

# Know Your Limits When It Comes to COBRA

By Juli Hanshaw

There are many limits in life — including speed limits, age limits and even mathematical limits. Limits seem to be everywhere, and this includes COBRA. While other limits may seem easy to understand as they provide us with a sensible stopping point, limits that deal with COBRA — such as deductibles, copayments and plan limits — can be more difficult to grasp.

While there's a common saying that says "know your limits," how does someone determine this for COBRA deductibles, copayments and plan limits after a qualifying event? Regulations state that qualified beneficiaries who elect COBRA are generally subject to the same deductibles, copayments and plan limits as a similarly situated active employee. That sounds easy for the most part, but what about the qualifying events that split up a family unit, such as when a dependent ceases to be a dependent or the covered employee has a divorce? What happens with the limits in these cases can be more of a mathematical adventure that most would like to embark upon.

Any amount that has been accumulating toward a deductible or plan limit would remain if a qualifying event occurs before the end of a plan year. Therefore, any expenses that had been incurred toward the deductible before the beginning of COBRA would remain just as if a qualifying event had not occurred. If deductibles and plan limits are computed individually before a qualifying event, then it would be the same with COBRA coverage.

However, what becomes difficult is splitting up deductibles and plan limits when they are applied to a family unit and the entire family either does not have a qualifying event or only some family members elect COBRA. When a deductible is computed on a family basis what remains depends on which members have a qualifying event and

are electing COBRA. Only the expenses for the qualified beneficiaries acquiring COBRA coverage are taken into account. Let's review a couple examples of how a family's deductibles and limits could be affected when changing to COBRA coverage.

**Deductible Example 1:** A group health plan applies a separate \$1,000 annual deductible to each individual it covers. A covered employee dies on July 11. The spouse and the two dependent children elect COBRA coverage, which will begin on Aug. 1.

- Covered expenses applied toward deductible through July 31:
  - o Spouse = \$800
  - o Older child = \$0
  - o Younger child = \$1,200
- Remaining deductible as of Aug. 1:
  - o Spouse: \$200
  - o Older child: full \$1,000 deductible
  - o Younger child: the deductible has been met

**Deductible Example 2:** A group health plan applies a separate \$2,000 annual deductible to each individual it covers, except that each family member is treated as having satisfied the individual deductible once the family has incurred \$5,000 of covered expenses during the year. A covered employee with four dependent children is divorced, the spouse obtains custody of the two oldest children, and the spouse and those children all elect COBRA coverage.

- Covered expenses applied toward deductible before the divorce:
  - o Family = \$4,200
  - o Each parent = \$700
  - o Oldest child = \$2,000



*Juli Hanshaw has more than 10 years of experience with COBRA and works directly for the president of Infinisource, Inc., which provides COBRA, flexible benefit and other administrative services to more than 15,000 employers nationwide.*

See *Limits*, p. 12

New! Try *HR 2009: Answers to Your Top 25 Questions* for 30 days. [www.thompson.com/answ](http://www.thompson.com/answ)

## **Limits** (continued from p. 11)

- o Youngest child = \$800
- o Other two children = \$0
- Remaining deductible at the beginning of COBRA:
  - o Spouse: \$1,300
  - o Oldest child: the deductible has been met
  - o Other child: \$2,000
  - o Family unit: \$2,300

Some plans base the amount of deductible on a person's compensation level, with lower compensated employees having a lower deductible. In such a case, the type of qualifying event dictates your options. If the employee remains employed during the COBRA period (for example, a divorce or dependent losing eligibility), the plan can choose to apply the deductible based on same salary level immediately before the qualifying event or based on actual, year-to-date compensation. On the other hand, if the employee is no longer employed during the COBRA period (for example, due to a termination of

employment), the plan must use the deductible in effect immediately before the qualifying event.

Plan benefits would work in the same manner for things such as maximum number of hospital days or dollar amount of reimbursable expenses, limits on out-of-pocket expenses or copayments, limits on deductibles plus copayments, or a catastrophic limit. This would apply equally to annual and lifetime limits and on specific benefits.

Here are some examples.

**Plan Limits Example 1:** A group health plan pays for a maximum of 150 days of hospital confinement per individual per year. Employee terminates employment and elects COBRA.

- Before the event: Covered employee = 20 days of hospital confinement
- Beginning of COBRA: Covered employee = covered for a maximum of 130 days of hospital confinement

See *Limits*, p. 13

## **Recover Benefits** (continued from p. 10)

### **Implications**


This seems to be a case where a judge's sympathy for an unemployed worker led the judge to tailor the law to reach a desired outcome without regard to how the law is written. For example, the judge did not approve of "back-dated" notices. However, even notices that would have been legally compliant in the judge's view would be back-dated, at least as to 44 days. Second, the fact that the statute has a penalty for late notices was completely ignored by this judge. That was a remedy for late COBRA notices, perhaps along with an opportunity to elect the COBRA coverage to which the aggrieved individual was entitled. Nothing in COBRA deems late notices to be "ineffective." They are completely effective in advising qualified beneficiaries of their rights back to the qualifying event date; however, they expose the plan administrator to notice penalties.

Nevertheless, this judge seemed to think that the better analysis was to call the late notice "ineffective" and then fashion a remedy that benefits the aggrieved qualified beneficiary. The judge may have thought this because Jennings never sought COBRA notice penalties.

