

A COBRA Administration Primer

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There are effectively *four* versions of federal COBRA. Only the first—the version for general commerce—is reviewed at length by most COBRA commentators. A second version for state and local governments comes under the Public Health Service Act (PHSA). A third version exists for federal government employees. In addition, a special COBRA-like continuation law exists for those on military service under the Uniformed Services Employment and Reemployment Rights Act (USERRA). While these other versions are generally designed to match the COBRA law for general commerce, they are not identical in all instances. (*For example, The Centers for Medicare & Medicaid Services in March, 2004, clarified that COBRA under PHSA does not pre-empt state and local laws, since state and local government plans do not qualify for the ERISA pre-emption.*)

Department of Labor’s Expectation on COBRA Compliance

THE DEPARTMENT OF LABOR MADE THE FOLLOWING SIGNIFICANT STATEMENT IN 2003 (REPEATED IN 2004) REGARDING ITS EXPECTATION OF WHAT EMPLOYERS WILL DO TO COMPLY WITH THEIR COBRA RESPONSIBILITIES:

“The department believes that, because of the expertise required, small plans will use service providers to review notices and to modify or adapt department models for use by the plan administrator. Generally, COBRA service providers offer plans on-going administrative services such as notifying employees about their group health plan continuation coverage, distributing and processing election forms, collecting and applying premium payments and monitoring COBRA compliance.”

WHEN VIEWING THE RISKS RELATED TO IMPROPER COBRA COMPLIANCE, IT IS IMPORTANT TO REMEMBER THE 1983 WARNING OF THE U.S. COURT OF APPEALS (FIFTH CIRCUIT) IN *DONOVAN v. CUNNINGHAM* REGARDING A FIDUCIARY LIABILITY ISSUE:

“a pure heart and an empty head are not enough.”

COBRA was signed into law in 1986, which means that there is more than twenty years of amendments, case law changes, and a general awareness by employees and their attorneys of their rights and the possible penalties for non-compliance. The letters listed below are examples of letters that must be *mailed* out—first class mail—to the last known address of the individual / qualified beneficiary.

—COBRA Letters—

The first letter is required by the Department of Labor and is an important protection for the employer. It is called “**Initial Notice**” (also known as the “General Notice”) and must be mailed out when the person first **joins** the plan. This letter explains the general provisions of COBRA, but more importantly, it officially notifies the employee of his / her obligation to notify the employer of a divorce or child becoming too old to remain on the plan (including the child taking time off from college). *Without this letter, the employer is not deemed to have officially notified the person of his / her obligations under COBRA, which could lead to serious consequences.*

The letters for COBRA/HIPAA administrators to send out in addition to the “Initial Notice” include:

- ◆ Sample cover letter to accompany the “Initial Notice.”
- ◆ “Notice to California Terminating Employees,” which must be sent out to employees who terminate employment. This notice alerts the individual to the fact that Medi-Cal might pay the COBRA premiums for them in certain circumstances. This is the “HIPPA” letter.
- ◆ Sample letter to qualified beneficiaries at the time of the qualifying event.
- ◆ Sample COBRA election form
- ◆ Sample letter to COBRA insureds who are believed to qualify for the disability extension under COBRA to go from 18 to 29 months.
- ◆ Sample letter to COBRA insureds notifying them of their options under the open enrollment of the plan(s).
- ◆ Sample letter to COBRA insureds who are believed to qualify for extended COBRA coverage (usually from 18 to 36 months) due to a second qualifying event having taken place.
- ◆ Sample letter to spouses (and children) who have been removed from the company health plans and who may have COBRA rights.
- ◆ Sample letter to COBRA insureds who are nearing the end of their COBRA coverage and who have conversion rights.
- ◆ Sample Department of Labor letter to notify COBRA continuees of HIPAA changes in 1996
- ◆ Sample HIPAA Certificate of Coverage (i.e., “certification of period of creditable coverage”)
- ◆ Safe Harbor Certification Notice Prior to June 1997
- ◆ Sample letter for a case where an “insignificant underpayment” was made.
- ◆ Sample letter notifying the COBRA insured that his/her COBRA coverage is being cancelled.
- ◆ Sample letter notifying an individual who has applied for COBRA coverage that he/she is not eligible for COBRA.

