



Don't Omit COBRA Rules if You Have a Retiree-only Health Plan

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February 13, 2013 — Employers that maintain “retiree only” group health plans breathed a sigh of relief upon learning that many health reform mandates don’t apply to such plans. But they gasp when they find out that COBRA’s coverage requirements *do apply* to the plans, which have no active employees. This column explains why, and the administrative issues you should consider.

Why Does COBRA Apply and Not Some Reform Rules?

As noted above, several health reform mandates otherwise applicable to group health plans (for example, annual and lifetime limits, coverage for children up to age 26, etc.) do not apply to retiree-only group health plans. The reason: The key reform coverage mandates only apply to plans that cover two or more *current* employees.

Retiree-only health plans are still subject to COBRA’s requirements, however, because COBRA does not include a specific exception for such plans, even when they are separate from an active employee plan. Instead, from a COBRA perspective, the key issue is whether there is (a) a group health plan, (b) maintained by, (c) an employer.

A **group health plan** is a plan (including a self-insured plan) of, or contributed to by, an employer or employee organization to provide health care (directly or otherwise) to the employees, former employees or others associated or formerly associated with the employer in a business relationship, or their families.

A **group health plan** is “*maintained*” by an employer for COBRA purposes — even if the employer does not contribute to it — as long as plan coverage would not be available at the same cost to an individual but for his or her employment-related connection to the employer.

Therefore, the COBRA rules and definitions are broad enough to include retiree-only group health plans within their purview. However, so you can further understand what it means to say that such plans are subject to COBRA, I’ll explain how retirees typically become covered by these plans.

Basic Coverage Scenarios

Sometimes, retiree health coverage is a full continuation of the active-employee health coverage into retirement. It is important to know that retirement is simply *not a qualifying event* for COBRA purposes if there is:

- change in the coverage terms;
- no separate election required;
- no change in a required premium contribution; and
- no other loss of plan coverage.

Nevertheless, other events, such as a retiree’s death, divorce or legal separation, or a child losing dependent status could be qualifying events if they would cause a loss of coverage under the group health plan.

Most typically, though, there is a change in the coverage terms (such as the ability to add new dependents or other coverage limitations), or retirees must make a separate election for retiree health coverage or must pay an increased premium for such coverage. When this happens, the retirement is a loss of coverage under the active employee group health plan. Certainly, if the retiree-only plan is established as a separate plan, the loss of coverage under the active-employee plan would constitute a qualifying event under that active plan.

Change Means Offering Choice

In cases where there is a change in the coverage terms, the retirement is a qualifying event (that is, a loss of coverage under the active group health plan). Therefore, employers should be offering retirees a choice between:

1. continuing COBRA coverage under the active plan (subject to the 18-month limit on COBRA coverage and possible multiple qualifying event extensions); or
2. continued coverage under the retiree health plan as an alternative to COBRA coverage.

Often, the retiree health coverage is a promise of “lifetime” coverage. So the COBRA choice in that case would mean a choice between 18 months of COBRA coverage (coverage that is identical to the active employee health coverage) or coverage under the retiree health plan subject to its terms for lifetime coverage.

Separate Election Rights Still Apply

Remember that each qualified beneficiary will have a separate right to elect COBRA coverage. This does not mean that a covered retiree’s spouse and/or dependent children must be given a separate right to elect retiree health coverage. The retiree plan alternative could be designed so that it is only available for the covered retiree, who can then add a spouse and/or dependent children. Nevertheless, in all cases, a loss of coverage under the active health plan triggers a COBRA right for *all affected qualified beneficiaries*.

Future Qualifying Events Still Apply

If a covered retiree elects to be covered under the retiree plan and is covered along with a spouse and/or dependent children, then that plan/alternative coverage is subject to COBRA for future qualifying events. This means if a covered retiree dies or is divorced, and that event causes a loss of coverage, that triggers a COBRA obligation for the retiree plan. In some instances, this may not be a difficult issue. For example, some retiree health plans allow a surviving spouse to continue coverage for his or her lifetime after the a covered retiree’s death. In other cases, however, this COBRA right might extend the retiree health coverage for divorced spouses or dependent children longer than otherwise anticipated.

Bankruptcy Adds Complexity

In considering the interplay of retiree health coverage and COBRA coverage, there are a few other rules to consider when a bankruptcy is involved.

COBRA has special rules that apply to retiree health benefits in the event of an employer’s bankruptcy reorganization. As explained in ¶1125 of *Mandated Health Benefits — The COBRA Guide*, an employer’s Chapter 11 bankruptcy proceeding that, but for COBRA’s coverage requirements, results in a loss of coverage for a retired employee (or his or her spouse, dependent child, or surviving spouse) is a COBRA qualifying event.

A loss of coverage for purposes of the bankruptcy rules includes a substantial elimination of coverage within one year before or after the date the bankruptcy proceeding commences.

If COBRA coverage is elected in the context of a bankruptcy qualifying event, it must extend until: (1) the date the retired employee dies (lifetime COBRA coverage); or (2) for a spouse, surviving spouse or dependent child, the date that individual dies or the date 36 months after the retiree dies, whichever is earlier. This extended COBRA coverage may be cut off if: (1) the retiree or dependent first becomes entitled to other group health plan coverage after the date of the election; or (2) the bankrupt employer terminates all its group health plans. However, unlike other COBRA situations, the extended COBRA coverage due to the bankruptcy qualifying event may not be terminated when the retiree or dependent first becomes entitled to Medicare.

When a bankruptcy proceeding is under way and the employer maintains a retiree group health plan, careful planning is required to ensure compliance with these special COBRA bankruptcy rules.

Conclusion

Designing or changing a retiree-only health plan is not always easy given all the cost and other legal considerations involved. However, employers should remember the basic rule: COBRA coverage applies to retiree-only health plans, so that principle should be considered in any type of design change.

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