vision, and drug treatments and coverage, but also:**
 - Plans for which an HMO provides the medical services
 - Group insurance plans in which employees pay the premiums
 - Treatment programs and clinics maintained by employers (except for first-aid care provided free of charge to employees during working hours)
 - Self-insured medical reimbursement plans
 - Employee assistance programs

COBRA – Covered Plans

❖ Health FSA:

- Employer agrees to reimburse an employee for out-of-pocket medical expenses up to a specified dollar limit
- Employees typically pay for their health FSA coverage with pre-tax salary reductions under a cafeteria plan

❖ Health FSAs are group health plans subject to COBRA

❖ Can design health FSAs to meet certain requirements that will allow them to offer COBRA coverage only to individuals who have “underspent” their health FSA accounts, on a limited basis and for a limited period of time

❖ This is not available for most HRAs

- HRAs generally must offer COBRA to all qualified beneficiaries (not just those who have underspent their accounts) for the entire COBRA maximum coverage period
- COBRA compliance presents difficulties for HRA sponsors

COBRA – Covered Individuals

- ❖ **“Qualified Beneficiary” = certain individuals who lose coverage due to a “qualifying event” (the triggering event)**
 - A “covered employee,” the spouse of a covered employee, or the dependent child of a covered employee; and
 - Must be covered by a group health plan immediately before the qualifying event
 - Covered Employee includes retirees, independent contractors, self-employed persons, and partners of a partnership, as well as employees, if those individuals are provided coverage under a GHP because they are performing or have performed services for the employer
- ❖ **Excludes: Unmarried domestic partner; qualified beneficiaries who don’t elect COBRA when election period expires**

What Triggers COBRA?

- ❖ A qualified beneficiary who loses group health plan coverage due to a qualifying event may elect to continue group health plan coverage for a limited time on a self-pay basis
- ❖ COBRA triggering events:
 - Termination of a covered employee's employment (other than for gross misconduct)
 - a reduction of a covered employee's hours of employment
 - the death of a covered employee
 - a divorce or legal separation from the covered employee
 - ceasing to be a dependent child under the terms of the plan
 - the covered employee's becoming entitled to Medicare
 - employer bankruptcy (this relates only to retiree plans)

Loss of Plan Coverage Required

- ❖ There must be a loss of GHP to trigger COBRA
- ❖ If no loss of plan coverage occurs as a result of a triggering event, there is no qualifying event
 - A loss of plan coverage occurs for a reason not listed as a triggering event, there is no qualifying event
 - If there is no qualifying event, there is generally no obligation to offer COBRA
- ❖ “To cease to be covered under the same terms and conditions as in effect immediately before the qualifying event”
- ❖ In addition to the obvious, this includes when the triggering event causes a change in the “terms and conditions” of coverage:
 - an increase in required premiums
 - a reduction of benefits
 - any other change in the terms or conditions of coverage

Loss of Plan Coverage Required

- ❖ A leave of absence is a reduction of hours and is therefore a triggering event that may cause a loss of coverage
- ❖ Special rules apply to leaves taken under the Family and Medical Leave Act (FMLA), so that a qualifying event occurs when an employee fails to return to work or gives notice that he or she does not intend to return to work
- ❖ A business reorganization or the acquisition of a business entity will create a triggering event (most likely termination of employment) that causes a loss of coverage for covered employees and their families
- ❖ Special M&A rules on who has COBRA responsibility

Employer's Compliance – Coverage Offer

❖ What type of COBRA coverage must be offered?

