



Finding and Fixing Errors Through A COBRA Compliance Review

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September 29, 2011 — More and more employers and administrators are focusing on COBRA compliance issues, particularly in light of the relatively new rules governing the COBRA excise tax. Under these rules, as explained more fully in ¶1511 of the *Guide*, the COBRA excise tax is enforced through a self-reporting approach. Among the principles governing the COBRA excise tax system are rules that do not impose a tax during any period for which the responsible party did not know, or exercising reasonable diligence would not have known, that the failure existed. Also, once a violation is discovered, no excise tax is imposed if the error was due to reasonable cause and not willful neglect and it is corrected within 30 days.

In light of these principles, employers and administrators are well-advised to conduct COBRA compliance reviews. There are many reasons to conduct such a review. For example:

- Conducting a regular review can help demonstrate that the plan administrator acted diligently in trying to comply with COBRA's requirements.
- By finding errors through a COBRA compliance review, an administrator can find errors that might need to be corrected and fix them before they become something more serious. In this regard, COBRA's legislative history indicates that one factor to be considered by the IRS in assessing or waiving excise tax penalties is the extent to which an employer's COBRA procedures are reviewed and updated periodically with the assistance of independent outside experts. In litigated cases as well, courts have looked at the extent of an employer's compliance with established COBRA procedures in deciding whether to mitigate ERISA late notice penalties.
- It is much easier to detect and fix any administration problems if they are found on your own before they are raised by a plaintiff's lawyer or the government.

Reviewing the Documentation

In conducting a compliance review, various approaches could be taken. The first, most basic type of review involves a review of all COBRA-related documentation. Specifically, this would mean a review of the relevant documentation for each "group health plan" subject to COBRA. The focus is on the extent to which the documents are consistent and accurate in describing COBRA's various rights and responsibilities. The types of documents to review include:

- the plan;
- the summary plan description (SPD);
- administrative manuals;
- COBRA notices (including the general notice as well as qualifying event notices);
- COBRA election forms and payment coupons; and
- any other letters, memos or communications used to train administrators or advise qualified beneficiaries of their rights.

Of course, this review of documentation presumes that the reviewer has identified all of the possible group health plans subject to the COBRA review, including general indemnity-type medical, dental and vision plans

as well as flexible spending accounts, health reimbursement accounts and other less commonly reviewed plans like employee assistance programs and certain on-site clinics.

Reviewing the Administrator

A second level of review would be to conduct one or more interviews with the individuals who actually administer COBRA. This would consist of questioning the administrator concerning all aspects of COBRA compliance. It is possible to do a review based on interviews alone; however, to be most effective, the interviews should be conducted only after at least a preliminary review of some basic COBRA documentation. Ideally, interviews should be conducted in person. It is also helpful to have all the interviewees in the same room. There are often some real benefits to having all the responsible individuals discuss COBRA administration collectively to make sure that they are all on the same page, as it were, with COBRA administration.

Conducting Training

A third level of review is a more general approach of conducting a COBRA seminar or training workshop for administrative personnel. The training should be conducted by experienced COBRA advisors. The advantage of this type of training seminar over more general COBRA compliance seminars is that it could be tailored to the specific needs of the employer or administrator. In fact, the training could be conducted after a review of the relevant COBRA documentation and procedures so that it can be more focused on the employer's actual plan administration and COBRA processes.

Items to Consider

In conducting any of these levels of review, following are a few of the specific items that should be considered:

Documentation Issues

1. Check your COBRA notices.
 - Have they been updated for the most recent guidance, including U.S. Department of Labor (DOL) regulations for COBRA notices?
 - Do your notices make sense in light of the plan subject to COBRA? For example, if you maintain a health FSA that is subject to the exceptions for COBRA coverage, have your COBRA notices been modified to reflect the more limited coverage for health FSAs?
 - Do you include all appropriate administrative rules and requirements for COBRA compliance? Remember that COBRA notices not only explain qualified beneficiaries' rights; they explain their obligations. Properly drafted notices will inform qualified beneficiaries in clear terms what their election and payment due dates are and the consequences of late elections and/or payment. Are all of your COBRA election and premium payment deadlines clear?
2. Check your plan and SPD language.
 - Do you even have a group health plan document? If not, or if you don't know, it is time to call a lawyer before a plaintiff's lawyer (or DOL) calls you first. There are many ways to draft a plan document, including what is known as a "wrap" document — one that wraps around various insurance policies or booklets. But there is no way to avoid the need to have a plan document.
 - Do you have an official SPD? I'm not talking about those nice little booklets provided by insurance companies that describe benefits under your group health plan. These booklets usually do a good job of describing benefits available under the plan. However, they are not typically tailored for individual employers. These booklets often are not official SPDs and need to be reviewed for legal compliance.
 - By the way, these documents often say something like: "If there is any discrepancy between this document and the legal plan document, the legal plan document controls." If you have a benefits summary or booklet that says something like this, you probably want to re-read the

paragraph above about the lack of a plan document. Do you really want a summary document pointing to a "legal plan document" that does not exist?

- When is the last time anyone in your administrative or human resources area actually read the plan and/or SPD and, specifically, the COBRA language? Are you sure the legally required language is correct and up to date? Part of your ERISA fiduciary responsibilities is to administer the plan in accordance with its actual written terms — not in accordance with what you think the terms are or what you were told the terms are. To avoid breaching that duty, it is a good idea to actually read those documents and make sure administration is consistent with the documents.

Administration Issues

Here are some basic administrative problems that need to be reviewed and likely corrected:

1. ***Are employees told about COBRA in exit interviews?*** If so, that's usually a bad idea. Let your COBRA notices do the talking, not your administrators. Often, administrators will say the wrong thing to a qualified beneficiary and over-promise what type of COBRA coverage is available.
2. ***Who in your organization (or at your third-party administrator or insurer) is responsible for which aspect of COBRA administration?*** In particular, who is responsible for sending COBRA notices on time and who is responsible for keeping the records (including postmarked envelopes) proving compliance? If you don't know, don't be surprised if you are penalized in litigation for failure to deliver timely COBRA notices.
3. ***How are claims handled during a COBRA election period, pending the qualified beneficiary's election and payment for coverage?*** What are hospitals and doctors told when they call to confirm coverage and a qualified beneficiary has not elected or paid for COBRA coverage? The regulations require a specific type of message to be delivered. Do you know what it is and who is instructed on how to deliver that message?
4. ***How do you deal with COBRA coverage and open enrollment issues?*** COBRA qualified beneficiaries have open enrollment rights and need to be told of their rights. Do qualified beneficiaries (and potential qualified beneficiaries) receive appropriate information about COBRA coverage during open enrollment?
5. ***What if you change or add a group health plan to your plan's coverage lineup?*** Do you anticipate coverage for existing qualified beneficiaries? What about potential qualified beneficiaries (those who are in the middle of an election period)?

These are just a few of the basic practical requirements of COBRA administration that are often overlooked. If any of these issues look familiar to you or if you don't know how to respond to any of these issues, it is time to conduct a basic COBRA compliance review and fix your administration.

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