

# Office Hours

## COBRA Continuation Coverage: The Top Five Issues for Employers

Audio

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# COBRA: The Big Picture

## Continuation Coverage in a Nutshell

### The Basics, and the Tricky Situations That All Employers Face

- COBRA = Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)
- Group health plans must offer continuation coverage to employees and certain dependents
- The basics are fairly straightforward, but the nuances can be quite complex
- Large potential liabilities makes correcting mistakes properly a top priority

## Top Five COBRA Issues for Employers

- 1) **Qualifying Events:** When are employees and dependents eligible for COBRA?
- 2) **Elections and Payment:** Timely election and payment for COBRA qualified beneficiaries
- 3) **Coverage Options:** Which plan options are available to COBRA qualified beneficiaries?
- 4) **COBRA Subsidies:** Navigating the potential nondiscrimination pitfalls
- 5) **Special Issues:** Mergers and acquisitions, Medicare, and domestic partner rules



# 1. Qualifying Events

## **Which Events Trigger COBRA Rights?**

# Qualifying Events: Must be a Group Health Plan

The COBRA rules apply to employer-sponsored group health plans. This generally refers to any employer plan that provides medical care under the IRC §213(d) definition.

## Subject to COBRA: Group Health Plans

- Medical
- Dental
- Vision
- Health FSA
- HRA
- EAP (if not limited to referral only)
- Wellness Program (if provides medical benefits)
- On-Site Medical Clinic (if provides more than first aid)

## Not Subject to COBRA: Not Group Health Plans

- Disability (STD/LTD)
- AD&D
- HSA
- Group Term Life
- Fixed Indemnity
- Long-Term Care
- Dependent Care FSA
- Voluntary Plans

# Qualifying Events: Triggering Events

## Two Requirements for a COBRA Qualifying Event

- 1) Loss of group health plan coverage
- 2) Caused by a COBRA triggering event.
  - Not all losses of coverage are a COBRA qualifying event!

A

### 18-Month COBRA Maximum Coverage Period

- Termination of employment
- Reduction of hours
- Failure to return from FMLA leave

B

### 29-Month COBRA Maximum Coverage Period

- Disability extension

C

### 36-Month COBRA Maximum Coverage Period

- Death of employee
- Divorce or legal separation from employee (including removal in anticipation)
- Loss of dependent status (child reaching age 26)

# Qualifying Events:

## Early Loss of COBRA

Employers or their COBRA TPA must provide a notice of COBRA termination to the qualified beneficiary whenever coverage ends before the maximum coverage period.

### A Failure to Timely Pay Required Premium

- Initial premium: Due 45 days after the date of the COBRA election
- Subsequent Monthly Premium: Must be paid by the end of a 30-day grace period that starts at the beginning of the coverage month
- Special Circumstances: Payment period may be extended where the qualified beneficiary is incapacitated

### B Enrollment in Other Group Health Plan Coverage

- COBRA will terminate early where the qualified beneficiary first becomes covered under another group health plan after electing COBRA
- Eligibility for a GHP does not terminate COBRA if the individual does not enroll
- Enrollment in another GHP prior to electing COBRA preserves COBRA rights

### C Other Events Causing Early Loss of COBRA

- Employer no longer maintains a group health plan
- Individual enrolls in Medicare after electing COBRA
- Disabled individual in 29-month disability extension is no longer disabled
- For cause (e.g., fraud or intentional misrepresentation of a material fact)

# Qualifying Events: Disability Extension

## Conditions for Disability Extension to 29 Months

The disability extension from 18 to 29 months is available where:

1. The COBRA qualifying event is the employee's termination of employment or reduction in hours;
2. The qualified beneficiary is determined by Social Security Administration (SSA) to have been disabled at any time during the first 60 days of COBRA coverage;
3. The qualified beneficiary notifies the plan within 60 days of the SSA disability determination; **and**
4. The qualified beneficiary notifies the plan of the SSA disability determination before the end of the 18-month standard maximum coverage period.

## COBRA Disability Extension Premium

- The COBRA premium can increase from 102% to 150% for the period of the disability extension (months 19 – 29) due to the fact that disabled former employees are likely to cause a greater expense to the plan

## Interaction with Cal-COBRA

- Cal-COBRA provides an extension to 36 months for fully insured major medical plans situated in California
- Generally, Cal-COBRA is a better option than the federal disability extension because:
  - The Cal-COBRA extension is longer than the federal disability extension (18 extra months vs. 11 extra months)
  - Cal-COBRA premiums are less expensive than the federal disability extension (110% vs. 150%)
  - Cal-COBRA is available to all qualified beneficiaries (not limited to those who are disabled and meet certain conditions)
- Disability extension would still be relevant for dental and vision (and self-insured plan options)
  - Cal-COBRA applies only to major medical coverage

# Qualifying Events: Unusual Gaps in Coverage

## COBRA Generally Provides Continuous, Seamless Coverage

- In other words, timely COBRA election and payment provides coverage retroactive to the instant active coverage terminated
- There are two exceptions where COBRA can include a gap in coverage between the period of active coverage and the COBRA continuation coverage:
  - 1) **Removing a spouse in anticipation of divorce or legal separation**
  - 2) **Failure to return from FMLA leave (after failure to timely pay)**
    - A good ERISA trivial pursuit question!

## Removal of Spouse in Anticipation of Divorce/Legal Separation

- Employees who are in the process of ending their marriage may choose to remove the spouse from coverage at open enrollment
  - Removal of a spouse or dependent at open enrollment is not a COBRA qualifying event
- **If the employee has removed the spouse in anticipation of divorce or legal separation, the plan will have to offer COBRA coverage to the spouse—but only upon the divorce or legal separation being finalized**
- There is no COBRA coverage available for the period from the date of the drop to the date the divorce or legal separation finalizes
  - Upon the plan receiving notice of the divorce or legal separation finalizing, the plan must offer coverage to the former spouse that is effective as of the date that the divorce or legal separation finalized

# Qualifying Events: Unusual Gaps in Coverage

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  - 2) **Failure to return from FMLA leave (after failure to timely pay)**
    - A good ERISA trivial pursuit question!