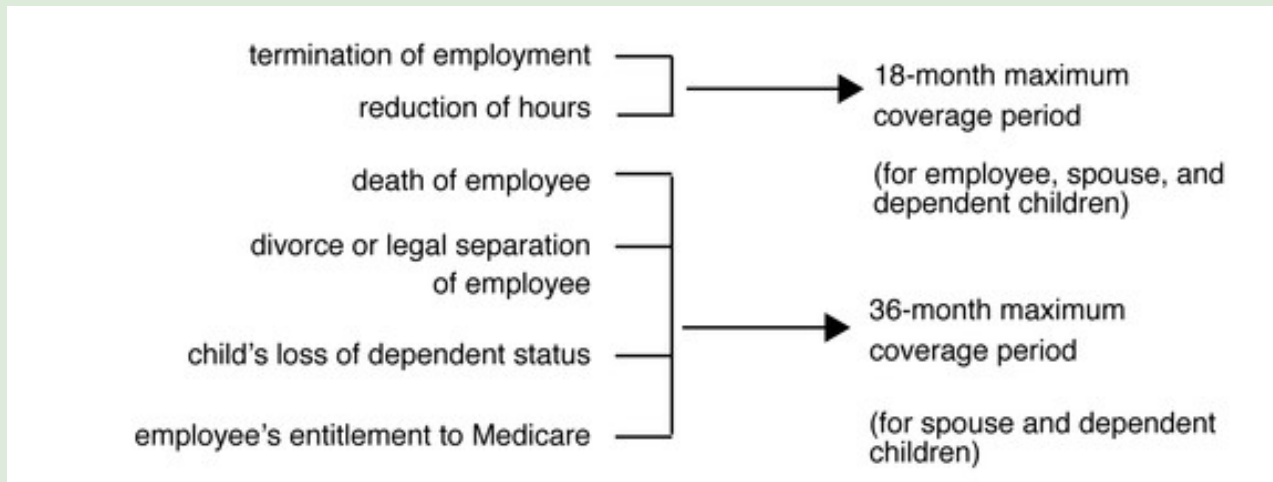
- Must be identical to the coverage provided to similarly situated beneficiaries under the plan (or plans) under which a QB was covered before the qualifying event
- Generally, this will be the same coverage that the QB had before the qualifying event

❖ Later change in COBRA coverage is possible due to open enrollment or HIPAA Special Enrollment Rights

- If a plan has an open enrollment period for active employees, this must be made available to COBRA QBs as well
- Once a QB is receiving COBRA coverage, the QB has the same right to enroll family members under the HIPAA rules as if the QB were an employee or a participant in the plan (e.g., to enroll certain family members upon the loss of other GHP coverage or upon acquiring a new spouse or a new dependent)

Employer's Compliance – Length of COBRA

- ❖ COBRA coverage generally starts on the date of the qualifying event (that is, on the date of the triggering event) and generally can last for the “maximum coverage period”
- ❖ The maximum coverage period varies according to the type of triggering event:



Employer's Compliance – Length of COBRA

- ❖ A GHP need not provide COBRA coverage to a QB until a timely election is made and required premiums are timely paid
- ❖ However, once COBRA is timely elected and payment is timely made, COBRA generally must be provided from the date that coverage would otherwise have been lost
- ❖ ***EXAMPLE — Maximum COBRA Coverage Period for Employment Termination:*** Tom and his wife, Emily, are covered under the medical plan of Tom's employer. Tom's employment terminates on September 18, 2023. Subject to certain exceptions, if Tom or Emily elects COBRA, the maximum coverage period will be 18 months, measured from September 18, 2023. In other words, COBRA coverage could last through March 17, 2024

Employer's Compliance – Length of COBRA

❖ Extension of Maximum Coverage Period:

- The maximum coverage period for a loss of coverage due to a termination of employment (or reduction of hours) is 18 months but can be extended

❖ *Multiple Qualifying Events:* If, after a qualifying event that is a termination of employment or reduction of hours, one of the following events (second qualifying events) occurs during the initial 18-month coverage period:

- the covered employee dies;
- the covered employee divorces or legally separates; or
- the covered employee's child ceases to be a dependent;

then the maximum coverage period for the spouse or dependent child who is a QB is extended to 36 months, measured from the same date on which the 18-month period started

