COBRA Pitfalls: Navigating Consequences and Solutions to COBRA Mistakes Q&A – the following questions were asked during the two webinar sessions in May 2019

General Presentation Questions

Q: Can the slides be downloaded?

A: You can get a copy of the slide handouts on the webinar page at: http://www.ebcflex.com/Education/Webinars.aspx

Q: Will this presentation be eligible for CE credits toward PHR/SPHR, SHRM or HCRIS?

A: This webinar was not submitted for approval for outside association CE credits. We can however, upon request provide a certificate of attendance in order for you to pursue the CE credit on your own.

Q: Is there a way to listen to this (or future) webinar from my desktop or do I need to call in?

A: At this time, the audio component of our webinars is only available through phone lines. If it is preferable to use earphones to listen to the webinar, please consider calling from a cellular phone.

Notice Requirements

Q: If you provide open enrollment materials electronically via work email, can you include the initial COBRA notice in the emailed materials?

A: If your electronic distribution meets the safe harbor conditions provided by the Department of Labor's disclosure regulations, the Initial Notice can be provided electronically. These regulations are very specific about who can receive electronic communication and in many cases, how to obtain required consent from individuals in order to be able to provide electronically. Because Initial Notices must also be provided to enrolled spouses, this further complicates the process of electronic disclosure.

If an employer chooses to email COBRA Initial Notices, they should do so with caution and be sure that they are in compliant with the disclosure regulations and that spouses also are receiving the notice. Sending an email to an employee at their work email address likely will not qualify as sending the Initial Notice to the spouse because the spouse typically is not copied on employee work email.

For a guide to these regulations, please see our Guidelines for Digital Documentation Distribution. While this document specifically speaks to Summary Plan Descriptions, it is a good reference for Initial Notices.

The material provided in this Q&A is by Employee Benefits Corporation and is for general information purposes only. The information does not constitute legal advice and may not be relied upon by anyone as such.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: If employer provides COBRA notice with benefit enrollment paperwork do they have to give the notice again at termination or loss of coverage situation?

A: Yes, there are two separate notices that would be provided based on your question above. When employees (and dependents) first enroll in COBRA-eligible benefits, employers are required to provide the Initial Notice. This is a general rights notice that provides information about COBRA. Once an employee (or dependent) terminates or loses plan eligibility, they must be provided with an COBRA Election Notice. This notice reviews the specific rights that they have based upon their loss of eligibility. This notice also provides instructions on how to enroll (along with enrollment deadlines).

Q: Can you provide a list of what the COBRA notice requirements are?

A: Below is a list of all of the notices required under COBRA. In addition, there are many optional notices that are referenced in the regulations. Please find this list in our COBRA Foundations slide presentation (Slide 57). For more information on these notices, please listen to the recording of the COBRA Foundations webinar from April. (This recording will be available through the end of June 2019.)

- Initial Notice (also know as general rights notice)
- Qualifying Event Notice to the Plan Administrator
- COBRA Election Notices (also known as specific rights notice)
- Unavailability of Coverage Notice
- Notice of COBRA Premiums Short by Insignificant Amount
- Open Enrollment Materials and Notice of Open Enrollment
- Individual Conversion Notice
- Disclosure to Health Care Providers
- Notice of Termination from COBRA Coverage
- Summary Plan Description (or SPD): This is required under ERISA and extends to COBRA QBs.
- Summary of Material Modifications (or SMM): This is required under ERISA and extends to COBRA QBs.
- Summary of Benefits and Coverage (or SBC): This is a requirement under ACA and extends to COBRA QBs.
- Notice of Rescissions: This is a requirement under ACA and extends to COBRA QBs.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: Are the notice and other COBRA requirements for governmental entities subject to PHSA the same as COBRA requirements? If the notices differ, are there examples of how the notices should be changed for entities subject to PHSA?

A: The notice requirements are the same for groups subject to ERISA and PHSA. From the list above, there are two notices listed that are required to be distributed to COBRA QB's based on ERISA regulations (SPD and SMM). These would not be required to be extended to participants of groups regulated by PHSA but nevertheless, the employer might use something similar to communicate plan details.

Below are some other differences between plans regulated by ERISA vs. PHSA:

- The triggering event of "employer's bankruptcy" does not appear in the PHSA.
- Determination of "gross misconduct" can vary between ERISA and PHSA.
- Be sure to determine plan eligibility based on the appropriate definition of a "group health plan" as defined by either ERISA or PHSA. While the definitions are similar, there are differences.