## Failure to Return from FMLA Leave (After Failure to Timely Pay)

- If an employee on FMLA leave fails to return to work when the protected leave period ends, health coverage will generally terminate as of the end of the last day of the protected leave
  - Absent an employer leave policy to extend coverage beyond the protected leave period
- That loss of coverage caused by failure to return from FMLA leave is a qualifying event for the employee (and covered dependents) that occurs as of the last day of the FMLA leave
- **There will be a coverage gap if active coverage terminated prior to the end of the protected leave period because the employee failed to timely pay the required premium**
  - The coverage gap will be from the loss of active coverage date (caused by failure to timely pay the premium during the leave) to the last day of the FMLA leave when the qualifying event occurs
- The special FMLA qualifying event rule looks only to whether coverage was in effect on the day before the first day of the FMLA leave (or became effective during the leave)
  - Doesn't matter if coverage was lost during the FMLA leave for failure to timely pay

# Qualifying Events:

## Late Notice of Divorce/Legal Separation

A former spouse is never\* eligible for the plan and must be removed whenever the plan receives notice—even if received very late. (\*Massachusetts fully insured plan exception)

### Termination of Coverage Date

- ACA prohibition of rescission does not apply to late divorce notification
- Means employer can terminate coverage retroactively to the date of divorce
  - Although the default termination date of coverage is always prospective, employer could terminate retroactively if it prefers to attempt to recoup back premiums (fully insured) or claims (self-insured) for the ineligible former spouse's coverage/benefits

A

### COBRA for the Former Spouse

- COBRA rules provide 60 days from the date of the event to notify the plan of divorce/legal separation (included in initial COBRA notice to employee/spouse)
- **If the employee/former spouse misses that 60-day notice window, the former spouse has technically lost all COBRA rights under the plan**
  - In some situations, the carrier (or stop-loss provider if self-insured) may agree to an exception where reasonably close to the 60-day limit
  - Ex-spouse should not receive COBRA election notice unless carrier confirms exception

B

### Disciplinary Action

- Employer may have employment disciplinary policies to address this form of fraud or intentional misrepresentation of a material fact
  - Employer should consider reviewing its handbook and internal policies to determine if that's an option to pursue in this type of situation

C

# Qualifying Events:

## Divorce vs. Legal Separation

Some plans terminate a spouse's coverage at the point of a court-ordered legal separation if it occurs prior to the finalized divorce. Loss of coverage for either is a qualifying event.

### Plan Terminates Coverage Upon: Legal Separation or Divorce

- Spouse has COBRA rights if coverage is lost for either event
- Note that not all married couples legally separate prior to a divorce
- Legal separation requires a court order (merely living apart does not qualify as legally separated)
- Employee or spouse must notify the plan within 60 days of the legal separation or divorce to preserve the spouse's COBRA rights

### Plan Terminates Coverage Upon: Only Final Divorce

- An earlier legal separation prior to entering into the final divorce will have no effect on the spouse's eligibility for active coverage
- Employee will not be able to remove the spouse from coverage at the point of legal separation (no permitted election change event where no loss of eligibility)
- Employee or spouse must notify the plan within 60 days of final divorce to preserve spouse's COBRA rights

# Qualifying Events: Gross Misconduct Exception

## Applies Only to Termination of Employment Triggering Event

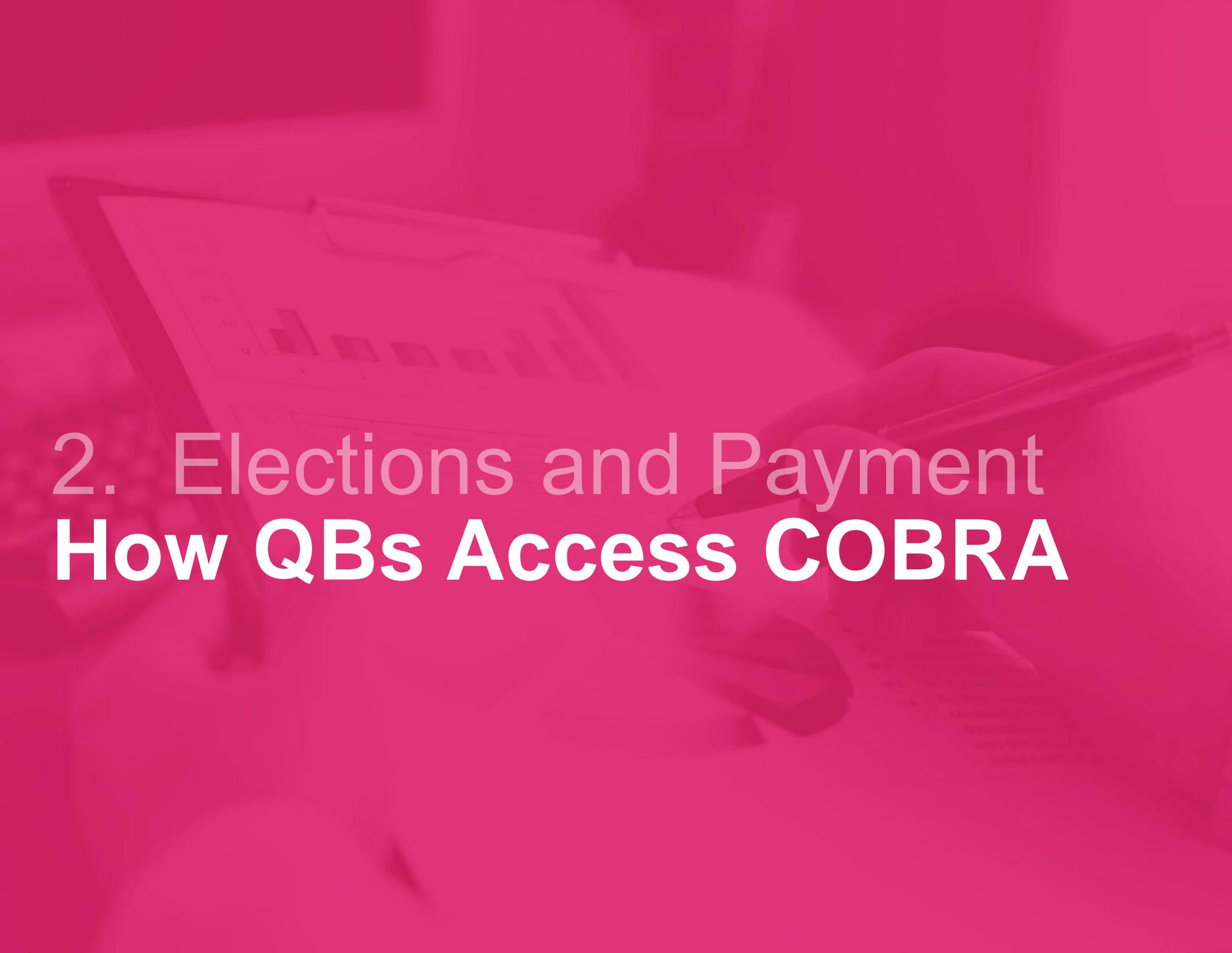
- COBRA provides that if an employee's loss of coverage is caused by a gross misconduct termination of employment, the employee does not experience a qualifying event
- However, there is no clear or consistent definition of "gross misconduct" in the COBRA statute, regulations, case law, or other available guidance

## Best Practices: Avoid the Gross Misconduct Exception Generally

- Courts have interpreted the gross misconduct exception to apply in very limited circumstances
  - It's extremely difficult to rely on the gross misconduct exception to deny offering COBRA
- Very high litigation risk associated with a COBRA gross misconduct denial
- Best practice therefore is to offer COBRA absent the most outrageous forms of misconduct
  - Former employee pays 102% of premium, so risk/reward analysis generally favors offering COBRA

## Court Examples Finding No Gross Misconduct in Lawsuits

- Employee allowed to voluntarily terminate in face of allegations of embezzlement
- Employee falsified expense reports
- Employee failed to mix onion powder into ravioli sold by employer, and did not report to manager
- Employee assisted manager in stealing company property at manager's direction to take to manager's new house
- Medical employee failed to complete referral for patient who was later discovered to have terminal cancer
- Nurse employee "mooned" another nurse employee in response to request to answer patient call lights
- Employee discussed starting a new competing company with co-workers and employer's clients

A person's hands are shown holding a pen over a document. In the background, a laptop screen displays a bar chart. The entire scene is overlaid with a semi-transparent red filter.

