

# **DON'T LET COBRA BITE YOUR CLIENT OR YOU!!!!<sup>1</sup>**

**Melissa F. Brown**  
**Melissa F. Brown, LLC**  
145 King Street, Suite 405  
Charleston, SC 29401  
843.722.8900 (office)  
843.722.8922 (fax)  
[www.melissa-brown.com](http://www.melissa-brown.com)



*Helping Individuals  
Cross Thresholds  
to New Lives*

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<sup>1</sup> This article was last updated in 2005, and the cases and statutes have not been updated since then. Thus, Melissa F. Brown, LLC, assumes no liability or responsibility for errors or omissions in this article.



## WHAT IS COBRA?

COBRA is an acronym for the Consolidated Omnibus Budget and Reconciliation Act of 1985. In 1985 COBRA amended the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code (IRC) and the Public Health Service Act.

The law requires certain group health insurance plans to provide continued health insurance coverage beyond the point at such coverage would otherwise terminate in specified situations. As a result, qualified beneficiaries, such as certain employees, former employees, retirees, spouses, former spouses, and dependent children, have the ability to elect health insurance coverage at group rates for a determinate period of time beyond the termination of the plan's regular coverage.

Final COBRA regulations were published in the Federal Register (64 FR 5160) on February 3, 1999, and on January 10, 2001, the Internal Revenue Service issued amendments to the regulations (26 CFR part 54) further clarifying the earlier regulations. The amendments are presented in a question and answer format and they better explain how the laws impact your businesses with group health insurance as qualified beneficiaries.

To qualify for COBRA benefits, three basic criteria must first be met:

1. The health insurance plan must qualify under COBRA's plan criteria;
2. The beneficiary must meet the definition of qualified beneficiary; and
3. A qualifying event, as defined by COBRA, must occur *before* eligibility can take place.



## **WHICH PLANS ARE SUBJECT TO COBRA?**

Most group health plans are subject to COBRA, although certain otherwise qualified group health plans such as small-employer plans, church plans and governmental plans, fall within the law's exceptions. A Group Health Plan is defined as "a plan maintained by an employer or employee organization to provide health care to individuals who have an employment related connection to the employer or employee organization or to their families." IRC Sec. 54.4980B-2(a). Long term care service plans and employer contributions to medical savings accounts are not considered under COBRA's definition of a group health plan.

Plans subject to COBRA are those maintained by an employer with twenty (20) or more employees on at least 50% of its typical business days during the preceding calendar year. To figure out whether a health insurance plan is subject to COBRA, you count the employees, both full-time and part-time, and the part-time employees count as a fraction that is used to calculate the total number of full-time employees under COBRA. The method is fairly simple. Take the number of hours typically worked by a part-time employee per day and keep that number by the number of hours a full-time employee typically works in a day. The resulting fraction is added to the number of full-time employees. For example, assume Company A employs ten (10) full-time employees who work 40 hours a week and 20 part-time employees who work 20 hours per week. Each part-time time employee typically works 4 hours a day, and each full-time employee works 8 hours a day. Thus,  $4/8 = 1/2$  so each part-time employee counts as one-half of a full-time employee. Under the definition of COBRA, Company A is considered to employ 20 full-time employees and is subject to COBRA's regulations.



## **WHO QUALIFIES FOR COBRA BENEFITS?**

A Qualified beneficiary is generally defined as an individual who is covered under a group health plan either as a covered employee, spouse of a covered employee, dependent child of a covered employee, or any child born to, adopted by, or placed for adoption with a covered employee during a period of COBRA continuation coverage. Non-resident aliens, their spouses and dependent children are not qualified beneficiaries. If a qualified beneficiary does not timely elect COBRA during the election period, the individual no longer qualifies and cannot subsequently elect Cobra Coverage.

Other qualified beneficiaries include covered employees who retired on or before the date of substantial elimination of the group health plan coverage, such as a company becoming bankrupt. These individuals' spouses, surviving spouses or dependent children are also considered as qualified beneficiaries. Other individuals can qualify as beneficiaries under less typical situations, which are specifically defined in IRC Section 54.4980B-3(a)(1)(c –f).

