COBRA Compliance

Top Issues for Employers

The business of employee benefits seems to get more complicated with every passing open enrollment season. For better or worse, healthcare reform has accelerated the number of new rules and regulations that have to be understood and communicated to employers and employees each year. However, with all the new rules and regulations, fundamental and long-standing requirements still need to be addressed.

For instance, almost all employer groups must comply with COBRA rules. Some smaller groups may administer COBRA themselves, but many employers take advantage of the expertise of a third party administrator (TPA) to administer their COBRA. Administering COBRA, in house, may seem like a good idea for smaller employers, but it often turns out to be penny wise and pound foolish since COBRA can be very complex. If not done in accordance with various mandates, it could lead to IRS excise taxes and ERISA statutory fines. Employers could pay as much as $500,000 or 10% of an employer’s health plan costs the prior year based on the severity of the compliance issues involved.

Here are the top issues we see employers run into with COBRA administration and tips on how to manage them.

**COBRA Does Not Apply to My Company**

Perhaps the most fundamental issue with COBRA is whether it applies to your client. Federal COBRA applies to all companies with more than 20 employees, but it’s not as easy as it sounds. Even if your client does not have 20 employees today, they could be subject to federal COBRA if they had more than 20 employees on more than half the business days the previous calendar year.

COBRA applies to state and local government employees, as well as full- and part-time employees. Part-time employees count as a percentage of a full-time employee based on average hours worked per week. If 40 hours is considered fulltime, a part-time employee who averages 20 hours per week counts as half of a full-time employee. Full- and part-time employees of companies under common ownership may count towards the calculation of whether or not COBRA applies.

Cal COBRA is a California state law that’s similar to federal COBRA, but applies to smaller employer groups (two to 19 lives) and allows up to 36 months of coverage. A qualified beneficiary can apply for Cal COBRA for an additional 18 months after federal COBRA has ended. Cal COBRA is administered by insur-
ance carriers; the carriers may charge up to 110% of the health plan premium.

**COBRA Does Not Apply to My Health Plan**

Once it has been determined that COBRA applies to your client, you must determine which health plans are COBRA eligible. COBRA applies to all employer-sponsored health plans that provide medical care to employees and their dependents. Most medical, dental, and vision plans are COBRA eligible. Flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), and employee-assistance programs (EAPs) are eligible if they provide medical care. COBRA does not apply to plans that do not provide medical coverage, such as group term life, short-term disability, long-term care, AD&D, and an EAP that does not provide any medical coverage. An employer-sponsored plan that meets the above criteria and is offered to active employees, must also be offered to COBRA eligible employees or qualified beneficiaries.

**Who Gets COBRA and When?**

To be COBRA eligible, an employee must be covered under employer-sponsored benefits the day before a qualifying event. Examples of a qualifying event are the death of an employee, termination, reduction in hours, divorce or legal separation, Medicare eligibility, or loss of dependent child status. Each of these qualifying events may affect the employee, their spouse, or dependents. It is very important to know who is COBRA eligible and under which circumstances. In many ways, not offering COBRA to an eligible qualified beneficiary is just as bad as offering COBRA to an employee who is not COBRA eligible.

**Domestic Partnerships and COBRA**

Only covered employees, federally recognized spouses, and dependent children are considered qualified beneficiaries with independent COBRA rights, even if the state of residence recognizes same sex domestic partnerships (see Federal Defense of Marriage Act). However, an employer may choose to be more liberal and, with carrier approval, offer COBRA coverage to an employee’s domestic partner. If COBRA benefits are extended to a domestic partner, that person should have the same rights as an active employee’s domestic partner (similarly situated person). If a domestic partner’s children are covered under an employee’s health plan, they should be considered qualified beneficiaries in connection with a qualifying event.

**Not Playing by the Rules**

An employer or TPA must follow COBRA procedures as mandated by COBRA guidelines. Not following procedures could put a plan out of compliance and result in errors regarding which qualified beneficiaries are offered COBRA and for how long. A COBRA plan must have reasonable documented procedures for active and former employees to inform the employer or plan administrator about a qualifying event, a second qualifying event (if applicable), or Social Security Administration (SSA) determinations. For a procedure to

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**NOW IS THE TIME TO MOVE COBRA. STERLING HSA IS THE PLACE.**

Did you know that a good time to move COBRA is “off anniversary” because the transition is seamless and there is no disruption?

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- Bundled fees represent all costs to the employer for standard services, making it easy to plan and budget.
- There are no set-up fees, monthly fees, or minimums.
- Services include installation and set-up, qualifying event, ongoing administrative, and open enrollment support.
- Standard and optional services are available to deliver the best program for your clients.

