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# COBRA QB Dilemma: Who's on First, What's on Second ...

*By Constance Gilchrest*

Nothing is simple when it comes to COBRA, not even who is considered to be a qualified beneficiary. When a qualifying event occurs causing a loss of coverage, employers must offer COBRA to all qualified beneficiaries. Sounds simple, does it not? There are several traps employer must avoid in make this determination.

The IRS' 1999 final COBRA regulations state a qualified beneficiary is:

- 1) any individual who, on the day before a qualifying event, is covered under a group health plan by virtue of being on that day either a covered employee, the spouse of a covered employee, or a dependent child of the covered employee; or
- 2) any child who is born to or placed for adoption with a covered employee during a period of COBRA coverage.

## **Domestic Partner Issues**

Frequently, the question of who is considered a dependent for COBRA purposes comes up. For example, many think that a domestic partner who was a dependent under the plan should be offered COBRA as a qualified beneficiary. After all, an increasing number of states recognize domestic partners as spouses. Many employers and insurers permit coverage of domestic partners as well.

The federal Defense of Marriage Act (DOMA) states the word "marriage" only means a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. DOMA supersedes any state domestic partner law when it comes to COBRA. Therefore, when offering COBRA coverage, employers are not required to include domestic partners.

Of course, a qualified beneficiary (covered employee) may add a domestic partner during open enrollment under COBRA to the same extent the domestic partner of an active

employee may be added. It is very important to check with the insurer regarding the terms of your group health plan to confirm that the plan would allow this type of arrangement.

Regarding a second issue, a domestic partner could be considered a qualifying relative under Code Section 152. In order to qualify they would need to receive more than half of their support from the taxpayer and the employer could cover the partner on a tax-free basis. However, this would not gain a qualified beneficiary status for COBRA purposes because COBRA can be offered only to a covered employee, spouse and dependent children. While a domestic partner might qualify as a dependent, that person could not qualify as a domestic child.

## **HIPAA and QMEDs**

Contrast the above with a child who is born to or placed for adoption with a covered employee during a period of COBRA coverage. Such a dependent child would be considered a qualified beneficiary for COBRA purposes.

The HIPAA special enrollment rules clarify if the child is added to the plan within 30 days from the date of birth or date of adoption, the coverage would become effective from the date of birth or adoption. Therefore, even if the covered employee were to terminate their COBRA coverage, the child would be able to continue coverage for the remainder of the COBRA maximum coverage period (as long as all other conditions like timely payment of premiums were satisfied).

Also, in one situation a child can be considered a qualified beneficiary even if the child is not even a dependent. If a qualified medical child support order (QMEDs) directs a plan to cover the child, the plan must treat the child as a qualified beneficiary.

COBRA participants can enroll with the covered employee on a new group health

**See *QB Dilemma*, p. 14**

# Employer Escapes COBRA Claim By Arguing it Was Time-Barred

The “plan administrator” has a crucial role in COBRA administration. Plan administrators must provide COBRA notices to the proper individuals and in a timely fashion. If there is a COBRA notice failure, the plan administrator is the one that bears the risk of penalties. Therefore employers need to be sure to identify who the “plan administrator” is for COBRA purposes.

Although an employer was unsuccessful in arguing that it was not a plan administrator for purposes of a COBRA claim, it was successful in having that claim dismissed as time-barred. The case is *Baker v. Kingsley*, 2006 WL 2927606 (N.D. Ill., Oct. 10, 2006).

## Facts of the Case

On Dec. 22, 2000, Outboard Marine Corp. (OMC) closed its Waukegan, Ill., plant, filed for Chapter 11 bankruptcy and stopped providing benefits under its self-insured group health plan to employees and retirees. Ultimately, OMC sold its assets.

Several employees and retirees sued OMC officers, contending among other things that they violated COBRA by failing to provide a COBRA election notice on a timely basis. (COBRA provides that a termination or reduction in hours of employment is a qualifying event that entitles qualified beneficiaries to

up to 18 months of COBRA coverage. See ¶1122 of the *Guide*.)

The OMC officers sought to dismiss the claims, countering that they had no obligation to provide COBRA notices because that responsibility fell on the plan’s Administrative Committee based on the plan terms. To support their argument, they point to the court’s earlier decision in *Fenner v. Favorite Brands Int’l* (see ¶1900, Case Nos. 327 and 341), as holding that employers cannot constitute plan administrators under COBRA.

The former employees and retirees acknowledged that the plan designated an Administrative Committee responsible for providing COBRA notices, but alleged that the committee was a “mere instrumentality” of OMC and its officers, who therefore bore the true burden of providing COBRA notices. Specifically, they alleged that the company’s group health plan — the “OMC Consolidated Plan”:

- operated under several different plan instruments, including plans for union members, nonunion members and retirees;
- had a single trust and a single trustee, and filed a single annual report with the U.S. Department of Labor;

See *Time-Barred*, p. 14

## Options (continued from page 11)

Henson then sued LCCPS for COBRA violations due to the “deprivation” of COBRA coverage, alleging that she never received a COBRA election notice after receiving the termination letter. LCCPS sought a dismissal of the claim, contending that Henson’s right to elect COBRA coverage had expired.

The key issue at this stage of the proceedings (to decide whether the court could dismiss the case) was whether and when did a qualifying event occur, because the termination date was in dispute. Henson contended that the Nov. 18, 2005, letter constituted a termination of employment effective Nov. 28, 2005, that triggered her COBRA rights. However, LCCPS argued that Henson was terminated around November 2004, when it informed her of the cancellation of her health coverage and her opportunity to continue that coverage. She decided not to continue her coverage at that time; therefore, she was not entitled to COBRA coverage in November 2005 after she received the termination letter.

In evaluating the motion to dismiss, the court had to accept Henson’s allegations as true — and draw

all reasonable inferences in her favor — and not consider the merits of this dispute. Accordingly, the court concluded that Henson’s employment was terminated in November 2005, not November 2004. Therefore, the court declined to dismiss Henson’s claim against LCCPS, holding that the qualifying event did not occur until November 2005 and Henson was entitled to a COBRA election notice upon receiving the November 2005 termination letter.

## Implications

Employers that offer some type of extended coverage option or continued coverage option in conjunction with a leave of absence need to carefully consider the interplay between that continued coverage right and COBRA. (See ¶1264 of the *Guide*.) Often, leave policies, including the right to continue coverage during the leave, arose at a time before COBRA was law and have continued to operate post-COBRA. However, if there is no coordination between the leave policies and COBRA, there is inevitable confusion as in the *Karp* and *Henson* cases. 