## 2. Elections and Payment

# How QBs Access COBRA

# Elections and Payment:

## The Required Notices

COBRA imposes two primary notice requirements on employers. The initial COBRA notice is sent upon enrollment, the COBRA election notice is sent upon a qualifying event.

### COBRA Initial Notice: Apprising of COBRA Rights

#### General Rule:

- Required to go to covered employees and their covered spouse within 90 days of enrollment in the plan
- No requirement to provide to children

#### Why Use Snail Mail?

- Notice treated as provided to employee and spouse where addressed to both and (based on most recent information available to the plan) the spouse resides at same address as the employee
- Electronic or hand delivery to employee generally wouldn't satisfy requirement to provide to spouse

### COBRA Election Notice: Upon a Qualifying Event

#### Election Notice to Qualified Beneficiary:

- 44 days from loss of coverage
  - o 30 days from employer to plan administrator
  - o 14 days from plan administrator to qualified beneficiary
  - o DOL enforces as combined 44-day limit

#### Election by Qualified Beneficiary:

- 60 days from the date of the election notice

#### Initial Premium Payment Deadline:

- 45 days from the COBRA election date

#### Remember This:

- 44/60/45 is a useful tool to memorize

# Elections and Payment:

## COBRA Election/Payment Exceptions

### Former Employees Frequently Ask for COBRA Exceptions

- There are two major issues with making an exception to permit late a COBRA election or premium payment:
  - **Insurance Carrier Policy Limitations**
  - **ERISA Plan Precedent**

### Reason #1: Insurance Carrier Policy Limitations

- Insurance carriers (and stop-loss providers) generally will pay claims only for employees and dependents who are eligible and properly enrolled
- Policies generally permit coverage for individuals through COBRA only if the individuals meet all of the conditions to receive COBRA coverage—including timely election and payment
  - COBRA has inherent adverse selection risks for carriers
  - These heightened concerns are magnified even further by extending election or payment deadlines
  - **If a carrier (or stop-loss provider) discovers that the employer permitted an employee to maintain COBRA coverage despite missing the applicable election or payment deadline, the carrier would be within its right to deny paying all claims for that individual from the date the issue arose**
  - **That would make the employer responsible for self-funding the COBRA claims (worst-case scenario!)**
  - Crucial that carrier agree to any late election/payment exception if employer wants to make exception
  - Carrier is well within its right to deny the coverage

# Elections and Payment: COBRA Election/Payment Exceptions

## Former Employees Frequently Ask for COBRA Exceptions

- There are two major issues with making an exception to permit late a COBRA election or premium payment:
  - Insurance Carrier Policy Limitations
  - ERISA Plan Precedent

## Reason #2: ERISA Plan Precedent

- ERISA requires that employers administer the plan in accordance with the terms of the written plan document
  - Plan document will not permit employees to maintain COBRA coverage unless they timely elect COBRA and make the required premium payments within the applicable deadlines
  - If the employer makes an exception, the employer has interpreted the plan's terms to permit the exception, and this interpretation must be applied consistently for all similarly situated employees
- This means that exceptions create an ERISA plan precedent requiring the plan to permit the late election or payment for all qualified beneficiaries in similar circumstances
  - A qualified beneficiary denied ability to make a late COBRA election or payment in similar circumstances would have a potential claim for ERISA breach of fiduciary duty or claim for benefits
  - This can create very difficult plan precedents to manage

## Summary

- For these reasons, we recommend not making COBRA election/payment exceptions
  - Where an individual is incapacitated, exceptions are appropriate with carrier approval

# Elections and Payment:

## Failure to Timely Provide Election Notice

Employers that discover a failure to timely provide a COBRA election notice will always want to correct that error quickly to avoid to significant tax and lawsuit liabilities.

### IRC §4980B Excise Tax: **\$100/\$200 Per Day Late** **IRS Form 8928**

#### **Excise Taxes/Reporting:**

- \$100/day excise tax for each day the election notice is late
- Increases to \$200/day if there is more than one individual (e.g., spouse or child)
- Self-reported on Form 8928

#### **Avoiding Taxes/Reporting (30-Day Rule):**

- Employers can avoid this excise tax and the associated reporting obligation if:
  - a) The failure is due to reasonable cause and not due to willful neglect; **and**
  - b) **The failure is corrected during the 30-day period beginning on date of failure discovery** (or, if earlier, date it should have been discovered using reasonable diligence)

### Potential Lawsuit Liability: **Self-Funding of** **Covered Plan Expenses**

#### **Covered Plan Expenses:**

- Gives rise to a potential lawsuit from the affected qualified beneficiaries
- Could bring claim for benefits for health expenses that would have been covered by the plan through COBRA
  - o Typically reduced by the amount of the COBRA premium the QB would have paid

#### **Self-Funding Concern:**

- Unlikely that the insurance carrier (fully insured plan) or stop-loss provider (self-insured plan) would cover the plan costs
- **Would likely result in employer being responsible for self-funding the covered benefits (at potential very high cost!)**

# Elections and Payment:

## Failure to Timely Provide Election Notice

Five-step process for employers to correct the failure:

- A**
  - Determine How Far Back the Error Occurred**
    - First step is to determine the date range of the failure
  
- B**
  - Communicate with Insurance Carrier or Stop-Loss Provider**
    - Confirm with the insurance carrier (fully insured) or stop-loss provider (self-insured) that it will provide COBRA coverage to the qualified beneficiaries at issue
    - If the carrier refuses to provide COBRA because of the employer failure (per contractual terms to avoid adverse selection), the employer is in a difficult position:
      - Employer must still provide notice, but will be responsible for self-funding covered expenses if the qualified beneficiary elects coverage
      - Look to contractual indemnity provisions if the failure was a result of vendor error (e.g., ben admin system or COBRA TPA) to address exposure
  
- C**
  - Determine When COBRA Will Be Effective**
    - If a long period has elapsed between the loss of active coverage and the corrected late COBRA notice, it will make more sense for COBRA to begin near the month of the corrected notice (i.e., with a gap in coverage)
      - In these situations, COBRA maximum coverage period (usually 18 months) would begin as of the prospective COBRA start date (not original loss of active coverage date)
      - Must carefully coordinate this issue with the carrier or stop-loss provider for approval because COBRA typically provides continuous, seamless coverage

# Elections and Payment:

## Failure to Timely Provide Election Notice

Five-step process for employers to correct the failure:

