THOMPSON'S
HR COMPLIANCE EXPERT
Analysis • Assurance • Solutions

Practical Issues in Administering COBRA in Divorce and Spousal Coverage Situations

Paul M. Hamburger

July 29, 2011 — Several questions have arisen recently on administering COBRA in divorce and other marital coverage situations. In part this has been a byproduct of group health plan administrators trying to clean up their eligibility rolls as they comply with health care reform. Many plans have conducted dependent audits to make sure that only those individuals who are really entitled to coverage are actually covered. The following scenarios are actual cases that health plan administrators have encountered.

Spousal Coverage Changes

Before addressing divorce cases, consider the plan administrator that found out about spouses who were obtaining coverage under the plan that they were not entitled to. Here's the scenario:

A group health plan subject to COBRA provides spousal coverage. However, only spouses who do not have group health coverage elsewhere are allowed to obtain coverage under the employer's group health plan. Employees must certify their spouses have no other coverage and must inform the plan administrator if that status changes. An employee complies with the rule and provides notice to the plan administrator that a formerly covered spouse is now no longer eligible because she has coverage through her employer.
The group health plan is going to drop the spouse from coverage. But is it a COBRA qualifying event? No, and here's why.

Under COBRA rules, a qualifying event occurs when one of the listed events causes a loss of group health plan coverage. Regarding covered spouses, a loss of coverage must be triggered by one of the events such as: a termination or reduction of hours of employment, the employee's death, a divorce or legal separation from the covered employee or the employee's Medicare entitlement. Loss of eligibility for the coverage on its own does not trigger a COBRA coverage obligation.

Interestingly, a loss of dependent child status under the group health plan *does* trigger a COBRA coverage obligation as a qualifying event. However, loss of spousal status does not.

Could a plan go beyond COBRA and voluntarily offer COBRA-like coverage under circumstances where COBRA is not required? Generally, yes. Plans can always be more generous than what COBRA requires if they are amended to so provide. However, doing so can create some additional costs for the health plan. In this regard, note that the fact that the affected individuals would be required to pay the full COBRA cost of coverage does not necessarily mean that the plan will recoup its true costs. Often, those paying the full cost of coverage expect to have expenses in excess of the premium cost. The plan would be on the hook for those expenses.

So before just offering COBRA-like coverage where it is not required, check the plan —is that coverage allowed? If so, make sure as a design matter that this type of coverage and expense is something desirable.

Divorce and COBRA Coverage

Consider the case of an employee who continues to cover his ex-spouse under a group health plan (otherwise subject to COBRA) after a divorce. This occurred because the divorce order required the employee to provide coverage for the ex-spouse. Although the employee could have reported the divorce to the group health plan as a qualifying event within 60 days of the divorce, he failed to do so. This is probably because the employee figured that it was cheaper to cover the ex-spouse by paying a spousal premium instead of the full COBRA premium. In any case, after the ex-spouse had been covered for six months incorrectly, the employee terminated employment and questions arose as to the ex-spouse's status.

Due to the termination of employment, the employee clearly had COBRA rights. However, what about the ex-spouse who was then covered? The qualifying event (divorce) occurred six months earlier. Ordinarily, that would have entitled the ex-spouse to up to 36 months of coverage. However, there was no proper and timely notice of the divorce to the plan administrator. Thus, the following questions arose: Does the ex-spouse get any COBRA rights on account of the employee's termination of employment? Does the fact that the ex-spouse lost coverage before the end of 36 months from the date of divorce mean that the ex-spouse now gets to finish out her COBRA coverage?

The bottom line is that the ex-spouse is probably out of luck going forward and could lose her coverage retroactively to the date of the divorce as well. Here's why.

Upon the employee's termination of employment, the loss of group health coverage would be a qualifying event entitling the employee, and any covered spouse or dependent children, to up to 18 months of COBRA coverage. At the time of the termination of employment, the ex-spouse was not a "spouse" for federal law purposes. The fact that the employee misrepresented her status as a spouse in order to obtain coverage post-divorce does not make her a spouse for this purpose. Therefore, the termination of employment should not give the ex-spouse any COBRA coverage rights.

