

# COMPLIANCE OVERVIEW

Provided by Clarke & Company Benefits, LLC

## COBRA Common Questions: Definitions

The Consolidated Omnibus Budget Reconciliation Act (COBRA) allows individuals to continue their group health plan coverage in certain situations. Specifically, COBRA requires group health plans to offer continuation coverage to covered employees and dependents when coverage would otherwise be lost due to certain specific events, such as a termination of employment, a divorce or the loss of dependent status under the terms of the plan.

COBRA sets rules for how and when continuation coverage must be offered and provided, how employees and their families may elect continuation coverage and when continuation coverage may be terminated.

Employers may require individuals to pay for COBRA coverage. Group health coverage for COBRA participants is usually more expensive than coverage for active employees, since many employers pay a part of the premium for active employees.

## HIGHLIGHTS

### COVERED EMPLOYERS

- Most private-sector employers that maintain group health plans for their employees must comply with COBRA's continuation coverage requirements.
- COBRA does not apply to group health plans maintained by small employers (fewer than 20 employees) or by churches.

### QUALIFIED BENEFICIARIES

A qualified beneficiary is any individual who, on the day before the qualifying event, is covered under a health plan by virtue of being:

- An employee;
- A spouse or dependent child of a covered employee; or
- Any child who is born to or placed for adoption with a covered employee during a period of COBRA coverage.

### LINKS AND RESOURCES

- The Department of Labor's (DOL) COBRA continuation coverage [web page](#).
- [An Employer's Guide to Group Health Continuation Coverage Under COBRA](#) – DOL resource
- The DOL's model COBRA forms – [Model General Notice](#) and [Model Election Notice](#)

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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## COVERED EMPLOYERS AND HEALTH PLANS

### ***What employers are subject to COBRA?***

Employers who employed 20 or more employees on more than 50 percent of the business days in the prior calendar year are subject to COBRA.

Small-employer plans, church plans and governmental plans are not subject to COBRA. However, state and local governments are required to comply with parallel continuation coverage requirements under the Public Health Service Act. Individuals covered under the Federal Employees Health Benefit Program are provided with similar, but not identical, rights to continue coverage.

### ***What is a small employer plan under COBRA?***

A small employer plan is a health plan maintained by an employer that normally employed fewer than 20 employees during the preceding calendar year.

An employer is considered to have normally employed fewer than 20 employees during a particular calendar year if, and only if, it had fewer than 20 employees on at least 50 percent of its typical business days during that year. For purposes of determining whether or not an employer has 20 or more employees, all employees of all related employers under common control with the plan sponsor must be counted. Employers with a parent-subsidiary or brother-sister relationship with 80 percent common ownership are treated as one employer under COBRA.

Small employer plans are not subject to COBRA for the years in which they qualify for this exception. However, if a plan has been subject to COBRA and becomes a small employer plan, the plan remains subject to COBRA for qualifying events that occurred during the period when the plan was subject to COBRA.

***Example of Small Employer Exemption:*** An employer employed 20 or more employees on more than 50 percent of its typical business days during 2014. Therefore, the employer must comply with COBRA for qualifying events occurring in 2015.

The employer employed fewer than 20 employees during 2015. Beginning January 2016, the employer is a small-employer plan and is not required to comply with COBRA for purposes of qualifying events that occur during 2016. However, the employer continues to be obligated to extend COBRA coverage to those individuals that experienced qualifying events in 2015.

### ***For purposes of COBRA, who is an employee?***

For purposes of determining whether an employer is subject to COBRA, employee means only common law employees. Therefore, self-employed individuals, independent contractors and directors are not counted when determining whether an employer is subject to COBRA. The term employee means any individual working for the employer, including part-time and full-time employees, regardless of whether the employee has enrolled in the health plan or is eligible for health insurance.

For purposes of determining how many employees an employer employs, part-time employees may be counted as a fractional employee, with the fraction being equal to the number of hours worked divided by the number of hours that an employee must work in order to be considered full time. However, an

employer may not consider a full-time employee as an individual working more than 40 hours a week for purposes of this calculation.

## ***What is a health plan under COBRA?***

A health plan is a plan maintained by an employer or employee organization to provide health care to individuals who have an employment-related connection to the employer or employee organization or to the families of such individuals. Individuals with an employment-related connection include employees, former employees and their family members.

A plan is considered to provide health care whether it does so directly or through insurance, reimbursement or other means, and whether it does so through an on-site facility or cafeteria or other flexible benefit arrangement. Insurance includes one or more individual policies under an arrangement maintained by an employer to provide health care to two or more employees.

Health care includes diagnosis, cure, mitigation, treatment or prevention of disease, and any other services or care for the purpose of affecting any structure or function of the body. Plans covering the following are generally considered health plans under COBRA:

- Medical or surgical care;
- Prescription drugs;
- Dental care;
- Vision care;
- Hearing care; and
- Drug and mental health treatment.

Health flexible spending arrangements (FSAs) and health reimbursement arrangements (HRAs) are also health plans. Some health savings accounts may be considered health plans, but the IRS has indicated that COBRA does not apply to these accounts.

## **QUALIFIED BENEFICIARIES**

### ***Who is a qualified beneficiary?***

A qualified beneficiary is any individual who, on the day before the qualifying event, is covered under a health plan by virtue of being on that day either:

- An employee;
- A spouse of a covered employee;
- A dependent child of the covered employee\*; or
- Any child who is born to or placed for adoption with a covered employee during a period of COBRA continuation coverage.

\*A child covered under the plan pursuant to a qualified medical child support order (QMCSO) will also be a qualified beneficiary if he or she experiences a qualifying event.

