



When a Former Employee Dies: Practical Thoughts on COBRA Administration Issues

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July 17, 2012 — Many employers and plan administrators struggle following a former employee's death, and not just due to any emotions regarding the loss of a former colleague. Rather, just as the former employee's family deals with *personal* administrative issues, such as estate and probate concerns, employers and plan administrators have to resolve *COBRA* administrative issues, such as how to best ensure they become aware of the death in order to properly fulfill COBRA notice obligations. Following are some helpful strategies to consider.

Background

Under COBRA, an employer has 30 days from the date of the following COBRA qualifying events to notify the plan administrator that the event has occurred:

- the employer's bankruptcy filing; or
- the participant's death, termination of employment, reduction in hours of employment or Medicare entitlement.

The plan administrator then has up to 14 days to provide COBRA qualified beneficiaries with a COBRA election notice. When the employer and plan administrator are the same entity, as is often the case with single employer group health plans, then the employer/plan administrator has 44 days from the qualifying event date to provide the notice. (In this situation, the employer needs to establish a system with its insurer and/or third-party COBRA administrator to ensure the notice is provided within the 44-day time frame.)

Underlying this rule is the assumption that an employer knows within the 30- or 44-day time frame that one of these qualifying events occurred. When the qualifying event is a participant's death, this assumption may not be accurate.

When You Don't Know

Most likely an employer will know when an active employee dies. However, this is not necessarily the case.

Example. *An employer in the retail business may have a lot of employees working various shifts with high turnover. An employee may stop coming to work without giving advance notice to the employer. In this situation, the employer may have quit or may have passed away, and the employer may not be able to verify within 30 or 44 days which of these scenarios occurred.*

The COBRA notification responsibility becomes more challenging when an employer has a plan that covers former employees. For example:

- Many employers offer retiree health coverage that is subject to COBRA requirements.
- In another common situation, some employers continue health coverage for former employees during a severance period, and the post-severance coverage is distinct from COBRA coverage.

The general rule discussed above, which places the burden on the employer to determine when a qualifying event has occurred, applies equally to former employees who are covered under a plan subject to COBRA. Similar issues occur when the qualifying event is a participant's entitlement to Medicare, but rarely does Medicare entitlement result in a qualifying event. Therefore, the more vexing situation for employers is a former employee's death.

No guidance relieves or mitigates: (1) an employer's responsibility to determine when a former employee's death has occurred (thus resulting in a qualifying event); or (2) a plan administrator's responsibility to notify qualified beneficiaries following a death, despite the fact that often the employer may have no independent method to learn of the death. This starkly contrasts with the U.S. Department of Labor's final regulations on COBRA notices, which include a special rule for multiple qualifying events, under which the 18-month coverage period can be extended to a total of 36 months.

Under this special rule, a qualified beneficiary who has experienced a second qualifying event may be required by the plan to notify the plan administrator of the occurrence of that event within 60 days after it has occurred. However, a plan may deny the coverage extension if:

1. it explained in the summary plan description and/or COBRA notices that a qualified beneficiary must provide notice of a second qualifying event and the procedure for providing the notice; and
2. the qualified beneficiary does not inform the plan administrator of the second event within the 60-day period.

This "burden-shifting" rule applies to any second qualifying event, including the covered employee's death.

In the absence of DOL guidance on how to administer COBRA in the event of a former employee's death, what should employers and/or plan administrators do to make sure they do not inadvertently run afoul of their COBRA election notice obligations?

Ask for Notice (But Don't Deny Coverage if Not Provided!)

The simplest, but perhaps least effective, method for addressing this concern is to ask the affected qualified beneficiaries to provide notice to the plan administrator following the former employee's death. Many SPDs and COBRA notices remind participants and qualified beneficiaries to keep administrators informed of any status changes.

However, it is a best practice to broaden this statement, or add the statement — if it is not already in the document — to specifically address a former employee's death and request that the qualified beneficiary inform the administrator of a death.

This procedure is similar to the second qualifying event notice rule, but an employer may not condition the availability of COBRA coverage on the qualified beneficiary providing the notice. For this reason, this solution may not fully alleviate the administrative concerns.

Perform Death/Medicare Entitlement Audits

Some employers conduct audits of their retiree populations to verify, among other things, whether any retirees have passed away. Although this may be costly (especially if an outside consulting firm is used), the process has two benefits, both of which will potentially lower the costs of maintaining the plan:

1. It ensures that the employer learns of events that may trigger COBRA obligations. Potential excise taxes and direct liability to qualified beneficiaries who may sue for COBRA violations are minimized by conducting these types of audits.
2. It ensures that the plan is covering only those individuals who are eligible for coverage.

Here's an example of how this can work.

***Example.** A plan has a coverage rule that states a surviving spouse's benefits end at the end of the month following the month in which a covered employee or retiree dies. In the retiree context, an employer that does not know of a death not only has to deal with potential COBRA violations, but it must address the fact that it could be providing coverage to individuals who are not entitled to it based on the plan rule. An audit may identify surviving spouses who had continued to remain covered under the plan after the end of the month following the retiree's death.*

If the plan documents clearly articulate when coverage ends and health care reform's prohibition against rescissions is either not applicable (as may be the case in a retiree-only plan) or complied with, then the plan may be able to retroactively cut off coverage for the surviving spouse. In any event, the plan may cancel the surviving spouse's coverage prospectively, saving the plan, at a minimum, future coverage costs.

Due to the multiple advantages that an employer may realize from conducting retiree health plan audits, an employer may find their costs to be worthwhile.

Provide Lifetime Coverage to Surviving Spouses of Retirees

Some plans provide lifetime coverage to surviving spouses of retirees as a plan rule. This practice eliminates concerns with proper COBRA administration following a former employee's death, although it is a very generous and potentially costly benefit. For this reason, it may not be a desirable method of COBRA compliance for many employers.

Coordinate with Retirement Plan Administrators

In many instances, employers that offer retiree health benefits also will offer retirement plans that provide monthly benefit payments to retirees (such as a defined benefit pension plan). Administering these types of retirement plans will often let employers know when a retiree dies, because either: (1) a payment will be returned to the plan administrator; or (2) a surviving spouse will contact the plan administrator to determine what happens to the benefit payments now that the retiree has passed away.

Therefore, it is a best practice for an employer that offers both a retirement plan and a retiree health plan to establish a process under which information on a retiree's death is shared among those responsible for administering each plan.

The Bottom Line

The bottom line is that COBRA contains many technical requirements and can be tricky to administer. The key to proper administration is to identify administrative issues and develop workable solutions. When an employer needs to identify when a former employee has passed away in order to comply with its COBRA obligations, many solutions are available. The employer just needs to review its processes and the factual situation and determine how to best address this compliance issue for its plan.

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