[During 2009 (and in some cases continued on into 2010), additional letters will be needed due to ARRA, and general COBRA notices will have to be amended to include ARRA language.]

COBRA law relies heavily on *written* instructions and information, with such written instructions mailed first class mail to ensure “receipt.” That is why the above letters are so important. Note: handing out such literature, such as at an exit interview, is NOT sufficient notification, especially a spouse is covered. (Recent COBRA regulations have liberalized this somewhat in the case of employee only coverage, but when a spouse is covered, it is still important to mail the notice.) *The 60-day COBRA election period does not begin until the proper notification letter has been mailed or provided.*

—COBRA Coverage Time Periods—

While much of a proper COBRA compliance program deals with notification issues, another important requirement is the proper tracking of when COBRA begins for a qualified beneficiary and then when it should end, with possible extensions along the way. Here in general are the federal and California state time limits for COBRA:

FEDERAL

Termination or Reduction of Hours:	18 Months [see note below]
Death of the Employee [for dependents]:	36 Months
Disability :	18/29 Months [see note below]
Medicare Entitlement [if loss of coverage results]:	36 Months
Divorce or Legal Separation [for spouse]:	36 Months
Dependent Child Ceases to be Eligible:	36 Months
Chapter 11 Bankruptcy of Employer [for retirees]:	For life of employee, 36 months
beyond that for dependents	

California Law AB 1401

[for benefits after September 1, 2003, and only for those who began receiving COBRA or Cal-COBRA coverage on or after January 1, 2003—and only for “core” coverage, which excludes dental and vision coverage]:

Termination or Reduction of Hours:	36 Months
Death of the Employee [for dependents]:	36 Months
Disability :	36 Months [see note below]
Medicare Entitlement [if loss of coverage results]:	36 Months
Divorce or Legal Separation [for spouse]:	36 Months
Dependent Child Ceases to be Eligible:	36 Months

AB 1401 provides up to 36 months of coverage, which means the special extension of coverage would come after regular COBRA or Cal-COBRA coverage would otherwise end. This is actually an expansion of Cal-COBRA, and as such, any expanded coverage would have a cost not to exceed 110% (150% for the disability extension).

Note: for cases where the individual would qualify for 29 months of coverage under federal COBRA or Cal-COBRA due to a disability approved by the Social Security Administration for disability benefits, the federal COBRA provisions would apply as long as the person remained disabled. If the person were no longer deemed disabled (but beyond 18 months), the federal COBRA would end and the Cal-COBRA under AB 1401 would take over. Thus, in that example, the cost of coverage would drop from 150% to 110%.

Special rules apply in cases of FMLA leaves and a leave under the “Michelle’s Law” for plan years on or after October 9, 2009.

—American Recovery and Reinvestment Act of 2009 (ARRA)—

The Act creates a new COBRA term, an “Assistance Eligible Individual” (AEI). Such a person is defined in the Act as follows (as amended by the Department of Defense Appropriations Act, 2010):

ASSISTANCE ELIGIBLE INDIVIDUAL.—For purposes of this section, the term “assistance eligible individual” means any qualified beneficiary if—

- (A) such qualified beneficiary is eligible for COBRA continuation coverage related to a qualifying event occurring during the period that begins with September 1, 2008, and ends with February 28, 2010,
- (B) such qualified beneficiary elects such coverage, and
- (C) the qualifying event with respect to the COBRA continuation coverage consists of the involuntary termination of the covered employee’s employment and occurred during such period.

Since the AEI is not eligible for any special treatment until February 17, 2009 (or March 1, 2009, in the case of health plans that begin all new coverage on the first of the month, which is the more common case); those who were terminated prior to September 1, 2008, would not come under the Act. This is in keeping with the Government’s goal of assisting those who are adversely impacted by the severe economic problems in the nation that largely began in September 2008.