Q: Regarding failure to enforce payment deadlines, is a COBRA administrator required to provide warning notifications to participants prior to terminating coverage due to failure to make timely payment? (I recognize payment deadlines and consequences are clearly communicated in the COBRA Election Notice.)

A: COBRA administrators are not required to provide late payment reminder letters, however, these are included in the list of optional notices that administrators can choose to include in their process.

If an employer chooses to provide late payment reminder notices – it is important that they do so consistently for all COBRA participants and consistently month to month.

Once COBRA has been terminated, COBRA administrators are required to provide a notice of termination of COBRA coverage.

Offers of Coverage

Q: Does COBRA need to be offered when there is a qualifying event (QE) and the employee is voluntarily dropping the employer sponsored coverage due to gain in coverage elsewhere (ex. through a spouse)?

A: No, if an employee voluntarily drops coverage either during open enrollment or based on a permitted election change event, the employer would not be obligated to provide an offer of COBRA coverage.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: If an employee who did not elect any insurance while actively employed terminates employment, are they eligible to enroll under COBRA?

A: Generally no. The offer of COBRA is based on the coverage that is in place the day before the qualifying event (i.e. termination of employment). If the employee was not enrolled in any plans at that time, they would not be eligible for COBRA coverage.

Q: Can a former employee's children elect COBRA coverage on their own, without the employee electing COBRA?

A: The offer of COBRA includes the option for each covered individual to make an independent COBRA election. Each person covered on the plan can independently make an election under COBRA. However, if active employees cannot enroll in child only coverage, you would not be able to do so under COBRA. Typically a group health plan would require that an employee be covered in order to cover their children. An exception to this would be in the case of a child losing dependent status whereby they are eligible to continue under COBRA on their own because they can no longer be covered under their parent's health plan.

Q: When an employee is eligible for COBRA, may they elect a lesser plan than what they currently have, ergo from family to single coverage or from a better plan to a lesser plan?

A: When a qualified beneficiary (QB) is provided the offer of COBRA, they are able to independently make elections for each individual included in the offer. Because of this, a QB can elect to change from family coverage to single coverage.

In general, when a QB is provided the offer of COBRA, they are only extended the offer on plans in which they are currently enrolled. QBs do not have the ability to elect from the other benefit options that the employer has for active employees. For example: An employee cannot elect to move from a PPO with a $500 deductible to a PPO plan with a $2,000 deductible based on their qualifying event and subsequent offer of COBRA.

There are exceptions to this including if the QB experiences a permitted election change that would result in the option for any covered employee to make a change in the plan in which they are enrolled. For example: QB, Joe, is terminated due to moving out of the area, and he was enrolled on a local HMO plan prior to termination. If his employer offers both the local HMO plan along with a PPO plan with national coverage – Joe should be offered the ability to change to the PPO plan based on the permitted election change event that results from his change in residence.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: In order for Medicare entitlement to be a COBRA qualifying event, the Medicare entitlement would have to cause them to be ineligible for the current plan, correct?

A: Yes, in order for Medicare entitlement to be a COBRA qualifying event, it would have to cause a loss of eligibility under the health plan. This is very rare due to the Medicare Secondary Payer Rules. Most often active employees can remain on the employer sponsored plan as primary coverage and enroll in Medicare which will pay secondary.

Q: If an employee becomes Medicare entitled (eligible and enrolled) and voluntarily drops group coverage, would this be a COBRA qualifying event for the employee? Would this allow their spouse/dependents to enroll in COBRA?

A: If an individual drops (cancels) their coverage mid-year (or at renewal) due to becoming entitled to Medicare, there is no offer of COBRA coverage for either the employee or to any eligible family that had been on the coverage if they did not lose the employer sponsored group health plan coverage as a result of enrollment in Medicare. In addition, there is no way for the spouse to stay on coverage without the employee. (Please be sure to review respective state laws to determine if there is any required continuation more generous than COBRA.) If the employee retires at a later time, there would not be an offer of COBRA for either the employee or dependents at that time.

Q: For an employee who is both Medicare entitled to and covered under the group health plan, when he terminates employment, what COBRA duration is offered for him and his dependents?

A: Here, the former employee is offered 18 months from termination of employment. The spouse and/or dependents are offered the longer of 18 months or 36 months from the date the former employee enrolled in Medicare.

