



Constance Gilchrest is the research and compliance specialist for *Infinisource, Inc.*, which provides COBRA, flexible benefits and other administrative services to more than 14,000 employers nationwide. She has more than 12 years of experience with COBRA, is certified for Flexible Compensation Instruction (CFCI) through the Employers Council of Flexible Compensation and is CDHC certified through the National Association of Health Underwriters (NAHU).

Make Sure You Include All Ingredients in COBRA Offering

By Constance L. Gilchrest

Any cook can tell you, probably from first-hand experience, about the disastrous results of leaving out even one ingredient or adding too much of another in an otherwise well-cooked meal. Forget the yeast, and the bread will not rise. Too much salt leaves the potatoes tasting, well, too salty.

The same holds true for offers of COBRA. You need to make sure you include all the ingredients.

The initial issue is when to preheat the oven. In other words, what triggers COBRA? Two ingredients are needed in order to offer COBRA:

- 1) a qualifying event; and
- 2) a loss of coverage under the group health plan.

Now, let's use a flour sifter to determine what ingredients to add. COBRA applies to an employer's or employee organization's group health plan. (See sidebar on p. 11.)

Now add to the mix the coverage that qualified beneficiaries are to be offered. When a qualifying event occurs, each qualified beneficiary must be offered the opportunity to continue, under COBRA, the group health plan benefits each person was receiving immediately before the qualifying event.

The main course, of course, is the group health coverage. Additional ingredients may include prescription drug, dental and vision coverage. There are two ways to add these ingredients:

- 1) **Bundled coverage.** This type of plan arrangement includes all health coverage options. In a "bundled plan" arrangement, active employees would not have the opportunity to select separate coverage options. They must take the entire plan (that is, medical, prescription, dental or vision).

Therefore, this would be the only option that must be made available to a qualified beneficiary.

- 2) **Separate coverage option.** This is a group health plan that has both core and non-core coverage options. Active employees may pick and choose among the coverage available; therefore each qualified beneficiary may elect any or all the plans they had before the qualifying event. There may be many different coverage election combinations.

If an employer offers the separate coverage option to active employees, it must do so when offering COBRA.

What About Health FSAs?

More ingredients may still need to be added. Don't forget about health flexible spending arrangements (FSAs). COBRA limits when an employer is required to offer the health FSA. If the health FSA satisfies two conditions (the two-step test), it would not need to be offered beyond the plan year in which the qualifying event occurred, if at all.

The two-step test is:

- 1) Benefits under the health FSA are excepted benefits under HIPAA.
- 2) The maximum payments for a year of COBRA equal or exceed the maximum reimbursement available under the health FSA.

If the health FSA meets a second test, it would not be offered at all.

The second test is: If the qualified beneficiary has a zero or overspent account balance (that is, reimbursements exceed contributions), the health FSA would not need to be offered at all under COBRA.

See *COBRA Offering*, p. 11

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More detailed articles on health FSAs appear in the March and April newsletters, under “Road Rules Provide Street Smarts for FSAs and COBRA.”

HRAs and HSAs

If the employer sponsors a health reimbursement arrangement (HRA), you need to keep stirring and add that to the mix. IRS guidance issued in 2002 makes it clear that HRAs must be offered under COBRA.

What Is a Group Health Plan?

A “group health plan” is defined as “a plan maintained by an employer or employee organization to provide health care, whether directly or through insurance, reimbursement or otherwise.”

Health care includes “the diagnosis, cure, mitigation, treatment, or prevention of disease and any other undertaking for the purpose of the affecting any structure or function of the body.” 

In contrast, a health spending account (HSA) generally is not offered under COBRA because it is an individual account, not a group health plan. In 2004, the U.S. Department of Labor (DOL) set out a five-factor safe harbor test for avoiding ERISA and COBRA:

- The employer may not limit the ability of eligible individuals to move funds to another HSA.
- No conditions are imposed on how the employee may use HSA funds.
- The employer does not make or influence HSA investment decisions.
- There are no representations that the HSA is established or maintained by the employer.
- The employer receives nothing in return for the arrangement.

Of course, the HSA-compatible high-deductible health plan is subject to COBRA.

Employee Assistance and Wellness Programs

The mix is getting thicker but we may still need to add a few more ingredients. Certain employee assistance programs (EAPs) fall under the definition of a health plan. If the plan offers mental or physical health counseling or referrals for drug or alcohol addiction, you need

to add the EAP to the mix. Two DOL Advisory Opinions clarified this issue.

Advisory Opinion 83-35A clarified counseling services are medical benefits subject to ERISA and COBRA. Advisory Opinion 88-04A clarified treatment of drug and alcohol abuse is also a medical benefit subject to ERISA and COBRA.


Wellness programs are usually sponsored by employers for the benefit of employees. A 1993 DOL Information Letter confirms that if a wellness program offers benefits that constitute medical care, those programs are subject to ERISA and COBRA.

Voluntary Insurance Is Commonly Forgotten

The commonly forgotten ingredient is voluntary insurance. Many employers unwittingly take steps that constitute sponsorship of such plans, and as a result have ERISA and COBRA application. (See sidebar.)

If the employer maintains a plan that reimburses for specific medical treatments or specific types of claims (for example, cancer), this is coverage that needs to be offered under COBRA, even if there is a conversion option upon termination of employment. If the plan merely pays out a lump sum if certain medical conditions occur, this would not have to be offered under COBRA.

Like adding arsenic to a cup of tea, some ingredients are never added to the COBRA mix. They include life and disability insurance, long-term care coverage and dependent care FSAs.

COBRA compliance can be difficult, so don't let the “mix of ingredients” cause you to fail. 

What Is a Completely Voluntary Plan?

A completely voluntary plan is one where:

- The employee contributes 100 percent of the premium.
- Participation is voluntary.
- The employer does not endorse the plan but allows the insurer to publicize it, with the employer merely making the appropriate payroll deductions and forwarding premiums to the insurer.
- The employer receives nothing in return for the arrangement, except for reasonable administrative expenses, if any. 