
VI. [Reserved]

VII. Qualifying Events: What Triggers COBRA?

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A. Overview of Qualifying Events

1. General Rule

COBRA requires employers to offer a COBRA election to qualified beneficiaries when there is:

- a triggering event listed in the statute¹
- that causes (or will cause) a loss of plan coverage
- within the maximum coverage period
- while the plan is subject to COBRA.

When these elements exist, there is a COBRA qualifying event.²

ERISA describes the rule this way: A COBRA qualifying event is a specified triggering event, “which, but for the continuation coverage required [by COBRA], would result in the loss of coverage of a qualified beneficiary.”³ The IRS COBRA regulations provide that an event is a qualifying event if it (a) is one of the specified triggering events; (b) causes the covered employee, spouse, or dependent child to lose coverage during the maximum coverage period; and (c) occurs while the plan is subject to COBRA.⁴

Step-by-Step Compliance Guide. For practical guidance identifying COBRA qualifying events based on the detailed information provided in this Section, consult Section XXXVIII, which contains EBIA’s useful step-by-step compliance guide.

¹ We refer to these listed events as “triggering events,” even though that term is not used in the statute or regulations, in order to distinguish more clearly between the two main components of a COBRA qualifying event—namely, (a) the occurrence of one of the listed triggering events; and (b) the occurrence of a loss of coverage caused by the triggering event.

² Treas. Reg. § 54.4980B-4, Q/A-1(a) and Q/A-1(d). Indeed, a court may dismiss a complaint for COBRA coverage that fails to allege that a triggering event (e.g., termination of employment) caused the qualified beneficiary to lose coverage. *Fenner v. Favorite Brands International, Inc.*, 25 F. Supp. 2d 870 (N.D. Ill. 1998).

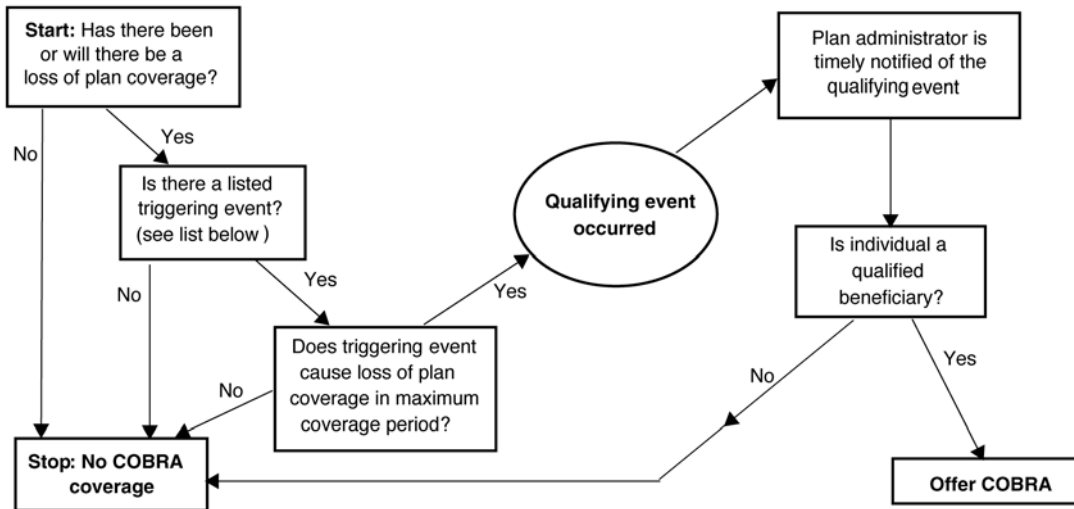
³ ERISA § 603.

⁴ Treas. Reg. § 54.4980B-4, Q/A-1(a); see also *Fritz v. Health & Welfare Department of the Construction and General Laborers’ Dist. Council of Chicago and Vicinity* (2001 U.S. Dist. LEXIS 25173 (N.D. Ill. 2001) (qualifying event cannot occur before a plan is subject to COBRA, but court applies exception for multiple qualifying events); *Chacosky v. The Hay Group*, 1991 U.S. Dist. LEXIS 1170 (E.D. Pa. 1991).

2. Framework for Analysis

The following chart describes the steps to take in analyzing whether or not a COBRA election should be offered.