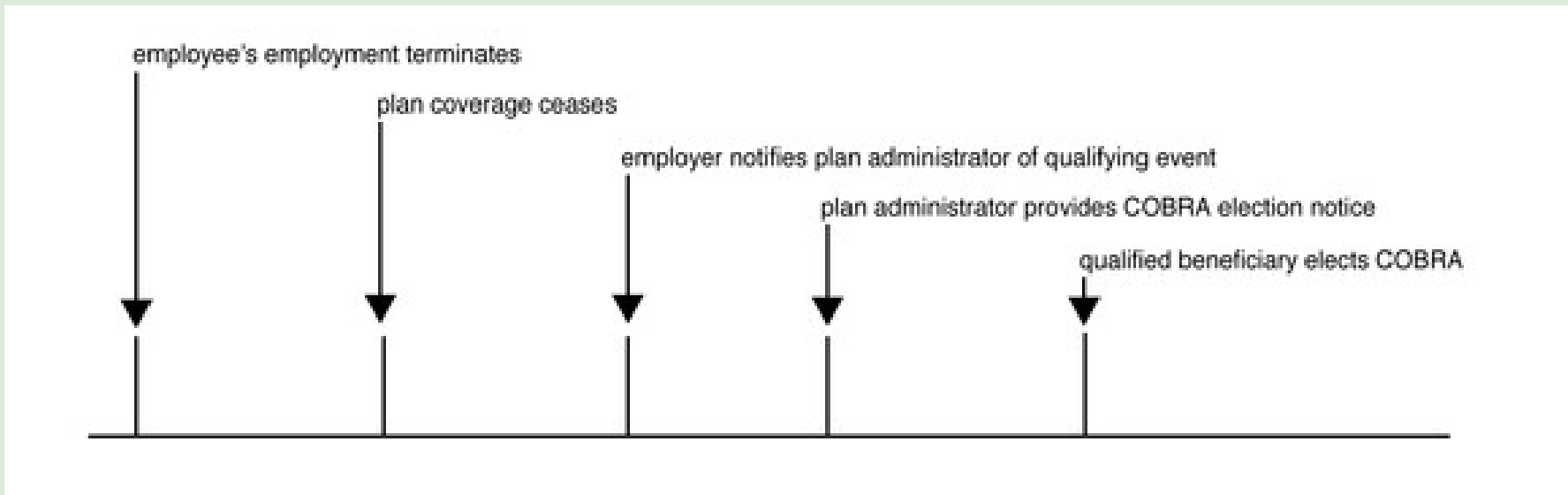
❖ Applies only if the second qualifying event would have caused a loss of coverage for the qualified beneficiary under the terms of the plan if it had occurred first

Employer's Compliance – Length of COBRA

❖ Early Termination of COBRA Coverage

- A plan can terminate a QB's COBRA coverage early, before the maximum coverage period (including any extension) expires, upon certain events
 - Needs to be in plan documents!
- ❖ The required premium for the QB's coverage is not paid on time
 - ❖ The QB becomes entitled to Medicare after electing COBRA
 - ❖ The QB becomes covered by another GHP after electing COBRA
 - ❖ the employer ceases to maintain any GHP for any employee
 - ❖ if the maximum coverage period has been extended under the disability extension, the qualified beneficiary who had been disabled is determined not to be disabled
 - ❖ for cause (e.g., filing a false benefit claim)

Employer's Compliance – Election Process



- ❖ The COBRA election process begins with a notice to the plan administrator that a qualifying event has occurred
- ❖ This is the Qualifying Event Notice

Employer's Compliance – Election Process

- ❖ **The employer must notify the plan administrator within 30 days when a QB loses or will lose coverage due to**
 - termination, or reduction of hours, of a covered employee's employment;
 - death of the covered employee;
 - the covered employee's becoming entitled to Medicare; or
 - the employer's bankruptcy
- ❖ **A QB or covered employee must notify the plan administrator within 60 days when a QB loses or will lose coverage due to:**
 - divorce or legal separation; or
 - a child's ceasing to be a dependent under the terms of the plan
- ❖ **Must establish reasonable procedures and notify employees in SPD**

Employer's Compliance – Election Process

❖ Notice of Unavailability of COBRA Coverage

- If individual is not entitled to COBRA, the plan administrator must provide him/her with an explanation as to why.
- This notice of unavailability within 14 days after the plan administrator has been furnished with notice of a qualifying event, a second qualifying event, or a disability

❖ COBRA Election Notice

- The plan administrator must notify each QB who will lose coverage under the plan as the result of a qualifying event of his or her rights under COBRA through the Election Notice
- Most critical step!

