

# COMPLIANCE ALERT

## COBRA SERIES, PART III: MORE COMPLIANCE BITES

August 1, 2019

### QUICK FACTS

- It is permissible for an employer to terminate a QB's COBRA coverage early when the QB becomes covered under another group health plan and certain other conditions are satisfied.
- If active employees are given the opportunity to change plan coverage options or covered dependents during an open enrollment, then QBs must be provided with the same opportunity.
- Employers may terminate a QB's COBRA coverage if premiums are not paid on time, but a special rule allows QBs who fail to pay their premiums timely to avoid losing coverage if they pay the necessary premium before the end of a required grace period.
- It is possible for a QB to add family members who are not otherwise qualified beneficiaries at open enrollment or due to a HIPAA special enrollment right.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides certain health plan participants the right to continue health plan coverage for a period of time after experiencing a qualifying event (QE). This is the third article in a series on COBRA compliance. This article focuses on several additional COBRA-related topics, discussed in small bites, which employers should keep in mind in order to properly meet their COBRA obligations.

This series will conclude in a future, final article that will discuss common COBRA errors and how to correct them.

### **BITE ONE – TERMINATING COBRA CONTINUATION COVERAGE DUE TO OTHER GROUP HEALTH PLAN COVERAGE**

COBRA provides a qualified beneficiary (QB) the right to elect to continue health plan coverage for up to 18, 29, or 36 months depending on the QE. COBRA continuation coverage may terminate before the end of the normally applicable coverage period when certain events occur. For example COBRA continuation coverage may end when a QB becomes covered under another group health plan.

Under this rule, an employer may terminate a QB's COBRA coverage early when the QB becomes covered under another group health plan and certain other conditions are satisfied. These conditions include:

- 1) other coverage must be obtained (mere eligibility is not enough) after COBRA is elected;
- 2) other coverage must be a plan that is sponsored by a different employer;
- 3) other coverage must be group health plan coverage (i.e., may not be an individual policy); and
- 4) other coverage must not include preexisting condition exclusions (generally not applicable due to health care reform).

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While employers may terminate COBRA coverage early for QBs with other group health plan coverage, the rule can be hard to apply in practice. One reason is because QBs rarely notify former employers when they get other coverage. Neither the COBRA statute nor the IRS COBRA regulations contain any notice requirement, so it is important for employer plan sponsors to include a reminder in their COBRA communications.

## **BITE TWO – COBRA QUALIFIED BENEFICIARIES HAVE OPEN ENROLLMENT RIGHTS**

COBRA limits the coverage that QBs may elect to continue to the group health plan coverage that they had on the day before a QE. Further, the coverage may not differ in any way from the coverage that is offered to “similarly situated” non-COBRA participants. COBRA does not define “similarly situated,” but the IRS guidance effectively defines the term to mean the group of covered employees, spouses, or dependent children who are receiving non-COBRA coverage under the plan and who, based on all of the facts and circumstances, are most similarly situated to the situation of the QB.

While QBs may elect to continue the coverage they had before their QE, the COBRA statute provides that if coverage is modified for similarly situated beneficiaries, the coverage for QBs is also modified in the same way. So, if active employees can change plan coverage options or covered dependents during an open enrollment window (or under a HIPAA special enrollment period), then a plan sponsor must give QBs the same opportunity.

When offering an open enrollment to QBs, plan sponsors should provide QBs with all relevant or required plan materials including the benefits guide, annual health plan notices, and summary plan descriptions or summaries of material modifications, among other items.

## **BITE THREE – LATE COBRA PREMIUM PAYMENTS**

Employers may terminate COBRA coverage if QBs fail to timely pay required COBRA coverage premiums. Timeliness will vary since there are two types of COBRA premium payments: the COBRA premium payment related to the first 45 days of COBRA coverage (the “initial coverage period”), and the COBRA premium for any subsequent period of COBRA coverage.

In general, the premium due date for the initial coverage period is no earlier than the 45<sup>th</sup> day after a QB elects COBRA. The due date for subsequent periods of coverage is typically the first day of each month during the subsequent period.

An employer need not offer a grace period for the initial COBRA premium payment. However, a special rule allows QBs who fail to timely pay their ongoing premiums to avoid cancellation of coverage if they pay the required premium before the end of a required 30-day grace period. Thus, if a QB fails to pay the COBRA premium for a subsequent coverage period by the due date, the employer may terminate COBRA coverage at the end of the applicable grace period if the premium payment is not made.

In the case of a failure to pay the initial premium, there is no requirement to send a notice of unavailability. Employers are not required to send a notice of termination, because the COBRA coverage in this situation technically never started.

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Further, neither the COBRA statute nor the IRS's COBRA guidance requires an employer to notify QBs that a payment is late. However, if an employer terminates COBRA coverage for failure to pay a subsequent COBRA premium following a 30-day grace period, it must send a notice of termination of coverage to the affected QBs.

## BITE FOUR – HOW NON-QBS CAN BECOME COVERED

COBRA generally provides that QBs eligible for continuation coverage include:

- Employees covered by the employer's plan on the day before the qualifying event, if coverage is lost due to termination of employment or a reduction of hours.
- An employee's covered spouse or dependent children.
- Children born to, or adopted by, a covered employee during a period of COBRA continuation.

Without regard to QB status, in certain circumstances, other individuals may become covered under a plan at a later date.

As noted in Bite Two, above, if active employees can change coverage options or covered dependents during annual enrollment, then QBs must be afforded the same opportunity. This requirement means that a QB could add family members who are not otherwise qualified beneficiaries at open enrollment. The added family members do not themselves become QBs as a result; they merely get coverage as dependents and have no independent QB rights.

QBs may also add eligible family members, including new spouses acquired after COBRA continuation coverage starts, to their coverage under HIPAA special enrollment rules.

Finally, a former dependent child who is a QB may be able to add a child to COBRA coverage. The QB may add the child under either the HIPAA special enrollment rules or during the open enrollment process.

## KEY TAKEAWAYS

COBRA provides significant protections for plan participants who lose health coverage due to QEs. COBRA failures can lead to costly statutory penalties and even self-funding potentially large medical claims. Therefore, it is important for employers to take time to understand their COBRA responsibilities. If you have any questions regarding COBRA or how it affects you as the plan sponsor, please reach out to one of your EPIC team members.

### ***EPIC Employee Benefits Compliance Services***

*For further information on this or any other topics, please contact your EPIC benefits consulting team.*

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