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# Incapacity Is Serious Matter For Employers

*By Juli Hanshaw*

COBRA time frames are no laughing matter. If improperly handled, they can lead to financially devastating lawsuits and fines. In particular, one area should be taken very seriously: incapacity — and that's no joke.

COBRA has many deadlines that employers must keep in mind. However, one exception to applicable deadlines that courts have carved out over the years is when a qualified beneficiary (QB) has a period of mental or physical incapacity.

Several courts have ruled that when a QB becomes incapacitated during, or prior to, a period of time where action must be taken, the affected period is suspended or “tolled” until the QB is no longer incapacitated or a legal guardian has been appointed. Incapacity can affect both failure to elect and failure to make a payment on a timely basis.

Webster defines incapacity as “unable to act or respond.” How does an employer know that this is the case for a QB? It is incumbent on the QB or a legal representative to make the employer aware of the situation. There also could be an instance where an executor of the estate is appointed in the event the QB dies before the date the QB is no longer incapacitated.

A QB should provide clear evidence of incapacity to an employer; notifying of an illness will typically not suffice. Once that happens, the employer must then “toll” time frames. Sometimes, this may mean reversing prior action preceding notification of the incapacity.

**Example.** A QB becomes incapacitated some time either during or prior to the end of an election period. The election period lasts 60 days from the later of the date: (1) the notice is sent; or (2) coverage is lost due to the qualifying event. Once notification is received of the incapacity, time will “stop” until the QB is no longer incapacitated or appoints

a legal guardian. Therefore, if for example, the QB had seven days left to elect coverage and became incapacitated at that time, the time to elect would stop. Then once a legal guardian is appointed or the QB is no longer incapacitated, there would be seven days left for the QB to elect.

This could also mean that even if the 60-day election period is over and the employer is notified on the back-end of the incapacity, the employer would then need to allow the 60-day election period to stop or be “tolled” from the incapacitation date until the QB is no longer incapacitated or a legal guardian is appointed.

COBRA also allows for the termination of COBRA coverage in the event a QB fails to pay a premium within the required payment period. Although neither the COBRA law nor regulations address incapacity as a reason for tolling a monthly grace period, many courts have ruled this way.

The first time frame met by QBs is to make the initial payment. From the date of election, a QB has 45 days to pay the initial premium. Should a QB become incapacitated during that time, the payment would be “tolled.” Additionally, each month a QB has a grace period to make payment on a timely basis could also be “tolled.”

A court that addressed the monthly “tolling” of premium payment was a case against Jefferson Parish Library Department. A QB failed to make a monthly COBRA payment. The QB claimed that this failure was a result of head injuries suffered from an assault on or about July 11. The QB claimed his Aug. 4 premium deadline should have been “tolled” due to his mental incapacity.

Upon notification of his COBRA being terminated, the QB provided documentation to his former employer of his incapacity.

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## **Incapacity** (continued from p. 8)

The employer denied a “tolled” time frame for the late COBRA premium. The QB claimed that federal law allows a tolling of premium deadlines when an insured has been incapacitated. However, his former employer refused to consider the medical documentation it requested. The final decision on this case will go before jurors to determine the incapacity and whether to grant the tolled monthly premium payment.

In making the decision to put this before a jury, the court reviewed an earlier case, *Sirkin v. Phillips Colleges, Inc.* In the *Sirkin* case, COBRA benefits were terminated by the employer when the QB failed to make a payment on a timely basis. The facts of this case were that five days after the payment deadline, the QB was admitted to a local hospital, where she remained for several months. A state court later determined the QB was mentally incompetent and appointed a legal guardian. Independent psychiatric evaluations demonstrated that the plaintiff suffered from cerebral atrophy and memory impairment, and had been unable to tend to her own affairs for more than four months. When the guardian sought to bring the QB’s COBRA account current, the employer refused to accept payment and reinstate the plan.

## **Questions** (continued from p. 7)

situations, the federal premium assistance rules generally apply to state continuation coverage laws, subject to a few exceptions.

**Example.** The federal rules provide for a special election period for individuals who were involuntarily terminated from employment back to Sept. 1, 2008, and who were not covered by the plan as of Feb. 17, 2009. Those individuals have a new special election period during which they can change their minds and elect to be covered under the plan.

This special election period does not apply to state continuation coverage rules unless a state decides to implement a special election period. Some states (like New Jersey and New Hampshire) have already indicated that they will require insurers to provide for the special election period. Other states (like New York) might not do so absent a state legislative amendment.

Therefore, advisors of insured plans should be aware of the federal ARRA rules and, at the same time, be aware of the possible application of state continuation coverage rules.

Future issues of the newsletter will address more of the practical implementation questions. 🏠

The court found that:

Where an insured misses a premium deadline under COBRA due to the insured’s incapacity to know of or meet her obligation, the deadline for that premium payment is tolled for a reasonable period of time until the insured or her legally appointed guardian is able to cure the deficiency.

Employers should recognize these situations and seek proof, then grant the delay if warranted. Once again, these time frames could be tolled if the QB is mentally or physically incapacitated to the extent that the person does not pay the required premium. This means that the specific timeline is put on hold during the incapacity period or until a guardian can be named to act on the QB’s behalf.

The American Recovery and Reinvestment Act of 2009 (ARRA) does not address incapacity. However, time frames associated with ARRA would continue to follow the rules for federal COBRA time frames, including those regarding incapacity.

Granting extensions based on incapacity can be challenging for employers. Many have found themselves before a judge to review their decision regarding incapacity. Employers need to remember an extension for incapacity is not unlimited and only tolls the deadline during the period of incapacity. Employers are encouraged to use caution when discussing or reviewing incapacity. Each case should be evaluated on its own merits by the plan or its designee. In the end, a bad decision will not be a laughing matter. 🏠

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