- D**
- Determine How to Address Retroactive Period of Coverage (If Applicable)**
- General rule is qualified beneficiaries have 45 days from the date of their COBRA election to make the first premium payment retroactive to the loss of coverage
  - **Where the employer does not timely provide the COBRA election notice, a large lump sum initial premium for the extended duration of retroactive coverage may be unreasonable**
  - Three options for employers to address this initial premium issue:
    1. Employer covers the initial COBRA premium for retroactive period of coverage;
    2. Employer provides an extended grace period for initial payment (beyond 45 days); or
    3. Employer creates a payment plan that spreads initial premium over longer timeframe
- E**
- Coordinate Distribution of COBRA Election Notice with TPA**
- Vast majority of employers rely on a COBRA TPA to provide COBRA notices
  - Employer should work with the TPA to ensure it distributes the corrected election notice to the affected qualified beneficiaries within 30 days of discovering the failure (or, if earlier, the date the failure should have been discovered using reasonable diligence)
  - In these situations, the COBRA election notice should address the issues surrounding the late notice:
    - When coverage would be effective if elected (retroactive or prospective);
    - The start date and duration of the maximum coverage period;
    - If/how the qualified beneficiary is required to pay the retroactive initial premium; and
    - Any other issues or concerns unique to the facts and circumstances of the failure

# Elections and Payment:

## Independent Election Rights

COBRA qualified beneficiaries have independent election rights. **Each qualified beneficiary can elect and maintain COBRA coverage independently.**

### Qualified Beneficiaries: Independent Election Rights

#### Individuals Who Can Be Qualified Beneficiaries:

- Employees
- Spouses
  - o As defined by federal law
  - o Includes same-sex and opposite-sex spouses
  - o Does not include domestic partners
- Children
  - o Determined by eligible child definition under the plan
- Children born to or adopted by covered employee during COBRA coverage

### Qualified Beneficiaries: Coverage Requirement

#### Must Be Covered Upon Qualifying Event

- Mere eligibility for the plan is not sufficient to be a qualified beneficiary
- Individuals not covered by the plan will not have independent COBRA rights upon any of the triggering events

#### Non-Qualified Beneficiaries

- Can still be added as a dependent
- However, will have no independent election/coverage rights
  - o Those not covered at time of qualifying event can be added at open enrollment
  - o Will lose COBRA coverage if covered employee dies or drops COBRA



3. Coverage Options

**Which Plan Options are Available Under COBRA?**

# Coverage Options:

## Plan Options Available Through COBRA

### General Rule: Same Coverage in Effect Prior to Qualifying Event

- Only the coverage that was in effect at the time of the qualifying event is available to qualified beneficiaries when making the COBRA election
- No option to enroll in a different coverage type (e.g., medical, dental, vision) or a different plan option (e.g., HMO vs. PPO) when electing to continue coverage through COBRA
- Three main exceptions:
  - 1) **Moving Outside the HMO Regional Service Area**
  - 2) **Plan Changes for Active Employees**
  - 3) **Open Enrollment**

### Exception #1: Moving Outside the HMO Regional Service Area

- If a COBRA qualified beneficiary moves outside of the HMO service region, the qualified beneficiary may request other coverage
- **Upon request, the employer must offer the qualified beneficiary the opportunity to elect coverage under any other plan option that is available to active employees and provides coverage in that location**
  - In other words, if the employer offers a different plan option that would provide coverage in the qualified beneficiary's new location, that plan option must be made available upon request
  - Coverage must be effective no later than the date of the relocation (or, if later, the first day of the month following the month in which the qualified beneficiary requests the alternative coverage)

### Exception #2: Plan Changes for Active Employees

- If the employer changes plan coverage for active employees, the same changes will apply to COBRA
  - A change in carriers from Anthem to Cigna will also move COBRA participants to the new Cigna benefit package option

# Coverage Options:

## Plan Options Available Through COBRA

### Exception #3: Open Enrollment

- The COBRA rules require that employers provide qualified beneficiaries with the same open enrollment rights as similarly situated active employees
  - Means that qualified beneficiaries can change their plan elections at open enrollment

### Detailed Listing of Open Enrollment Rights under COBRA:

- Qualified beneficiaries have the same right to receive open enrollment materials as active employees
- Qualified beneficiaries can change their plan option within health plan types at open enrollment (e.g., change medical plan option from PPO to HMO)
  - The IRS has informally stated that qualified beneficiaries can also enroll in other health plan types at open enrollment, even if they were not covered by the plan type at the time of the qualifying event (e.g., enroll in dental and vision coverage at OE even if previously covered only by medical)
- Qualified beneficiaries can add dependents at open enrollment (as non-qualified beneficiaries with no independent COBRA rights), even if they were not covered at the time of the qualifying event
- Ideally the employer will provide the same duration of open enrollment to qualified beneficiaries as offered to active employees (as rules suggest, but do not explicitly require)
- Employees who are still in the COBRA election period are technically considered qualified beneficiaries, and therefore they should have the same open enrollment rights as those who have already elected COBRA
- The DOL has informally stated that qualified beneficiaries must receive reasonable advance notice of increased premiums prior to the annual increase
- Cal-COBRA participants generally have the same open enrollment rights as federal COBRA participants with respect to the employer's fully insured major medical plan options in California

# Coverage Options:

## Cal-COBRA vs. Federal COBRA

Small employers are not subject to federal COBRA, and therefore only state mini-COBRA laws apply. California's mini-COBRA law is referred to as Cal-COBRA.

### Small Employers (2-19 EEs): Cal-COBRA Only (36 Months)

#### Small Employer Defined

- Fewer than 20 full-time employees (including full-time equivalents) on at least 50% of its typical business days in the prior calendar year
- Small employer plans are not subject to federal COBRA

#### Cal-COBRA for Small Employers

- Applies only to fully insured health plans situated in California
- Applies to medical, dental, and vision
- Maximum coverage period is 36 months
- Premium amount is 110% (not 102%)
- Administered by the insurance carrier (not employer or employer's COBRA TPA)

### Large Employers (20+ EEs): Cal-COBRA Extension (18 Months)

#### 18-Month Extension Applies to:

- Large employers subject to federal COBRA
- Only fully insured medical plans situated in California
- Does not apply to dental/vision