Exceptions. The analysis below (in particular, a trigger causing a loss) does not work well in at least two instances: (a) when coverage is lost in connection with leave taken under the Family and Medical Leave Act of 1993 (see subsection L); and (b) when coverage is reduced or eliminated in anticipation of a qualifying event (see subsection K).



In the following subsections, we discuss the elements of a qualifying event in more detail.

3. The Seven Triggering Events

COBRA specifies seven triggering events that can be qualifying events if they result in a loss of coverage:

- voluntary or involuntary termination of the covered employee’s employment other than by reason of gross misconduct;
- reduction of hours of the covered employee’s employment;
- divorce or legal separation of the covered employee from the employee’s spouse;
- death of the covered employee;
- a dependent child ceases to be a dependent under the generally applicable requirements of the plan;
- a covered employee becomes entitled to benefits under Medicare; and
- an employer’s bankruptcy, but only with respect to health coverage for retirees and their families (this triggering event does not appear in the PHSA).⁵

⁵ ERISA § 603; Code § 4980B(f)(3); Treas. Reg. § 54.4980B-4, Q/A-1.

Different Events for Different Qualified Beneficiaries. A covered employee can be a qualified beneficiary entitled to elect COBRA only with respect to the triggering events of termination of employment, reduction of hours, and bankruptcy of the employer.* These three triggering events also apply to spouses and dependent children, along with the triggering events of divorce/legal separation, death of a covered employee, and a covered employee's becoming entitled to Medicare, which apply only to spouses and dependent children. When the trigger is a child's ceasing to be a dependent, COBRA applies only to the dependent child. Details about who is entitled to elect COBRA are found in Section IX.

* Treas. Reg. § 54.4980B-3, Q/A-1(d).

B. Termination of Employment (Event #1)

The termination of a covered employee's employment (other than for gross misconduct) is a triggering event whether it is voluntary or involuntary. Indeed, "apart from facts constituting gross misconduct, the facts surrounding the termination...are irrelevant in determining whether a qualifying event has occurred."⁶ Therefore, termination of employment includes retirement. It also includes voluntary quitting, layoffs, other employer-initiated discharges (other than for gross misconduct), strikes, and lockouts.⁷

Question: Is it permissible for a terminated employee, near the end of the 18 months of COBRA coverage, to be rehired for a month and then elect another 18 months of COBRA coverage?

Answer: Assuming that the employer is willing and plan coverage starts on the date of hire, this is acceptable—although the insurer might object if the sole reason the individual is rehired is to extend COBRA coverage.

1. Tendering a Resignation

Tendering a resignation is not a triggering event. As one court noted:

an employee may give days, weeks, or even months prior notice, which an employer will accept. In the interim the employment relation continues. Only when the employee leaves the company, or has his hours reduced to the point of losing coverage, does a qualifying event occur, thereby triggering the administrator's duties under COBRA.⁸

2. Employee Transfers Within Single Company

While neither the statute nor regulations address the situation, it is clear that, when a covered employee simply transfers from one position within an employing entity to another, there is no termination of employment even if the transfer causes a loss of coverage under a group health plan of the employer.

Example: Employee Transfers Within Single Company. Tom is an employee of Hefty Corporation, which maintains manufacturing divisions around the country. Tom is covered under a group health plan maintained for employees of the division located in New York. Tom is transferred to a division in Montana, which causes him to lose coverage under the New York plan for himself, his wife, and his dependent children. Because he remains a full-time employee of Hefty, however, Tom's transfer is not a triggering event. Thus, even though his transfer caused a loss of coverage under the New York plan, it is not a COBRA qualifying event for Tom or any member of his family. This is the result whether or not Hefty's Montana division has a group health plan for its employees.

⁶ Treas. Reg. § 54.4980B-4, Q/A-2. See, e.g., *Olick v. Kearney*, 451 F. Supp. 2d 665 (E.D. Pa. 2006) (employee who learned from his COBRA notice that he was terminated may not have been given timely notice).

⁷ Treas. Reg. § 54.4980B-4, Q/A-1(g), Example 2; Treas. Reg. § 54.4980B-4, Q/A-2. But see *Powell v. Strategic Outsourcing Inc.*, 2009 WL 746253 (S.D. Tex. 2009) (COBRA not required following "sham" termination of employment).

