



Understanding Qualified Events and Alternative Coverage

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April 29, 2011 — Under COBRA, a qualifying event occurs if there is an event (such as retirement or any other termination of employment) and a "loss" of coverage under a group health plan that is caused by (or results from) that event. When a qualifying event happens, a group health plan has to offer "COBRA continuation coverage." Technically speaking, COBRA coverage is supposed to be identical to the coverage in effect immediately before the qualifying event. In many cases, though, employers offer alternative coverage arrangements to COBRA coverage. For example, in a severance situation, an employer might want to offer employees six months of free continued coverage to help them out for a while.

As explained in ¶1264 of the *Guide*, when alternative coverage is offered, employers need to consider their options carefully. There are basically three ways to offer alternative coverage:

1. a "choice method," where the alternative coverage is an option in lieu of COBRA coverage (choose either COBRA coverage or the alternative);
2. a "consecutive coverage method," where the alternative coverage option is offered at the end of COBRA coverage (COBRA coverage plus the alternative); or
3. a "concurrent coverage method," where the alternative coverage is integrated with COBRA coverage (for example, the offer could be to provide free COBRA coverage for six months followed by 12 months of fully paid coverage).

One issue involving alternative coverage that is not always well-understood involves how to integrate retiree health coverage obligations with COBRA coverage. This article explores the key factors to consider in dealing with retiree health coverage in the COBRA context.

Is Retirement a Qualifying Event?

The first question that arises is whether a qualifying event occurs at all when an active employee retires and becomes eligible for retiree health coverage. The question arises because retirees are typically told that they can remain covered by the active medical plan for an extended period (for example, lifetime coverage). The cost of this coverage is often provided at the same premium cost as active employees or at a cost that is less than the true "COBRA cost" of coverage. If a retiring employee is allowed to remain in the active employees' group health plan (or a plan just like it), then, the argument goes, there should be no loss of plan coverage and no qualifying event for COBRA purposes.

This common argument for the interplay between retiree health coverage and COBRA coverage is typically not correct. To understand, we need to review the basic structure of what it means to have a "qualifying event" for COBRA purposes.

COBRA rules provide that a qualifying event consists of two things: (1) an event and (2) a loss of coverage under a group health plan that is triggered by that event and that occurs before the end of what would otherwise be the maximum COBRA coverage period. Clearly, retirement is a termination of employment and qualifies as one of the listed events. So the real question is to understand what it means to "lose" coverage under a group health plan.

According to the COBRA regulations, to "lose" coverage means "to cease to be covered under *the same terms and conditions* as in effect immediately before the qualifying event. Any increase in the premium or contribution that must be paid by a covered employee (or the spouse or dependent child of a covered employee) for coverage under a group health plan that results from the occurrence of one of the [listed events] is a loss of coverage." Also, when a qualifying event occurs and an alternative coverage option is made

available to qualified beneficiaries, if the alternative continuation coverage differs "*in any way*" from the coverage made available to similarly situated nonCOBRA beneficiaries, the alternative coverage offered does not constitute COBRA coverage. Therefore, "the group health plan is not in compliance with COBRA unless other coverage that does constitute COBRA continuation coverage is also offered."

These principles are illustrated in one of the examples in the COBRA regulations related to retiree health plans. The example provides:

(i) An employer maintains a group health plan for both active employees and retired employees (and their families). The coverage for active employees and retired employees is identical, and the employer does not require retirees to pay more for coverage than active employees. The plan does not make COBRA continuation coverage available when an employee retires (and is not required to because the retired employee has not lost coverage under the plan). The employer amends the plan to eliminate coverage for retired employees effective January 1, 2002. On that date, several retired employees (and their spouses and dependent children) have been covered under the plan since their retirement for less than the maximum coverage period that would apply to them in connection with their retirement.

(ii) The elimination of retiree coverage under these circumstances is a deferred loss of coverage for those retirees (and their spouses and dependent children) under paragraph (c) of this Q&A-1 and, thus, the retirement is a qualifying event. The plan must make COBRA continuation coverage available to them for the balance of the maximum coverage period that applies to them in connection with the retirement.

The significance of this example is that the IRS indicated that COBRA coverage was not required to be offered at retirement because the coverage for active and retired employees under the same group health plan was "identical" and the employer did not require that retirees pay more for that coverage than active employees. In other words, three factors indicated no qualifying event occurred at retirement: (1) the retiree coverage was under the same group health plan; (2) the retiree coverage provided was identical to the active employee coverage; and (3) the retirees were not required to pay any more for the coverage than active employees.

Court Cases Follow Regulatory Approach

There have not been a lot of COBRA cases dealing with the interplay between active and retiree health plans; however, those that do seem to follow the regulatory approach. For example, in *Phillips v. Wythe County Community Hospital* (see ¶1900, Case No. 720), retirees were offered retiree coverage. In this case, the court found that the differences in benefits were significant in that retirees had different deductibles, out-of-pocket limits and co-payments than active employees. Although the plaintiffs received gratuitous health coverage through their retirement packages, the court noted that they correctly contended they were entitled to notification of their COBRA rights upon retirement because their retiree coverage was not identical to the coverage they had been receiving previously as employees.