#### How the Extension Works

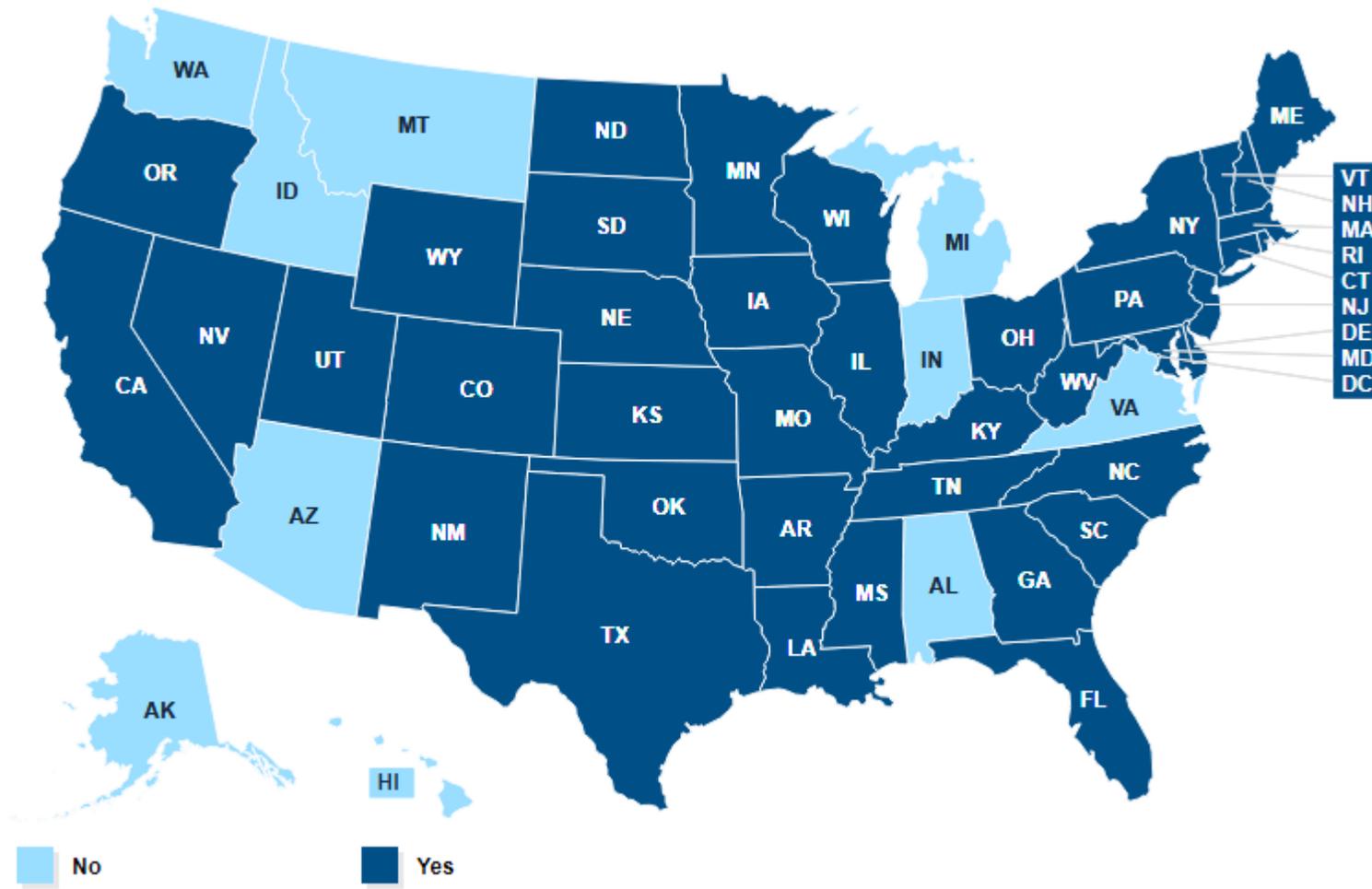
- Qualified beneficiary first exhausts the 18 months of federal COBRA
- Can extend continuation coverage for the major medical plan for another 18 months through Cal-COBRA (36 months total)
  - o Extension does not apply for 36-month federal COBRA qualifying events

# Coverage Options: 40 States with Mini-COBRA Laws

Source: Kaiser Family Foundation

<https://www.kff.org/private-insurance/state-indicator/expanded-cobra-continuation-coverage-for-small-firm-employees>

**Important Note:** Mini-COBRA laws vary significantly (e.g., length of coverage, premium amount, application to large group)



A hand holding a pen over a document with a bar chart, overlaid with a red gradient.

## 4. COBRA Subsidies **Employer Premium Payments**

# COBRA Subsidies:

## Fully Insured vs. Self-Insured

COBRA subsidies to cover all or a portion of the premium for a set period are very common as part of severance benefits and for extended non-protected leaves. There are some key considerations to keep in mind depending on the plan's funding arrangement.

### Fully Insured Plan:

#### **COBRA Subsidies Permitted** *Extended Period Caution*

**Tax-free direct COBRA subsidies are common because no nondiscrimination rules apply to fully insured plans**

- The ACA added fully insured plan nondiscrimination rules originally to take effect in 2011
- IRS Notice 2011-1 indefinitely delayed until further notice from IRS/DOL/HHS
- Employer should consider stating in any materials communicating an extended subsidy (e.g., six months or longer) that it may convert the subsidy to taxable compensation if the nondiscrimination rules take effect during the subsidy term

### Self-Insured Plan:

#### **§105(h) Nondiscrimination** *Taxable Compensation Alternative*

**§105(h) generally prohibits COBRA subsidies of greater amount or duration to HCIs than available to non-HCIs**

- Violation of §105(h) could result in all HCIs being taxed on all or a portion of the benefits received (referred to as the "excess reimbursement")
- Taxable cash compensation avoids creating issues under the §105(h) rules (which apply only to self-insured plans)
- Can be based on the amount the COBRA subsidy would have been
- Employer may choose to gross up employees to make them whole

# COBRA Subsidies:

## Model Provision for Fully Insured

### Sample Language—Recommended provision to include for any COBRA subsidy to extend six months or longer:

*The Company reserves the right to discontinue any COBRA subsidies in the event the nondiscrimination provisions added by Section 10101(d) of the Affordable Care Act, as codified in Public Health Service Act §2716, take effect. Pursuant to IRS Notice 2011-1, such nondiscrimination provisions do not apply until after regulations or other administrative guidance of general applicability has been issued by the Internal Revenue Service under §2716. If such guidance is issued and takes effect during the period in which the Company intends to subsidize your COBRA coverage, such COBRA subsidies will cease as of the effective date of such guidance to avoid potential excise tax liability to the Company under Internal Revenue Code §9815.*

*If the Company discontinues your COBRA subsidies pursuant to application of the nondiscrimination provisions described above, the Company will make an additional payment to you in standard taxable compensation, subject to withholding and all applicable payroll taxes, intended to cover the amount of the discontinued COBRA subsidy for the remainder of your intended COBRA subsidy period.*

*[Optional: The Company will also pay you a “gross up” amount intended to cover the tax liability from this additional payment.]*

# COBRA Subsidies: Model Provision for Self-Insured

## Sample Language—Recommended provision to describe taxable income alternative to direct COBRA subsidies:

*The Company will pay you an additional amount of [Enter amount—can be in regular intervals or lump sum] in standard taxable compensation, subject to withholding and all applicable payroll taxes, intended to cover the cost of your [Optional: “major medical plan” to exclude all other coverage] COBRA premium for [Enter duration]. This amount is based on your full [Optional: “employee-only”] COBRA premium, including the 2% administrative fee.*

*[Optional: The Company will also pay you a “gross up” amount intended to cover the tax liability from this additional payment.]*

# COBRA Subsidies: GHP Enrollment After Subsidies End

## General Rule: Termination of Employer Contributions for Non-COBRA Coverage is a HIPAA Special Enrollment Event

- The termination of employer contributions for non-COBRA coverage (e.g., active coverage) is treated in the same manner as a loss of eligibility for other coverage
- This causes a HIPAA special enrollment event for mid-year plan enrollment
  - The plan must permit employees to make medical election changes as required by HIPAA

## COBRA Rule: Termination of Employer Contributions for COBRA Coverage is Not a HIPAA Special Enrollment Event

- No HIPAA special enrollment event occurs where an employer discontinues providing a COBRA subsidy to a former employee
- The HIPAA special enrollment event trigger for loss of COBRA coverage requires that the full maximum coverage period be exhausted (18 months for termination of employment)
  - No right to enroll in new employer's plan mid-year because former employer's COBRA subsidy ends!