Eligible AEIs may receive a subsidy of 65% of their COBRA premiums for a specified time period, up to fifteen months. Those with who become COBRA eligible on March 1, 2010, or later do not qualify for the subsidy.

Unlike general COBRA law, which applies to most employers who employed 20 or more employees on 50% of the business days in the prior calendar year, ARRA has no specified size limit, but it only affects smaller employers or plan sponsors to the extent that they come under a state continuation law, such as Cal-COBRA in California. Many states have comparable ‘mini-COBRA’ laws. This means that many small employers will have COBRA responsibilities that they are not used to having. ARRA is the responsibility of the employer or plan sponsor, not the health plan, unless the COBRA comes under a state “mini-COBRA” law for employers too small for federal COBRA.

Eligibility for the subsidy is means tested. Those individuals who had a “modified adjusted gross income” (defined below) of \$125,000 single or \$250,000 for a couple filing jointly for the tax year in question, 2009 or 2010, would qualify for the full subsidy. For those with modified adjusted gross incomes of \$125,001 - \$145,000 (or for couples filing jointly \$250,001 - \$290,000), the amount of the subsidy would be reduced proportionately. Thus for example, a single-filing AEI with a modified adjusted gross income of \$135,000 would qualify for 50% of the subsidy, since \$135,000 is half way between \$125,000 and \$145,000. One with modified adjusted gross income over the \$125,000 | \$250,000 threshold can make a permanent election to waive the COBRA subsidy; special rules apply to such waivers. Why would one waive the subsidy? Because a tax penalty of 110% of the subsidy received that was not ultimately due the AEI could apply if the taxpayer did not properly return the overpayment. Due to the complexity of determining income, a taxpayer might decide not to risk a possible problem. (The Act says that the penalty will not be applied “with respect to any failure if it is shown that such failure is due to reasonable cause and not willful neglect.”) How would one repay the subsidy? The Conference Agreement includes this answer: “The mechanism for repayment is an increase in the taxpayer’s income tax liability for the year equal to such amount.”

The election period for an AEI is from the date of the Act up to 60 days after the date of notification of the new COBRA rights. Date of notification generally means that the notification was mailed first class mail (or in some cases hand delivered). This can include someone who was on COBRA for a short period of time but dropped coverage, if the individual was deemed involuntarily terminated on or after September 1, 2008. It is understood that those already on COBRA with a Qualifying Event date of September 1, 2008, or later, due to an “involuntary termination” may also elect to receive the 65% subsidy, but not before the time periods mentioned above. Note: ARRA mandates that health plans that come under federal COBRA or comparable federal laws (typically employers with over 20 employees, and the federal, state, and local governments) must offer a special enrollment period for AEIs who were not covered by COBRA in February, 2009, but are otherwise eligible. This would mean those who were involuntarily terminated on or after September 1, 2008 through February, 2009, but did not elect COBRA or dropped COBRA coverage. Such individuals could elect COBRA on the first enrollment date on or after February 17, 2009, which would be March 1, 2009 for most plans. Even though such coverage might begin on March 1, for determining when the normal 18 months of COBRA would be up, the qualifying event date would revert back to Qualifying Event date based on the person’s involuntary

termination. Thus someone fired on October 15, with a Qualifying Event date the first of the following month, would use that date, and not March 1, in the above example.

Note: this mandate does NOT apply to smaller employers that come under various state mini-COBRA laws. The Department of Labor verified its position on this in its February 26, 2009 Fact Sheet. The DOL in its answers to a series of FAQs, stated in regard to this question: “For individuals eligible for State continuation coverage (such as state ‘mini-COBRA’), your state may choose but is not required to provide a second election period.”

