



## Contemplating COBRA... “Is It Fact or Fiction?”

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Determining what your company’s responsibility is under the COBRA laws can be tricky to say the least. First, you need to identify whether your company is subject to your State’s Continuation Laws, Federal COBRA regulations, or both.

The following ten fact and/or fiction points will help you determine what is required to be COBRA compliant when an employee experiences a Qualifying Event.

**1. Company’s only need to consider the number of employees that are participating in their Group Health Plan to determine if they fall under Federal COBRA law.**

- Fiction:** If the employer has 20 or more employees on 50% of employer’s typical working days during the prior calendar year, the federal COBRA law will apply. You need to count all full-time, part time and **common-law employees** of all employers in the controlled group of the employer maintaining the Group Health Plan, not just the employees participating in the Group Health Plan. Part-time employees are counted as a fraction of an employee. The fraction is equal to the number of hours that the part-time employee works divided by the number of hours (maximum is eight/day or 40/week) that an employee must work to be considered full-time by the employer.

**2. Federal COBRA does not apply to all group health plans.**

- Fact:** You are not subject to the Federal COBRA laws if your group health plan is sponsored by a Church and certain church-related organizations; is a Federal Government plan; HSAs and/or Disability Plan.
  - **Key Note:** Life insurance plans are not considered “medical care”, therefore Federal COBRA laws do not apply. However, some States do have laws that apply in this situation so you will need to check your state laws before excluding this type of coverage from your COBRA offerings.

**3. A Qualified Beneficiary (QB) is generally an individual, who is covered by a group health plan on the day before a qualifying event and is either, an employee, the employee’s spouse or an employee’s dependent child(ren).**

- Fact:** In certain cases, a retired employee, their spouse and the retired employee’s dependent children may also be qualified beneficiaries. In addition any child born to or placed for adoption with a covered employee during the COBRA benefit period is also considered to be a qualified beneficiary. Agents, independent contractors, and directors who participate in the group health plan are also considered qualified beneficiaries.

4. The following events are not qualifying events for which COBRA must be offered:

- Employer that terminates group health coverage
- Reduction or the elimination of group health coverage in the anticipation of a qualifying event
- FMLA or other type of Leave of Absence
- Employer merger and acquisition
- Employer Bankruptcy

**Fact:** The initial loss of coverage must result from one of the following:

- ⇒ Termination of a covered employee
- ⇒ A reduction in the employee hours
- ⇒ The death of the employee
- ⇒ A divorce or legal separation from the covered employee
- ⇒ Ceasing to be a dependent child under the plan
- ⇒ The covered employee becoming entitled to Medicare

5. The Federal COBRA Benefit Continuation period is the same for all types of qualifying events for spouses and the employee's dependent(s) who are qualified beneficiaries?

**Fiction:** Spouses and the employee's eligible dependent(s) will have a COBRA benefit period of 18 months in the case of the employee's termination of employment (for reasons other than gross misconduct) or reduction in hours. The COBRA benefits period is 36 months in the case of death of the covered employee, divorce or legal separation of the covered employee from his or her spouse, covered employee's becoming entitled to Medicare benefit, a dependent ceasing to be a dependent under the plan, or employer bankruptcy (Retiree Coverage Only).

6. Under Federal COBRA law an employee who is entitled to Medicare prior to electing COBRA is not eligible for COBRA benefits.

**Fiction:** Entitled for the purpose of COBRA means that a person who is eligible for Medicare **and has actually become enrolled** in Medicare and is currently receiving benefits. If the person takes additional steps to enroll in Medicare before receiving benefits, then the person is not considered "entitled" until steps have been taken and the enrollment has become effective.

- **Key Note:** If a qualified beneficiary has obtained Medicare entitlement prior to their COBRA election, their COBRA coverage may not be discontinued, even if the other coverage continues after the COBRA election was made. This would not be the case however, if a qualified beneficiary becomes entitled to Medicare after they elect COBRA continuation they would no longer be eligible to continue their COBRA continuation benefits.