## **WHAT IS A QUALIFYING EVENT?**

A qualifying event includes the following:

- (a) Death of the covered employee;
- (b) Termination (other than by reason of gross misconduct), or reduction of hours of a covered employee's employment;
- (c) Divorce or *legal* separation of a covered employee from the employee's covered spouse;
- (d) Covered employee becoming entitled to Medicare benefits under Title XVIII of the Social Security Act;
- (e) A dependent child's ceasing to be a dependent child of the covered employee under the plan; or



(f) A proceeding in bankruptcy under Title 11 of the United States Code with respect to an employer from whose employment a covered employee retired at any time.

Once a qualifying event occurs, the qualified beneficiaries become eligible for COBRA coverage. In addition to the above circumstances, voluntary termination, strikes, lockouts, layoffs or involuntary discharge are also qualifying events. The reason for the event's occurrence is irrelevant unless it is the result of gross misconduct. Neither the statute nor the regulations define gross misconduct but a number of court cases have addressed situations which qualify as gross misconduct although the standards of different courts can widely vary. A Western District of Texas court held that where there was a "substantial deviation from the high standards and obligations of a managerial employee that would indicate that said employee cannot be entrusted with his management duties without danger to the employer."<sup>2</sup> Another court held that a schoolteacher who was sexually involved with a student could not qualify for COBRA because the teacher's actions rose to the level of gross misconduct.<sup>3</sup> Where a flight attendant yelled racial epithets and threw an apple at another employee in front of passengers, another Texas court held such conduct rose to the level of gross misconduct.<sup>4</sup>

With regard to family law matters, if parties obtain a divorce or a legal separation such an event is considered a qualifying event and triggers COBRA coverage. Interestingly, South Carolina courts have held this state does not have legal separations<sup>5</sup>

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<sup>2</sup> *Avina v. Texas Pig Stands, Inc.*, No. SA-88-CA-13, 1991 U.S. Dist. LEXIS 13957 (W.D. Tex. Feb., 1, 1991).

<sup>3</sup> *McKnight v. School District of Philadelphia*, 2001 U.S. Dist. LEXIS 4751 (E.D. Pa. 2001).

<sup>4</sup> *Nakisa v. Continental Airlines*, 2001 U.S. Dist. LEXIS 20784 (S.D. Tx. 2001).

<sup>5</sup> S.C. Code Ann. 20-7-420(2)(Supp.) includes the term "legal separation" as part of the statute, but case law specifically states that legal separations are not a recognized form of litigation in South Carolina. The



but our actions for separate maintenance and support are the equivalent of other states' legal separation actions. There is no real explanation for South Carolina's insistence upon not having the authority to grant "legal separations," but as a result, this distinction removes "legal separations" as a qualifying event in South Carolina because those parties who obtain an order of separate maintenance and support can remain on the employed spouses health insurance without triggering COBRA coverage because technically a qualifying event has not occurred.<sup>6</sup> If your state takes a similar position to and holds it cannot or will not grant a legal separation, a client who could not otherwise obtain health insurance coverage on their own may consider not divorcing but at least resolving all other issues so she can remain on the covered spouses health insurance plan.<sup>7</sup>

### **HOW LONG DOES COBRA LAST?**

COBRA establishes minimum required period of coverage although the actual health insurance plan can provide periods of coverage beyond those set forth in COBRA. COBRA allows for up to 18 months, 29 months or 36 months of continuation coverage depending upon the status of the qualified beneficiary and the nature of the qualifying event. Basically, except for an interruption of coverage in connection with a waiver,

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inclusion of the term "legal separation" created much confusion for family law practitioners in South Carolina so the South Carolina Supreme Court clarified their position in *Nocher v. Nocher*, 268 S.C. 503, 234 S.E.2d 884 (1977)(A divorce *a mensa et thoro*, divorce from bed and board, i.e. legal separation, does not exist in South Carolina.); See also, *Ariail v. Ariail*, 295 S.C. 486, 369 S.E.2d 14 (Ct. App. 1988)(There is no cause of action for legal separation in South Carolina); *Rivenbark v. Rivenbark*, 301 S.C. 175, 391 S.E.2d 232 (1990); See Marital Litigation in South Carolina 3<sup>rd</sup> Edition (2001), by Roy T. Stuckey, p. 4 and p. 150).

