

Some of the Most Commonly Asked COBRA Questions

Q1. The qualified beneficiary said they did not want COBRA and signed a waiver of COBRA coverage. Now they change their mind and state they want COBRA. Should we still offer them the coverage?

A1. The qualified beneficiary may revoke their waiver any time during the 60-day election period. The Plan does not, however, need to provide COBRA coverage for the time period from the loss of coverage to the date of the revocation. This could result in a gap in coverage for the qualified beneficiary. If the beneficiary revokes the waiver of coverage beyond the 60-day election period, the group is not required to offer coverage.

Q2. What happens when an employee eliminates coverage for their spouse before a divorce is final?

A2. The employer is required to make COBRA continuation coverage available effective on the date of the divorce, but not for any period before the date of divorce or legal separation. This could result in a gap in coverage for the former spouse.

Q3. If a person is covered by another health plan and COBRA or continuation coverage, which plan is primary?

A3. The National Association of Insurance Commissioners (NAIC) coordination of benefits (COB) rules govern order of payment when an individual is covered under more than one health plan. The COB rules establish a uniform order of benefit determination under which plans pay claims. One of the primacy determination rules addresses continuation coverage.

The general COB rules state that each primacy determination rule is followed in order until a primary determination can be made. If one of the rules, for example, the birthday rule, determines primacy, the rule governing continuation coverage does not come into play. This means that a COBRA or continuation plan could be primary for a former employee who is also covered as a dependent under a spouse's plan. The COB rules also contain special rules regarding coordination of benefits for children who are covered under more than one plan and these rules would take precedence over the continuation rule. If none of the primacy determination rules controls prior to reaching the continuation coverage rule, then the continuation rule will apply to make the COBRA coverage primary.

Q4. Can a spouse or children who were not covered by the health plan when the former employee was an active employee, be added to a COBRA plan?

A4. Yes, if similarly situated active employees are allowed to add dependents. Employers should treat qualified beneficiaries on COBRA in the same manner that they treat their active employees. Dependents who were not covered prior to the qualifying event and later added to the COBRA coverage are not qualified beneficiaries and do not have rights to a second qualifying event.

Q5. Not everyone who was covered under the health plan wants to continue coverage. Can the family determine which family members they want to cover under COBRA?

A5. Yes, each qualified beneficiary has an independent right to elect COBRA.

Q6. The employee is required to notify the employer within 60 days of a divorce or a child losing dependent status. The employee did not provide this notice within 60 days. Can we allow the spouse or dependent to come on the plan now?

A6. The group health plan is not required to offer the spouse or dependent an opportunity to elect continuation coverage if the employee does not provide notice to the plan administrator (usually the employer) within 60 days of the divorce or loss of dependent status. However, if the employee's former spouse or student dependent never received a general initial notice of COBRA rights and obligations and a description of reasonable notice procedures, the employee's obligation to inform the plan administrator may be waived. In these situations, the plan administrator should offer continuation. The decision to offer continuation coverage is left to the group in these situations because they will know if the spouse or student dependent was provided the initial notice and the plan's reasonable notice procedures.

Q7. What is "gross misconduct?"

A7. There is no standard definition of gross misconduct. Unfortunately, the courts have not agreed on a common standard to apply in gross misconduct cases. Certain federal courts have looked to the unemployment insurance laws of the state in which the court sits. One federal court applied the following definition of gross misconduct:

"Gross misconduct may be intentional, wanton, willful, deliberate, reckless or in deliberate indifference to the employer's interest. It is misconduct beyond mere minor breaches of employee standards, but conduct which would be considered gross in nature."

The Federal Employee Health Benefits Amendment Act of 1988 defines gross misconduct as a "flagrant and extreme transgression of law or established rule of action."

The plan administrator (usually the employer) must decide whether to offer continuation coverage when an employee's conduct may be considered gross misconduct. Misconduct that would lead to the termination of employment may not necessarily be considered gross misconduct.

Q8. The employee is taking a leave of absence, should COBRA be offered?

A8. The answer to this may vary depending on the type of leave the employee is taking and the employer's policy.

Taking leave under the Family Medical Leave Act (FMLA) is not considered a qualifying event. The qualifying event occurs on either the last day of FMLA leave or the day the employee gives notice that they will not be returning to work.

If the leave of absence is not taken under FMLA, there are three options:

- Treat the start of the leave as the qualifying event;
- Treat the end of the leave as the qualifying event;
- Treat the start of leave as qualifying event but offer alternative coverage.

The employer should have a policy and administer it consistently.

Q9. Who has the COBRA liability in the case of a sale of a company?

A9. This frequently asked question is often complicated. The IRS has provided guidance in 2002 regulations regarding COBRA consequences during business sales and reorganizations. Generally, the parties to the transaction should determine COBRA liability or the IRS regulations will determine which plan is responsible to cover the affected employees. Since the parties to the transaction have the facts needed to make a determination, they must make the decisions regarding COBRA coverage responsibility.

Q10. What effect does workers' compensation have on continuation benefits?

A10. Health coverage in general is not addressed in most workers' compensation settlements since usually the discussion of health care is limited to the medical issue that relates to the injury. Eligibility for workers' compensation is not listed as a triggering event under either state continuation or federal COBRA. Employers should determine when an individual with a work-related injury loses coverage due to a reduction in hours or loss of employment and offer COBRA appropriately.

Fully Insured Groups

Fully insured groups should follow the guidelines for the qualifying event of total disability if the employee is unable to work due to a workers' compensation claim. If the employee is unable to perform his/her own job, they may remain on the plan for two years. If after two years, the employee is able to perform another occupation, then they would no longer qualify for coverage under the state disability laws and if they do not return to work, then it would be the employer's decision whether to formally end employment. When employment ends, the obligation to offer 18 months of continuation coverage is triggered. If, however, after two years the employee is unable to perform any other occupation for which they may become reasonably qualified by training or education, the employee may remain on the group's health plan indefinitely.

Self-Insured Groups

It is the employer's decision when employment ends that is the trigger to offer COBRA. We rely on the employer to notify us regarding the duration of continuation coverage the person on workers' compensation should receive.