⁸ *Mlsna v. Unitel Communications, Inc.*, 41 F.3d 1124 (7th Cir. 1994).

3. Employee Transfers Within Controlled Group

Neither the statute nor regulations address the issue of employee transfers within a controlled group of corporations or other entities. However, both ERISA and the IRS COBRA regulations define “employer” to include not only the “person for whom services are performed” but any other entity that is a member of that person’s controlled group—i.e., all members of a group described in Code § 414(b) (controlled groups of corporations), Code § 414(c) (trades or businesses under common control), Code § 414(m) (affiliated service groups), or Code § 414(o) (other arrangements described in regulations).⁹ (These complicated rules, which sweep in all sorts of related organizations, are beyond the scope of this manual. For a more extensive discussion of these rules, consult *401(k) Plans* (Thomson Reuters/EBIA, 1994-present, updated quarterly).)

In addition, the IRS COBRA regulations define “employee” as an individual eligible to be covered under a group health plan “by virtue of the performance of services for the employer maintaining the plan....”¹⁰ Moreover, except for purposes of the small employer exception, the regulations define “employment relationship” (including “termination of employment of an employee”) with reference to the definition of “employee.”¹¹ Consequently, it appears that when a covered employee simply transfers from one employing entity to another within the same controlled group, there is no termination of employment even if the transfer causes a loss of group health plan coverage.

Example: Transfer Between Related Corporations. When Lisel’s full-time employment with Sixteen Candles Corporation is terminated, she is immediately hired into a full-time position with Climb Every Mountain Corporation. Both corporations are wholly owned subsidiaries of Novelty Entertainment Corporation and thus are part of the same controlled group. As a result of her transfer, Lisel loses coverage under the Sixteen Candles group health plan for herself and her dependent child. However, it appears that Lisel’s employment has not terminated because she remains employed by the same controlled group of corporations. Therefore, neither she nor her child would be entitled to elect COBRA under the Sixteen Candles plan.

Does This Conclusion Make Us Queasy? Well, a little bit. A court technically is not bound to follow the IRS COBRA regulations when it is interpreting ERISA’s COBRA provisions. (See Section III.) Even though the ERISA § 607(4) definition of employer is quite clear about incorporating the controlled group rules, if Lisel in the above example lost all health coverage because Climb Every Mountain didn’t maintain any plan for its employees, it is possible that a court might stretch to give her COBRA coverage under the Sixteen Candles plan. However, we are not aware of any guidance or authority suggesting that COBRA should be offered in these circumstances, nor do we believe that employers consider such transfers to be qualifying events.

4. Mergers, Acquisitions, and Reorganizations

Whether and how terminations of employment occurring in connection with corporate mergers, acquisitions, and reorganizations constitute COBRA triggering events is discussed in Section XII.

5. Gross Misconduct Exception

a. Termination for Gross Misconduct Is Not Qualifying Event for Any Affected Person

The triggering event of termination of employment does not include termination because of gross misconduct. When a covered employee is terminated for gross misconduct, there is no qualifying event for the covered employee, or for the spouse or dependent children. None of them is entitled to a COBRA election.¹²

⁹ ERISA § 607(4); Treas. Reg. § 54.4980B-2, Q/A-2. See Code § 414(t)(2) (listing Code § 4980B as an applicable section).

¹⁰ Treas. Reg. § 54.4980B-3, Q/A-2(a)(1). There is no separate definition of the term “employer maintaining the plan.” The regulation expressly provides that this definition of employee applies for all purposes under the regulation except the small employer exception, for which special rules are provided in Treas. Reg. § 54.4980B-2.

¹¹ Treas. Reg. § 54.4980B-3, Q/A-2(a)(2). Special rules regarding the definition of “employee” for purposes of the small employer exception are found at Treas. Reg. § 54.4980B-2, Q/A-5(c).

¹² *Mlsna v. Unitel Communications, Inc.*, 41 F.3d 1124 (7th Cir. 1994); see also *Collins v. Aggreko, Inc.*, 884 F. Supp. 450 (D. Utah 1995) (citing *Mlsna*).

Recommended Policies Regarding Gross Misconduct. Except for the most flagrant conduct that clearly constitutes a substantial and willful disregard of the employer's interests, denying COBRA coverage on account of gross misconduct should be avoided. Plans should seek legal advice before they deny COBRA coverage for employee misconduct—being wrong about gross misconduct can lead not only to an award of retroactive COBRA coverage but also to imposition of penalties of \$110 per day.

