



Compliance Consulting

COBRA

Frequently Asked Questions

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Gallagher

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1) Are we required to offer COBRA coverage if we do not offer group health insurance (medical, dental, vision, etc.) to our employees?

No. COBRA only applies to those employers that offer health insurance.

2) Which employees should be considered in determining if the small employer exemption applies?

An employer with fewer than 20 employees normally employed on a typical business day during the preceding plan year is not subject to COBRA. When determining if an employer is exempt from offering COBRA the following employees must be counted:

- All full-time employees of all the related companies within the controlled group of corporations, including related companies located outside the U.S.;
- All part-time employees (count as a fraction of a full-time employee) of all the related companies within the controlled group of corporations, including related companies located outside the U.S.; and
- Corporate directors (if they are also employees of the employer).

3) We have just become subject to COBRA. Are we required to advise the covered spouses and dependents of their COBRA rights?

Yes. All employees, spouses, and dependents receiving group health coverage must be provided with an initial notice explaining their COBRA rights. This includes newly covered employees, their spouses, and dependents. Note that COBRA permits one initial notice to be sent to the employee's last known address, and unless the plan is aware that the spouse and/or dependents live at a different address, the single notice addressed to the employee and spouse will be deemed to satisfy the requirement to disclose the initial notice to the spouse and dependents as well as the employee.

4) We are moving our medical plan to a different insurance company at renewal. Will the individuals that are on COBRA with our current insurance company remain on that plan?

No. The current policy will no longer be in effect when you move to a different insurance company. Therefore, all individuals (active employees, their dependents, and everyone on COBRA) that continue to be eligible for coverage will transfer to the new plan.

5) Who can become a qualified beneficiary?

Employees, former employees, and their spouses and dependent children covered by the employer's health plan on the day before the qualifying event are considered qualified beneficiaries. Additionally, children born to, or placed for adoption with, the covered employee during COBRA coverage are also treated as qualified beneficiaries, whereas spouses and other dependents added to a qualified beneficiary's COBRA coverage after the initial qualifying event are only considered plan participants.

6) Are we required to send COBRA notices by registered or certified mail?

There are no regulations that require the use of registered or certified mail when sending COBRA notices, but the employer must be able to prove that notices were sent to qualified beneficiaries. We recommend using a certificate of mailing, which is less costly than certified mail. This still provides the employer with proof of mailing, but the qualified beneficiary does not have to sign a receipt to receive the notice.

7) Does each qualified beneficiary have an independent right to elect COBRA coverage?

Yes. It is also important to note that qualified beneficiaries that are either covered employees or spouses of covered employees are able to elect COBRA coverage on behalf of all other qualified beneficiaries, and the election will be binding. Also, elections may be made on behalf of minor children by their parents or legal guardians, and by legal representatives in cases where the qualified beneficiary dies or becomes incapacitated.

8) Are we able to accept a verbal election or cancellation of COBRA coverage from a qualified beneficiary?

Verbal elections and cancellations are not recommended unless they are followed by written confirmation. Without documentation a qualified beneficiary could dispute his or her rights.

9) We received a qualified beneficiary's election of COBRA after the 60-day period. Are we able to decline COBRA coverage?

Elections are made on the date they are sent to the plan administrator. Therefore, if the election was sent on or before the 60th day, it should be accepted even though it may have been received after the election period had expired. We recommend that employers keep a qualified beneficiary's election file open for several days beyond the 60-day election period and also review, for mitigating circumstances, those elections that are clearly late. There may be cases where it is not prudent for the employer to deny an election.

10) After receiving notice from a qualified beneficiary waiving her right to elect COBRA coverage, she wants to revoke the waiver. Her 60-day period to elect COBRA has not expired. When should her COBRA coverage be effective?

Employers are only required to provide COBRA coverage from the date of the revocation. This will cause a gap in coverage from the date of the loss of coverage to the date that the waiver is revoked. Employers can decide if COBRA coverage will be effective from the loss of coverage (with no gap in coverage), or on the date of the revocation. Before an employer makes this decision, they should confirm how their particular insurance carriers interpret this type of situation.

11) Does COBRA coverage have to be offered if an employee moves from full-time to part-time?

If the move to part-time employment causes a loss of coverage, then COBRA coverage must be offered. For example, the plan states that only employees that work over 30 hours a week are eligible for coverage. A full-time employee becomes part-time and only works 20 hours a week. Due to a reduction in hours the employee cannot stay on the plan, and a qualifying event has occurred. Therefore, because of the loss of coverage, the employee has the right to elect COBRA.

For employers subject to ACA Employer Shared Responsibility that count hours to determine plan eligibility through a look back measurement method, the change from full-time to part-time may not take effect until the end of the stability period after the change in status, which will ultimately impact the COBRA qualifying event date related to the reduction of hours.

