

# Counting to 20 Is More Difficult Than It Used to Be

By Juli Hanshaw



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Learning to count to 20 was something everyone learned early in life. Most picked up the skill by the time they hit kindergarten, if not before. It's an aptitude that remains, but when related to COBRA, it brings twists and turns. This time around, employers count employees to determine if they need to offer COBRA. While it may sound easy enough, counting 20 employees can be confusing.

COBRA is an employer law. However, not all employers must comply. This law only applies to employers who have "20 or more employees on 50 percent of its typical business days during the preceding calendar year." Easy enough, right? Just count your employees and all is complete. Not as easy as kindergarten when counting to 20 got you a smiley face sticker from the teacher.

A couple things can cause problems and make counting to 20 more difficult. What does an employer do with part-time employees? Do they count an employee even if they are not on the health plan? What about the self-employed, independent contractors or directors, should they be included?

When figuring out the employee count, an employer needs to count *all* employees, whether full- or part-time, and regardless of whether the employees are enrolled or eligible for the health plan. However, one of the twists is how to count the part-time employees. The 1999 proposed IRS COBRA regulations provided guidance in this area. This group, part-time employees, is considered as a fraction of a full-time employee.

Additionally, the 2001 final IRA COBRA regulations clarified who to count — only common law employees are taken into account. Self-employed individuals, independent contractors and directors are not counted when figuring the small employer rule and checking for 20 employees.

When does the employer figure all of this? An employer may count the employees on a

daily basis or a pay period basis. The chosen basis must be used consistently for all employees for the entire year.

Let's review with an example, not a test like school, just an example.

**Example.** An employer uses 40 hours per week as a benchmark for full-time status. (At no time may an employer use more than 40 hours per week as such a benchmark.) One employee who works 20 hours per week would be counted as one-half an employee for COBRA purposes. Another employee who only works 10 hours per week would be counted as one-quarter of an employee.

So, counting to 20 is not as easy as kindergarten. It actually takes you back to the third grade, when fractions started becoming a portion of the math problems.

For multi-employer plans, counting to 20 is determined by which employers are contributing to the plan and the number of employees within the workforce for the employers during the preceding calendar year.

When an employer ceases to maintain 20 employees during the preceding calendar year and becomes exempt from COBRA, what happens to anyone already on COBRA? They remain on COBRA until dropped for a terminating reason or the COBRA coverage expires. Just because an employer becomes exempt does not provide it with an opportunity to remove all qualified beneficiaries off COBRA coverage at that time. They elected COBRA while the employer was above the 20 employee rule, therefore can continue once the employer drops below 20 employees.

The rule reverses for those exempt employers that then go over the 20 employee mark; that is, an employer did not have to offer COBRA, but the following year starts to comply. Nothing states the employer has

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# Benefits Briefs

## INDUSTRY EXPERT NOTES THE CHALLENGES OF HCTC EXPANSION

While it may appear “logical” to expand the Health Coverage Tax Credit (HCTC), several challenges exist, Janet Trautwein, executive vice president and CEO, National Association of Health Underwriters, noted at a recent Urban Institute briefing.

The HCTC was established under the Trade Act of 2002 (Pub. L. 107-210), which provides trade adjustment assistance (TAA) or alternate TAA (ATAA) for people who lose their jobs because of trade-related reasons, such as competition from foreign imports. TAA or ATAA-eligible individuals can use the HCTC, a 65-percent tax credit, to offset the cost of qualified health insurance such as COBRA coverage.

However, there have been concerns that the HCTC program lacks flexibility. For example, Trautwein noted that, “Many people assume that an individual who has lost coverage always has a COBRA option. This is not the case. Many TAA-eligible individuals worked for employers who have gone out of business. Because COBRA is an employer law, if there is no employer, there is no COBRA. The same holds true for state continuation options. Also, many other eligible individuals worked for small employers to which COBRA does not apply, and not all states have mandated continuation of coverage options for smaller employers.”

Accordingly, as the HCTC faces reauthorization, there have been calls to expand its provisions to larger classes of workers. However, in her presentation, Trautwein listed the following concerns regarding an expansion:

- 1) State high-risk pools, elected as the only option in 15 states, are not designed to handle large populations.
- 2) If, for example, a person’s eligibility period was tied to unemployment compensation, he or she would be eligible for the credit for six months — a short-term risk like this is not attractive for insurers.
- 3) Even with a generous credit like the HCTC, individuals and families with substantially reduced income due to the loss of employment are significantly less able to come up with their own 35-percent share of premiums, particularly if the

coverage cost is artificially high, which is the case with the current purchasing options.

An alternative solution would be to simply target low-income working individuals who make too much to qualify for Medicaid, but not enough to afford health insurance on their own, according to Trautwein. She also recommended improvements such as revising purchasing options to allow eligible individuals to purchase available state-approved coverage without requiring a special state election. Because keeping the costs of the HCTC program manageable is another concern, Trautwein offered several suggestions, such as: (1) phasing

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to go backwards and offer COBRA to anyone who lost coverage the prior year. The COBRA obligation would begin with the calendar year that the company has to offer COBRA. Anyone losing coverage with a qualifying event after that date would be offered COBRA coverage. Let’s look at this concept closer:

**Example.** Company ABC’s group health plan renews June 1 and is no longer required to comply with COBRA because it only has 17 employees. Anyone on COBRA or with a qualifying event before June 1 would continue with that opportunity. Anyone with a qualifying event after June 1 would not be offered COBRA coverage.

The same would be true for the flip-side of this scenario. If ABC has to begin complying on June 1, no one who had a qualifying event before that date would be offered COBRA. Any qualifying events following that date would be offered COBRA coverage.

The reason counting to 20 is so important to an employer is that small employers, those with fewer than 20 employees, are exempt from having to comply with COBRA. Counting makes a big difference to this group of employers. Also exempt is the federal government, which has its own rules regarding continuation coverage, and church plans, within the meaning of Section 414(e) of the Internal Revenue Code.

It’s all about the math. Not as easy as in elementary school, but counting to 20 is an important number for employers with a group health plan. 🏠