We also offer robust, easy-to-use online tools for employers and qualified beneficiaries to access reports and manage COBRA accounts.

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be considered reasonable, it must be described in a summary plan description, define who should be notified, and how the notification should be provided. The summary plan description should define the content of the notice as well as any mandated time frame to deliver the notice. Finally, procedures should be established about what to do in the event of an incomplete notice.

**Giving Qualified Beneficiaries Bad Information**

It is not enough to simply give a qualified beneficiary the right COBRA notice at the right time. Required COBRA notices must also contain all the information mandated by COBRA notice guidelines issued 1/1/2005.

**Leaving Qualified Beneficiaries In the Dark**

COBRA general notice rules mandate that an employer or TPA (upon notification by an employee of a qualifying event) is required to provide qualified beneficiaries and their dependents with COBRA eligible plan information. This COBRA information must conform to guidelines issued 1/1/2005 regarding the content of COBRA notices. Some other mandated COBRA notices include a general (initial) COBRA notice, COBRA election notice, notice of unavailability, notice of early termination and employer notice of qualifying event.

**Not Providing Enough Coverage**

A qualified beneficiary must be given the same coverage options as other similarly situated individuals. This coverage must be the same coverage as provided before the qualified beneficiary’s qualifying event. It cannot be reduced for a qualified beneficiary or other plan participants. Plan change times are only allowed during the employer group’s open enrollment season.

**Charging the Wrong Thing**

A plan administrator may charge up to 102% of the COBRA eligible plan premium before the qualifying event. This premium includes former employer contributions, employee contributions, and the cost to administer the plan. A plan administrator may charge up to 150% of COBRA eligible plan premium for qualified beneficiaries with a disability extension. For self-insured groups, COBRA premiums can be based on past cost or an actuarial determination of future costs.

A plan administrator must provide a qualified beneficiary with COBRA premium costs in advance for the 12-month determination period. A determination period is essentially the group’s health plan year. Premiums may be changed for a new determination period (plan year) or if the applicable health plan premium changes outside of renewal.

“The maximum any employer could be taxed in a given year is $500,000 or ten percent of the health plan costs in the previous year, whichever is less.”

**Insufficient Documentation**

COBRA administration can be complicated due to the various rules and requirements about who should be notified of what, when they should be notified, and the requirements for the information provided in the COBRA notifications. Keeping complete and accurate documentation throughout the COBRA process is essential and can help an employer avoid many potential compliance issues. An employer or TPA should keep records of all notices sent to and received from qualified beneficiaries, as well as track all premium payments made by qualified beneficiaries to insurers.

**Timing Is Everything**

Successful COBRA administration is all about timing. Providing the correct length of COBRA coverage based on a specific qualifying event is important. Qualified beneficiaries may want a longer COBRA coverage period while employers may want to provide a shorter COBRA coverage period to minimize their potential exposure to claims. The length of COBRA coverage is determined by mandate. Termination of employment or a reduction in hours allows for 18 months of COBRA coverage while most other qualifying events provide 36 months of COBRA coverage. In some situations, COBRA coverage may be extended or terminated early. Some examples of extended coverage would be disability, a second qualifying event, or Medicare entitlement. Some examples of a shorter COBRA coverage period would be failure by the qualified beneficiary to pay premiums, employer discontinuation of health coverage, the qualified beneficiary becomes covered by another group health plan, or a disabled qualified beneficiary is determined to be no longer disabled. Whenever COBRA is terminated before the maximum coverage period, a notice must be given to the qualified beneficiary.

**Penalties**

Both employers and plan administrators are subject to tax penalties for failing to properly comply with federally mandated COBRA procedures for COBRA administration. The excise tax penalty is $100 per day for non-compliance and can increase to $200 per day if more than one qualified beneficiary is affected by the same violation. Penalties increase to as much as $2,500 for each qualified beneficiary affected by failing to comply, or a total amount based on the length of the non-compliance period, whichever is less. And if the IRS finds a violation it considers to be more than just minimal, employers may be subject to a penalty up to $15,000. The maximum any employer could be taxed in a given year is $500,000 or ten percent of the health plan costs in the previous year, whichever is less.

Darrell Perkins is vice president of Sales in Northern California for Sterling Health Services Administration. Sterling is an Oakland, CA-based company and a leading independent administrator of health savings accounts (HSA), health reimbursement arrangements (HRA), flexible spending accounts (FSA), premium only plans (POP), COBRA, Form 5500 filing, and level funding and traditional self-insurance. For more information, visit www.sterlingsia.com and www.sterlingsia.com.