What is “involuntary termination”? That term is not defined specifically. The IRS in a recent FAQ on ARRA stated simply (as later amended), “The qualifying event for purposes of eligibility for the subsidy is involuntary termination of the covered employee’s employment that occurs during the period beginning Sept. 1, 2008, and ending [February 28, 2010].” As under general COBRA law, it does not include one terminated for “gross misconduct,” but since that term is also not defined, that provision is rarely used by employers. Pending clarification from the Department of Labor, the term seems to mean anyone who lost employment on other than a voluntary basis, which should thereby include layoffs, being fired, reductions in force, etc. A reduction in hours is not thus deemed to be an “involuntary termination.”

One of the government’s commentators on its above-mentioned webinar, said that in his opinion (which is not binding on the government), other examples of those who could be deemed “involuntarily terminated” included those who were:

- furloughed,
- fired but told that if they moved to a second company location a long distance away quit they could remain employed but chose not to move,
- were moved to much reduced hours and the person had to quit because he or she could not live on the reduced income.

Employers are allowed, but not required, to open up to AEIs when they make an election a lower cost option if one exists for active employees. Thus, if the employer so elects, the AEI could elect a lower cost plan than the plan the AEI had prior to the original Qualifying Event Date. The lower cost coverage does not include just dental, vision, EAP, onsite medical benefits or a flexible spending account. If this option is made available by the plan sponsor, the AEI would have up to 90 days to elect to make the change, from the date of notification.

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Note: one issue in COBRA compliance is that if the COBRA administrator is not collecting the money (which is often the case and probably preferred), it will not necessarily know if someone has dropped off COBRA. That is not a significant problem but it is a point that needs to be understood. It could become important if the employer changes health plans and the COBRA person is forgotten in the process.

—Questions for a Potential COBRA Administrator—

The following are helpful questions when evaluating a COBRA administration program:

1. Which of the following letters does the Administrator send out?
 - ❑ "Initial Notice" [Non-California]
 - ❑ "Initial Notice" [California]
 - ❑ COBRA Letter to Qualified Beneficiaries at the Time of the Qualifying Event

 - ❑ "Notice to California Terminating Employees" (HIPP) [English & Spanish]

 - ❑ Sample COBRA Election Form
 - ❑ Sample COBRA Disability Extension Notice
 - ❑ Sample Open Enrollment Notice to COBRA Insureds
 - ❑ Sample COBRA Secondary Event Notice
 - ❑ Sample Letter to Spouse and / or Children Being Removed from the Plan
 - ❑ Sample COBRA Conversion Notice
 - ❑ Sample California Laws SB 761 / SB 2043 Notification Letter
 - ❑ Sample Letter to Accept SB 761 / SB 2043 Coverage
 - ❑ Sample Letter for “Insignificant Underpayment”
 - ❑ ARRA letters
2. Does the Administrator take legal responsibility for its work in all aspects of COBRA administration and does its Errors and Omissions insurance cover such work?
3. Does the Administrator collect the money each month? (This is optional and sometimes not advised.)
4. Does the Administrator keep track of how long qualified beneficiaries are on COBRA in order to provide them the legally-required letters about their conversion options within six months of the end of COBRA?
5. Are COBRA letters sent out first-class mail with a record of when each letter was mailed?
6. Does the Administrator do sufficient work and have sufficient responsibility to be deemed legally the COBRA administrator (and thus possibly qualify for an extra 30-day extension in order to send out COBRA letters)?
7. Is the Administrator a resource to the **employer** for answering the difficult questions on COBRA that come up from time to time in most employee benefit programs?
8. Does the Administrator act as a resource for **qualified COBRA beneficiaries** to call?
9. Does the Administrator work with the insurance carriers when the law is gray or when “blaming” the carrier is advisable?
10. What is required on the employer’s end in order to do its part in the COBRA compliance program?

11. Does the Administrator have a COBRA compliance database in order to keep track of the many aspects of proper COBRA administration?
12. Does the Administrator have multi-lingual capabilities?
13. Does the Administrator provide modular services so that the employer can select only those services that it wants?

