

# The Undocumented Alien Question: To Offer or Not Offer COBRA

By Constance Gilchrest

While the issue of undocumented aliens is a topic of frequent discussion, its impact on COBRA has been largely overlooked. And yet, it is a real issue with an increasing number of employers, especially those located in border states.

The issue is simply framed but not easily answered: During an immigration investigation by the U.S. Citizenship and Immigration Services, an employer terminates an employee after discovering he/she is not authorized to work in the United States. Should/must the employer offer COBRA coverage if the individual was covered under the group health plan?

The Immigration Reform & Control Act states that it is unlawful to employ any individual who is not authorized to work in the United States after discovering that the individual is an undocumented alien. That much is clear. Unfortunately, neither the COBRA law nor any issued guidance gives clear direction on what an employer's continuation coverage obligations are in the event of such a termination.

## Looking to COBRA's Definitions

Two things need to occur in order to offer COBRA:

- 1) a qualifying event (for example, termination of employment); and
- 2) a loss of coverage.

In this situation, the undocumented alien was covered under the group health plan the day before the qualifying event (termination of employment) occurred; therefore the employee is a qualified beneficiary.

The next question that could arise is who is considered a qualified beneficiary? Under COBRA, the term "qualified beneficiary" means, in addition to a covered employee under a group health plan, any other individual who, on the day before the qualifying event for that employee, is a beneficiary under the plan as the spouse of the covered employee or as the dependent child of the employee.

Here is the issue: COBRA makes reference to "covered employees" not "covered lawful employees." An undocumented alien would have a good argument for being a qualified beneficiary.

There is an exception for non-resident aliens in the Code:

The term "qualified beneficiary" does not include an individual whose status as a covered employee is attributable to a period in which such individual was a non-resident alien who received no earned income from the employer, which constituted income from sources within the United States.

See *Undocumented*, p. 6



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## Other Potential Employer Arguments Against Offering COBRA Coverage

- The undocumented alien was never an eligible plan participant, so the employer can cancel coverage retroactive to the original coverage date. Employers should review plan documents/SPD language to see if this is a viable argument.
- The plan has the right to terminate coverage, including COBRA, for "cause." Cause in this case would be the misrepresentation of employability status and the commission of a federal crime in connection with the employment.
- The loss of coverage was not due to a qualifying event but a loss of eligibility. However, this could be a hard argument to make because the loss of eligibility was essentially caused by the termination of employment.

# COBRA Claim May Still Be Timely, Court Rules

COBRA claims for benefits must be brought within the appropriate statute of limitations for these claims or else the claim will be dismissed even if the qualified beneficiary has a legitimate claim to lost COBRA benefits. The issue in many cases is how to determine the appropriate statute of limitations. Typically, courts will follow the most analogous state-law statute of limitations because COBRA does not have its own. Another important point in evaluating statute-of-limitations claims, though, is to determine when the limitations period starts. Again, in the absence of a rule under COBRA, courts are likely to follow the “discovery rule” — when did the aggrieved individual first discover that he or she had a claim?

In an employer’s eyes, COBRA notice claims should have been dismissed as time barred because the aggrieved qualified beneficiary filed suit less than a month after the two-year statute-of-limitations period expired. However, a federal district court in Illinois noted that the employer incorrectly assumed that the limitations period began running on the qualifying event date. Instead, the

court indicated, that period could begin on a later date: when the qualified beneficiary found out that his COBRA rights allegedly had been violated. Because that date had not been definitively determined at this stage of the proceedings, the court denied the employer’s motion to dismiss. The case is *Enenstein v. Eagle Ins. Agency, Inc.*, 2006 WL 1594019 (N.D. Ill., June 7, 2006).

## Facts of the Case

Eagle Insurance Agency, Inc. had a group health plan insured by Humana Health Insurance Co. and administered by Robert Gainsberg. Eagle employee Louis Enenstein alleged that he was terminated from employment on Jan. 16, 2004. (COBRA provides that a termination or reduction in hours of employment is a qualifying event that entitles qualified beneficiaries to 18 months of COBRA coverage. See ¶1122 of the *Guide*.) Allegedly, he was not notified of his COBRA rights. Under COBRA, an employer has 30 days from the qualifying event date to notify the plan administrator, who then

See *COBRA Claim*, p. 7

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This does not apply to the situation with the undocumented alien.

### Is Gross Misconduct a Defense?

An employer might argue against offering COBRA based on the fact that the termination was for violation of federal law and thus was gross misconduct. However, this may not be an easy solution. On Jan. 5, 2004, the IRS issued Revenue Procedure 2004-3, which has a list of 57 specific questions and problems on which it will not issue rulings. Included on the list was the definition of “gross misconduct” in the COBRA context.

Therefore, without a clear definition of what is considered gross misconduct, an employer would be at the discretion of a court system to determine if the employee’s action was considered gross misconduct. Generally, it would be in the employer’s best interest to offer COBRA to eliminate possible court costs, fines and penalties. The conservative approach is to offer COBRA; it would be in a rare case that an election or payment would be made to continue coverage. Employers lose many gross misconduct cases; they are often based on applicable state laws, which vary widely. In a case like this, venue could mean everything. It would be doubtful if an employer could win such an argument in El Paso, Tex., or Phoenix. See the sidebar on the previous page for other potential employer arguments in favor of not offering COBRA coverage.

### Have a Plan of Action

Employers with insured plans (or self-insured plans with stop-loss coverage) should discuss this issue with their insurers. Otherwise, they may incur uninsured COBRA liability if they offer COBRA but the insurer concludes undocumented aliens are ineligible for plan coverage.

Ultimately, the question may be asked whether it really matters. As a practical matter, the former employee will likely be en route to or living in a foreign country by the time the election notice is sent and is unlikely to elect COBRA coverage in any case. However, the ex-employee could have a spouse and/or dependents who qualify to continue to live in the United States (for example, children born here). Failure to offer COBRA coverage to all eligible qualified beneficiaries could result in daily penalties, litigation, reimbursement of unpaid claims and other related costs.

Keep in mind an employer would be at the discretion of a court to make a final decision whether COBRA should have been offered. This could be a risky and expensive roll of the dice. This situation may never happen in your organization, but employers should not wait until the unexpected occurs. Have a plan of action in place to avoid negative consequences. As the adage goes, the failure to plan is simply a plan to fail. 🏠