COBRA Compliance and Enforcement

A Lexis Practice Advisor® Practice Note by
Gabriel S. Marinaro, Katten Muchin Rosenman LLP


Gabriel S. Marinaro

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) is a federal statute and set of regulations that requires certain employers to offer each qualified beneficiary (QB) who would otherwise lose coverage under a group health plan due to a qualifying event (QE) an opportunity to elect, within the election period, COBRA coverage under the employer's group health plan for the COBRA coverage period.

The administration and enforcement of COBRA fall under the jurisdiction of the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Department of Health and Human Services (HHS). The IRS and DOL have jurisdiction over private-sector single and multiemployer group health plans. The DOL's jurisdiction and guidance cover the disclosure and notification requirements of COBRA (i.e., the COBRA notices), and the IRS's jurisdiction and guidance cover eligibility, coverage, and premium payment under COBRA. HHS has jurisdiction over state and local government health plans.

The focus of this practice note is on private-sector single and multiemployer group health plans and the COBRA administration and enforcement obligations relating to such plans. The following specific topics are discussed below:

- Which Employers Are Subject to COBRA?
- Which Group Health Plans Are Subject to COBRA?
- Who Is a Qualified Beneficiary?
- What Is a Qualifying Event?
- What Is COBRA Continuation Coverage?
- How Long Can COBRA Coverage Last?
- How Are the Premiums Paid for COBRA Coverage?
- What Are the COBRA Notification Requirements?
- How Do HIPAA and COBRA Interact?
- How Does COBRA Affect Eligibility for Health Insurance Marketplace Coverage?
- How Do the Family Medical Leave Act (FMLA) and COBRA Interact?
- What Are the Penalties for Failure to Comply with the COBRA Requirements?
- How Does the DOL Enforce the COBRA Requirements?

For additional Lexis Practice Advisor COBRA resources, see the forms and charts in the Health and Welfare Plan task's COBRA subtask. For COBRA issues in corporate transactions, see COBRA Considerations in Corporate Transactions.

WHICH EMPLOYERS ARE SUBJECT TO COBRA?

Employers (26 C.F.R. § 54.4980B-2, Q&A-2) that maintain a group health plan are subject to the COBRA requirements if they employed 20 or more employees on at least 50% of its typical business days during the preceding calendar year. All full-time and part-time common law employees are taken into account in determining whether an employer had 20 or more employees. 26 C.F.R. § 54.4980B-2, Q&A-5(c). Each part-time employee is counted as a fraction of an employee, with the fraction equal to the number of hours that the part-time employee worked divided by the hours an employee must work to be considered full-time. 26 C.F.R. § 54.4980B-2 Q&A-5(e).

If the employer determines that it did not employ 20 or more employees during the preceding year, it may still be subject to "mini" COBRA requirements in certain states. These "mini-COBRA" statutes (to the extent applicable to an employer) must be reviewed for employers with fewer than 20 employees, but are beyond the scope of this practice note. You can find details for individual states through the Health & Welfare Benefits and Mini-COBRA State Practice Notes Chart.

Multiemployer plans are subject to COBRA when one of the contributing employers employs 20 or more employees during the previous calendar year (based on the same employee count requirement as for single-employer plans).

Church plans (within the meaning of Internal Revenue Code (Code) section 414(e)) and governmental plans (within the meaning of Code section 414(d)) are not subject to COBRA. Although group health plans maintained by governmental entities are not subject to COBRA, group health plans maintained by state and local governments are generally subject to parallel provisions that were added to the Public Health Service Act. 42 U.S.C. sections 300bb-1 through 300bb-8.

WHICH GROUP HEALTH PLANS ARE SUBJECT TO COBRA?

For purposes of COBRA, a group health plan generally is a plan maintained by an employer or employee organization to provide health care to employees, former employees, the employer, and others associated or formerly associated with the employer or employee organization in a business relationship. 26 C.F.R. § 54.4980B-2, Q&A-1(a). "Health care" is provided under a plan whether provided directly or through insurance, out of the employer's general assets, or otherwise, and whether or not provided through an on-site facility (except as provided in 26 C.F.R. § 54.4980B-2, Q&A-1(d)), or through a cafeteria plan (as defined in Code section 125) or other flexible spending arrangement (see 26 C.F.R. § 54.4980B-2, Q&A-8, regarding requirements for health flexible spending accounts).

Health care has the same meaning as "medical care" under Code section 213(d), which includes

- The diagnosis, cure, mitigation, treatment, or prevention of disease and any other undertaking for the purpose of affecting any structure or function of the body –and–
- Transportation primarily for and essential to health care.