If, after obtaining legal advice, a plan decides to deny COBRA coverage in the case of flagrant misconduct, we recommend sending a letter to all qualified beneficiaries stating that COBRA coverage will not be offered. There are three reasons why a letter is a good idea:

- the plan will learn early if the terminated employee (or other qualified beneficiary) intends to challenge the denial of coverage;
- sending a letter prior to the deadline for a COBRA election notice will avoid later allegations by qualified beneficiaries that the denial of coverage on account of gross misconduct was an afterthought to remedy a late COBRA election notice; and
- a denial of coverage for gross misconduct affects all qualified beneficiaries, not just the employee who engaged in misconduct. The family of the terminated employee (or the employee) might claim that the plan administrator has a fiduciary duty to notify them that they will not be offered COBRA coverage so that they may, for example, obtain individual coverage or otherwise address their loss of medical coverage.*

In our view, such a letter would not be, by itself, subject to the requirements of the DOL's claims regulation (discussed in more detail in Section XXV), which imposes various notice and communication obligations on group health plan administrators in connection with benefit claims and appeals.† Plan administrators should bear in mind, however, that any claim for reimbursement of medical expenses submitted by an individual who is denied COBRA coverage because of gross misconduct would be subject to and should be handled in compliance with the DOL's claims regulation.

* See *Fischer v. Phil. Elec. Co.*, 994 F.2d 130, 16 EBC 2413 and 96 F.3d 1533, 20 EBC 1905 (3d Cir. 1996) and *Kurz v. Phil. Elec. Co.*, 994 F.2d 136, 16 EBC 2420 and 96 F.3d 1544, 20 EBC 1914 (3d Cir. 1996) (ERISA requires plan fiduciaries to provide responses about contemplated plan amendments before those amendments are finally adopted; this duty arises when a company gives "serious consideration" to an amendment). The Ninth Circuit has followed this formulation of the rule in *Bins v. Exxon Co.*, 220 F.3d 1042, 24 EBC 2377 (9th Cir. 2000). For further discussion of fiduciary duties, consult Section XXV.H.

† DOL Reg. § 2560.503-1. The claims regulation does not apply to eligibility decisions made by a plan about an individual unless the plan determines eligibility in connection with a claim for benefits submitted by or on behalf of that individual. See EBSA Frequently Asked Questions and Answers, Benefit Claims Procedure Regulation, Q/A-3, http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html (as visited Nov. 5, 2007).

b. No Uniform Definition of Gross Misconduct

COBRA contains no definition of gross misconduct. Based solely on the legislative history, it is clear that termination for gross misconduct is not the same as termination simply "for cause."¹³

Unfortunately, the courts have not agreed on a common standard to apply in gross misconduct cases.¹⁴ Certain federal courts have looked to the unemployment insurance laws of the state in which the court sits because these laws often deny unemployment benefits to employees terminated for "gross misconduct,"

¹³ The Senate version of COBRA (S. 1730) would have required COBRA coverage to be offered when an employee's employment was terminated "other than for cause." The House version (H.R. 3128 and 3500) did not consider termination of employment to be a qualifying event at all. See H.R. Rep. No. 99-453 at 563 (1985) (*Conference Report*), reproduced behind Appendix Tab 9. See *Lloyd v. Hanover Foods Corp.*, 72 F. Supp. 2d 469, 23 EBC 2465 (D. Del. 1999) (employee was fired by food manufacturer for failing to mix onion powder into a ravioli product and failing to report the omission to a supervisor; court found these actions to be "at most ordinary negligence," not gross misconduct); *Boudreaux v. Rice Palace, Inc.*, 2007 WL 1670419 (W.D. La. 2007) (collecting cases illustrating varying definitions of gross misconduct for purposes of COBRA).

¹⁴ *Larsen v. Senate of the Commonwealth of Pennsylvania*, 154 F.3d 82 (3d Cir. 1998). When deciding disputes under ERISA (of which COBRA is a part), federal judges have the power not only to interpret and apply the statute but also to fill gaps in the statutory scheme through creation of ERISA "federal common law." See, e.g., *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 21 EBC 1969 (6th Cir. 1997).