Given the possible health impacts of COVID-19, maintaining access to health care and insurance coverage is front of the mind for just about everyone. Continuation coverage under COBRA offers employees a route to continue job-based coverage in the event of job loss or reduction of hours.

Most employers are no strangers to the basic requirements of COBRA. In general, employees (and their spouses and dependents) who lose coverage under an employer’s health plan due to termination of employment or reduction of hours are entitled to continue that coverage for up to 18 months. Although not the focus of this post, the 18-month period may be extended to 29 months in the event of a disability, and spouses and dependents have additional COBRA rights to elect up to 36 months of coverage due to certain other qualifying events including divorce or the employee’s death.

The COBRA rules are complex. Here are some of the more common questions we have received from our employer clients, updated for COVID-19.

1. Have any of the COBRA notice, election and premium payment timeframes been relaxed due to the COVID-19 outbreak?

Yes. An emergency regulation issued April 29, 2020 by the DOL, IRS and Treasury requires group health plans to disregard the “Outbreak Period” for purposes of COBRA premium payment deadlines, COBRA election deadlines, and deadlines for individuals to notify the group health plan of a qualifying event or disability determination. In addition, group health plans and their sponsors and administrators may disregard the Outbreak Period for determining the date for providing COBRA election notices. The “Outbreak Period” is defined as the period beginning on March 1, 2020 and ending 60 days after the announced end of the COVID-19 national emergency or such other date announced by the agencies in a future notification. For more information, see our companion post.

2. The COVID-19 Pandemic has had a significant negative impact on our business, but we hope it is temporary and are considering a “furlough.” Under the furlough, employees will not be terminated. However, they will not work and will not be paid, or will have their hours and pay reduced. We do, however, want to continue to provide medical insurance during the furlough. For medical insurance purposes, can we just continue to treat the furloughed employees as active employees, or must we offer COBRA?

It depends.

First, you must review your plan documents. If your employees are required to work a minimum number of hours in order to stay benefits-eligible, and they will not meet those requirements during the furlough, then they will presumptively lose coverage. The employer then has two options:

- Do not treat the furlough as a COBRA qualifying event, but rather keep the employees on the plan as if they were active employees. The issue here is that the medical insurance provider (or the stop loss provider, in the case of a self-funded plan) may not agree with this waiver of the plan’s eligibility requirements, and could refuse to cover benefits expenses of employees who are not working sufficient hours. The employer should preemptively manage this concern by discussing the matter
with the insurer or stop loss carrier, and obtaining a written waiver of the eligibility requirements.

- Treat the furlough as a COBRA qualifying event (i.e. a loss of coverage due to a reduction in hours) and offer COBRA coverage to the employee. As noted below, the COBRA coverage can be subsidized by the employer in its discretion.

3. In light of COVID-19, will the government subsidize COBRA?

Following the 2008 financial crisis, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), which made COBRA continuation coverage more affordable and accessible to terminated workers by offering a 65% COBRA premium subsidy. The subsidy was available from Sept. 1, 2008 and May 31, 2010.

It is hard to predict whether the COBRA subsidy will be revived. Although the ARRA COBRA subsidy was generally considered a success, it was implemented before the existence of the Obamacare health insurance exchanges. It is possible that, rather than a COBRA subsidy, we will see relief offered through the exchanges, such as increased premium assistance and additional enrollment rights.

But let’s not rule it out a COBRA subsidy just yet. Many terminated employees continue to prefer COBRA over the marketplace. Some do not want the hassle of purchasing marketplace coverage, or see few appealing marketplace choices. Others simply prefer the devil they know – after all, why risk buying a new plan which may not cover needed services and preferred doctors, or might have terrible service?

4. Must I pay for a terminated (or reduced hours) employee’s COBRA coverage?

No. An employer can require an electing employee to pay up to 102% of the cost of the medical coverage in order to continue coverage under COBRA. The 102% represents the total premium (employee’s share plus the employer’s share) plus a 2% administrative fee. Although many employers do subsidize COBRA, especially as part of a severance package, this is not required.

5. Many of my employees will not be able to afford 102% of the premium costs. May I pay for a terminated (or reduced hours) employee’s COBRA coverage (in full or in part)?