Initial Notice Dissemination Requirements

The Department of Labor (DOL) requires **employers or plan administrators** to mail to employees and dependents (if covered) a letter explaining COBRA benefits and rights once the above become insured under a group health plan. This is called the Initial Notice (or General Notice) and proposed regulations published by the Department of Labor on May 28, 2003, along with final regulations a year later, discussed it in some detail. While the proposed regulations allow the employer to meet its COBRA requirement by mailing this letter within 90 days of the individual becoming covered or including it in the Summary Plan Description (SPD) that it gives out within 90 days of the individual becoming covered, there are two important provisos: (1) the employer has only met its COBRA requirements if the individual is not covering a spouse, since any covered spouse must have the information sent to him/her by at least first class mail (2) SPDs are generally *not* the plan booklets printed by the insurance carrier or HMO. The SPD must be ERISA compliant—*most plan booklets are not*—and the Initial Notice must provide specific information on whom the individual should contact at the employer to tell of certain qualifying events. Thus, this is very narrow exception to the rule of mailing out the Initial Notice. (A sample letter, based on DOL recommended wording, appears in the Sample Letters section.) The DOL has stated that it will consider a single mailing to a family sufficient if the employee and spouse live at the same address. However, different letters must be sent if it is known that different addresses apply. Also a separate letter must be sent out if the spouse becomes covered by the plan later.

Note: the importance of this Initial Notice is seen in the text of the DOL's 2003 proposed regulations, where it is stated, "the statutory time limits for the qualified beneficiaries' notices are minimum time limits and that plans can provide for longer time periods. The proposed regulations specifies, however, that a plan's time limit for providing any of the qualified beneficiaries' notices could not begin to run unless and until the plan had satisfied the general notice requirements of section 606(a)(1) [*which deals with the Initial or General Notice*] with respect to the affected qualified beneficiaries." This could mean, for example, that if the Initial Notice had never been adequately sent out (or delivered, in the case of an ERISA compliant SPD), the plan could not say that the individual was too late for applying for COBRA coverage—because the individual applied for COBRA more than 60 days after the Qualifying Event letter had been mailed out— since the Qualifying Event letter that starts the 60-day window for applying for COBRA *would be deemed as not having been sent*. This could have an enormous impact on COBRA law if that interpretation became COBRA law.

Common COBRA Terms

Qualifying Event:

This is an event that causes an employee or qualified dependent to lose health coverage. The possible events are: (1) termination of employment or reduction in hours (2) death of the employee (3) divorce or legal separation (4) employee's entitlement to Medicare (5) a dependent child ceasing to remain eligible under the terms of the plan. In addition, special rules apply for retirees of a former employer in Chapter 11 bankruptcy and FMLA leaves.

The 1999 final regulations clarify that “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 events [*listed above*] is a loss of coverage. In the case of an event that is the bankruptcy of the employer, lose coverage also means any substantial limitation of coverage under the plan, occurring within 12 months before or after the date bankruptcy proceedings commence, for a covered employee who had retired on or before the date of the substantial elimination of group health plan coverage or for any spouse, surviving spouse, or dependent child of such a covered employee if, on the day before the bankruptcy qualifying event, the spouse, surviving spouse, or dependent child is a beneficiary under the plan.” The final regulations also point out the loss of coverage need not happen immediately, as long as it occurs prior to the end of the maximum COBRA period.

Qualified Beneficiary:

This is an employee, a spouse or dependent child who was covered under the employee's group health plan on the day prior to the Qualifying Event or start of FMLA leave. In 1997, COBRA was amended to include as a qualified beneficiary “a child who is born to or placed for adoption with the covered employee during the period of continuation coverage under this section [*of the Internal Revenue Code*].”

Group Health Plan:

This can mean any employer sponsored plan that provides coverage for treatment as defined under §213 of the Internal Revenue Code. Briefly, that covers the “diagnosis, cure, mitigation, treat-

ment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”

In general that is understood to mean medical, prescription, dental, and vision coverage. It also can include Employee Assistance Programs (EAPs) and flexible spending accounts under §125 which relate to unreimbursed medical, dental, and vision expenses.

