

Show Me the Money ... COBRA-style

By Constance Gilchrest

Actor Cuba Gooding, Jr. is not the only one who can say “Show me the money,” as he does several times in the movie *Jerry Maguire*. Employers can do the same thing before reinstating COBRA coverage.

Three issues occur in this area:

- 1) Who has the right to elect COBRA coverage, triggering the duty to show the money.
- 2) Who may pay for COBRA coverage, the actual showing of the money.
- 3) What circumstances justify a delay in or tolling of the right to elect or the duty to pay for COBRA.

Electing COBRA Coverage

The COBRA statute makes it clear that each qualified beneficiary has the same rights under the health plan and is subject to the same terms and conditions as similarly situated active employees. Qualified beneficiaries also have independent election rights, grace periods, timeframe rights and the right to be informed of open enrollment and plan changes or rate changes.

Each qualified beneficiary may independently elect COBRA coverage. For instance, if an employee retires and enrolls in an employer-sponsored retiree plan that does not cover dependents, the retiree’s spouse and any dependent children may elect COBRA (for a period of 18 months).

The IRS COBRA regulations clarify that a covered employee or his/her spouse may elect COBRA coverage on behalf of all other qualified beneficiaries with respect to that qualifying event. Thus, a parent or legal guardian may elect on a minor child’s behalf.

The regulations also clarify that a spouse may not decline COBRA coverage on the other spouse’s behalf. The other spouse retains the independent right to elect COBRA. This principle would also extend to non-minor children, such as college-aged children still covered as dependents.

The preamble of the final COBRA regulations clarifies that a qualified beneficiary need not elect COBRA himself or herself. The election can be made on the qualified beneficiary’s behalf by a third party (including a third party that is not a qualified beneficiary). Who is the third party? It could be a parent or legal guardian of a minor child, or legal representative of a qualified beneficiary who is incapacitated or has died. This legal representative would be determined by applicable state law.

Paying for COBRA Coverage

Generally, the qualified beneficiary pays the COBRA premium(s). However, the final COBRA regulations make it clear that employer-sponsored health plans must accept premium payments on a qualified beneficiary’s behalf, regardless of who makes the payment. (See sidebar on p. 8 for examples of potential payers.)

Tolling of Election and Payment Periods

Even though the COBRA statute and regulations specifically refer to a 60-day election period, a 45-day initial payment grace period and a 30-day ongoing payment grace period, issues could occur that extend these periods, such as incapacitation or a natural disaster. Unfortunately, Hurricane Katrina fully demonstrated how a natural disaster affects COBRA timeframes. By law and other guidance, the U.S. Department of Labor and IRS extended the election and payment periods from Aug. 29, 2005, through Feb. 28, 2006.

If a qualified beneficiary were to die or become incapacitated during an election or payment period, he or she would not be able to elect COBRA. Several courts have ruled that when a qualified beneficiary becomes incapacitated during or before a time that action should have been taken, the affected period is suspended or “tolled” until the person:

- is no longer incapacitated; or
- has a legal guardian appointed; or



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- has an executor of the estate appointed (in the event of death).

Three cases illustrate how tolling works.

(1) In *Branch v. G. Bernd Co.*, the court ruled that a deceased former employee's COBRA election was timely even though it was executed after his death, which was more than 60 days after his termination of employment. During the election period, the former employee was shot several times and was admitted into the hospital in a semi-comatose state before dying. The hospital administrator was appointed as administrator of his estate and made a valid election because the election period had been tolled.

(2) The second case relates to a qualified beneficiary's mental incompetency. In *Sirkin v. Phillips Colleges, Inc.*, the court ruled that a group health plan must accept the premium payment after the expiration of the 30-day grace period when the delay in payment was due to mental incompetency of a qualified beneficiary who had already demonstrated intent to pay the premium.

(3) In *Andre v. Salem Technical Services*, the court found that tolling would be necessary to preserve the qualified beneficiary's right to reinstatement. In this

case, a sudden illness near the end of the payment grace period rendered the person unable to make the necessary inquiries or payments for COBRA.

To better illustrate how a tolling period works, below is an example:

- Qualifying event and loss of coverage occur on June 1.
- COBRA election notice is mailed June 13.
- Normal COBRA election period would end Aug. 12 (60 days later).
- Qualified beneficiary becomes incapacitated on June 20 (with 54 days left in election period).
- Legal guardian is appointed Sept. 10.
- Legal guardian must elect COBRA on behalf of incapacitated individual no later than Nov. 3 (54 days after appointment).

The above example extends the election period by almost three additional months.

As you can see, there are several issues to keep in mind when it comes to electing and paying for COBRA. Proper record keeping and consistency are two keys to proper and full COBRA compliance. 🏠

Who Can Pay a Qualified Beneficiary's COBRA Premiums?

Assuming a qualified beneficiary has elected COBRA, here are some of the potential COBRA payers:

- **American Kidney Foundation:** If an individual is diagnosed with end-stage renal disease, the foundation may pay the COBRA premiums through the American Kidney Fund (www.kidneyfund.org).
- **Another Insurer:** For example, a no-fault auto insurer could pay for COBRA premiums rather than the actual medical expenses for a COBRA qualified beneficiary who was injured in an automobile accident.
- **Divorced Spouse:** Frequently, courts order an employee to maintain health coverage for a former spouse. Therefore, the employee could pay COBRA premium(s) on the ex-spouse's behalf for the 36-month coverage period.
- **Former Employer:** In consideration of a severance package, a former employer could pay the COBRA premiums for a designated period.
- **Health Insurance Premium Payment (HIPPP):** This is a state program that pays for health care premiums for Medigap or an employer's plan premiums, including COBRA.
- **Hospitals or Physicians:** To avoid unpaid medical claims, a hospital or physician could pay COBRA premiums once they are aware of the situation; this would ensure treatment would be paid.
- **Legal Representatives:** An appointed legal guardian or an administrator of the estate could pay the premiums.
- **New Employer:** A new employer may pay COBRA premiums, especially if its health plan has a waiting period.
- **State Medicaid Programs:** A state Medicaid program has the option of paying COBRA premiums for individuals whose family income is no more than 100 percent of the federal poverty level and whose resources are no more than twice the limit applicable for social security income in the state. (This arrangement only applies to employers with 75 or more employees.) 🏠