

# COBRA:

## The Developing Law



# EBIA

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## *What's New in the 2nd Qtr. 2012 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 2nd Qtr. 2012 *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 III—COBRA: Sources of Law.**
  - III.D.2—*IRS Items*. We have added a discussion of the new procedural guidelines that will be used by IRS examiners when conducting COBRA examinations and compliance checks.
  - III.G.8—*W-2 Reporting: Cost of Employer-Sponsored Health Coverage*. We've expanded the discussion of the health care reform W-2 reporting requirements in light of recent IRS guidance.
  - III.G.9—*COBRA Disclosure in the Summary of Benefits and Coverage (SBC)*. In accordance with recently issued IRS regulations, we have specified the date by which the first SBCs must be provided to plan participants.
- **Section V—What Plans Are Subject to COBRA?**
  - V.C.2—*Dental Plans and Vision Plans*. We have updated our discussion to emphasize that, unlike HIPAA, COBRA contains no exception for stand-alone dental and vision plans.
- **Section VII—Qualifying Events: What Triggers COBRA?**
  - VII.B.5—*Gross Misconduct Exception*. We have expanded the table of gross misconduct cases to include several recent court decisions that turned upon whether an employee's behavior rose to the level of gross misconduct.
  - VII.C—*Reduction of Hours (Event #2)*. We've revised our discussion of temporary layoffs to emphasize that a furlough may be a COBRA triggering event.
  - VII.L.2—*Leave Taken Under the FMLA*. We have updated our discussion of the COBRA issues related to exigency leave and covered servicemember leave available under the FMLA to employees who are relatives of veterans and members of the Armed Forces.
  - VII.L.7—*Table of Leave of Absence Cases*. We've added several recent cases to our table of cases involving confusion and mistakes in administering COBRA with respect to leaves of absence.
- **Section VIII—Duration of COBRA Coverage.**
  - VIII.B—*Five Ways Maximum Coverage Period Can Be Expanded*. In our discussion of Social Security disability determinations, we referenced a new case emphasizing that an insurer cannot make a disability determination for purposes of COBRA. In our discussion of second qualifying events, we noted the same case's support of the rule that a termination of employment following a qualifying event that is a reduction of hours cannot be a second qualifying event that expands the maximum coverage period.
- **Section XV—The COBRA Initial Notice, the SPD, SBC, and Other Disclosure Issues.**
  - XV.H—*When Must Initial Notice Be Provided?* We have updated the discussion of the 90-day initial notice period with a recent case that concluded that the election notice provided to an employee who terminated employment within 90 days of enrolling in the plan also satisfied the initial notice requirement.
  - XV.R—*Requirement to Furnish SBC*. We have updated our discussion of the four-page summary of benefits and coverage in accordance with recent guidance regarding the content of the SBC and the timing of delivery. We have also added a discussion of the required statement regarding state and federal continuation coverage rights that must be included in the SBC.

- **Section XVIII—COBRA Election Notice and Notice of Unavailability.**
  - XVIII.C—*Plan Administrator Must Provide Election Notice and Notice of Unavailability.* We've updated the discussion of who is responsible for providing the election notice with a recent case holding that when an insurance company is the designated plan administrator, the employer is not liable for the failure to provide an election notice.
  - XVIII.D.5—*Case Law Assessing Adequacy of Election Notices (After 2004 Final DOL COBRA Regulations).* We have added discussion of a recent case in which the court imposed only a nominal \$500 penalty despite a long list of content deficiencies in the employer's standard election notice.
- **Section XX—Coverage During COBRA Election & Premium Payment Periods.**
  - XX.B—*COBRA Coverage Election and Premium Payment Periods.* We have expanded our discussion of the options available to the sponsor of an indemnity or reimbursement plan with regard to providing coverage prior to the time that a participant elects or pays for COBRA coverage. We have also added a discussion of the health care reform anti-rescission rules and their impact on the retroactive cancellation of coverage when a participant chooses not to elect or pay for COBRA coverage. Finally, we have expanded our discussion of the relationship between the DOL's claims regulations and the IRS's COBRA regulations with respect to the payment of benefit claims during the COBRA election period.
  - XX.C—*Coverage During Election Period After Waiver Is Revoked.* In our discussion of waivers of COBRA coverage, we have added an example showing the effect of a waiver of coverage followed by a revocation of the waiver within the 60-day election period.
- **Section XXV—Consequences of Failing to Comply With COBRA.**
  - XXV.C—*Statutory Penalties for Failure to Provide Certain COBRA Notices.* We have expanded the table of statutory penalty cases to include two recent cases in which the court refused to waive penalties even when the affected employee suffered no actual harm.
  - XXV.H—*Procedural Issues in COBRA Lawsuits Under ERISA.* In our discussion of the statute of limitations for COBRA actions, we have added a recent case confirming the rule that the statute of limitations period runs from the date the employee discovers the employer's COBRA violation rather than an earlier date when the violation occurred. We have also added a recent case citation to our discussion of federal court jurisdiction over certain COBRA claims.
  - XXV.L—*Lawsuits Under the Americans with Disabilities Act and Title VII.* We have expanded and renamed this Section to also include discussion of lawsuits brought under Title VII.
- **Section XXIX—Special Issues: Qualified Medical Child Support Orders.**
  - XXIX.A—*Overview of QMCSO Requirements.* We have updated the discussion of who can be an alternate recipient to reflect the health care reform age 26 coverage mandate and rules on the tax treatment of children under age 27.
- **Section XXXVIII—Step-by-Step Compliance Guide.**
  - XXXVIII.L—*Step 11: Identify Causes for COBRA Termination and Provide Required Notices.* We have updated the step-by-step guide with instructions on how to determine whether a termination involves a rescission that may implicate the appeals and review regulations.

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***Substantive Changes to the Appendix:***

- **Tab 4—IRS Items**
  - Updated TOC
  - Removed Examination User's Guide

**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.

**EBIA Weekly.** Keep up with new legal developments as they occur: sign up now for the EBIA Weekly, a free e-mail newsletter, at [www.ebia.com](http://www.ebia.com).

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