In another context, a federal district court in Illinois found that a loss of coverage occurred when a retiring employee had to take additional action to continue coverage. (See *Mansfield v. The Chicago Park Dist. Group Plan*, ¶1900, Case Nos. 266 and 317.) The court stated that:

If a retiring employee automatically continues to receive the same medical coverage he or she had before retirement, no qualifying event occurs. However, if the health plan requires any action by the employee to continue this coverage, and without this action the employee's coverage would terminate, then retirement is a qualifying event and the employer must give its retiring employee COBRA notice.

In applying this guidance to typical retiree group health plan arrangements, the following three rules are applicable: (1) changes in coverage; (2) increase in premium; and (3) retiree coverage under separate group health plan.

Changes in Coverage

First, if coverage under a retiree health plan changes at all from the coverage for active employees that was in effect before retirement, COBRA notices should be provided and the retirees should be offered a choice between: (1) electing COBRA coverage under the active group health plan with its exact same terms and conditions; or (2) continuing retiree coverage under the terms for retiree coverage. Examples of typical differences between COBRA coverage and typical retiree coverage include:

1. Requiring retirees to apply for retiree health coverage within a period that is shorter than the normal 60-day COBRA election period.
2. Changing or re-starting copayment, coinsurance or deductible amounts for retirees.
3. Limiting the number or identity of dependents (such as spouses or children) who can be covered under the retiree health coverage, when limits did not exist for active employees. For example, divorced retirees might not be allowed to add new spouses, or divorced spouses might not be allowed to continue retiree health

coverage. (Note, though, that even if a retiree chooses retiree coverage with its limitations over COBRA coverage, if a divorce under the retiree coverage causes a loss of retiree coverage for the divorced spouse, that event is still a qualifying event from the date of divorce.)

4. Reducing retiree coverage due to Medicare coverage being available, whether or not the retiree chooses to enroll in Medicare (note that COBRA coverage could be terminated upon actual enrollment in Medicare after a COBRA election; but if the qualified beneficiary is only eligible for and not enrolled in Medicare, COBRA coverage cannot be reduced).

If any differences in coverage exist under the retiree health coverage from that in effect for active employees, COBRA coverage should be offered.

Increase in Premium

If coverage under the retiree health plan costs more than active employee coverage, a qualifying event will have occurred at retirement and COBRA coverage should be offered. This is true even if the retiree coverage is otherwise identical to COBRA coverage as a substantive coverage matter:

Example. Assume COBRA coverage costs \$102 per month and active employee coverage costs \$50 per month. If retiree health coverage (which is otherwise identical to active employee coverage) costs \$75 per month, a qualifying event has occurred at retirement and COBRA coverage needs to be offered.

Why is this a qualifying event? After all, the COBRA coverage would cost more than the retiree coverage and the substantive coverage rights are exactly the same.

The reason is that COBRA provides not only coverage opportunities for qualified beneficiaries but also important procedural protections. For example, COBRA qualified beneficiaries have a 60-day election period to decide whether to elect COBRA coverage. Also, qualified beneficiaries have the right to not pay the first premium for coverage until 45 days after the COBRA election date and then they have a 30-day grace period for regular monthly premiums. The regulatory concern is that if a plan did not treat the increase in premium as a qualifying event for COBRA purposes, the plan might then deny the qualified beneficiaries these important procedural protections.

Retiree Coverage Under Separate Group Health Plan

If retiree coverage is a separate group health plan for COBRA purposes from the active group health plan, COBRA notices should be provided from the active plan, even if the coverage under the separate retiree plan is otherwise identical to the active plan and retirees are not charged any more for it. The reason is that COBRA is administered on a "plan-by-plan" basis. If the active plan is a separate group health plan from the retiree plan, then, upon retirement, retirees lose coverage under that active plan.

To be cautious, a COBRA notice should be provided in that instance. (Of course, it is not likely that anyone would elect COBRA coverage in such a case; but to avoid penalties, it is prudent to provide the notice.) Note also that the separate retiree group health plan will have to provide the covered employee (and spouse if any) with a new general initial COBRA notice once they become covered under that separate plan. Furthermore, the active group health plan will have to provide a HIPAA certificate of creditable coverage on account of the loss of coverage under that separate group health plan.

Other Issues Should Be Evaluated

Aside from these substantive COBRA rights, several administrative issues need to be addressed in considering the interplay between COBRA and retiree health coverage; particularly when that coverage is offered under separate group health plans. These include various notice requirements as well as premium payment administrative rules. This article summarizes only whether COBRA coverage must be offered in connection with an offer of retiree health coverage. Employers and plan administrators should evaluate these issues carefully with the assistance of experienced benefits counsel.

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