The COBRA Law: 25 Years Later and Still Going Strong

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May 29, 2011 — Twenty-five years ago, on April 7, 1986, President Ronald Reagan signed COBRA into law. About one year later, the first copy of Mandated Health Benefits — The COBRA Guide went to print! We have been joined together — COBRA and our Guide — ever since. Here are some editorial thoughts as we look back at the past 25 years and look forward to the future.

The History

What we know as "COBRA" was actually just one small part, Title X, of the Consolidated Omnibus Budget Reconciliation Act of 1985. The rest of the law covered issues from agriculture to veteran's program requirements and had absolutely nothing to do with group health plans. What is interesting is that "COBRA" was the first "consolidated" budget reconciliation bill of its kind. Since then, although there have been several "OBRAs" (just plain "omnibus" budget reconciliation acts), there has never been another COBRA. To this day, the acronym for the law known as "COBRA" has meant primarily one thing — the continuation coverage requirements applicable to group health plans.

When COBRA was enacted, most practitioners were not really paying much attention to it. Health and welfare plans were not high on the radar screen at the time and there were not really that many federal mandates applicable to group health plans. From an employee benefits perspective, the "big" news at the time was "SEPPA," the Single Employer Pension Plan Amendments Act of 1986. That law fundamentally changed the rules governing the termination requirements for defined benefit pension plans and was viewed as much more significant than some little-known group health plan rule.

Yet COBRA, as a law and as an acronym, survived long after SEPPA faded into both the sunset and the memory of most employee benefits practitioners. Although it has been amended by nearly 20 different legislative enactments since 1985, COBRA's basic structure has remained intact.

From a plan participant perspective, COBRA has been a significant benefit for individuals (whether they are former employees, former spouses, or surviving spouses and dependent children). Those who have needed a temporary bridge from one plan to another have options thanks to COBRA. Admittedly, COBRA can be an expensive option; but it has been worth it for many who could not otherwise have obtained group health coverage.

The Challenges

By now, employers and administrators are certainly very well versed in COBRA's rules, but that was not always the case. Over the years, several problems have vexed employers in dealing with COBRA administration. Some are still with us and not likely to disappear any time soon. Here is a list of some things that have caused, and continue to cause, challenges for employers in administering COBRA rules: (1) COBRA penalties for noncompliance; (2) COBRA notices — explaining the rules in English (and Spanish); (3) constant change in the statutory rules; (4) lack of adequate and timely guidance; and (5) the impact of the health care reform law.
COBRA Penalties for Noncompliance

The penalties for noncompliance with COBRA's requirements have changed significantly over the years. The penalties always included a notice penalty (now up to $110 per day in a court's discretion). However, the tax penalties have changed. Originally, COBRA noncompliance meant an employer faced a denial of all tax deductions for its group health plans, and highly compensated employees had to pick up the cost of medical coverage in income.

This draconian penalty was never enforced and, in 1988, was replaced with an excise tax for COBRA violations that was intended to be a more tailored approach. Even that tax, however, had not been enforced, as a practical matter, until recently. Now, IRS final regulations mandate that COBRA violations be reported on a Form 8928 and that the excise tax penalty be paid. The reporting requirements apply for 2010 years and forward. At this point, employers are still struggling with several issues, including:

- how to calculate the tax;
- how to allocate liability for the tax among responsible parties;
- how to obtain a statutorily authorized waiver of the tax for relatively de minimis errors in the absence of any guidance from the government; and
- what to do about pre-2010 years.

These questions (and more) will just have to await further guidance.

COBRA Notices — Explaining the Rules in English (and Spanish)

Several complicated rules govern COBRA compliance, including rules related to election periods, timely payment of COBRA premiums, duration of COBRA coverage and when COBRA coverage terminates. All of these rules have to be explained in COBRA notices and each group health plan summary plan description. From time to time, the U.S. Department of Labor (DOL) has issued model notices. The DOL has also provided Spanish language COBRA notices. These notices help, but they are not always up to date and cannot possibly cover each type of group health plan subject to COBRA. Therefore, employers always must review and revise their notices for the latest legislative changes. On a related point, it is often hard to determine how much information is too much. There are so many rules potentially affecting COBRA coverage (election periods, payment periods, cut-off rules, etc.) that it is hard to know how to strike the balance between enough information and information overload.