7. **All Health Flexible Spending Accounts (FSA) are subject to COBRA and have the same COBRA obligations?**

**Fiction:** Health FSAs that meet three conditions are considered a “qualifying” FSA and will have special limited COBRA obligations.

- **1<sup>st</sup> Condition: HIPAA Maximum Benefit Condition.** The maximum benefit payable under the Health FSA to any participant in the class cannot exceed two times the participant’s salary reduction election under the Health FSA for the year, or if greater, cannot exceed \$500, plus the amount of the participant’s salary reduction elections.

⇒ For example, a Health FSA that is funded solely by employee salary reductions will meet the HIPAA maximum benefit condition.

- **2<sup>nd</sup> Condition: Availability Condition.** Other group health coverage must be available for the year to the class of Health FSA participants by reason of their employment and the other coverage cannot be limited to benefits that are excepted benefits under HIPAA.

⇒ For example, if all employees are eligible for the same Health FSA and are also eligible for major medical coverage with the same entry dates, this would then satisfy criteria for the Availability Condition.

- **3<sup>rd</sup> Condition: COBRA Premium Condition.** Maximum amount that the Health FSA can require the participant to pay for a year of COBRA continuation coverage must equal or exceed the maximum benefit available under the Health FSA for the year.

- **Key Note:** Most Health FSAs under a Cafeteria Plan will satisfy this condition if the plan is designed to be funded solely with employee salary reductions (no employer credits or subsidies).

8. **COBRA must be offered for all Health FSA for all employees regardless of what their account balance is.**

**Fiction:** Most Cafeteria Plans are structured in such a way that the Plan Sponsors are only required to offer COBRA continuation to Participants who have not overspent their accounts at the point they lose coverage. In other words, only Participants that have a positive balance in their account at the time of the triggering event will be offered COBRA. The maximum duration of COBRA continuation for a qualifying Health FSA would only be through the remainder of the Plan Year in which the triggering event occurred.

9. **Under Federal COBRA law Qualified Beneficiaries can be charged more than the cost of the group health premium(s).**

**Fact:** Generally, each Qualified Beneficiary may be required to pay the entire cost of the continuation coverage. Under Federal COBRA the amount a Qualified Beneficiary may be required to pay cannot exceed 102% of the cost to the plan for similarly situated individuals covered under the plan who have not incurred a Qualifying Event. In the case of an extension of coverage due to disability, the cost cannot exceed 150% of the cost to the group health plan.

- **Key Note:** Keep in mind that your State Continuation Laws pertaining to group health insurance policies may preempt the Federal COBRA law, for example, **Wisconsin, Iowa and Illinois all prohibit additional charges** over the premium rate. The 2%

administrative fee **cannot be charged** in addition to the premium on insured plans in these states.

**10. Health Reimbursement Arrangements (HRA) are not subject to COBRA.**

- Fiction:** HRAs are considered group health plans, so Federal COBRA rules will apply. Generally, HRAs are not excepted benefits under HIPAA and the normal COBRA duration periods will apply. Even HRAs with a spend-down feature must still present the Participant with the option of COBRA. However, it may be more desirable for a Participant to waive their rights to COBRA in order to obtain spend down privileges. This allows them to continue submitting and being reimbursed for qualified medical expenses without having to pay COBRA premiums. Expenses incurred for the Participant and/or the Spouse and Dependent(s) of the Participant who lose coverage under the Plan due an event that would constitute a "Qualifying Event" under COBRA may elect to spend-down the Health Reimbursement Account of the Participant under this Plan as an alternative to and in lieu of electing COBRA continuation coverage. This alternative coverage will last for the Participant as well as the Spouse and Dependent(s) of the Participant until the balance credited to the Health Reimbursement Account of the Participant as of the date participation ceases is depleted. Under this alternative coverage, the Employer will not credit contributions to the Health Reimbursement Account of the Participant after the date participation ceases.