Plans providing health care will also include prescription drugs, dental and vision care, certain employee assistance programs (EAPs), and health reimbursement arrangements. Certain other types of plans are not

treated as providing health care and therefore not subject to COBRA, including life insurance, disability benefits, health savings accounts, and medical savings accounts. 26 C.F.R. 54.4980B-2, Q&A-1(f).

"Health care" for COBRA purposes does not include anything that is merely beneficial to the general health of an individual, such as a vacation. For example, if an employer maintains a spa, swimming pool, or gym that is normally accessible by employees for reasons other than relief of health or medical problems, such a facility does not constitute a program that provides health care and is not covered under a group health plan. 26 C.F.R. § 54.4980B-2, Q&A-1(b).

WHO IS A QUALIFIED BENEFICIARY?

A "qualified beneficiary" or QB, is any individual who, on the day before the "qualifying event," is covered under a group health plan as a covered employee, a spouse of the covered employee, or a dependent child of the covered employee.

A QB also includes:

- Any child who is born to or placed for adoption with a covered employee during a period of COBRA continuation coverage
- Any self-employed individual (within the meaning of Code section 401(c)(1)), independent contractor, or director –and–
- In the case of a qualifying event that is a bankruptcy of the employer, a covered employee who had retired on or before the date of the substantial elimination of group health plan coverage, as well as any spouse or dependent child if he or she was covered under the plan on the day before the bankruptcy qualifying event

26 C.F.R. § 54.4980B-3, Q&A -1.

WHAT IS A QUALIFYING EVENT?

A QB must experience a qualifying event to be eligible for COBRA coverage.

A "qualifying event," or QE, occurs for the covered employee if any of the following events cause the employee to lose coverage:

- Voluntary or involuntary termination (other than by reason of the employee's gross misconduct)
- Reduction of the employee's hours (this occurs whenever there is a decrease in the hours that an employee is required to work or actually works, but only if the decrease is not accompanied by an immediate termination of employment)

There is no definition of "gross misconduct" under COBRA's statutory or regulatory provisions. Courts have different interpretations of what constitutes gross misconduct and sometimes consider state-law standards for gross misconduct for disqualification for unemployment benefits.

A QE occurs for the covered employee's spouse or dependent children when any of the following events cause a loss of coverage:

- Voluntary or involuntary termination (other than by reason of the employee's gross misconduct) of the covered employee

- Reduction of the covered employee's hours
- A covered employee becoming entitled to Medicare under Title XVIII of the Social Security Act (42 U.S.C. sections 1395-1395ggg)
- Death of the covered employee

A QE will also occur with the divorce or legal separation of a covered employee from the employee's spouse, or when a dependent child ceases to be dependent child of a covered employee due to the terms of the plan. 26 C.F.R. § 54.4980B-4.

A QE will also occur in connection with bankruptcy with respect to an employer from whose employment a covered employee retired at any time.

The QE must cause the covered employee, or the spouse or a dependent child of the covered employee, to lose coverage under the plan. To "lose coverage" means to cease to be covered under the same terms and conditions as in effect immediately before the QE. Any increase in the premium or contribution that must be paid by a covered employee (or the spouse or dependent child of a covered employee) for coverage under a group health plan that results from the occurrence of a QE is a loss of coverage. 26 C.F.R. § 54.4980B-4.

WHAT IS COBRA CONTINUATION COVERAGE?

If a QE occurs, each QB who has a loss of coverage must be offered an opportunity to elect to receive the group health plan coverage that is provided to similarly situated non-COBRA beneficiaries (i.e., the same coverage that the qualified beneficiaries had on the day before the QE). If coverage is modified for similarly situated non-COBRA beneficiaries, then the coverage made available to qualified beneficiaries is modified in the same way.

In the case of a QB who is a child born to or placed for adoption with a covered employee during a period of COBRA continuation coverage, the child is generally entitled to elect immediately to have the same coverage that dependent children of active employees receive under the benefit packages under which the covered employee has coverage at the time of the birth or placement for adoption.

QBs are subject to the same deductibles, plan limits on benefits, out-of-pocket expenses, and co-payments as similarly situated non-COBRA beneficiaries. Additionally, if the employer makes an open enrollment period available for similarly situated active employees, the same open enrollment period rights must be made available to each QB receiving COBRA coverage.