What about the fact that the divorce occurred? Doesn't that entitle the ex-spouse to any COBRA coverage rights for up to 36 months from the date of divorce, as it would ordinarily? But to become entitled to that coverage, the qualified beneficiary (or someone acting on his or her behalf, like the employee) must notify the plan administrator of the divorce within 60 days. Under the plan terms in question, the divorce caused an immediate loss of coverage as of the divorce date. Therefore, the qualified beneficiary had to tell the plan administrator about that divorce within 60 days. (See sidebar)

In the particular case in question, no notice of the divorce was provided to the group health plan administrator. This means that the ex-spouse was not entitled to any COBRA coverage at all on account of the divorce. The coverage provided to the ex-spouse for six months after the divorce was not appropriately provided and the plan should be able to terminate that coverage.

The Role of Health Reform

What about terminating the coverage retroactively? Doesn't the new health care reform law prohibit rescissions of group health plan coverage?

Generally, as a part of health care reform, the Patient Protection and Affordable Care Act (known simply as the "Affordable Care Act") enacted a rule that prohibits group health plans from rescinding group health plan coverage. Under the "no rescission" rule, a group health plan may not rescind an individual's coverage (that is, terminate that coverage retroactively) except in the case of fraud or the individual's intentional representation of a material fact, as prohibited by the plan terms.

In addition, a group health plan must provide at least 30 days' advance written notice to each individual who would be affected before any coverage may be rescinded (due to fraud or an intentional misrepresentation of material fact). Separately, a group health plan may cancel coverage, even retroactively, if the termination of coverage is due to a failure to pay required premiums or contributions toward the cost of coverage on a timely basis.

In interpreting this no-rescission rule, however, the federal agencies have provided the following guidance:

If a plan does not cover ex-spouses (subject to the COBRA continuation coverage provisions) *and the plan is not notified of a divorce* and the full COBRA premium is not paid by the employee or ex-spouse for coverage, the Departments do not consider a plan's termination of coverage retroactive to the divorce to be a rescission of coverage. (Of course, in such situations COBRA may require coverage to be offered for up to 36 months if the COBRA applicable premium is paid by the qualified beneficiary.)

Given this guidance, it should be permissible to retroactively terminate coverage on account of a divorce if no proper notice of the divorce was provided to the plan administrator.

A Few Important Tips

Before retroactively terminating coverage due to a divorce, plan administrators should be sure to review their administrative practices for the following key issues.

1. **Does the Plan Administrator Provide a General Notice of COBRA Rights When Employees and Spouses First Become Covered by a Group Health Plan?**

   Under COBRA, a general COBRA notice must be provided to employees *and* spouses when they first become covered by a group health plan. This general notice is provided at the time of the initial coverage in order to inform the employee and spouse of their rights if a future qualifying event (like a divorce) occurs. In particular, that general notice will explain to the spouse that if a divorce occurs, notice of the event needs to be provided to the plan administrator within 60 days of the divorce in order to take advantage of COBRA rights due to the divorce.

   If a plan administrator fails to provide the general notice to a covered spouse in a timely manner, and a divorce later occurs, the divorced spouse may not know to give the COBRA notice within 60 days of the divorce. If the notice is not provided on time, the plan administrator might then argue that no COBRA coverage needs to be provided because the spouse did not provide notice of the qualifying event within 60 days. However, the divorced spouse may respond to that defense by arguing that he or she did not know of the requirement to provide notice within that time. After all, the general COBRA notice, which informs the spouse of that notice obligation, had not been given to the spouse when he or she became covered by the group health plan in the first place.
   There is a fundamental principle underlying the COBRA notification rules: It is generally not permissible to penalize a qualified beneficiary for failing to have acted within a particular time if the plan administrator never informed him or her of the period within which to act. Therefore, if a plan administrator never provided the initial COBRA general notice, it will be difficult to claim at some future date that the divorced spouse failed to notify the plan administrator on time of a COBRA qualifying event.

   As is often true in these situations, the question of whether a plan administrator would prevail in a given situation is not the key issue. Rather, the important point is to realize that the controversy and potential litigation generated by the failure to provide the initial general notice is not worth the effort when it can be entirely avoided by simply providing the notice on time.