Q: Would the spouse be eligible for up to 36 months even though the reason for the loss of coverage was retirement?

A: Upon retirement, the former employee and all of their eligible dependents would be offered COBRA for 18 months. Retirement would be classified similar to a termination or reduction in hours.

If the employee had recently become entitled to Medicare and remained on the group health plan, there are special rules that would apply to the spouse and dependents. The employee is eligible to remain on COBRA for 18 months. The spouse/dependents are eligible to remain on COBRA for the longer of:

- 18 months from the loss of coverage due to retirement or
- 36 months from the date of Medicare entitlement.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: Do employers HAVE to offer COBRA if they are offering a dental/vision plan? Would they be penalized if they don't offer COBRA on dental/vision (they only offer COBRA on the health)?

A: Group-sponsored dental and vision plans are subject to COBRA. A plan is a group-sponsored plan if the contract is written under the employer name not individual contracts. Plans can also be classified as group-sponsored if the carrier and plan is chosen by the employer, triggering ERISA, even if the full premium is paid by employees. In these cases, COBRA must also be offered. Failure to do so would make the employer subject to penalties.

Q: Does the Dental plan subject to ACA plan need to be included into the COBRA notification?

A: Group-sponsored dental plans are subject to COBRA. This would include pediatric dental plans required by ACA, along with employer-sponsored plans (funded by employers and/or employees).

Q: Are all accident plans COBRA eligible?

A: Like in the question above, group-sponsored accident plans are subject to COBRA. A plan is a group-sponsored plan if the contract is written under the employer name not individual contracts. Plans can also be classified as group-sponsored if the carrier and plan is chosen by the employer, triggering ERISA, even if the full premium is paid by employees. In these cases, COBRA must be also offered. Failure to do so would be subject to penalties.

Q: If an employee dropped their spouse from their plan in anticipation of a divorce, once the divorce is final and COBRA is extended to the spouse – when would the COBRA coverage be effective for the spouse? Would it be retroactive to date coverage was dropped or effective on the divorce date?

A: The COBRA offer would be based on the date of the divorce, not when coverage was voluntarily terminated by the ex-spouse. COBRA coverage would be effective as of the date of the divorce assuming the employer was notified within 60 days of the divorce, COBRA was elected timely, and the premium was paid on time.

Q: Why would you have to continue COBRA if a qualified beneficiary (QB) is covered under another plan? This was noted under Correcting COBRA Failures, slide 21.

A: The inability to terminate COBRA coverage for a QB who is covered under another plan could be the result of the QB failing to receive proper notification that clearly states that coverage on another plan results in the termination of COBRA and that the QB has an obligation to notify the plan administrator (or COBRA administration) within 30 days of other coverage. Otherwise, if you are already on COBRA and then subsequently become enrolled in another group health plan, your COBRA is terminated early.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: If I have an employee on FMLA leave, I am required to maintain their benefits (and the company's contribution amount) for 12 weeks? Is the employee is still responsible for paying their portion of the insurance? If they do not have vacation or comp time, is the employee required to remit payment to the company? Is that considered a loss of coverage, and would it trigger an obligation to offer COBRA? Based on the FMLA status, they do not lose coverage; however, the terms of payment are changed. Could you provide an overview of the interactions between COBRA and FMLA leave?

A: When an employee is going out on FMLA, the employer should meet with the employee prior to the start of the leave (when the leave is anticipated). During this time, the employer and employee should establish how payment will be handled during the leave. The employer can offer multiple options to employees including:

- Pre-pay: The employee would pay for their portion of the premiums pre-tax from payroll prior to the leave based on the anticipated period of time of the leave.
- Pay-as-you-go: The employee would pay for their portion of the premiums post-tax while on leave.
- Catch-up: The employee would pay for the missed premiums pre-tax after returning from leave.

If an employee chooses pay-as-you-go and fails to pay the premiums post-tax, they must be provided a 30-day grace period to submit the premium. If they fail to do so by the end of the grace period, coverage can be terminated. The employer would not have a requirement to offer COBRA since the termination was for non-payment. However, once the employee returns to work (if during the FMLA timeframe) their insurance coverages would need to be reinstated as of the date they return to work. If the employer chooses, they can cover the employee contributions that are missed during a pay-as-you-go arrangement and treat it as if the employee selected the catch-up method. This will allow the employer to keep the coverage active and could elect to recoup the missed premiums upon the employee's return to work. If the employee does not return to work – it would be up to the employer to attempt to recoup their funds.