Generally yes, although employers who engage in this practice should proceed with caution. In particular, such an arrangement could be considered discriminatory under the Internal Revenue Code if the health plan is self-insured and the subsidy is not broadly offered. In addition, when the employer does agree to pay for all or part of the cost of COBRA coverage, they should be clear (such as in the former employee’s severance agreement) that the obligation to pay is subject to the employee’s timely election of, and eligibility for, COBRA coverage. The agreement should also state which plans will be subsidized and whether the subsidy will extend to employee-only or family coverage.

6. May I provide more than 18 months of COBRA coverage to a terminating (or reduced hours) employee?

If an employee terminates employment or has a reduction in hours, in either case resulting in a loss of health coverage, employers must offer 18 months of COBRA. The COBRA rules do not prohibit an employer from offering a longer period; however, offering more than the required 18 months could get an employer into hot water. For example, if an insurance or stop-loss carrier does not cover the extension period, and an employee with an extension has a catastrophic medical event after the 18th month, the employer may need to self-insure those expenses at a huge cost to the company.

7. A terminating (or reduced hours) employee is currently on our company’s medical plan and is also over 65 and eligible for Medicare. Must I offer them COBRA coverage under our company’s medical plan?
Yes, although the COBRA period may be limited depending on when Medicare “entitlement” occurs. For Medicare purposes, “entitled” means that an employee is not only eligible for Medicare, but is actually enrolled in Medicare coverage. If the employee became entitled to Medicare before the termination of employment, then the employee must be offered the full 18 months of COBRA. If however, the termination of employment occurred before Medicare entitlement, then the employer is permitted to terminate the COBRA period upon Medicare entitlement.

As an aside, keep in mind that the “Medicare Secondary Payer” (MSP) rules generally prohibit employers from offering Medicare beneficiaries incentives to decline enrollment or terminate coverage in an employer-sponsored plan. Employers must take care not to run afoul of these rules by discouraging Medicare-eligible employees from exercising their COBRA rights.

8. **May an employee pay for their COBRA premiums pretax out of severance payments?**

Maybe, if some requirements are satisfied:

- The employer’s cafeteria plan must allow it. The “cafeteria plan” is the written plan that allows for payment of premiums on a pre-tax basis through payroll deductions.
- The employee should make an affirmative election to reduce the severance payments to pay for the COBRA coverage. This can be informal, but should be in writing.
- The pre-tax deduction generally should not continue beyond the end of the plan year in which the qualifying event occurred.
- If other employees are not allowed to partake in this practice, then it could be considered discriminatory under the Internal Revenue Code.

9. **Must we offer COBRA coverage for a health care flexible spending account (FSA)?**

COBRA is available for a health care FSA if the account is underspent as of the time of termination. The coverage in that case need only last for the duration of the year in which the termination occurs (i.e. not the full 18 months). For example, let’s say an employee elects to contribute $100/month to a calendar year health FSA. The employee terminates June 30 having submitted no medical expenses but having contributed $600. This employee has an “underspent” account and has a right to elect COBRA for the rest of the year. If, however, that employee had submitted $700 of expenses as of June 30, then the account is overspent and the employer need not offer COBRA for the FSA.

10. **May an employee elect COBRA if the employee was not participating in our medical plan at the time of termination of employment?**

No.

11. **How does COBRA interact with FMLA leave?**

The taking of leave under FMLA does not constitute a COBRA qualifying event; rather, a COBRA qualifying event generally occurs when the employee does not return to employment with the employer at the end of the FMLA leave. Certain exceptions may apply.

12. **What happens if our company goes out of business? Who offers COBRA?**

If your company ceases to maintain any group health plan (such as when it goes out of business), and there are no group health plans sponsored by companies elsewhere in your controlled group, COBRA need not be offered.

13. **How does COBRA coverage interact with marketplace exchange coverage?**

Enrollment in marketplace coverage (i.e. “Obamacare”) is limited to the open enrollment period (generally, November 1 to December 15) and to situations of special enrollment. Loss of job-based coverage creates a special enrollment right, as does the end of the full 18-month COBRA period. Terminating COBRA prior to the end of the 18-month period simply because an employee does not like the coverage does not appear to create a marketplace special enrollment right; however, dropping COBRA because an employer-provided COBRA subsidy has ended, however, may create a marketplace special enrollment right.

**Notes for the Road:**

While almost every company and industry will be affected in some way by COVID-19, the effects will vary widely by employer, and there is no “one size fits all” strategy for weathering this storm. We
encourage you to consult with counsel when handling COBRA and health insurance matters during this time.

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