Anyone who is covered under the plan by virtue of being an “employee” can be a qualified beneficiary entitled to COBRA if they meet the law’s other eligibility requirements. For this purpose, “employee” is not limited to common law employees and may include, for example, independent contractors covered under the plan.

Where an employer files a proceeding in bankruptcy under Title 11, a covered employee who had retired on or before the date of substantial elimination of group coverage is also a qualified beneficiary, as is any spouse, surviving spouse, or dependent child of such a covered employee, if on the day before the bankruptcy, the spouse, surviving spouse or dependent child were covered under the plan.

Each qualified beneficiary has an independent right to elect COBRA. For example, if an employee and his or her spouse were covered under the health plan on the day before the qualifying event, the spouse may elect COBRA even if the employee declines coverage.

### ***Who is NOT a qualified beneficiary under COBRA?***

In some cases, individuals covered under a health plan or under COBRA continuation coverage are not qualified beneficiaries.

Domestic partners do not meet COBRA’s definition of a spouse or dependent. Where an employer offers domestic partner benefits, even where state law recognizes domestic partners, domestic partners are not qualified beneficiaries. Therefore, employers offering domestic partner benefits should clarify within their summary plan description and COBRA notices whether they will voluntarily provide COBRA rights to domestic partners. An employer should seek approval from its insurance carrier or stop loss carrier prior to voluntarily expanding the scope of its definition of COBRA qualified beneficiary to include domestic partners.

Where a qualified beneficiary covered under COBRA adds a spouse or dependent during a health plan’s open enrollment period, that spouse or dependent is not a qualified beneficiary. While the spouse or dependent is covered under COBRA, he or she does not have independent rights under COBRA. Therefore, if the employee terminates coverage prior to the end of the maximum COBRA coverage period, the non-qualified beneficiary spouse or dependents will lose coverage since they do not have an independent right to continue COBRA.

## **QUALIFYING EVENTS**

### ***What is a COBRA qualifying event?***

A qualifying event is any of a set of specified events that occur while a health plan is subject to COBRA and that results in a loss of coverage to a covered employee, covered spouse of a covered employee or a covered dependent child of a covered employee. The specified events are:

- Termination of employment or reduction of hours of the covered employee (other than by reason of gross misconduct);
- Death of a covered employee;

- Divorce or legal separation of a covered employee from the covered employee's spouse;
- A covered employee becoming entitled to Medicare benefits;
- A dependent child ceasing to be a dependent child under the terms of the health plan; and
- An employer's filing of bankruptcy under Chapter 11 with respect to a retired covered employee, any spouse, surviving spouse or dependent child of such a covered employee, if on the day before the bankruptcy, the spouse, surviving spouse or dependent child were covered under the plan.

A qualifying event must: a) result in a loss of coverage; and b) be a result of one of the above specified events. Note that, although the employee's Medicare entitlement is a permissible qualifying event under COBRA, it will rarely cause a loss of coverage due to the Medicare secondary payer rules. Therefore, the employee's Medicare entitlement is usually not a true qualifying event.

Under the federal regulations, to lose coverage means to cease to be covered under the same terms and conditions as in effect immediately before the event. A loss of coverage includes an increase in employee premium or contribution as a result of one of the events listed above. For employer bankruptcy, the term to lose coverage also includes a substantial elimination of coverage that occurs within the 12 months before or after the date on which Chapter 11 bankruptcy proceedings begin.

### ***What is a second qualifying event under COBRA?***

Where a qualified beneficiary elects COBRA following a termination of employment or reduction of hours and later experiences an event that would have been a qualifying event entitling the qualified beneficiary to 36 months of coverage, the qualified beneficiary is entitled to 36 months of coverage beginning from the date of the first qualifying event.

A plan may require the qualified beneficiary to notify the Plan Administrator of the second qualifying event within 60 days of the date of the second qualifying event.

### ***What qualifies as gross misconduct under COBRA?***

While COBRA does not require an employer to extend COBRA continuation rights to an employee and his or her spouse and dependents where the employee's termination was due to gross misconduct, COBRA does not define gross misconduct. In addition, federal courts have not provided a clear standard for determining what constitutes gross misconduct. Court decisions have referred to gross misconduct as "intentional, wanton, willful, reckless, or deliberate." An employee's failure to follow an employer's policy is often not conduct that rises to the level of gross misconduct.

An employer should consult with an attorney before refusing to offer an employee and his or her covered dependents COBRA continuation coverage based on the employer's determination that the employee was terminated as a result of gross misconduct. If an employer mistakenly determines that an employee's termination was a result of gross misconduct, the employer will be liable for failing to offer COBRA.

## OTHER ISSUES

### ***What is an election period under COBRA?***

Individuals that experience a qualifying event must be provided with an opportunity to elect COBRA continuation coverage at any time during the election period. An election period must be at least 60 days long.

The election period ends on the later of sixty days following: a) the date coverage under the plan terminates; or b) the date on which the qualified beneficiary receives notice from the plan administrator.

A qualified beneficiary's election is deemed to be made on the date it is sent to the employer or plan administrator.

### ***What is a plan year under COBRA?***

A plan year is the year that is designated as the plan year in the plan documents. If the plan documents do not designate a plan year, then the plan year is determined as follows:

- The plan year is the deductible/limit year used under the plan.
- If the plan does not impose deductibles or limits on an annual basis, then the plan year is the policy year.
- If the plan does not impose deductibles or limits on an annual basis, and either the plan is not insured or the insurance policy is not renewed on an annual basis, then the plan year is the employer's taxable year.
- In any other case, the plan year is the calendar year.