

COBRA:

The Developing Law



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What's New in the 4th Qtr. 2009 Edition

This What's New section highlights the changes made in the last quarter to the *COBRA: The Developing Law* guidebook—the authoritative guidebook for employers, administrators, and advisors.

Also see the 4th Qtr. 2009 *Current Developments* newsletter, which can be accessed under the Bookmarks tab. The *Current Developments* newsletter summarizes important legal developments that occurred during the quarter.

- **Section IV—What Employers Are Subject to COBRA?**
 - IV.C—*Small Employer Exception*. We've added to our discussion of how to count employees for purposes of the small employer exception. We now include a discussion of how to count employees for purposes of the fractional rule when they are not paid by the hour and do not keep time records.
- **Section VII—Qualifying Events: What Triggers COBRA?**
 - VII.D—*Divorce or Legal Separation (Event #3)*. We've updated this discussion for a recent case in which the court ruled that a pending divorce was not a qualifying event and that the qualifying event did not occur until the divorce became final.
 - VII.J—*Not All Losses of Health Coverage Are Caused by Triggering Events*. Our discussion of health coverage losses that are not COBRA triggering events has been updated for a recent case in which the court held that the employer's failure to pay premiums was not a COBRA qualifying event.
 - VII.M.2.b—*Option 2: COBRA Continuation Starts as of Termination of Employment, but Severance Agreement Provides Employer Subsidy of Health Care Coverage*. This discussion has been expanded with an example of how COBRA works when an employer subsidizes the COBRA premiums in a reduction in force situation.
 - VII.M.2.c—*Option 3: No COBRA Qualifying Event Occurs as a Result of Termination and COBRA Continuation Period Runs From an Agreed-Upon Deferred Date*. We have revised this discussion and included a new example of how to coordinate COBRA and severance when the employer allows for a deferred loss of active coverage under its health plan.
 - VII.M.2.d—*Option 4: Offer of Alternative Coverage or Other Incentive to Induce Waiver of COBRA Election Rights*. We've added an example to this subsection of how to coordinate COBRA and severance when the employer offers a cash payment in lieu of COBRA if the qualified beneficiary will sign a waiver of his or her rights to COBRA continuation coverage.
 - VII.M.5.b—*Paying for COBRA Coverage on a Pre-Tax Basis Through a Cafeteria Plan*. We've added new information to this subsection including an example of when COBRA may be paid through a cafeteria plan and sample plan language that could be used to permit this.
 - VII.M.5.d—*Effect of Severance on ARRA COBRA Premium Subsidy*. We have updated this discussion with a new subsection discussing the effect of severance payments on the COBRA premium subsidy created by the American Recovery and Reinvestment Act of 2009 (ARRA).
 - VII.N.1—*Impact of Employer's Bankruptcy on COBRA Rights*. We've revised this discussion to add additional information about automatic stays of claims against health plans during bankruptcy and COBRA claims against employers involved in a Chapter 11 reorganization.
 - VII.O—*Administering the Anticipation-of-Divorce Rule*. We've added some practical examples of the complexities that arise when the plan administrator tries to determine whether health plan coverage was eliminated in anticipation of a divorce.
- **Section XVII—Notices From Covered Employees and Qualified Beneficiaries.**
 - XVII.K—*If Plan Knows of Qualifying Event or Second Qualifying Event, Must Qualified Beneficiary Still Provide Notice?* We've updated the discussion of whether courts will follow the inquiry notice theory with a

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recent case which avoided inquiry notice and instead ruled that a former spouse was not entitled to COBRA where she did not give notice of divorce, despite her argument that her employer knew of her divorce.