## Options for Terminated Employees Choosing Between Subsidizing COBRA from Prior Employer or Enrollment in New Employer's Plan:

1. Enroll in COBRA and pay the full COBRA premium (102%) after the subsidized period ends until the next open enrollment period for the new employer; or
2. Enroll in the new employer's plan as a new hire instead of taking advantage of the period of subsidized COBRA through prior employer
  - The second option will be to employee's advantage in most cases unless the COBRA subsidy period aligns nicely with the end of the new employer's plan year

# COBRA Subsidies: GHP Enrollment After Subsidies End

## 29 CFR §2590.701-6(a)(3)(ii)-(iii):

(ii) Termination of employer contributions. In the case of an employee or dependent who has coverage **that is not COBRA continuation coverage**, the conditions of this paragraph (a)(3)(ii) are satisfied at the time employer contributions towards the employee's or dependent's coverage terminate. Employer contributions include contributions by any current or former employer that was contributing to coverage for the employee or dependent.

(iii) **Exhaustion of COBRA continuation coverage.** In the case of an employee or dependent who has coverage that is COBRA continuation coverage, **the conditions of this paragraph (a)(3)(iii) are satisfied at the time the COBRA continuation coverage is exhausted.** For purposes of this paragraph (a)(3)(iii), an individual who satisfies the conditions for special enrollment of paragraph (a)(3)(i) of this section, does not enroll, and instead elects and exhausts COBRA continuation coverage satisfies the conditions of this paragraph (a)(3)(iii). **(Exhaustion of COBRA continuation coverage is defined in §2590.701-2.)**

## 29 CFR §2590.701-2:

(4) **Exhaustion of COBRA continuation coverage** means that an individual's COBRA continuation coverage ceases for any reason other than either failure of the individual to pay premiums on a timely basis, or for cause (such as making a fraudulent claim or an intentional misrepresentation of a material fact in connection with the plan). An individual is considered to have exhausted COBRA continuation coverage if such coverage ceases—

(i) Due to the failure of the employer or other responsible entity to remit premiums on a timely basis;

(ii) When the individual no longer resides, lives, or works in the service area of an HMO or similar program (whether or not within the choice of the individual) and there is no other COBRA continuation coverage available to the individual; or

(iii) When the individual incurs a claim that would meet or exceed a lifetime limit on all benefits and there is no other COBRA continuation coverage available to the individual.

# COBRA Reimbursement: Reimbursing a New Hire's COBRA Cost

## Common Approach to Address New Hire Waiting Periods

- In some situations, employers will want to reimburse all or a portion of the cost of a new hire's COBRA coverage through a prior employer
  - This is commonly designed to address any waiting period the employee has to enroll in coverage

## Addressing Potential Issues

### a) Potential Issue with Establishing New Group Health Plan

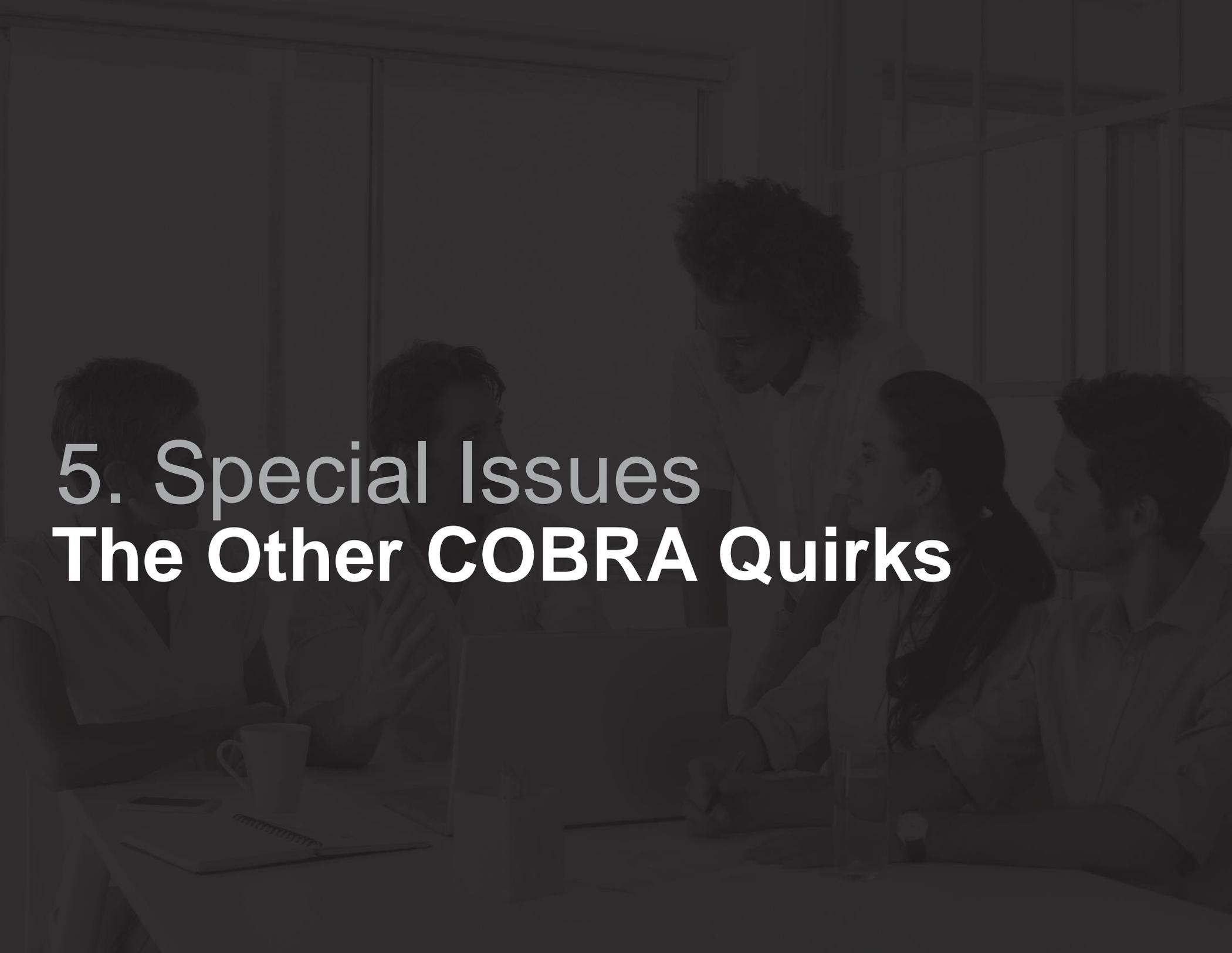
- There is an argument that reimbursing an employee's COBRA coverage through a prior employer creates a new group health plan that has a variety of potential compliance issues
  - However, this has been a long-standing practice in the industry without actually becoming an issue
  - More of a theoretical concern than one likely to present itself in practice