Special enrollment rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) permit the enrollment of additional family members for a QB who has elected COBRA coverage upon the loss of other group health plan coverage or upon the acquisition by the employee or participant of a new spouse or of a new dependent through birth, adoption, or placement for adoption, if certain requirements are satisfied. In addition to HIPAA special enrollment rights, if the plan permits new family members of active employees to become covered before the next open enrollment period, that same right must be extended to new family members of a QB. If the addition of a new family member will result in a higher applicable COBRA premium, the plan can require the payment of the higher amount for the COBRA coverage.

26 C.F.R. § 54.4980B-5.

HOW LONG CAN COBRA COVERAGE LAST?

The following subsections describe the required duration of the COBRA coverage period based on various circumstances.

Maximum Periods

Generally, COBRA coverage must be provided for a period that can span 18 to 36 months, depending on the type of QE and whether certain events occur that extend the original period of COBRA coverage or terminate the COBRA coverage prematurely.

In the case of a QE that is a termination of employment or reduction of hours, the maximum coverage period is 18 months. The maximum period is 36 months for all other QE events. The 18-month period can be extended in a couple of different situations:

- **Disability of the QB.** If a QB is entitled to a "disability extension," the maximum required coverage period is extended from 18 months to 29 months. A QB becomes entitled to a disability extension if (1) the QE occurs because of a termination or reduction of hours of a covered employee's employment; (2) the QB is determined under Title II or XVI of the Social Security Act (42 U.S.C. sections 401 or 1381-1385) (SSA) to have been disabled at any time during the first 60 days of COBRA continuation coverage; and (3) the QB provides notice to the plan administrator on a date that is both within 60 days after the date the determination is issued and before the end of the original 18-month maximum coverage period that applies to the QE. See COBRA Disability Extension Flowchart.
- **Second QE.** During the first 18-month period of COBRA coverage, except for a bankruptcy-related QE, the coverage may be extended up to a total of 36 months when one of the following second QEs occurs during the first 18 months:

See COBRA Second Qualifying Event Flowchart.

  - A covered employee becoming entitled to Medicare
  - A dependent child's ceasing to be a dependent child of a covered employee under the generally applicable requirements of the plan
  - Death of the covered employee
  - Divorce or legal separation of a covered employee from the employee's spouse

In the case of QE in connection with a loss of coverage (i.e., a substantial elimination of coverage within one year, before or after the date of commencement, of the bankruptcy proceeding) in connection with the bankruptcy of the employer, the maximum coverage period for a QB:

- Ends on the date of the retired covered employee's death for the retired covered employee –and–
- Continues for a period up to 36 months after the death of a retired covered employee for the surviving spouse and any dependent child of the retired covered employee

26 C.F.R. § 54.4980B-7, Q&A-4.

Early Termination of COBRA

COBRA coverage may end earlier than the maximum periods discussed above, upon the occurrence of one of the following events:

- Timely payment for COBRA continuation coverage is not made to the plan with respect to the QB
- The employer ceases to provide any group health plan (including successor plans) to any employee
- The QB becomes covered under any other group health plan after electing COBRA continuation coverage, provided that:
    - The QB is actually covered, rather than merely eligible to be covered under, the other group health plan
    - The other group health plan is not maintained by the employer providing the COBRA coverage –and–
    - The other group health plan does not contain any exclusion or limitation with respect to any preexisting condition of the QB (other than such an exclusion or limitation that does not apply to, or is satisfied by, the QB by reason of the provisions in I.R.C. § 9801)
- The QB becomes entitled to Medicare benefits after electing COBRA continuation coverage (even if the QB does not obtain Medicare coverage)
- In the case of a QB who is entitled to a disability extension, the later of
    - The earlier of (1) 29 months after the date of the QE, or (2) the first day of the month that is more than 30 days after the date of a final determination under the SSA that the disabled QB whose disability resulted in the QB's being entitled to the disability extension is no longer disabled –or–
    - The end of the maximum coverage period that applies to the QB without regard to the disability extension

26 C.F.R. § 54.4980B-7.

Alternative Coverage

If health coverage is provided to a QB after a QE without regard to COBRA continuation coverage (for example, as a result of state or local law, the Uniformed Services Employment and Reemployment Rights Act of 1994, a collective bargaining agreement, severance agreement, or plan procedures), the end of the maximum COBRA coverage period will not be extended because of such alternative coverage.