Constant Change in the Statutory Rules

Another issue that has plagued COBRA administration over the years has been the constant change. No sooner do employers and administrators figure out how certain COBRA rules work then Congress decides to tinker with COBRA one more time. This constant change causes confusion, leads to errors in administration and adds to the burden of compliance. Some of the changes might be beneficial to qualified beneficiaries, but the frequency of change has made it very hard for employers and administrators to keep their forms in compliance.

Lack of Adequate and Timely Guidance

The government agencies (IRS and DOL) have done a reasonably good job at issuing regulations on COBRA requirements. The regulations cover a wide variety of topics and elaborate on some of the more unclear statutory provisions. Nevertheless, employers still need more guidance, and given all the recent, higher priority, developments in the health care area (primarily health care reform), this guidance will not likely be forthcoming soon. For example, much guidance is needed surrounding the implementation of the COBRA excise tax; but the regulators do not seem able to provide more specific rules. It seems that employers will continue to have to interpret COBRA's rules on their own (with the aid of legal advisors), which in turn leads to inconsistent positions and the risk of litigation.
Impact of the Health Care Reform Law

A final point of confusion is how to integrate COBRA coverage requirements with other changes in related laws. The prime example of this conundrum is health care reform. Sweeping health care reform has fundamentally changed the landscape for group health plans. A fair question that has arisen is whether there will be a need for COBRA once the health care reform mandates apply and all individuals are required to have coverage. At this point, the basic answer is that there will still be a need for COBRA coverage because, absent a national, uniform coverage level mandate, employers will still have variations among the types and levels of coverage available. Therefore, when qualifying events occur, people will still need the ability to continue the coverage they had before the event. Nevertheless, stay tuned — we never know what new mandates might creep into the law and change the way COBRA is administered.

DOL Lauds COBRA's 25th Anniversary

In marking COBRA's 25th anniversary, DOL officials had this to say.

"For 25 years, COBRA has been an essential safety net for those workers who play by the rules, yet still find themselves weathering difficult times. It ensures that they can continue their health coverage while getting back on their feet," DOL Secretary Hilda L. Solis said in a statement. Since that time, "COBRA has helped some 50 million workers — and their families — maintain affordable health coverage," she added.

"Before COBRA, many workers faced a stark choice between trying to purchase insurance on their own in the individual insurance market, or simply going without," said Phyllis Borzi, the assistant DOL secretary for the Employee Benefits Security Administration, in a posting on DOL's blog. "Either way, workers were met with potential financial hardship as they paid high premiums for non-employer sponsored insurance coverage or teetered on the edge, one accident or illness away from going deep into debt from medical bills."

Both Solis and Borzi explained that the ongoing concern about the high cost of health coverage has led the government to institute other measures post-COBRA, such as the premium subsidies under the American Recovery and Reinvestment Act of 2009 and various provisions under the health care reform law.

In tying together the protections under the reform law and COBRA, Borzi noted that, "It is fitting that as we celebrate the 25th anniversary of COBRA, we are also working to ensure access to health coverage for all Americans."

Benefits and Burdens

So looking back over the past 25 years, we can definitely say that COBRA has resulted in some significant benefits to qualified beneficiaries in need of coverage. At the same time, it has imposed significant administrative burdens on plan administrators as they cope with so many new and complicated laws.

What can we expect for the next 25 years? Good question. The only certain thing is that nothing is certain. There will be more regulations, more cases, more legislative changes and more real world experience in dealing with compliance. The best way to handle this is to stay on top of the latest developments through consultation with employee benefits advisors and, of course, by maintaining a subscription to Mandated Health Benefits — The COBRA Guide.

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