<u>The offer of COBRA would only apply during an FMLA leave at the end of the FMLA period if the employee has not returned to work.</u> This qualifying event date may be delayed if an employer has an additional personal (non-FMLA) leave that extends an employee's benefits eligibility beyond FMLA. At the end of the 12-week FMLA leave, the leave would transition to a "personal" leave (non-FMLA). If the employer has a leave policy that extends benefits eligibility during a personal leave, the COBRA obligation would be delayed until the end of the terms defined in the leave policy.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Correcting Failures

Q: How long should an employer look back to see if COBRA notices were sent in order to correct errors?

A: The determination on how far back to audit notice errors would be at the discretion of the employer. If there is a serious concern that an employer is not compliant with the regulations, it may be advisable for the employer to consult with legal counsel.

If the concern is that Initial Notices were not provided to all employees and spouses, the safest course of action would be to distribute the Initial Notice to all covered under an employer's COBRA eligible benefits, regardless of whether or not some of the employees had gotten the Initial Notice previously.

Q: Is an employee essentially penalized by having a shorter election period if an employer sends the COBRA Election Notice out late?

A: If an employer (or COBRA administrator) sends out a COBRA Election Notice to a qualified beneficiary (QB) late – the QB would still be given the same amount of time to make their election (60 days from the date of the COBRA Election Notice). In addition, the participant would still receive and additional 45-days to make the retroactive premium payments after their election.

Miscellaneous Questions

Q: Can an employer elect to keep an employee's spouse on the plan after the divorce without implementing COBRA?

A: Generally, no. For most insurance plans, an ex-spouse would not meet eligibility requirements. If an employer wishes to allow coverage for ex-spouses, they could review with their insurance carrier to see if the carrier would include this in the plan eligibility. If a carrier agrees to this, the employer would need to collect any premiums for the ex-spouse's coverage post-tax as they would likely not meet the IRS definitions of a qualified tax dependent.

Q: Federal COBRA impacts self insured plans only, correct? State Continuation does not apply to ERISA plans, correct?

A: Federal COBRA applies to both insured and self-funded plans for employers that have over 20 lives (in the prior calendar year). State continuation requirements vary by state. In general, state continuation would only apply to fully-insured plans. This is because self-insured plans are subject to ERISA or PHSA and not subject to state laws.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: If the parent company ("Parent") has 10 employees and the subsidiary company ("Subsidiary") has 50 employees (both companies have different EIN/Tax ID's) is the parent company subject to COBRA?

A: Yes, regardless if Parent and Subsidiary offer benefits separately or through one plan – for purposes of COBRA, the employee count for both companies would include an aggregate of all employees under the controlled group. As long as Parent and Subsidiary meet the requirements as a controlled group, the counts must be combined.

Be cautious when determining COBRA obligations of an employer in cases of changes in ownership. *Example: If Parent sells Subsidiary on January 1, 2020, Parent will still be required to extend offers of COBRA through December 31, 2020 as the COBRA determination is based on employee counts in the PRIOR calendar year. For this case, the employee counts would still include Subsidiary based on the controlled group status in 2019.*

Q: Are there any specific COBRA qualifications when a company is transitioning to a new owner offering health insurance through a new open enrollment?

A: There are many variables which will impact if there is a COBRA obligation in cases of mergers, acquisitions and changes in ownership. In these cases, it is best to consult with legal counsel for guidance relative to the specific circumstances.

Possible outcomes include:

- No COBRA obligations (example, group health plan under former owner is terminated and new ownership does not offer group health plans)
- COBRA obligation remains with former group health plan (example, one division is being sold and new owner does not offer benefits)
- COBRA obligation transfers to new ownership (example, former owner's group health plan is terminated, new ownership offers benefits)

Within the examples above – the type of business transfer can have an impact on who is responsible for COBRA, if at all (merger, asset sale, stock purchase, spin-off company).

In all cases above, if there is a change in ownership, it is advisable to provide new Initial Notices to all covered employees' under a new employer. This avoids possible litigation based on a new employer not having provided this notice originally

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: What do we do if we suspect an employee is 'legally separated' from his spouse?

A: In most cases, insurance plans do not recognize legal separation as a loss of coverage event. First and foremost, review your various insurance contracts to determine if legal separation is in fact treated as a permitted election change event. If it is, it is the employee (and their dependent's) responsibility to notify you as the employer of this event within 60 days. Failure to do so timely could result in the loss of COBRA rights. (Legal separation is listed in COBRA regulations for when it does result in a loss of eligibility.)