However, if the alternative coverage does not satisfy all of the requirements for COBRA coverage, or if the amount that the group health plan requires to be paid for the alternative coverage is greater than the amount required to be paid by similarly situated non-COBRA beneficiaries for the coverage that the QB can elect to receive as COBRA coverage, the plan covering the QB immediately before the QE must offer the QB receiving the alternative coverage the opportunity to elect COBRA coverage.

If an individual rejects COBRA coverage in favor of alternative coverage, then, at the expiration of the alternative coverage period, the individual need not be offered a COBRA election. However, if the individual receiving alternative coverage is a covered employee and the spouse or a dependent child of the individual would lose that alternative coverage as a result of a QE (such as the death of the covered employee), the spouse or dependent child must be given an opportunity to elect to continue that alternative coverage, with a maximum coverage period of 36 months measured from the date of the QE.

Conversion Rights

If a QB's COBRA period ends as a result of the expiration of the maximum coverage period, the group health plan must, during the 180-day period ending on the expiration date, provide the QB the option of enrolling under a conversion health plan if such an option is otherwise generally available to similarly situated non-COBRA beneficiaries under the group health plan. If such a conversion option is not generally available, it need not be made available to a QB.

Termination for Cause

A group health plan can terminate for cause the coverage of a QB receiving COBRA continuation coverage on the same basis that the plan terminates for cause for non-COBRA beneficiaries. For example, if a group health plan terminates coverage for active employees for the submission of a fraudulent claim, then the COBRA beneficiary can also be terminated for the submission of a fraudulent claim.

HOW ARE THE PREMIUMS PAID FOR COBRA COVERAGE?

A group health plan can require the payment of an amount that does not exceed 102% of the applicable premium for that COBRA period. If a QB is entitled to a disability extension after the end of the original 18-month maximum coverage period, the plan may require the payment of an amount that is up to 150% of the applicable premium for the remainder of the period of COBRA continuation coverage (i.e., from the beginning of the 19th month through the end of the 36th month) as long as the disabled QB is included in that coverage. 26 C.F.R. § 54.4980B-8.

For fully insured plans, the "applicable premium" means the cost to the plan for such period of the coverage for similarly situated beneficiaries with respect to whom a qualifying event has not occurred (without regard to whether such cost is paid by the employer or employee).

For self-insured plans, there are two methods for calculating the applicable premium:

- A reasonable estimate of the cost of providing coverage for such period for similarly situated beneficiaries that (1) is determined on an actuarial basis, and (2) takes into account such factors as the IRS may prescribe by regulation
- The cost to the plan for similarly situated beneficiaries for the same period occurring during the preceding determination period (i.e., 12 months), adjusted by the percentage increase or decrease in the implicit price deflator of the gross national product for the 12-month period ending on the last day of the sixth month of such preceding determination period. A plan administrator may not use this method in any case where there is a significant difference between the determination period and the preceding determination period, in coverage under, or in employees covered by the plan.

I.R.C. § 4980B(f)(4).

The applicable COBRA premium for each determination period must be computed and fixed by a group health plan before the determination period begins. The determination period is any 12-month period selected by the plan, provided that it is applied consistently from year to year.

During a determination period, a group health plan can increase the amount it requires to be paid for a QB's COBRA continuation coverage only in three cases:

- The plan previously charged less than the maximum amount permitted and the increased amount required to be paid does not exceed the maximum permissible amount (i.e., 102% or 150%).

- The increase occurs during the disability extension and the increased amount required to be paid does not exceed the maximum amount permitted.
- A QB changes the coverage being received.

If a QB changes coverage from one benefit package (or a group of benefit packages) to another benefit option (or group of benefit packages), or adds or eliminates coverage for family members, the following applies:

- If the change in coverage is to a benefit package, group of benefit packages, or coverage unit (such as family coverage, self-plus-one-dependent, etc.) for which the applicable premium is higher, then the plan may increase the amount that it requires to be paid for COBRA continuation coverage to an amount that does not exceed the maximum amount (i.e., 102% or 150%, as applicable) as applied to the new coverage.
- If the change in coverage is to a benefit package, group of benefit packages, or coverage unit (such as individual or self-plus-one-dependent) for which the applicable premium is lower, then the plan cannot require the payment of an amount that exceeds the amount permitted (i.e., 102% or 150%, as applicable) as applied to the new coverage.