### b) COBRA Reimbursement Not an ACA Individual Policy Issue

- There are no ACA individual policy reimbursement issues with reimbursing COBRA premiums because COBRA is not an individual policy (it's continuation of group coverage)

### c) Taxable or Non-Taxable?

- **Taxable:** Pay the employee the amount of the intended COBRA subsidy (plus a gross up, if desired), and include in standard taxable income subject to withholding and payroll taxes
- **Non-Taxable:** Employer has two choices to make the payment a tax-free health expenditure:
  1. Pay the COBRA premiums directly to the COBRA administrator (or to the employee via a check made out directly to the COBRA administrator); or
  2. Reimburse only upon employee substantiation of the COBRA payment with proof of payment receipt



# 5. Special Issues

## The Other COBRA Quirks

# COBRA M&A Qualified Beneficiaries: Stock Deal

## General Rule

- If the selling group ceases to provide any group health plan to any employee (and the termination of the seller's plan was in connection with the sale), the buyer's group health plan is liable for the COBRA coverage
- The buyer's group health plan has the obligation to make COBRA continuation coverage available to all M&A qualified beneficiaries with respect to that stock sale

## Definition of a Stock Deal

- "A stock sale is a transfer of stock in a corporation that causes the corporation to become a different employer or a member of a different employer."
- Continuing employees do not terminate from employment in a stock deal

## M&A Qualified Beneficiaries

- Any COBRA participant whose qualifying event occurred prior to or in connection with the sale (and whose last employment was with the seller)

### M&A Qualified Beneficiaries Include:

- COBRA participants already receiving COBRA coverage with seller's plan before the deal (i.e., existing COBRA qualified beneficiaries); and
- Individuals who lose coverage under the seller's plan in connection with the deal (i.e., seller's employees who do not continue employment upon the acquisition by the buyer)

# COBRA M&A Qualified Beneficiaries: Stock Deal

## Buyer's Obligation to Offer COBRA If Seller Terminates Plan

- The buyer's plan has the obligation to offer COBRA to all of the M&A qualified beneficiaries as of the later of:
  - 1) The date the seller group ceases to provide a group health plan; or
  - 2) The date of the stock sale

## Example (Easy)

- Big Co. (1,000 EEs) acquires Medium Co. (150 EEs) as of July 1, 2019
- Medium Co.'s group health plan terminates as of the close
- At the time of the sale, Medium Co. has 14 COBRA qualified beneficiaries (whose qualifying event occurred with Medium Co.)
- Big Co. terminates 25 of Medium Co.'s employees in connection with the sale

## Result

- The 14 existing COBRA participants under the Medium Co. plan are M&A qualified beneficiaries **with the right to continue the remainder of their COBRA maximum coverage period under the Big Co. group health plan as of July 1**
- The 25 Medium Co. employees who terminate employment in connection with the sale are also M&A qualified beneficiaries **with the right to the full 18-month maximum coverage period under the Big Co. group health plan**
- The Medium Co. employees who continue employment are not M&A qualified beneficiaries (they have no COBRA qualifying event)

# COBRA M&A Qualified Beneficiaries: Stock Deal

## Example (Hard)

- Medium Co. is part of a controlled group with Other Co.
- Medium Co. and Other Co. both sponsor separate group health plans
- Big Co. acquires Medium Co. (but not Other Co.) as of July 1, 2019
- Medium Co.'s group health plan continues after the close
- At the time of the sale, Medium Co. has 14 COBRA qualified beneficiaries (whose qualifying event occurred with Medium Co.)
- Big Co. terminates 25 of Medium Co.'s employees in connection with the sale

## Result

- The 39 M&A qualified beneficiaries (14 existing and 25 terminated upon close) have the right to COBRA under Other Co.'s group health plan
- Even though Medium Co. still maintains its plan, and even though Medium Co.'s employees were never eligible for Other Co.'s plan
- Reason is that Other Co. is part of the seller group and continues to maintain its plan
- Very weird result!

## How to Avoid that Weird Result

- As part of the deal, the Medium Co. and Other Co. group could negotiate with Big Co. to have Medium Co.'s plan be responsible for COBRA for all M&A qualified beneficiaries
- This would mean that Other Co.'s plan is not required to offer COBRA to the M&A qualified beneficiaries (unless Medium Co. fails to fulfill its contractual responsibility to offer COBRA)

# COBRA M&A Qualified Beneficiaries: Asset Deal

## Definition of an Asset Deal

- “An asset sale is a transfer of substantial assets, such as a plant or division or substantially all the assets of a trade or business.”
- Continuing employees are terminated from employment and rehired by the buyer

## Buyer Group Obligated to Provide COBRA if Successor Employer

- In an asset sale, the group health plan of the buying group is obligated to make COBRA available to M&A qualified beneficiaries if it is a “successor employer”
- Buyer is a “successor employer” if:
  - 1) The seller ceases to provide any group health plan to any employee;
  - 2) The cessation occurs in connection with the sale; and
  - 3) The buying group continues the business operations associated with the assets without interruption or substantial change

## Successor Employer COBRA Timing

- The successor employer’s group health plan has the obligation to offer COBRA to all of the M&A qualified beneficiaries as of the later of:
  - 1) The date the seller group ceases to provide a group health plan; or
  - 2) The date of the asset sale

# COBRA M&A Qualified Beneficiaries: Asset Deal

## M&A Qualified Beneficiaries

- Any COBRA participant whose qualifying event occurred prior to or in connection with the assets being sold (and whose last employment was with the seller)

### M&A Qualified Beneficiaries Include:

- COBRA participants already receiving COBRA coverage with seller's plan before the asset sale (i.e., existing COBRA qualified beneficiaries); and
- Individuals who lose coverage under the seller's plan in connection with the deal (i.e., seller's employees who do not continue employment upon the acquisition by the buyer)

## No Qualifying Event Where Rehired By Successor Employer

- In an asset sale, continuing employees are terminated from employment with seller and rehired by the buyer
- The termination of employment is not a qualifying event if the buyer is a successor employer and the covered employee is employed by the buyer immediately after the sale

## Asset Sales in Connection with Bankruptcy Proceedings

- An employer who purchases assets in sale that occurs in connection with a bankruptcy under Title 11 can still be a successor employer required to offer COBRA to all M&A qualified beneficiaries
- Many employers don't consider this in a bankruptcy situation