Under the look back measurement method rules, an employee's full- or part-time status is generally locked in during the employer's ongoing stability period. If the employee's move to part-time status has the effect of lowering the employee's average hours during the ongoing measurement period such that the overall average is under 30 hours/week, then the employee will be considered non-full time during

the subsequent stability period. When an employer uses the ACA counting hours rules to determine plan eligibility, and an employee is full-time in one stability period but not in the next stability period, the employee's COBRA qualifying event will occur upon the end of the stability period in which the employee was considered full-time and eligible.

12) Does COBRA coverage have to be offered to an employee terminated for gross misconduct?

No. Employers are able to decline COBRA coverage because of termination due to gross misconduct, even though a loss of coverage has occurred. The IRS Regulations and the statute do not provide any guidelines for employers to use in determining if the employee's actions can be defined as gross misconduct. Therefore, it is the responsibility of employers to determine if the employee's actions should be defined as gross misconduct.

Employers should note that the gross misconduct exception was intended to be limited in its application, because an employee's actions could lead to innocent spouses' and children's inability to continue on COBRA coverage. Because of this, employers should review each case carefully and consult legal counsel and the insurance company before denying an employee's right to COBRA coverage. Not having a clear definition of gross misconduct means that employers risk being sued for coverage and being subject to penalties for not offering COBRA coverage.

Employers are required to provide a Notice of Unavailability of COBRA Coverage to those individuals who will not be offered COBRA because of a termination due to gross misconduct.

13) Are there any COBRA regulations that prohibit an employer from cancelling an employee's health coverage the day before he or she will be fired?

Yes. Employers are specifically prohibited from cancelling an employee's coverage in anticipation of a qualifying event so that COBRA coverage does not have to be offered.

14) Can COBRA terminate early if a qualified beneficiary becomes covered under another employer's plan?

COBRA coverage can be terminated when a qualified beneficiary first becomes covered under another employer's group health plan after the date they elect COBRA. A qualified beneficiary may have both the other group health coverage and COBRA if he or she had both prior to electing COBRA.

15) An employee and spouse elected COBRA after an employee's termination of employment. During the 18-month coverage period they get divorced. Can we cancel the spouse's coverage?

No. The spouse is a qualified beneficiary and has the right to continue her coverage for 36 months from the first qualifying event (termination of employment) because the divorce is considered the second qualifying event.

16) An employee, spouse, and child elected COBRA coverage after the employee's termination of employment. When the 18 months expires can the spouse and child continue coverage?

No. The maximum period of coverage available due to termination of employment is 18 months. This can only be extended to 36 months when a second qualifying event occurs during the 18-month

period. Examples of second qualifying events are divorce, death, and cessation of being an eligible dependent.

17) Can an employee who elects COBRA due to termination ever extend the 18-month period?

Yes. The 18-month period can be extended to 29 months if the qualified beneficiary receives a disability determination from the Social Security Administration (SSA). The following conditions must be met to be provided with the 11-month extension for an SSA disability.

- The qualifying event must be the covered employee's termination of employment or reduction of hours;
- The employee or qualified beneficiary must be determined under the SSA to have been disabled at any time during the first 60 days of COBRA coverage;
- The employee or qualified beneficiary must notify the plan administrator of the SSA determination within 60 days after the latest of
 - the date of the SSA determination;
 - the date of the initial qualifying event;
 - the date on which the employee loses (or would lose) coverage under the plan as a result of the qualifying event; or
 - the date on which the employee is informed, through the furnishing of the plan's SPD or COBRA initial notice, of both the responsibility to provide the notice of SSA determination and the plan's procedures for providing such notice to the administrator; and
- The employee or qualified beneficiary must notify the plan administrator of the SSA determination before the end of the 18-month period following the initial qualifying event.

As noted above, the disability extension is also available to spouses and dependents that are qualified beneficiaries. If one qualified beneficiary is determined SSA disabled and obtains the 11-month extension, all other qualified beneficiaries in the family benefit receive the extension as well.

18) An employee's daughter turned 26 and was offered COBRA because she was no longer eligible as a dependent. What is her maximum period, and is she able to add her new spouse?

The daughter's maximum period of coverage is 36 months because the qualifying event is the loss of eligible dependent status. Since COBRA qualified beneficiaries must be provided with the same special enrollment rights as similarly situated employees, she can add her new spouse during a HIPAA special enrollment event. But her spouse will never be considered a qualified beneficiary with the same rights as the employee's daughter. For example, if the daughter's coverage terminates, her spouse will not be able to remain on the plan since they are not a qualified beneficiary and therefore do not have the right to continue COBRA coverage independently.

19) Can we terminate COBRA early when a qualified beneficiary becomes entitled to Medicare?

It depends on whether the Medicare enrollment is effective before or after the COBRA qualifying event.

