

COMPLIANCE ALERT

COBRA SERIES, PART IV: COMMON ERRORS AND HOW TO CORRECT THEM

October 1, 2019

QUICK FACTS

- Failure to provide required COBRA notices or properly identify COBRA qualifying events are the top areas of non-compliance.
- Employers should have processes in place to promptly and accurately identify the occurrence of QEs and offer of COBRA coverage within the required timeframe.
- Employers that fail to comply with COBRA can face IRS excise tax and statutory penalties under ERISA, lawsuits, attorney fees, and potential liability for expensive health claims.
- The excise tax on COBRA failures typically does not apply to failures that are corrected within 30 days after discovery.

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 fourth and final article in a series on COBRA compliance. This article reviews common COBRA errors and how to correct them in ways that should lessen or avoid costly penalties and time-consuming litigation.

FAILURE TO OFFER COBRA COVERAGE OR PROVIDE REQUIRED NOTICES

Employers and health plans subject to COBRA are required to provide numerous notices to plan participants upon initial health plan enrollment, following QEs, when COBRA coverage is unavailable, and when COBRA coverage has terminated or will terminate early. Failure to provide COBRA notices – or to offer COBRA at all – are by far the most common pitfalls for employers. For more details about COBRA notices see our [prior COBRA article](#).

The initial COBRA notice spells out the rights and obligations under COBRA for both an employer-sponsored health plan and plan participants. The notice must be provided “upon enrollment” in a health plan. If a plan fails to provide the required initial COBRA notice to qualified beneficiaries (including covered spouses), it should consider doing so immediately to the plan participants who were supposed to have received it.

Plan sponsors should send the notice of the right to elect COBRA following a QE to any qualified beneficiary, including covered spouses, to advise that active coverage will terminate and to explain the conditions for continuing coverage under COBRA.

COMPLIANCE ALERT

The notice generally must be sent within 30 days of the QE. If a plan sponsor fails to send timely QE notices or offer COBRA coverage as required, within the required timeframe, it should consider doing so as soon as possible. If very late, the plan sponsor may wish to consider offering to pay for retroactive coverage so that the qualified beneficiary is not harmed financially. Alternatively, COBRA coverage could be offered prospectively. In both cases, in an insured plan context, plan sponsors should seek carrier approval before proceeding.

Qualified beneficiaries must also be informed if COBRA is unavailable, not extended due to a second QE, or if COBRA coverage has terminated or will terminate early for a permitted reason such as failure to timely pay COBRA premiums.

Failure to provide required COBRA notices could result in civil penalties and other relief if qualified beneficiaries are harmed because they were uninformed about COBRA rights. In addition, an employer may be liable if COBRA was not offered as required, or the qualified beneficiary was not informed that coverage was no longer be available or had been terminated.

Most plan sponsors (or their COBRA administrators) mail COBRA notices to the employee and spouse at their last-known mailing address to ensure delivery to the spouse. Electronic or hand-delivery of notices to employees is not sufficient to constitute delivery to spouses, thus home delivery is the best practice.

The burden of proof for providing the notices rests on the plan administrator. Consequently, it is important to document that all required notices are sent, to whom, the date, and the address. Note that while the plan administrator is required to *provide* the notices, there is no requirement to ensure that the notices are *received*.

FAILURE TO IDENTIFY QUALIFYING EVENTS

Employers should install processes to promptly and accurately identify QEs in order to properly offer COBRA coverage within the required timeframe. QEs for employees include voluntary or involuntary termination (except for termination for gross misconduct) and reduction in work hours. QEs for covered spouses and children include voluntary or involuntary termination of the covered employee (except for termination for gross misconduct), reduction in the covered employee's work hours, and death, divorce or Medicare entitlement of the covered employee. Children that lose eligibility for coverage under a plan also experience a QE.

COBRA obligations with respect to leaves of absence can be particularly challenging for plan administrators. Employees who exhaust leaves of absence during which health coverage is continued will experience a QE when coverage is lost. If active coverage for employees on leave is not restored upon return to work, or if they do not return to employment, COBRA coverage will generally need to be offered. Procedures should be established to track health coverage for employees on leave, identify when a QE occurs, and coordinate with leave and COBRA administrators to avoid COBRA compliance issues.

FAILURE TO PROPERLY COLLECT COBRA PREMIUMS

Plan administrators may fail to collect COBRA premiums by the due date, extend due dates when premium grace periods apply, or discontinue coverage due to insignificant premium shortfalls. To avoid such failures, procedures should be in place to administer the required grace period and to address underpayment and late issues.

COMPLIANCE ALERT

FAILURE TO OFFER COBRA COVERAGE FOR ALL HEALTH PLANS

Plan administrators should be sure to identify and offer continuation coverage for all health plans subject to COBRA. Some health plans are obvious, such as medical or dental plans, but often overlooked are health flexible spending accounts, health reimbursement arrangements (HRAs), as well as EAPs and wellness programs that provide medical care (such as mental health counseling or biometric screening), many of which are health plans subject to COBRA.

COBRA PENALTIES AND CORRECTIONS

Employers that fail to comply with COBRA – such as not providing required notices or charging excess premiums could be subject to IRS excise tax penalties of \$200 per day, even if the violation is due to an inadvertent error. In addition, ERISA civil penalties of up to \$110 per day and special “other relief” could be imposed. In addition, lawsuits could compel coverage and payment of attorneys’ fees.

Internal Revenue Code section 4980B imposes an excise tax on COBRA failures. The failures are self-reported on IRS [Form 8928](#); the taxes are payable when the form is filed with the IRS. However, the taxes imposed by Code 4980B do not apply to failures that are corrected within 30 days after discovery.

Under Code 4980B, failures are treated as corrected 1) if the failure is retroactively undone to the extent possible; and 2) the qualified beneficiary is placed in a financial position which is as good as the beneficiary would have been had the failure not occurred. The qualified beneficiary must be treated as if he or she had elected the most favorable coverage in light of the expenses incurred since the failure first occurred.

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 potentially having to self-fund large medical claims. Therefore, it is important for employers to take time to understand their COBRA responsibilities and establish procedures to ensure that they meet all applicable requirements. If you have any questions regarding COBRA or how it affects you as a 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.

EPIC offers this material for general information only. EPIC does not intend this material to be, nor may any person receiving this information construe or rely on this material as, tax or legal advice. The matters addressed in this document and any related discussions or correspondence should be reviewed and discussed with legal counsel prior to acting or relying on these materials.