

## Offering COBRA due to Covid-19 related layoff

As the economic impact of the COVID-19 crisis grows, employers are facing the reality of laying off or terminating employees. When this happens, employers need to be very careful to recognize when COBRA applies and know what needs to be done to maintain employees' access to health coverage without creating or increasing the risk of non-compliance.

The federal COBRA law has been in place for over 30 years. It requires employers who employ more than 20 employees for a majority of its business days during the preceding calendar, and offer a group health plan, to notify qualified beneficiaries of their right to stay on the employer's health plan for a defined amount of time. Qualified beneficiaries are employees, spouses or dependent children who were covered on the plan at the time of a qualifying event and consequently lost coverage due to that event. For the purpose of this article we will focus on two specific COBRA qualifying events – Termination of Employment and Reduction in Work Hours.

### COBRA Qualifying Events

In its simplest terms, if an employee (and/or spouse, dependent children) **loses coverage due to a termination or reduction in hours, it is a COBRA-qualifying event** and the employer needs to send a COBRA Qualifying Event Notice to the qualified beneficiaries, which explains their right to stay on the health plan for up to 18 months.

Let's assume that employers will know if a termination or reduction of hours has occurred. The more difficult determination for the employer may be whether or not the termination or reduction of hours has caused a loss of coverage.

A loss of coverage is defined as "not being covered under the same terms and conditions as in effect immediately prior to the qualifying event." Therefore, a loss of coverage could be either a loss, or reduction, of the benefit or an increase in the cost to the employee.

What employers need to determine is, per the terms of the group health plan, at what point does a loss of coverage occur, and, was the loss of coverage caused by the termination or reduction of hours? If there is both - a loss of coverage and an event that caused it - then it is a COBRA qualifying event and those losing coverage must be notified with a proper COBRA notice.

It's important to note that the loss of coverage need not be immediate. In fact, in the case of a reduction of hours COBRA event, the loss of coverage could occur anytime within the following 18 months. Therefore, if a layoff occurred on April 1 and the loss of coverage did not occur until April 30, it is still a COBRA-qualifying event.

## Applicability of Local or State Issued Guidance

Some states have started placing Shelter in Place orders, and are even providing suggestions or actual guidance to employers to place workers on temporary leave as opposed to termination (Michigan). Some states have also started directing insurance providers to offer more time to employers to pay premiums, for example, up to 60 days (Ohio). Will this also apply to COBRA premiums? Employers will need stay vigilant and do their best to apply any local or state directives as best they can. Seek legal counsel as necessary.

How does all of this impact the application of the COBRA rules to employers? It all comes down to determining at what point a loss of coverage, per the terms of the group health plan, has occurred. Understanding how the group health plan determines eligibility will be critical for employers in the coming days and weeks.



### REMEMBER

**COBRA Event + Loss of Coverage = COBRA Qualifying Event**

Once an employer has determined a COBRA-qualifying event has occurred, the Qualifying Event Election Notice needs to be sent (first class mail with Certificate of Mailing from the United States Postal Service recommended) within 44 days of the qualifying event. The 44 days comes from the 30 days the employer has to notify the plan administrator of a qualifying event plus the 14 days given to the plan administrator to send the notice. If any employer serves as both employer and plan administrator, then it may use the full 44-day timeline.

Once the Qualifying Event Election Notice is sent, the qualified beneficiaries have 60 days to elect COBRA (from the latter of the date of the notice or the date of loss of coverage). If COBRA is elected and all retroactive premiums are paid, then the beneficiary(ies) need to be reinstated on the plan and premiums are due monthly with a 30-day grace period.

## Incapacitation

COBRA regulations and several COBRA lawsuits have established a course of action when a beneficiary is incapacitated and not able to elect or pay for COBRA. If a person is incapacitated, the applicable timeframe that applies – generally the COBRA election period or the timely payment of the COBRA premium – is to be “tolled.” This means that the timeline is paused. The timeline is paused until the individual is no longer incapacitated or until a legal representative is appointed and can resume responsibility for electing or paying for COBRA.

In the case of COVID-19, there are a few different situations that have the potential to be considered incapacitation. For example, a qualified beneficiary who is hospitalized in an isolated hospital unit or under a mandatory quarantine period if returning to the United States from international travel.



## Subsidizing COBRA Premiums

One option for employers when offering COBRA to a laid-off or terminated employee is to subsidize COBRA premiums. This is a common practice when a severance arrangement is offered. In light of COVID-19, some employers may opt to use this approach to make it easier for beneficiaries to keep their coverage.

In severance situations, employers may offer to cover part or all of the COBRA premium for a period of time – a few months perhaps. The key is to make sure COBRA is offered as required and then let the beneficiary know that if they elect COBRA, the employer will cover part or all of the premium for a specific period of time. By offering COBRA and requiring the beneficiary to elect it to get the premium subsidy, the employer is still following the letter of the COBRA law. If an employer were to come up with a more creative way to keep people covered that didn't include COBRA, they would need to be very careful in explaining the creative approach to carriers and those individuals affected. It may be safer to follow the COBRA rules, which would not require an explanation or pre-approval from a carrier.

Another benefit to offering COBRA from the start is that the COBRA 18-month coverage period starts as well. This keeps the total amount of time available to the beneficiary limited to the minimum, reducing exposure to the health plan. Hopefully it won't take that long for employers and the economy to recover from COVID-19 but employers will need to anticipate that possibility.

## Communicate Plan Changes

Employers may choose to implement changes to their group health plans to help employees or family members affected by the virus, such as covering the cost of testing. ERISA (Employee Retirement Income Security Act) requires plans to notify all plan participants of any changes to the plan. Employers should not forget that qualified beneficiaries (either on COBRA or in their election period) need to be informed of the change just as is provided to active employees.

## Get Legal Advice Before Getting Creative

Employers will find themselves in the middle of abiding by terms of the health plan, laws such as COBRA, FMLA, ADA or FLSA, and trying to provide some measure of relief to their current or former employees. Examples may be offering exceptions to rules or extensions of time frames due to COVID-19. If an employer chooses to modify how they handle circumstances pertaining to the health plan, they should only do so with proper legal advice from their own counsel and confirmation from their insurance carrier or stop-loss carrier. After receiving that advice, if the employer does modify any processes or rules, it also needs to determine when those modifications will end. At an appropriate time the employer will need to communicate the expiration of the modifications to those impacted.

## Resources

### Employer's Guidance to Health Benefits under COBRA

- Visit: <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/an-employers-guide-to-group-health-continuation-coverage-under-cobra.pdf>

### myHRCounsel Employer COVID-19 Toolkit

- Visit: <http://visit.infinisource.com/covid19-toolkit>.
- myHRCounsel provides human resources legal advice directly to employers for a low per-employee-per-month fee.
- Email [salesupport@infinisource.com](mailto:salesupport@infinisource.com) for more information.



If you have questions regarding the terms of your health plan, please consult your benefits advisor or insurance carrier.

**Infinisource Benefit Services - [www.infinisource.com](http://www.infinisource.com)**

Please email [salesupport@infinisource.com](mailto:salesupport@infinisource.com) for more information about COBRA administration services.

**Infinisource Benefit Services has been providing COBRA administration services to employers for over 30 years and currently has over 19,000 COBRA customers.**

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