<sup>6</sup> The only exception is if the health insurance plan itself actually specifies Orders of Separate Maintenance and Support terminate the covered employee spouse's right to health insurance coverage and this situation is rare.

<sup>7</sup> Consider a situation where the health insurance coverage terminates upon divorce and the employee spouse must pay alimony to the non-employee spouse. If the non-employee spouse has a medical condition which would make the cost of obtaining health insurance coverage prohibitive, it may make sense for the parties to remain married for financial reasons alone. Such a suggestion, however, is not possible in those states with legal separations---only those states where parties want to resolve all matters such as custody, support, property division and the like, with the exception of the actual divorce.



COBRA coverage begins on the date of the qualifying event and ends not before the earliest of the following:

- (1) Last day of the maximum coverage period;
- (2) First day qualified beneficiary's premium payment is **not** timely made (there is a thirty day window of opportunity to pay);
- (3) Date when employer ceases to provide a group health plan to any other employee;
- (4) Date when the qualified beneficiary first becomes covered under any **other** group health plan; or
- (5) Date when the qualified beneficiary first becomes entitled to Medicare benefits.

If the qualified beneficiary becomes disabled during the continuation of coverage period, the continuation of coverage is extended to either 29 months or the end of the maximum coverage period. In addition, continuation coverage can terminate if an event occurs during this period that would cause the regular plan to terminate coverage for cause. If an individual is not a qualified beneficiary but receives health insurance coverage solely because of their relationship to a qualified beneficiary, this individual loses coverage if the qualified beneficiary's continuation of coverage can be terminated.

The period of time for continuation of health insurance coverage is charted below, but in no event other than what may be provided in a specific plan does the continuation coverage extend beyond 36 months:



<b>BENEFICIARY</b>	<b>QUALIFYING EVENT</b>	<b>PERIOD OF COVERAGE</b>
Employee, Spouse, Dependent Child	Termination or Reduced Hours	18 months *
Spouse or Dependent Child	Employee entitled to Medicare, Divorce or Legal Separation occur, or Death of Covered Employee	36 months
Dependent Child	Loss of Dependent Status	36 months

\* This 18-month period may be extended for all qualified beneficiaries if certain conditions are met in cases where a qualified beneficiary is determined to be disabled under COBRA. Benefitsnext at [http://www.benefitsnext.com/content/view.cfm?articles\\_id=2123&subs\\_id=1](http://www.benefitsnext.com/content/view.cfm?articles_id=2123&subs_id=1).

While the chart makes the period of coverage look simple, it can get tricky. For example, what happens if a Husband terminates his employment (a qualifying event) and the family loses its health insurance? If Husband properly and timely elects continuation of coverage under COBRA, the coverage will last eighteen months. However, if the Husband and Wife divorce before the eighteen months continuation coverage runs, the divorce is the second qualifying event and will extend the non-employee spouse's (i.e. Wife's) health insurance coverage to 36 months beyond the date she initially began receiving COBRA coverage. The Employee spouse (i.e. Husband) is not entitled to extend his COBRA coverage beyond the original eighteenth month period.

### **HOW MUCH DOES COBRA COST?**

COBRA is expensive but generally, it costs less than obtaining individual coverage because the qualified beneficiary who elects COBRA coverage continues to receive the benefit of group health coverage at a discounted rate. However, the premium is more expensive than the regular group health plan because the employer contributes to the regular group health plan premium cost while the COBRA beneficiary must pay the premium without the benefit of a contribution by the employer.