If an employee/qualified beneficiary becomes entitled (i.e., eligible and enrolled) to Medicare prior to their COBRA election date, then COBRA cannot be cancelled early.

If an employee experiences an initial qualifying event of termination of employment or reduction in hours, the employee's spouse and dependents may be eligible for a COBRA maximum period of up to 36 months if the employee was entitled (i.e., eligible and enrolled) to Medicare before the initial

qualifying event. In this instance, the length of COBRA coverage for the spouse or dependent will be the longer of 18 months from the initial qualifying event or 36 months from the date of Medicare entitlement.

If a qualified beneficiary becomes entitled to Medicare after the election date, then COBRA coverage may be terminated. Other family members who are qualified beneficiaries would be able to remain on the plan for the 18 months allowed under COBRA.

20) Do qualified beneficiaries need to be notified of any changes in the plan?

Yes. Plans should inform qualified beneficiaries in the same as you would notify your active employees with respect to plan changes and premium increases.

21) Our company offers an HMO plan and an indemnity plan. Is he able to switch to a different plan if he moves out of the HMO service area?

Yes. The initial COBRA offer should be the HMO because it is the plan the employee was covered under before the qualifying event. However, if the employer provides coverage to active similarly situated employees under a plan that would provide coverage for the qualified beneficiary in the new area, then that coverage should also be offered. Also, if active employees are able to change their coverage at open enrollment, qualified beneficiaries on COBRA coverage must be provided with the same rights.

22) Do we have to wait until open enrollment to add a qualified beneficiary's newborn to the COBRA coverage?

No. The birth of a child to a covered employee is a HIPAA special enrollment opportunity and qualified beneficiaries have the same rights as active employees to add newborns from the date of birth. The newborn will be considered a qualified beneficiary.

23) Can we charge additional premium when a qualified beneficiary adds a benefit or dependent?

Yes. The qualified beneficiary should be charged the additional premium. In some cases, the addition of a dependent will not change the premium, if for example, a plan only charges premium for the first two children of the employee only.

24) Are we able to withhold an employee's final paycheck until they elect or decline COBRA?

No. Employers are not able to withhold money or other benefits to which an employee is entitled until COBRA coverage is elected or declined.

25) Can a qualified beneficiary's COBRA coverage be terminated if payment was insufficient?

Yes. Before COBRA coverage is terminated, the plan administrator must allow the qualified beneficiary the opportunity to make the payment prior to the expiration of the grace period (minimum 30 days). If payment is not received in full, the coverage may be terminated unless the shortfall is considered insignificant (i.e., the lesser of \$50 or 10% of the required COBRA premium for that month). We recommend that the qualified beneficiary be notified of the termination with documentation kept on file.

Although employers are technically within their rights to terminate a qualified beneficiary's COBRA coverage when the grace period expires, under certain extenuating circumstances it may be prudent to allow extra time to receive the proper payment.

Further, if the payment is only slightly less than the required amount, plans should consider accepting the amount as the total payment or informing the individual of the insufficient amount and permitting the additional payment during a grace period.

26) Does a qualified beneficiary have the right to reinstate COBRA that was terminated for non-payment?

No. Once it is determined that payment was not received within the applicable grace period and there are no extenuating circumstances, the qualified beneficiary's COBRA coverage can be terminated and is not required to be reinstated. This applies to all situations where the employer, in compliance with the COBRA regulations, has terminated a qualified beneficiary from COBRA coverage. For example, a qualified beneficiary that has had COBRA coverage for 10 months notifies the plan administrator that she no longer wishes to continue coverage and is cancelled from the plan. Two months later she advises the plan administrator that she wants her coverage reinstated. Because she waived her right to continue coverage, she is unable to come back on the plan.

27) Do we have to charge qualified beneficiaries the 2% administration fee?

No. Employers have the option of charging up to 102% of the premium. When a qualified beneficiary receives the 11-month disability extension, the employer may charge up to 150% of the premium.

28) Who can pay premiums for a qualified beneficiary?

A plan is required to accept payment from any party on behalf of a qualified beneficiary, and an employer can pay a portion or all of a qualified beneficiary's COBRA premiums.

29) What happens when a qualified beneficiary's timely initial COBRA payment covers one month's premium but is made three months after the qualifying event?

A qualified beneficiary has 45 days from the date of their COBRA election to make the initial premium payment, which should cover the period of time from the loss of coverage through the current month. If the current month's grace period has not expired, payment for that month is not required yet. The partial payment must be applied retroactively to the date that COBRA coverage commenced. If additional payment is not received, the grace period expires, and the qualified beneficiary does not make further payments, coverage can be cancelled after the month for which payment was received.

30) Where can I find answers to additional questions on COBRA Continuation Coverage?

The Department of Labor (DOL) has produced FAQs and an Employer's Guide to COBRA. [COBRA Continuation Coverage Tools and Resources for Employers and Advisers](#)

The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization's general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.