



## Changing the Determination Period for COBRA Premiums: Is It Possible?

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June 1, 2012 — COBRA requires that COBRA premiums be set for a 12-month period, known as the “determination period.” The policy behind the determination period concept is to make sure that COBRA qualified beneficiaries have some assurance not only of the COBRA premium amount but that it will not be subject to frequent fluctuations. From time to time, however, employers and plan administrators may need to (or want to) change the determination period. When this comes up, the question is how a determination period change can be made without adversely affecting existing qualified beneficiaries.

The COBRA statute and regulations are completely silent regarding if, when or how a plan may change the determination period for COBRA premiums. Indeed, one could read the statute and regulations as prohibiting any plan from ever changing the determination period. Of course, that extreme position does not make much sense in the real world where changes could be needed for many different reasons. For example, following a corporate transaction the health plans of the buyer and the seller may be merged and it may be necessary to change the determination period for one group of qualified beneficiaries in order to streamline the merged plan’s administration. Another example of when it may be necessary for a plan to change its determination period is when the determination period matches the plan year, but the plan changes the plan year for non-COBRA related reasons. In these instances, it will make sense to find a way to adjust the determination period to match plan administration.

The rules applicable to the COBRA premium determination period are explained in detail in *Mandated Health Benefits — the COBRA Guide*. Briefly, however, group health plans subject to COBRA must determine, in advance, the applicable premium for COBRA coverage to be charged for a 12-month determination period. The determination period may be any 12-month period selected by the plan, but it must be applied consistently from year to year. Additionally, IRS regulations clarify that each qualified beneficiary does not have his or her own determination period based on the date (or anniversaries of that date) that COBRA coverage begins. In other words, if a plan uses a calendar year as the “determination period,” that means that the COBRA premium for a particular benefit package generally remains constant for that calendar year. If a qualified beneficiary starts COBRA coverage in, say, October of year 1, then the applicable COBRA premium can be changed the next January even though the qualified beneficiary has only had three months of COBRA coverage.

With that as background, then, how might it be possible to change a COBRA premium determination period? Again, there is no guidance on this point, so employers must act consistent with a reasonable good faith interpretation of the statute and regulations. As plan sponsors consider their options, there appear to be three basic methods that should be considered (of course, in conjunction with consulting benefits counsel).

### **Limit Change to New Qualifying Events**

One method for implementing a change in determination period is to cause the new period to be effective for all qualifying events occurring after the date the plan adopts the new period.

**Example.** *A plan uses a 12-month determination period from July 1 to June 30. Due to a corporate transaction and plan merger in August 2012, the decision is made to change to a new determination period based on a calendar year for all plans.*

Under one method of implementing the change, the new determination period would end on Dec. 31, 2012, for all qualifying events occurring after the adoption of the new period. All existing qualified beneficiaries related to earlier qualifying events would continue to have the July 1 to June 30 determination period apply for the duration of their COBRA coverage and never experience a change in their determination period. Eventually (that is, within no later than 36 months after adoption of the new determination period), the old determination period will expire as a practical matter and the plan will again have a single, new determination period in place.

This approach appears to be consistent with existing guidance. However, the downside for some sponsors is the extended running of two different determination periods, depending on when certain qualifying events occurred.

### **Implement Change for Existing Qualified Beneficiaries After a Long Determination Period**

A more aggressive interpretation would be to implement the new determination period only after each existing qualified beneficiary has had a minimum determination period of 12 months. Consider the example above where the plan wanted to switch from a July 1-June 30 determination period to a calendar-year period. Under this interpretation, once the change is adopted, say in August 2012, existing qualified beneficiaries would not be changed to a new determination period until after the expiration of the current determination period that began on July 1, 2012. However, because the plan implemented a calendar-year determination period as of Jan. 1, 2013, the next determination period after expiration of the July 1, 2012, determination period will begin on Jan. 1, 2014. Under this approach, Jan. 1, 2014 is the first date that the premium can be adjusted for existing qualified beneficiaries at the time of adoption of the new determination period. In effect, this group of qualified beneficiaries has a long determination period of 18 months (July 1, 2012 through Jan. 1, 2014) in order to account for the fact that the group was were in the middle of a determination period when the new period was adopted.

The theory behind this approach is that the statute and regulations require a 12-month determination period, so a method that ensures that all qualified beneficiaries benefit from a 12-month determination period in the context of a change would appear to be consistent with that approach.

### **Implement Change for Upcoming Year with a Transition Period**

An even more aggressive approach is to implement the change as soon as there is a legally justifiable reason for doing so, even if it causes a qualified beneficiary to have a determination period of less than 12 months, as long as there is some grandfathering protection. Under this approach, again using the example above, in August 2012, the determination period would change from a July 1 to June 30 time frame to a calendar-year determination period beginning Jan. 1, 2013. However, the applicable premium set on July 1, 2012, would remain in effect until June 30, 2013 for all qualified beneficiaries regardless of when their qualifying events occurred. Effective July 1, 2013, the premiums would be adjusted upward to the Jan. 1, 2013 level (assuming the premium went up) and then each Jan. 1 thereafter the new determination period would apply.

## Other Factors to Consider

The three methods described above are really just three possible approaches to consider. There are pros and cons to these approaches and their application depends very much on the facts of a given case. For example, if a change is under consideration when there are no active qualified beneficiaries, it will be easier to implement a new determination period immediately than if there are several existing or potential qualified beneficiaries. If there are a small number of qualified beneficiaries, there may be alternative ways of protecting their interests and still implementing the change quickly.

Another factor to consider is the reason for the change. For example, if a change must be made due to a corporate transaction and/or plan merger, that might justify a more aggressive approach to changing the determination period (that is, due to business necessity) than a change that is simply for administrative convenience.

In the final analysis, no specific regulatory or other guidance dictates how to implement a change in the COBRA premium determination period. Therefore, plan sponsors that are contemplating a change in the determination period need to carefully consider their options and all of the facts very carefully and in consultation with benefits counsel.

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