# COBRA and Medicare:

## Where COBRA Can Terminate Early

### COBRA Coverage Can Terminate Early Based on Medicare “Entitlement”

- Medicare “entitlement” means Medicare enrollment
- Mere Medicare eligibility (e.g., reaching age 65) is not Medicare entitlement
- Thus, merely being eligible to enroll in Medicare cannot terminate COBRA rights

### The Geissal Rule: U.S. Supreme Court Weighs In

- The only Supreme Court decision to address COBRA was *Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998)
- The court found that Medicare entitlement (*i.e.*, enrollment) can terminate COBRA rights **only if Medicare enrollment occurs after the COBRA election**
- In other words, Medicare enrollment prior to electing COBRA cannot cut short a qualified beneficiary’s COBRA rights
- Now reflected in the COBRA regulations (Treas. Reg. § 54.4980B-7, Q/A-3(a))

### Example:

- Jane, who is age 65+, terminates employment with Company A
- Jane enrolls in Medicare prior to electing COBRA coverage under A’s plan
- **Jane can maintain both Medicare and COBRA coverage because she enrolled in Medicare prior to making her COBRA election (although most probably wouldn’t want to, she could)**
- **If she elected COBRA prior to enrolling in Medicare, the subsequent Medicare enrollment would cut short her COBRA rights**

# COBRA and Medicare: Generally Not a Qualifying Event

## COBRA Qualifying Event: Two Requirements

- 1) Loss of coverage
- 2) Caused by one of the COBRA triggering events

## MSP Rules Prohibit Medicare Enrollment Triggering Loss of Coverage

- Loss of coverage caused by enrollment in Medicare technically is a COBRA qualifying event
- For most employers (generally 20+ EEs), the MSP rules prohibit employers from taking into account Medicare enrollment
- **Therefore, an employer-sponsored group health plan generally cannot provide for loss of eligibility upon Medicare enrollment**
- No COBRA qualifying event because no loss of coverage

## Medicare Enrollment Also Not a Second Qualifying Event

- Certain events can extend the COBRA maximum coverage period for spouses and dependents from 18 months to 36 months
- Because Medicare enrollment almost always does not cause loss of coverage, it also cannot be the basis for a second qualifying event

# COBRA and Medicare: Pre-QE Medicare Enrollment Extension

## COBRA Extension Applies to Two Qualifying Events

- 1) Termination of Employment; or
- 2) Reduction in Hours

## COBRA Extension Applies Only to Spouse and Children

- No extension for the employee!

## Medicare Enrollment Must Occur Prior to Qualifying Event

- Medicare enrollment after QE not a second QE (see previous slide)

## Extension Duration Depends on When Employee Enrolled in Medicare

- COBRA maximum coverage period is the later of:
  - 36 months from the date the employee enrolled in Medicare; or
  - 18 months from the date of termination or reduction in hours.

## Example

- Evan enrolls in Medicare July 1, 2019, and he retires December 31, 2019
- Evan elects COBRA for himself, his wife, and his kids effective January 1, 2020
- Evan's COBRA maximum coverage period is 18 months (until June 30, 2021)
- Wife and kids can continue coverage through COBRA for 30 months (until June 30, 2022)

# COBRA and Domestic Partners: DPs Not Qualified Beneficiaries

## COBRA Qualified Beneficiaries Do Not Include Domestic Partners

- Must be a COBRA “qualified beneficiary” to have independent COBRA rights
- Qualified beneficiaries include the following individuals covered under the plan as of the date of the qualifying event:
  - 1) **Covered Employee**
  - 2) **Spouse of Covered Employee (Does Not Include Domestic Partners)**
  - 3) **Child of Covered Employee**
  - 4) **Child Born (or Placed for Adoption) with Covered Employee During COBRA Period**

## What Happens When Domestic Partner Loses Coverage?

- General rule is that as a non-qualified beneficiary, the domestic partner has no independent COBRA election rights
- DP must therefore be covered as the employee’s dependent to receive COBRA coverage
- Employee has the right to cover DPs if they are eligible dependents for active employees
- If employee dies or drops COBRA coverage, DP has no right to continue COBRA coverage

## Employer May Offer “COBRA-Like” Coverage for Domestic Partners

- Treats domestic partners as a qualified beneficiary in the same manner as a spouse
- Confirm with insurance carrier (fully insured) or stop-loss provider (self-insured) if permitted

A person is writing in a notebook with a pen. In the background, a laptop screen displays a bar chart with five bars of varying heights. The scene is overlaid with a semi-transparent pink filter.

# Wrap Up **Takeaways**

# COBRA Continuation Coverage: Top Five Issues for Employers

1

## Qualifying Events

- A COBRA qualifying event occurs when one of the listed triggering events causes loss of coverage under a group health plan subject to COBRA
- The maximum coverage period depends on the type of qualifying event experienced by the qualified beneficiary
- Special rules for situations such as removal of a spouse in anticipation of divorce, failure to return from FMLA leave, and gross misconduct termination

2

## Elections and Payment

- Two primary COBRA notices: The initial notice and the election notice
- Remember that each qualified beneficiary has independent election rights
- Proceed with caution: Late election/payment requests and late election notices

3

## Coverage Options

- General rule is that only the coverage in effect at the time of the qualifying event is available through COBRA
- Three main exceptions where qualified beneficiary may change coverage
- State mini-COBRA laws provide an additional continuation coverage option

# COBRA Continuation Coverage: Top Five Issues for Employers

4

## COBRA Subsidies

- It's very common for employers to want to provide some level of financial support too address high cost of COBRA premiums
- Direct COBRA subsidies are the standard route for fully insured plans
- Standard taxable compensation is the best practice approach for self-insured
- Remember: Loss of COBRA subsidy  $\neq$  mid-year special enrollment right!
- COBRA reimbursement is also common to address new hire waiting periods

5

## Special Issues

- Mergers & Acquisitions
  - Rules differ slightly depending on whether the deal is a stock or asset sale
  - Buyer generally has to offer COBRA to “M&A qualified beneficiaries”
- Medicare
  - Medicare enrollment can cut short COBRA rights depending on timing
  - MSP rules prevent Medicare enrollment from causing loss of active coverage
- Domestic Partners
  - Not qualified beneficiaries, but plan may offer “COBRA-like” coverage to domestic partners that mirror independent election/coverage rights for spouses

# Content Disclaimer

## COBRA Continuation Coverage

The intent of this analysis is to provide the recipient with general information regarding the status of, and/or potential concerns related to, the recipient's current employee benefits issues. This analysis does not necessarily fully address the recipient's specific issue, and it should not be construed as, nor is it intended to provide, legal advice. Furthermore, this message does not establish an attorney-client relationship. Questions regarding specific issues should be addressed to the person(s) who provide legal advice to the recipient regarding employee benefits issues (e.g., the recipient's general counsel or an attorney hired by the recipient who specializes in employee benefits law).

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# Thank you!

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