Note: This is one of the reasons it is critical for spouses to receive the Initial Notice as it includes information regarding this and the time they have to notify an employer in the case of legal separation or divorce.

If an employee and an ex-spouse (legal separation if loss of eligibility or divorce) intentionally do not provide notice of these types of event that result in a loss of eligibility, and continue coverage – this would be fraud. If an insurer discovers this, they could deny claims. As an employer, your employment policies would determine if this would be subject to disciplinary action.

Q: Within the Employee Benefits Corporation portal, would the qualifying event date be the loss of coverage date or the termination date?

A: The qualifying event date that COBRASecure clients should list in the Employee Benefits Corporation portal would be the date of the qualifying event. Based upon information that client's provide to Employee Benefits Corporation upon their set-up (and updated at renewal), termination criteria is established in our system based upon the employer's insurance contract provisions that will identify if the loss of each benefit occurs as of the date of the loss of eligibility or at the end of the month (or based upon other criteria).

When a client covers their medical plan only through the date of termination, but covers dental through the end of the month – they would enter a termination of 5/15/19 into the system with that date. The COBRA Election Notice will be generated indicating that COBRA for medical would begin on 5/16/19 and that the COBRA coverage for the dental would begin on 6/1/19.

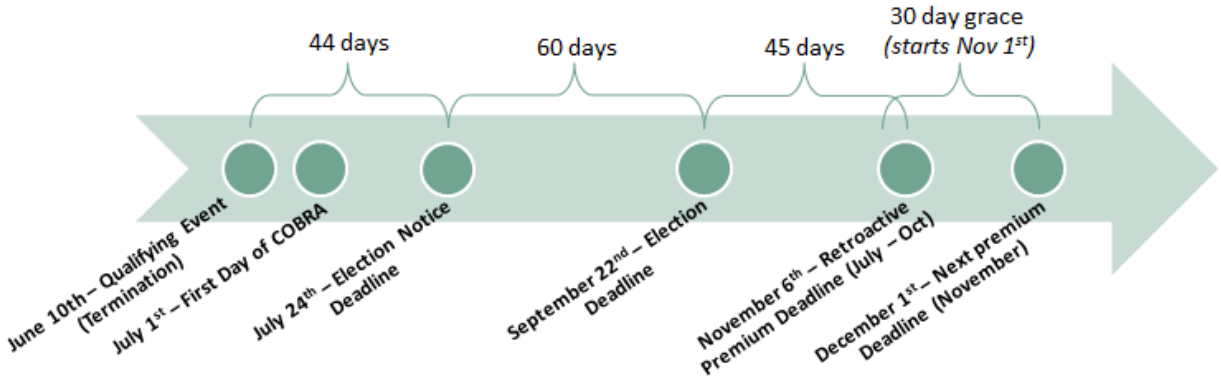
Q: What was the COBRA event in the Capgemini case?

A: The COBRA qualifying event in the Capgemini case was a termination of employment. The termination was due to the employees being transferred to another country for work. With each transfer from the U.S. to another country, it was considered a termination, followed by being hired based on an international position.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Q: Is there a screenshot showing the COBRA timeline?

A: Below is a timeline example showing a qualifying event, followed by the maximum permitted periods of time for the distribution of the COBRA Election Notice, the QB's election deadline and payment deadlines.



In addition, there are two other timelines that were included in the COBRA Pitfalls presentation. The first is an example of the disability extension timeline (found on slide 45). The second is an example of Medicare entitlement before a COBRA election (found on slide 57).

Q: Can qualified beneficiaries (QBs) on COBRA make changes to their coverage and/or who is enrolled on their plans? If so, can this be done at any time or only based upon open enrollment and permitted election change events?

A: COBRA QBs are given the same rights as active employees. This includes the ability to change who is enrolled on their plans and what plans they are covered by at open enrollment. This would include enrolling in coverage that they had either not enrolled in prior to the qualifying event or opted to not elect COBRA originally in a coverage they were enrolled in at the time of the qualifying event. QBs can make changes to their coverage mid-year based on permitted election changes.

Otherwise, COBRA QB's cannot change their coverage – just as an active employee would not be able to change their coverage mid-year.

The only exception is that COBRA QB's can cancel coverage at any time without having a permitted election change event either by request or based on non-payment of premiums.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com