The cost of the premium cannot exceed 102% of the regular group health plan premium. If the participant does not make timely payment (within thirty days), the group health plan can terminate COBRA coverage.

Where there is a disabled qualified beneficiary, the amount of the premium payment differs and depends on several factors. However, the COBRA premium cannot exceed 150 % of the applicable premium cost under any circumstances.

### **WHAT NOTICE IS REQUIRED?**

Employers must give notice of COBRA rights to their employees and their spouses when the employee is first covered by the employer's group health insurance plan or at the time their group health insurance plan becomes subject to COBRA or when new spouses are added. Notice may be provided by first class mail to the last known address of the employee and spouse.

The burden of notifying a qualified beneficiary who experiences a qualifying event and becomes eligible for continuation of health insurance coverage is upon employers, employees and plan administrators. An employer has 30 days to notify the plan administrator when an employee dies, is terminated or reduces his or her work hours. When an employee becomes divorced or legally separated or a dependent is no longer qualified for health insurance coverage because of his or her age, the employee has 60 days to notify the plan administrator. Once the plan administrator receives notice of the qualifying event, the plan administrator must notify the employee and qualified beneficiaries of their continuation rights within 14 days. After the employee and/or qualified beneficiaries receive notice of their continuation rights, they have 60 days to



decide whether or not they want to elect COBRA's continuation of health insurance coverage.

### **ARE THERE PENALTIES FOR AN EMPLOYER'S FAILURE TO COMPLY?**

What happens if during a divorce a Wife learns her Husband's company, which he owns, provides a group health insurance that is subject to COBRA, but the company has not been complying with COBRA's requirements to provide coverage to qualified beneficiaries after the occurrence of a qualified event?

Answer: The Husband and company are in BIG trouble, and the attorney must insure that if the Wife is innocent that she is protected from any liability stemming from the company's failure to comply with federal law because COBRA may impose an excise tax on the employer (i.e. the Husband), the company and/or possibly the insurance carrier. The amount of the excise tax is One Hundred Dollars (\$100.00) per day for each day that notice was not provided to a qualified beneficiary. In addition, failure to provide notice can cause the employer to become liable for all medical expenses that otherwise would have been covered by the group health insurance once COBRA continuation coverage began and such costs could be financially devastating.

### **HOW DO WE PROTECT OUR DIVORCE CLIENTS REGARDING COBRA?**

Health insurance is a major factor in divorces as our society ages and medical costs skyrocket. If you represent the spouse in need of health insurance coverage, this issue is often a major factor in the divorce.

In determining alimony, finding out the cost of the health insurance can become a critical issue when determining a client's post-divorce financial needs. When valuing the marital estate, particularly the marital business, determine whether the business has



complied with COBRA and other local, state and federal laws. Add questions to your discovery requests that include whether or not the company's health insurance plan falls within COBRA's reach and remind your business valuation expert to include this potential liability as part of his information gathering quest and ultimate valuation.

The discovery process should also include questions about health insurance options post-divorce in the event a spouse has serious medical needs. Consider adding some of the following requests to your discovery forms:

Requests for Production:

1. Please provide a copy of your company's Health Insurance Plan;
2. Please provide a copy of your company's Employee Handbook;
3. Please provide copies of all Health Insurance Plans offered by your employer; and
4. If the opposing party runs the marital business, inquire whether the health insurance plan is subject to COBRA and whether the business has fully complied with COBRA's requirements and provide written documentation to confirm such compliance.

Interrogatories:

1. How many full-time employees were employed by your employer last year?
2. How many hours a week did the full-time employees work last year?
3. How many full-time employees are currently employed by your employer?
4. How many hours a week do full-time employees at your company currently work?
5. How many part-time employees does your employer's company employ, and what hours do they work?
6. What period of time does the employer consider a normal workweek?