   Providing Notice of a Divorce
   How are qualified beneficiaries supposed to notify plan administrators of divorce? Is there a form to do so? Is there a specific person/committee to notify?

   COBRA notice regulations from the U.S. Department of Labor allow group health plans to impose reasonable notification procedures as a condition to proper COBRA notification. So a group health plan could require that notice be provided on a particular form or to a particular department in the human resources area.

However, for these procedures to be enforceable, they have to be communicated to qualified beneficiaries. In particular, the COBRA general notice that is provided when employees and covered spouses first become covered by a group health plan is a proper place to provide those instructions.

2. **Are You (the Plan Administrator) Sure That Neither the Employee nor the Qualified Beneficiary Provided Notice of the Divorce Within 60 Days?**

   Suppose the plan administrator otherwise knows of a divorce within the COBRA 60-day notice period. For example, the plan administrator may have learned this information when an employee changed his or her W-2 withholding or submitted a qualified domestic relations order regarding a qualified pension or 401(k) plan. Does that knowledge of the divorce mean that the plan administrator has to send a COBRA notice? Or can the plan administrator avoid giving COBRA notices until a formal notice of the divorce arrives from the qualified beneficiary?

   In one reported decision, *Ludwig v. Carpenters Health & Welfare Fund of Philadelphia and Vicinity*, see ¶1900, an employer/plan administrator's awareness of a "pending divorce" did not negate a qualified beneficiary's need to provide notice of the actual qualifying event when the divorce was finalized, and the ex-spouse's failure to do so on a timely basis negated her COBRA rights. However, that case involved knowledge of divorce proceedings and not whether the actual divorce occurred.

Generally, it may make sense for plan administrators to act on specific information informing them of a divorce and actually provide appropriate COBRA notices. Of course, this assumes that the plan administrator has notice of an actual divorce, not just divorce proceedings. (Even if the administrator knows of divorce proceedings, it is a good idea to keep an eye on the situation to find out when the actual divorce occurs.) There are two key reasons for this advice:

1. **Under ERISA, the plan administrator owes a fiduciary duty to ensure that participants and beneficiaries (including qualified beneficiaries) are provided with all the appropriate information about plan benefits.** When the plan administrator is aware of a COBRA qualifying event and fails to give an appropriate COBRA notice, a court may not look favorably upon the plan administrator asserting a defense that the qualified beneficiary did not inform the plan administrator of something it already knew.
2. **Under COBRA, if the qualifying event notice is provided, the qualified beneficiary would have 60 days to elect COBRA coverage or lose his or her right to elect the coverage.** If the plan administrator waits for the qualified beneficiary to notify the plan of the event, he or she could wait up to 60 days and then get another 60 days for the COBRA election. This is a full 120 days of an "adverse selection" window of opportunity where the individual could wait to see if the COBRA election makes sense based on actual claims incurred. By starting the "clock" running on the COBRA notice timeline, the plan administrator may reduce the plan's exposure to any adverse selection risk due to an extended election.

   In addition to this general operational advice, plan administrators also should establish proper notice procedures for how qualified beneficiaries are to notify plan administrators of a divorce. As indicated in the sidebar, these procedures can help mitigate the extent to which individuals claim that inadvertent notice of the divorce to the plan administrator triggers actual COBRA notification obligations.

These administrative issues illustrate how important it is to make sure that plan administrators consider how they administer divorce situations under COBRA. With a few proper basic steps, plan administrators can effectively manage the potential liability issues that arise when divorce is an issue.

Paul M. Hamburger, Esq., is a partner in the Washington, D.C., office of the law firm Proskauer Rose LLP. He is a member of Thompson's Health Plan Advisory Board, and is author and contributing editor of the COBRA Guide, *the* Pension Plan Fix-It Handbook *and the* Guide to Assigning and Loaning Benefit Plan Money, *all published by Thompson Publishing Group.*

____

For more information on Thompson's HR Compliance Expert | Employee Benefits Solutions*, click [here](). A free [14-day trial]() to our digital research library also is available to interested parties.*