



How to Better Anticipate an “Anticipation of a Divorce”

Issue

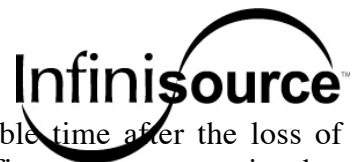
One difficult area of COBRA is complying with the rule on loss of coverage due to the employee’s anticipation of a qualifying event.ⁱ After all, employees decide who to cover on the group health plan and can drop coverage for family members during open enrollment and at other times, depending on circumstances. Employers often do not know the real reason for a change in coverage.

When the reason is the anticipation of a qualifying event – like divorce – the subject of COBRA may not arise until months, or even years, later. When it does, the desire of the ex-spouse and perhaps his or her dependent children to be covered can cause difficulties for an employer and the insurance carrier. How can an employer better “anticipate” an anticipation of a qualifying event?

Solution

The solution comes in four parts:

- Strictly enforce the participant election change rules. During a plan year employee premium contributions through a §125 Cafeteria Plan are irrevocable and subject to change only in limited circumstances.ⁱⁱ Divorce and legal separation are among those events.ⁱⁱⁱ However, merely filing for divorce or living apart while separated does not qualify. Thus, when an employee wants to drop a spouse or a dependent during the plan year, ask why. Acceptable reasons include a change in status, a court order, and FMLA leave. Reasons like financial setbacks and non-FMLA leave do not qualify. The requested change must also be consistent with the requested change.^{iv} For example, a Qualified Medical Child Support Order would not justify dropping a spouse from the plan. Therefore, the ability to remove a spouse in anticipation of a COBRA qualifying event is typically limited to the annual open enrollment period. Of course, a divorce, once final, gives rise to a change in election.
- Address anticipation of a qualifying event in the COBRA General Notice. Employers should always put employees and family members on notice of the rules related to the rule for anticipation for a qualifying event. While a General Notice is not required to address this rule^v and the DOL’s Model General Notice does not include this rule,^{vi} the General Notice should address removal from health coverage in anticipation of a qualifying event. After all the General Notice must be sent to the covered employee and his or her covered spouse when they first begin coverage.^{vii}
- Remember to Send a HIPAA Certificate of Creditable Coverage. Whenever a participant’s coverage ceases – regardless of the reason – an employer is required to send a HIPAA Certificate of Creditable Coverage.^{viii} This is referred to as an



automatic certificate and must be sent within a reasonable time after the loss of coverage.^{ix} A prudent employer may enclose with the Certificate a separate notice that reiterates the rules related to anticipation of a qualifying event.

- **Strictly Apply COBRA's Other Requirements.** A previously covered ex-spouse or dependent must notify the employer of the qualifying event within 60 days of the later of the event, the loss of coverage, or the date the individual knows about this obligation.^x Thus, if an employer learns of the divorce three months after the fact and if the employer had previously notified the individual of the notice obligation, COBRA would not need to be offered.

In addition, if there is an intervening qualifying event between the loss of coverage and the divorce, an employer may assert that the spouse would not have elected COBRA when initially offered. This is based on an assumption in IRS Revenue Ruling 2002-88, which addressed the anticipation of a qualifying event.^{xi} For example, an employee removed a spouse from coverage in anticipation of divorce and resigns before the divorce is final. If the employer can show that at the time of the divorce that the spouse had other group health plan coverage and likely would not have elected COBRA, COBRA would not need to be offered when the divorce is finalized later.

Explanation

When a former spouse or dependent raises the issue of anticipation of a qualifying event, an employer must send a COBRA Election Notice and offer coverage retroactive to the date of the qualifying event, not the loss of coverage.^{xii}

For More Information

Infinisource can assist you with both specialized COBRA notifications and §125 Cafeteria Plan administration. We started providing COBRA administrative services in the same year that COBRA was enacted. Our collective expertise is available to you at 800-300-3838 or www.infinisource.net.

ⁱ 26 CFR §54.4980B-4, Q/A-1(c).

ⁱⁱ 26 CFR §1.125-4.

ⁱⁱⁱ 26 CFR §1.125-4(c)(2)(i).

^{iv} 26 CFR §1.125-4(c)(3).

^v 29 CFR §2590.606-1(c).

^{vi} Appendix to 29 CFR § 2590.606-1.

^{vii} 29 CFR §2590.606-1(b).

^{viii} 26 CFR §54.9801-5(a)(2)(ii)(B); 29 CFR §2590.701-5(a)(2)(ii)(B); 45 CFR §146.113(a)(2)(ii)(B).

^{ix} Ibid.

^x 29 CFR §2590.606-3(c)(1).

^{xi} IRS Revenue Ruling 2002-88. Specifically, the IRS stated: "There are no facts to indicate that [employee's former] spouse would have otherwise lost coverage under the plan before the divorce."