- **Section XVIII—COBRA Election Notice and Notice of Unavailability.**
 - XVIII.D—*What Information Must the Election Notice Contain.* We have updated this subsection with a new case that held that a COBRA premium payment postmarked one day after the end of the grace period was late where the COBRA election notice clearly stated that payment would be considered made on the date postmarked and specifically warned of the dangers of mailing payments at the end of the grace period.
- **Section XXII—COBRA Premiums: Payment Deadlines and Other Rules.**
 - XXII.D—*Dealing With Overdue Premiums.* We've updated the discussion of how to deal with overdue COBRA premium payments with a recent case in which the court rejected the employee's argument that a COBRA premium payment should be considered timely made on the day the wife deposited it in the mailbox.
- **Section XXIV—Mistakes Happen: Identifying, Correcting, and Preventing COBRA Compliance Problems.**
 - XXIV.B—*Correcting Failures to Offer COBRA.* We have updated the discussion of how to correct failures under Code § 4980B for new information from the final IRS regulations on excise tax reporting for failure to comply with COBRA.
- **Section XXV—Consequences of Failing to Comply With COBRA.**
 - XXV.B.1—*Amount of Excise Tax.* The discussion of excise taxes under the Code for failing to comply with COBRA has been reorganized and expanded in light of recent final regulation from the IRS with guidance on how to report the excise tax.
 - XXV.B.2—*Limitations on the Amount of Excise Tax.* We've updated the discussion of the limitations on the Code's excise tax for failing to comply with COBRA with recent guidance from the IRS, including information about how to waive the tax which is drawn from the draft instructions to new Form 8928.
 - XXV.B.3—*Reporting Excise Taxes on Form 8928.* We have updated and revised our discussion of how to report the Code's excise tax for new information from the IRS's draft Form 8928 and the draft instructions to the form, including information on how to request an extension for filing Form 8928.
 - XXV.B.4—*Persons Liable for Excise Tax.* This discussion has been reworked in order to better explain the persons other than the employer, such as TPAs and insurers, who may be responsible for paying the Code's excise tax for failing to comply with COBRA.
- **Section XXVII—State Continuation and Conversion Laws: Does ERISA Preempt Them?**
 - XXVII.A—*Background on State Continuation Coverage and Conversion Laws.* We have expanded our overview of state continuation coverage and conversion laws to provide more information about the different types of laws that have been enacted by various states.
 - XXVII.B—*Preemption Analysis Applied to Specific Kinds of State Laws.* This subsection has been updated to add a discussion of new state continuation coverage laws that extend coverage for dependents beyond the COBRA maximum coverage, including a discussion of whether such laws would likely be preempted by ERISA.
- **Section XXX—Special Issues: COBRA and Medicare.**
 - XXX.D—*Medicare Secondary Payer (MSP) Rules.* We've updated the discussion of the Medicare Secondary Payer (MSP) rules with regard to ESRD-based Medicare eligibility with a recent case that follows the MSP regulations in holding that the MSP rules prohibit terminating group health plan coverage based solely on ESRD eligibility, except as permitted by COBRA.
- **Section XXXIV—Special Issues: The Health Coverage Tax Credit (HCTC) and the Special Second COBRA Election Period.**
 - XXXIV.D—*HCTC Program: Government Payment of HCTC-Eligible COBRA Premiums.* We've updated the discussion of how the HCTC program's retroactive payments work with new information and an IRS webpage with information on how employees should request reimbursement.
- **Section XXXVI—Uniformed Services Employment and Reemployment Rights Act (USERRA).**
 - XXXVI.A—*Introduction to USERRA's Continuation Requirements for Health Plans.* We've revised our subsection on USERRA and health FSAs to add a discussion of the qualified reservist distribution rule that allows health FSAs to permit certain employees called to active duty in the military to receive a distribution of their health FSA account balances.
 - XXXVI.B—*Health Plan Continuation Coverage When Plan Is Subject to COBRA.* We have updated the USERRA discussion of coordinating USERRA and COBRA with a new subsection about coordinating administration of USERRA continuation coverage and the ARRA COBRA premium subsidy.

- **Section XXXVII—Special Issues: COBRA Premium Assistance and the Plan Enrollment Option.**
 - XXXVII.C—*COBRA Premium Assistance*. We've expanded the discussion in this subsection about what will be considered other group health plan coverage that will end the ARRA COBRA premium subsidy, including some new examples.
 - XXXVII.E.4—*Effect of Pre-Tax Payment of COBRA Premiums on Premium Subsidy*. We have added a new subsection, including a new example, that discusses the effect that offering COBRA on a pre-tax basis through a cafeteria plan has on the ARRA COBRA premium subsidy.
 - XXXVII.E.5—*Taxability of Subsidy to AEI*. This is a new subsection that discusses the tax consequences to the assistance eligible individual of the ARRA premium subsidy. We have also updated and moved our discussion of the recapture of the subsidy for certain highincome individuals to this subsection.
 - XXXVII.F—*Reimbursement of COBRA Premium Subsidy*. We have expanded our discussion of how ARRA's COBRA premium subsidy is reimbursed, including more information on how and when to file Form 941.
 - XXXVII.H—*Notices Required by ARRA*. We've added a new discussion of the ARRA premium subsidy recipient's notice to the plan to inform it that he or she is no longer entitled to the subsidy because of other coverage, including a new discussion of the penalties for failing to give the notice.
- **Section XXXVIII—Step-by-Step Compliance Guide.**
 - XXXVIII.F—*Step 5: Provide COBRA Election Notices and Notices of Unavailability*. We've revised the step-by-step compliance guide to alert administrators of the possible need to coordinate the COBRA election notice with the notice required under the Uniformed Services Employment and Reemployment Rights Act (USERRA).
- We have also made changes to **Appendix Tab 10**.
 - We have updated the Sample USERRA Notice (To Accompany COBRA Election Notice) to mention that some individuals receiving the notice may be eligible for the ARRA COBRA premium subsidy.

Substantive Changes to the Appendix:

- **Tab 1—Internal Revenue Code Section 4980B**
 - Updated TOC
- **Tab 2—Treasury Regulations**
 - Updated TOC
 - Updated Treas. Reg. § 54.4980B for excise tax
- **Tab 4—IRS Items**
 - Updated TOC
- **Tab 10—Sample Documents**
 - Updated TOC
 - Updated Guide to & Sample USERRA Notice documents

Lots More to Come! From the feedback we've received, we know that our manuals are the premier group health plans resources in the country. But here at EBIA we're not satisfied. We are constantly striving to make the manual even better. In upcoming editions, look forward to complete coverage of all legal developments affecting COBRA compliance, and to our further analysis of existing law, with more examples and Q/As, etc.

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