Employer's Compliance – Election Process

❖ Election Notice Continued:

- Due 14 days after receiving a Qualifying Event Notice UNLESS employer and plan administrator are the same entity, then employer has 44 days after a qualifying event that is a termination or reduction of hours, death of the covered employee, the covered employee's becoming entitled to Medicare, or the employer's bankruptcy)

❖ 60-Day Election Period: Each plan must set a COBRA election period that begins no later than the date that plan coverage is lost and lasts at least until 60 days after:

- the date that GHP coverage is lost; or
- if later, the date that the plan administrator provides the Election Notice

❖ Each qualified beneficiary has an independent right to elect COBRA

Employer's Compliance – COBRA Premium

- ❖ A plan may but is not required to charge a premium for COBRA coverage
- ❖ Cannot be more than 102% of the “applicable premium” for the month
 - Exception for COBRA coverage during the disability extension: 150% of the applicable premium if the disabled QB is included in the COBRA coverage group
- ❖ Premium is based on the “cost to the plan” for providing coverage
 - *Insured plans*: the monthly insurance premium paid to the insurer
 - *Self-insured plans*: a more complex calculation, based on reasonable actuarial estimates of future costs or on past costs adjusted for changes in a cost-of-living index
- ❖ Determined in advance for a 12-month period called the “determination period”
 - The determination period can be any 12-month period selected by the plan, but it must be applied consistently from year to year and must be the same for all QBs covered under the same benefit option

Employer's Compliance – COBRA Premium Payment

- ❖ May not require payment of the initial premium earlier than 45 days after the QB elects COBRA
- ❖ Thereafter, premiums generally are due on the first day of each month, subject to a grace period
- ❖ The grace period must be at least 30 days, and it must be longer than 30 days if (i) the plan by its terms allows covered employees or qualified beneficiaries a longer period in which to pay; or (ii) the arrangement with the plan's insurer, HMO, or other similar entity that provides plan benefits allows the employer a longer period in which to pay for coverage for similarly situated non-COBRA beneficiaries
- ❖ COBRA requires plans to allow monthly premium payments

Employer's Compliance – COBRA Premium Payment

- ❖ Not required to notify QBs of overdue payments and may terminate COBRA coverage for nonpayment or insufficient payment of premiums after the expiration of any applicable payment or grace period
 - But must provide a notice of termination
- ❖ Premium payments are deemed to be made when sent
- ❖ Plan administrators should maintain records relating to late payments (including postmarked envelopes) to support termination of COBRA coverage

Employer's Compliance – Failure to Comply

❖ Financial Consequences for Employer:

- Excise tax penalties may be assessed by the IRS (up to \$200 per day) for each day
- Statutory penalties of \$110 per day may be recovered (by QBs) for failure to provide certain notices
- QBs may sue to recover COBRA coverage
- Failure to provide notices can create exposure to “other relief”
- Lawsuits under ERISA for COBRA coverage, the court is permitted to award attorneys' fees to the prevailing party

State Continuation & Mini COBRA Laws

- ❖ Many states have health continuation coverage statutes that are analogous to COBRA, but these laws may have requirements that differ from or are additional to COBRA requirements
- ❖ Generally, these laws apply to insurers and may impose on insurers and their insurance products requirements that are different from or additional to the COBRA requirements
- ❖ To the extent that such laws attempt to impose their requirements directly on the employer or plan, *generally*, they will be preempted by ERISA
- ❖ Note: State and local government plans

State Continuation & Mini COBRA Laws

- ❖ **Extension of Continuation Coverage Requirements to Small Employers**
 - Continuation coverage requirements that apply to small employers having fewer than 20 employees
- ❖ **Extension of Continuation Coverage Period**
 - May require a longer period of continuation coverage under insured group policies
- ❖ **Different Notice Requirements**
 - May require election notices in shorter timeframes than COBRA
- ❖ **Required Conversion Option**
 - May require that group health insurance provide a conversion option through which a covered individual may elect coverage under an individual insurance policy after group coverage terminates