7. What is the name, address and phone number of the plan administrator of the employer's health insurance plan?
8. What is the actual cost of the health insurance premium, including the portion the employer pays?
9. What are the costs of the COBRA premium?
10. If the opposing party runs the marital business, inquire whether the health insurance plan is subject to COBRA and whether the business has fully complied with COBRA's requirements

When you know your client will need to elect COBRA coverage following the divorce, assist the client by drafting a letter to the plan administrator notifying the administrator of the qualifying event, i.e. the date of the divorce. The plan administrator must then timely notify the client of her election rights, and the client must pay attention to the fact that once the plan administrator contacts her, she only has 60 days to elect COBRA coverage.

### **CONCLUSION**

In conclusion, remember the following when addressing COBRA issues in the family court setting:

- a. COBRA is a federal law that provides temporary continuation of group health insurance coverage under certain circumstances;
- b. Not all group health insurance plans are subject to COBRA such as those businesses with less than 20 full-time employees, church plans and governmental plans;
- c. Divorce and a covered employee's termination from employment, whether voluntarily or involuntarily are qualifying events that can trigger the need for COBRA;



d. Cobra's notice and election requirements are firm. If your client or her spouse fails to act timely, your client could lose her rights to COBRA regardless of what the Divorce Decree states;

e. Some group health insurance plans allow the covered spouse to keep the ex-spouse on their health insurance policy beyond the divorce;

f. If your client does not make arrangements for new health insurance coverage while covered by COBRA, your client might not be able to obtain health insurance coverage or possibly affordable coverage. Thus, remind clients to look for long term health insurance coverage before their divorce is over and warn them to only rely upon COBRA until a more permanent, affordable plan is in place or at least until they qualify for Medicare;

g. COBRA is expensive, and while its premiums are often less expensive than some individual plan premiums, it is possible to find individual plans with less expensive premiums that will not bankrupt your client although the deductible may be higher; and

h. Identify health insurance experts to assist you when your client's medical needs are a major issue in the divorce. Employment attorneys, business attorneys, tax attorneys, certified public accountants, health insurance experts, benefits administrators and health insurance plan administrators are usually familiar with COBRA and other health insurance plan options.

Finally, and probably most importantly, remember COBRA coverage is only *temporary*. Failing to address COBRA with a client who qualifies for COBRA,



particularly one with chronic health problems puts ourselves and malpractice carrier at risk and this is a mistake none of us can afford.



**EXHIBIT A**

It shall be the sole obligation of the husband/wife and his/her attorney, to timely and appropriately notify the appropriate individuals such as the administrator of Husband/Wife's employer and/or health insurance carrier of Husband/Wife's right of health insurance conversion coverage under COBRA and SC Code Section 38-71-770 and husband/wife and his/her attorney shall have no obligation to notify anyone of the same to assure continued health, medical and dental insurance coverage for the Husband/Wife.

“HOT TIPS” “Potpourri of Practical Tips” by D. Patrick McCullough, American Academy of Matrimonial Lawyers, Fall Seminar 2001, November 7 – 10, 2001

**EXHIBIT B**

If the Husband/Wife and/or his/her attorney fail to timely and appropriately notify the appropriate individuals such as the administrator of the Husband/Wife's employer and/or health insurance carrier of husband/wife's right of health insurance conversion coverage under COBRA and SC Code Section 38-71-770, the Husband/Wife and/or his/her attorney become fully responsible for payment of all Husband/Wife's post divorce medical expenses.

**EXHIBIT C**

Employee Benefits Plan Administrator  
XYZ Corporation  
1212 Main Street  
Dallas, TX 75201

Dear Sir or Madam:

This law firm represents Mary Smith, former wife of your employee, Robert Smith. Please be advised that the parties were divorced on \_\_\_\_\_, by order of the Family Court, \_\_\_\_\_ County, Case Number \_\_\_\_\_. (See attached Order). Therefore, please send any notices and correspondence, including COBRA notices, to Mary Smith at the following address:

Thank you for your assistance in this matter.

*Family Advocate*, “Keep Your Client Covered with COBRA” by Maxine Aaronson, pp. 18 – 21, Fall 1990.

