

COBRA for Tax-Advantaged Plans Q&A – the following questions were asked during the two webinar sessions in March 2017.

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Q: I just wanted to clarify determining the underspent account. I thought you just needed to look at the deposits to date and compare that to the claims submitted to-date? I'm not following the logic in comparing the balance to the premiums?

A: Treas. Reg. §54.4980B-2, Q/A-8(e) provides that in the case of “excepted” health FSAs, COBRA coverage should be offered to qualified beneficiaries (QBs) if the remaining balance in the FSA exceeds the COBRA premium due for the rest of the plan year.

If one does the calculation using a “deposits-to-date vs. claims-to-date” analysis as you described in your question, it is possible that in certain complex scenarios, such as those involving rollover, employer contributions and the 2% administrative fee, one could obtain erroneous results.

Let’s look at some examples to illustrate this:

Example 1: Assume that an employee elects \$2,600, and the employer provides a match of \$2,600, which, according to the terms of the plan, is supposed to be deposited on a per payroll basis (26 payrolls). The employer fails to make those deposits according to the terms of the plan, however, so when the employee terminates on March 31, 2017, the employee only has his own deposits in the health FSA, which equal \$700. Assume, however, that the employee has claimed \$1,000, so the health FSA has a remaining balance of \$4,200.

If we apply a “deposits-to-date vs. claims-to-date” analysis, this employee’s health FSA would be considered “overspent,” and COBRA would not be offered. That is, \$700 (deposits) < \$1,000 (claims), so the account would appear to be “overspent,” and COBRA would not be offered.

However, since the employer owes the employee \$700, that amount would not be part of the COBRA premium. That is, \$5,200 (election) - \$1,400 (employee and employer contributions) = \$3,800 (COBRA premium). Thus, the employee’s COBRA premium would actually be \$3,800 for the remainder of the year. Since \$3,800 (premium) < \$4,200 (balance), the account would actually not be overspent, and COBRA would have to be offered.

Example 2: An employee elects \$2,600, and the employer provides a match of \$2,600, which, according to the terms of the plan, is supposed to be deposited on a per payroll basis (26 payrolls). The employer

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makes those deposits according to the terms of the plan, so when the employee terminates on March 31, 2017, the employee has deposits equaling \$1,400. The employee has claimed \$1,400. So, the employee has a health FSA election of \$5,200, and on the date of termination, the remaining health FSA balance is \$3,800.

If we apply a “deposits-to-date vs. claims-to-date” analysis, the health FSA would not appear to be overspent, because \$1,400 (deposits) = \$1,400 (claims), so it would seem that COBRA would have to be offered.

However, if the employer charges the 2% administrative fee, then the employee’s COBRA premium would be \$3,876 for the remainder of the year. That is, \$5,200 (election) - \$1,400 (contributions) = \$3,800 x 102% (admin. fee) = \$3,876 (COBRA premium). Since \$3,876 (premium) > \$3,800 (balance), the account is actually “overspent,” and COBRA would not have to be offered.

Example 3: An employee elects \$2,600 and has \$500 of rollover. When the employee terminates on March 31, 2017, the employee has deposits equaling \$700. The employee has claimed \$1,000 so far. So, the employee has a health FSA election of \$3,100, and on the date of termination, the remaining health FSA balance is \$2,100.

If we apply a “deposits-to-date vs. claims-to-date” analysis, the health FSA would appear to be overspent, because \$700 (deposits) < \$1,000 (claims), so it would seem that COBRA would not have to be offered.

However, the employee’s COBRA premium would be \$1,900 for the remainder of the year, while the available health FSA balance would be \$2,100. That is, \$2,600 (election, not counting rollover) - \$700 (contributions) = \$1,900 (COBRA premium). Since \$1,900 (premium) < \$2,100 (balance), the account is actually not overspent, and COBRA would have to be offered.

Q: If an employer has a retiree-only HRA with the funds put into the HRA upon retirement, should the employee divorce after separation from employment, would COBRA need to be offered?

A: COBRA has to be offered to any QBs who were covered under the plan the day prior to the qualifying event. So, if the ex-spouse was covered under the retiree-only HRA the day prior to the divorce, the ex-spouse would have to be offered COBRA. COBRA would also have to be offered if there was a judicial decree requiring it as a consequence of the divorce.

Q: If I have an employee on COBRA and he has a disability, I can charge 150%? I never heard of this...

A. Yes, the COBRA Regulations allow an employer to charge a QB up to 150% of the “applicable premium” during the 11-week disability extension.

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Q: Do you find that most groups go with "forego" or "de minimis" for HRA calculation?

A: I find that it depends on the size of the employer. Large employers generally get an actuarial valuation to calculate the HRA premium, while smaller employers often just charge a "de minimis" monthly premium.

Q: Can an employer require a health FSA participant to pay the full amount of his remaining plan year FSA COBRA premiums in full upon electing COBRA?

A: If the employee-QB chooses to pre-pay the COBRA premiums on a pre-tax basis prior to terminating employment, then the employer could require the employee to pay his COBRA premiums in full for the rest of the plan year. If, however, the QB elects to pay COBRA premiums on an after-tax basis after the qualifying event, then the employer would not be able to require him to pay the full amount of COBRA premiums immediately upon electing COBRA. QBs have to be treated like similarly situated active employees, and since active employees are able to make equal amounts of contributions into their health FSAs throughout the course of the plan year, the QB would have the same rights with respect to his COBRA premiums.

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