Timely Payment of Premium for COBRA Coverage

Timely payment for a period of COBRA coverage under the group health plan means payment that is made to the plan by the date that is no more than 30 days after the first day of that period. Payment that is made by a later date is also considered timely if:

- Under the plan terms, covered employees or QBs are allowed until a later date to pay for their coverage for the period –or–
- Under the terms of an arrangement between the employer or the employee organization and insurance company, HMO, or other entity that provides plan benefits on the employer's or employee organization's behalf, the employer or employee organization is allowed until that later date to pay for coverage of similarly situated non-COBRA beneficiaries for the period

A plan cannot require payment for any period of COBRA coverage earlier than 45 days after the date on which the election of COBRA continuation coverage is made for that QB.

If a timely payment is made to the plan in an amount that is not significantly less than the amount the plan requires to be paid for a period of coverage, then the amount paid is deemed to satisfy the plan's requirement for the amount that must be paid, unless the plan notifies the QB of the amount of the deficiency and grants a reasonable period of time for payment of the deficiency to be made. A safe harbor of 30 days after the notice is provided is deemed to be a reasonable period of time. An amount is not significantly less than the amount the plan requires to be paid for a period of coverage if the shortfall is no greater than the lesser of the following two amounts:

- $50 (or such other amount as the IRS provides)
- 10% of the amount the plan requires to be paid

Payment is considered made on the date on which it is sent to the plan. 26 C.F.R. § 54.4980B-8, Q&A-5.

WHAT ARE THE COBRA NOTIFICATION REQUIREMENTS?

Initial COBRA Notice

The administrator of a group health plan subject to COBRA shall provide written notice to each covered employee and spouse of the covered employee of the right to COBRA coverage (Initial COBRA Notice, sometimes also referred to as the General Notice). The Initial COBRA Notice generally must be provided to each employee and each employee's spouse not later than 90 days after the date on which such individual's coverage under the plan commences. The Initial COBRA Notice can be furnished separately or included with the plan's summary plan description (SPD). A plan administrator may satisfy the requirement to provide the Initial COBRA Notice to a covered employee and the covered employee's spouse by furnishing a single notice addressed to both the covered employee and the covered employee's spouse if, on the basis of the most recent information available to the plan, the covered employee's spouse resides at the same location as the covered employee.

The Initial COBRA Notice must be written in a manner calculated to be understood by the average plan participant and contain the following:

- Name of the plan under which COBRA is available, and the name, address, and telephone number of a party or parties from whom additional information about the plan and continuation coverage can be obtained
- A general description of the COBRA coverage under the plan
- An explanation of the plan's requirements regarding the responsibility of a QB to notify the administrator of a QE that is a divorce, legal separation, or a child's ceasing to be a dependent under the terms of the plan, and a description of the plan's procedures for providing such notice
- An explanation of the plan's requirements regarding the responsibility of qualified beneficiaries who are receiving COBRA coverage to provide notice to the administrator of a determination by the Social Security Administration that the QB is disabled, and a description of the plan's procedures for providing such notice
- An explanation of the importance of keeping the administrator informed of the current addresses of all participants and beneficiaries under the plan who are or may become QBs
- A statement that the notice does not fully describe continuation coverage or other rights under the plan and that more complete information regarding such rights is available from the plan administrator and in the plan's SPD

29 C.F.R. 2590.606-1

The Initial COBRA Notice must be furnished in a manner consistent with the requirements of 29 C.F.R. 2520.104b-1, including the requirements for the use of electronic media. For a model, see COBRA Rights General Notice.

Qualifying Event Notice

Employer Notice

An employer subject to COBRA must notify the plan administrator of the occurrence of a QE that is:

- The covered employee's death
- A termination of employment (other than by reason of gross misconduct)

- A reduction in hours of employment
- A Medicare entitlement –or–
- A bankruptcy proceeding of an employer from whose employment the covered employee retired at any time

Generally, this notice must be provided no later than 30 days after the QE occurs (if the employer is also the plan administrator, see COBRA Election Notice below). The employer notice to the plan administrator must include sufficient information to enable the plan administrator to determine the plan, the covered employee, the QE, and the date of the QE. See COBRA Notice Flowchart (Employee Loss of Coverage). 29 C.F.R. 2590.606-2.

QB-Initiated Notice

A QB must provide notice to a plan administrator about a QE in the following circumstances:

- A divorce or legal separation of a covered employee from his or her spouse
- A beneficiary ceasing to be covered under the plan as a dependent child of the participant
- Notice of the occurrence of a second QE after the QB has become entitled to continuation coverage with a maximum duration of 18 (or 29) months
- Notice that a QB has been determined by the Social Security Administration to be disabled or is no longer disabled

29 C.F.R. 2590.606-3.

See COBRA Notice Flowchart (Spouse or Child Loss of Coverage).