Plan Administrator: The plan administrator is defined in ERISA 3(16)(A) in the following manner:

“The term ‘administrator’ means—

- (i) the person specifically so designated by the terms of the instrument under which the plan operated;
- (ii) if an administrator is not so designated, the plan sponsor; or
- (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.”

Note: very often the employer is deemed to be the plan administrator.

[The definition of an **Assistance Eligible Individual** is given earlier in the Primer.]

COBRA COMPLIANCE QUESTIONS FOR ADMINISTRATION

Grace period for late payment after initial payment is made [<i>30 days unless stated otherwise here</i>]:	
When a qualifying event is deemed to start [<i>at the end of the month of the actual qualifying event unless stated otherwise here</i>]:	
The definition of an “insignificant underpayment” [<i>lesser of \$50 or 10% of the total monthly premium owed unless stated otherwise here</i>]:	
The definition of a separate plan that can be chosen on its own without having to be bundled with other plans [<i>all plans are deemed separate except for prescription drug coverage unless stated otherwise here</i>]:	

<p>The amount of the COBRA premium [<i>the generally prescribed 102% and 150% of the full premium for active employees, as described in this manual, unless otherwise stated here</i>]:</p>	
<p>How often COBRA premiums will be changed [<i>once per year unless otherwise stated here; note that some plans increase their rates more often than that. COBRA regulations require fixed premiums by the plan for at least 12 month intervals</i>]:</p>	
<p>How leaves (other than FMLA or workers' compensation disability leaves) are treated for COBRA purposes [<i>COBRA is offered immediately in a manner similar to any other insured with reduced hours below the minimum unless otherwise stated</i>]:</p>	
<p>How workers' compensation disability leaves for a California employee are treated for COBRA purposes [<i>the insured remains on the plan until a company officer instructs otherwise, unless otherwise stated here</i>]:</p>	
<p>How workers' compensation disability leaves for a non-California employee are treated for COBRA purposes [<i>offer COBRA immediately (but subject to the rules of FMLA if applicable), unless otherwise stated here</i>]:</p>	
<p>How non-work related disability leaves are treated for COBRA purposes [<i>offer COBRA immediately (but subject to the rules of FMLA if applicable), unless otherwise stated here</i>]:</p>	
<p>Where monthly payments are sent each month [<i>to the individual/office that administers COBRA unless otherwise stated here</i>]:</p>	
<p>When COBRA premiums are company-paid [<i>no COBRA premiums are company-paid unless otherwise stated here</i>]:</p>	
<p>The amount of the COBRA premium owed for a single dependent electing coverage, without any other family members electing coverage [<i>this is based on the single rate for an active employee (or the amount billed by the insurance company if it is offering direct bill services) unless otherwise stated here</i>]:</p>	
<p>If FMLA applies to the company, whether or not the company uses the 75-mile rule to determine eligibility for FMLA [<i>if FMLA applies, the 75-mile rule is not used unless otherwise stated here</i>]:</p>	

<p>If Domestic Partner coverage is offered, whether or not Domestic Partners are eligible for COBRA [<i>based on an interpretation of eligible dependents under the Internal Revenue Code, Domestic Partners are not deemed eligible for COBRA unless otherwise stated here</i>]:</p>	
<p>Describe annual Open Enrollment timing and what options exist, such as uninsured may join at that time or only those currently insured may make a change in plans [<i>uninsured may join at open enrollment unless otherwise stated here</i>]:</p>	
<p>Describe options if someone moves out of the Service Area of a plan. Is there another plan the person is eligible to take? Include here a possible lower cost option given under ARRA. [<i>There is no option to select a second plan unless stated here.</i>]</p>	
<p>Is there any objection to offering individual health insurance to perhaps get people off COBRA? [<i>This is commonly done. There is no objection unless stated here.</i>]</p>	

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