Indeed, he could not have sought such penalties because he argued that the qualifying event date was July 1, in which case the Aug. 8 notice was timely and not "inef-

fective." Had the judge found that the qualifying event date was July 1, as Jennings requested, the judge could still have reached his result simply by finding that Jennings was still an employee entitled to coverage prior to July 1 and allowed Jennings to seek his coverage based on the general ERISA rules for participants seeking benefits under group health plans. Then, all of the analysis of "backdating" COBRA notices and "ineffective" COBRA notices was irrelevant.

On the other hand, the employer seemed to argue that the qualifying event was May 11, 2005. If that was the case, then the Aug. 8, 2005 notice was 89 days late as explained above. In this scenario, the analysis could have been that qualifying event was May 11 and that the employer/administrator was 89 days late in providing a COBRA notice. Then, the court could have found that the administrator was liable for COBRA notice penalties and that Jennings, as a qualified beneficiary, could have a right to elect COBRA retroactively, less payment of the premiums.

Instead, because there was no finding of a qualifying event and because Jennings never really argued this case as a COBRA coverage case, the judge's opinion is confusing. Its value as precedent will hopefully be restricted to the unique nature of the pleadings and facts of this case. 

We've done some remodeling! Check out the new look and features of [thompson.com](http://thompson.com) today!

# CMS Appeals Form for ARRA Subsidy Denials Now Available

In late May, the Centers for Medicare and Medicaid Services (CMS) set up a special Web site where it posted a 13-page application for assistance-eligible individuals (AEIs) covered by public-sector government plans and state mini-COBRA laws to use to appeal the denial of the COBRA premium subsidy under the American Recovery and Reinvestment Act (ARRA).

Although appeals information can be accessed at <http://www.cms.hhs.gov/COBRAContinuationofCov>, the key Web site for subsidy denial information is <http://www.continuationcoverage.net>. The latter site is managed by MAXIMUS Federal Services, Inc. — “a government contractor with experience in performing impartial reviews of benefit claim disputes.” CMS contracted with

## **Limits** (continued from p. 12)

**Plan Limits Example 2:** A group health plan reimburses a maximum of \$20,000 of covered expenses per family per year, and the same \$20,000 limit applies to unmarried covered employees. A covered employee and spouse who have no children divorce on May 1. The spouse elects COBRA.

- Before the event:
  - o Employee = \$5,000 of expenses
  - o Spouse = \$8,000 of expenses
- At the beginning of COBRA, reimbursable expenses:
  - o Spouse = \$12,000 (\$20,000 - \$8,000)

The above example, which comes straight from the IRS’ final COBRA regulations, provides the basis for properly calculating coverage limits for health FSAs and health reimbursement accounts.

Copayments would remain the same as a similarly situated active employee and would have no effect with COBRA coverage. If an office visit was \$30 before a qualifying event, while on COBRA an office visit would remain \$30 until and unless that copayment changes for the coverage of similarly situated active employees.

When you hear people say, “The sky is the limit” you know they are not referring to health plans with deductibles, copayments and plan limits. Keeping the mathematical limits straight with COBRA can be confusing, and a reason to purchase a calculator. 🏠

MAXIMUS to provide administrative case management services and answer the public’s questions about premium assistance and COBRA coverage.

## **Background**

ARRA includes a 65-percent subsidy for COBRA premiums paid by AEIs who lose group health plan coverage due to a covered employee’s involuntary termination from employment at any time from Sept. 1, 2008, through Dec. 31, 2009. (See ¶1286 and ¶1360 of the *Guide*.) The law anticipates that there could be disagreements about someone’s AEI status; accordingly, it requires the U.S. Department of Health and Human Services (HHS, or the U.S. Department of Labor (DOL) for private-sector COBRA coverage) to provide for an expedited review for individuals who were denied subsidy eligibility status “by reason of such individual’s ineligibility for COBRA continuation coverage” under federal, state and local government plans, and in plans regulated by comparable state mini-COBRA laws.

HHS and DOL are supposed to decide these appeals and respond within 15 business days after receipt of the application form. Their review is “de novo”; they do not have to defer to an employer’s decision and can make their own determination, to which any reviewing court must defer.

In an information collection request published in the May 4, 2009, *Federal Register*, CMS, which is an HHS agency, estimated that 12,000 individuals will appeal under its process.

## **About the CMS Process**

At the Web site <http://www.continuationcoverage.net>, CMS notes that individuals with questions can contact a help desk via e-mail at [continuationcoverage@maximus.com](mailto:continuationcoverage@maximus.com) or call (866) 400-6689 between 8 a.m. until 8 p.m. EST. They can also download a copy of the application form, “Request for Review If You Have Been Denied Premium Assistance.” There is no online application like DOL issued for private-sector employers on May 22 (see ¶1840). Applicants must either mail or fax the CMS application to MAXIMUS.

Otherwise, the CMS form is very similar to DOL’s form. Both forms ask the applicant the same 10 questions to further determine subsidy eligibility, but CMS

See *Appeals Form*, p. 14

New! Try *HR 2009: Answers to Your Top 25 Questions* for 30 days. [www.thompson.com/answ](http://www.thompson.com/answ)