

# COBRA Beyond U.S. Borders

By Constance Gilchrest

At times, COBRA can make you feel like you're spinning your wheels, causing bruising instead of cruising. One issue that frequently arises is when a U.S. employer has a foreign operation and a group health plan covering its overseas employees.

This can become quite complex, causing bumps along the way. Hopefully, the ride along the freeway can become smoother with the following directions. When steering through these issues, one immediately comes to a four-way stop sign, with three clear decision points:

- Determining who is the employer for COBRA purposes.
- Deciding how COBRA affects non-U.S. citizens covered in the United States.
- Applying COBRA to U.S. citizens covered abroad.

## Which Employers Are Subject to COBRA?

In order to avoid a roadblock, a determination must be made regarding the definition of an employer. Under COBRA, the term "employer" is determined on a controlled group basis, taking into account all U.S. and foreign entities. Thus, for purposes of determining the small employer exception, you must count the employees of foreign companies within the control group, even if they are not U.S. citizens.

The IRS' final COBRA regulations provide a clear example:

A foreign company has a wholly owned U.S. subsidiary with only 12 U.S. employees. Taking into account the employees of the parent, the U.S. subsidiary is subject to COBRA.

COBRA also applies to companies in U.S. territorial jurisdictions, which are:

- the District of Columbia
- Puerto Rico

- Virgin Islands
- America Samoa
- Guam
- Wake Island
- the Panama Canal Zone

Employer-sponsored group health plans in the territorial jurisdictions are subject to the same COBRA rules as companies in the 50 states. For example, in *Torres-Negron v. Ramallo Brothers*, the Puerto Rican company's human resources director tried to convince her employer that as a territorial jurisdiction, its group health plan was subject to COBRA. Her explanations were not taken into consideration.

When her own employment terminated, Ramallo Brothers did the expected by failing to offer COBRA. Shortly after Torres-Negron filed a COBRA lawsuit about 10 months later, Ramallo Brothers sent an election notice. The employer tried to argue that based on Torres-Negron's knowledge of COBRA, she did not need a COBRA notice. The employer lost the argument, and had to pay a daily penalty that amounted to \$24,900, in addition to an award of attorney's fees and costs.

## Which Foreign Employees Are Subject to COBRA?

Down the road is a detour to determine if an employee who resides outside the United States should be offered COBRA. No need to swerve. The general rule is that a foreign employee covered under a U.S. group health plan must be offered COBRA even if the group health plan does not cover expenses outside the United States.

We need to make a "U" turn regarding nonresident aliens. For Internal Revenue Code purposes, nonresident aliens who do not receive any U.S. income — as well as their relatives — cannot become qualified beneficiaries. On the other hand, resident



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# Court Rejects Employer's Attempt to Use COBRA To Cut FMLA Damages Award

In attempting to lessen a damages award of more than \$31,620 related to a violation of the Family and Medical Leave Act (FMLA), an employer argued that since the aggrieved employee was sent a COBRA election notice, the damages should be limited to the amount of the insurance premium, rather than her unpaid medical expenses — even though the employee contended she never received the notice and in any case did not intend to elect COBRA coverage. A federal district court in Illinois rejected the employer's argument, finding that the jury that decided the case chose to believe the employee's contention because, among other things, the notice had a typo in her mailing address. From this evidence, the court held, a jury reasonably could have found that she never received the COBRA notice. Even if she had received notice, she had no reason to believe she needed COBRA coverage, according to the court. The case is *Ryl-Kuchar v. Care Centers, Inc.*, 2008 WL 2444588 (N.D. Ill., June 16, 2008).

## Facts of the Case

Kathleen Ryl-Kuchar was an employee with by Care Centers, Inc., and received a salary based on a 40-hour work week.

In February 2003, Ryl-Kuchar told the human resources (HR) department that she was pregnant with triplets, and allegedly she was given an FMLA certification form and told that she could take 12 weeks of FMLA leave. After having her doctor complete the form, Ryl-Kuchar returned it to Care Centers. In mid-May 2003, Ryl-Kuchar began working from home, and worked fewer than 35 hours per week.

On July 17, 2003, Ryl-Kuchar gave birth, and went home with the triplets on July 21. She continued to work from home until the end of July or beginning of August, but her personal duties were such that she stopped doing work for Care Centers but intended to resume her duties following her FMLA leave. Ryl-Kuchar could not

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aliens who are paid with U.S. income are covered by COBRA.

An example would be a U.S. company that employs several English expatriate employees who are covered under the U.S. health plan. If an expatriate returns to the United Kingdom-affiliated company, no qualifying event exists because there is no termination of coverage. But if an employment termination coincides with the return to the United Kingdom, there is a COBRA qualifying event, even though the U.S. plan may not cover expenses incurred outside of the United States. An argument exists that the U.K. company would have to offer its coverage instead because the U.S. plan is region-specific and the qualified beneficiary has moved out of the service area.

### **How Does COBRA Affect U.S. Employees On Foreign Soil?**

Let's turn toward when an American works overseas and participates in a foreign health plan. For this purpose, this means plans "maintained outside the U.S. primarily for the benefit of non-resident aliens." COBRA provisions under ERISA do not reach individuals participating in foreign plans. However, an argument exists under the tax code that an employer-sponsored plan would

need to offer COBRA to the U.S. citizen under the U.S. plan, especially if the individual and family are returning to the United States.

Very often, U.S. expatriates in foreign countries are covered by an "international" health plan. It is important that employers review the administration of such plans to determine whether and how ERISA and COBRA apply to such coverage and plan accordingly.

### **One Last Speed Bump: Creditable Coverage**

Caution should be taken regarding the fact that foreign group health coverage constitutes "creditable coverage" for individuals who were enrolled in the plan. The map to this determination is found in HIPAA's final portability regulations. A foreign employee who is covered under a foreign group health plan becomes eligible for coverage under a U.S. plan without being subject to a pre-existing condition exclusion as long as there were 12 months of creditable coverage without more than a 63-day gap in coverage.

With so many long and winding roads, employers should carefully map out their continuation coverage processes when it comes to employees who work in a country where they are not citizens. 