Reasonable Procedures to Furnish the QB-Initiated Notice

With respect to covered employees and QBs notifying the plan administrator about a QE, ERISA requires that the plan establish reasonable COBRA procedures for purposes of covered employees and QBs furnishing the COBRA Election Notices. These procedures will be deemed reasonable only if such procedures:

- Are described in the plan's SPD (29 C.F.R. 2520.102-3)
- Specify the individual or entity designated to receive such notices
- Specify the means by which the notice may be given
- Describe the information concerning the QE or determination of disability that the plan deems necessary to provide COBRA coverage –and–
- Meet the timing requirements described below

29 C.F.R. 2590.606-3(b)(2).

The plan administrator can require that the covered employee or QB use a specific form to provide notice to the plan administrator, provided that the form is easily available, without cost, to covered employees and QBs. For a model, see COBRA Qualifying Event Notice.

If a plan has not established reasonable procedures for participants to provide notice of one of the QEs listed above, such notice shall be deemed to have been provided when a written or oral communication identifying a specific event is made in a manner reasonably calculated to bring the information to the attention to any of the following:

- In the case of a single-employer plan, the person or organization unit that typically handles employee benefit matters of the employer
- In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee, or other similar group (or any member of such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily are referred
- In the case of a plan the benefits of which are provided or administered by an insurance company, or other similar organization subject to regulation under the insurance laws of one or more states, the person or organizational unit that customarily handles claims for benefits under the plan, or any office of the insurance company, insurance service, or other similar organization

Reasonable Period of Time to Furnish QB-Initiated Notice

The plan may establish a reasonable period of time for furnishing the notice, provided that the period is not shorter than 60 days after the latest to occur of the following events:

- The relevant QE
- The QB loses (or would lose) coverage under the plan as a result of the QE –or–
- The QB is informed, through the furnishing of the plan's SPD or the initial COBRA notice, of both the plan's responsibility to provide the notice, and the plan's procedures for the QB to provide the QB's notice to the plan administrator

The period of time for furnishing the notice regarding a disability determination may not end before 60 days after the latest to occur of:

- The disability determination under the SSA;
- The relevant QE occurs;
- The QB loses (or would lose) coverage under the plan as a result of the QE –or–
- The QB is informed, through the furnishing of the SPD or the Initial COBRA Notice, of both the plan's responsibility to provide the notice, and the plan's procedures for the QB to provide the QB's COBRA election to the plan administrator

The plan also may require that the disability determination notice be furnished before the end of the first 18 months of COBRA coverage.

The period of time for providing a notice of a **change** in disability status to the plan administrator may not end before 30 days after the latest to occur of:

- The final determination under the SSA that the QB is no longer disabled –or–
- The date on which the QB is informed, through the SPD or the Initial COBRA Notice, of both the QB's

responsibility to provide the notice to the plan administrator, and the plan's procedures for the QB to provide such notice to the plan administrator

A plan may establish reasonable requirements for the content of any notice to the plan administrator regarding the occurrence of a QE. However, a plan may not deem a notice to have been provided untimely if such notice, although not containing all of the information required by the plan, is provided within the time limit established under the plan (and subject to the requirements under COBRA), and the administrator is able to determine from such notice:

- The identity(ies) of the covered employee and QB(s)
- The QE or disability –and–
- The date on which the QE (if any) occurred

A plan administrator may require that a notice that does not contain all of the information required by the plan be supplemented with additional information necessary to meet the plan's reasonable content requirements for such notice in order for the notice to be deemed to have been provided in accordance with these requirements.

With respect to each of the notice requirements, any individual who is either the covered employee, a QB with respect to the QE, or any representative acting on behalf of the covered employee or QB may provide the notice. The provision by one individual will satisfy any responsibility to provide notice on behalf of all related QBs with respect to the QE.

COBRA Continuation Coverage Election Notice (COBRA Election Notice)

Upon receipt of a notice of a QE from the employer or the QB, the administrator shall furnish to each QB, not later than 14 days after receipt of the notice of the QE, the COBRA Election Notice.

For employer-initiated QE notices (e.g., termination of employment, reduction of hours, etc.), where the employer is also the administrator of the plan, the employer shall furnish to each QB a COBRA Election Notice no later than 44 days after the date the QE occurred.

In the case of a multiemployer plan, a notice meeting the requirements described below must be furnished not later than the later of:

- 14 days after receipt of the notice of the QE –or–
- The end of the time period provided in the terms of the plan

The COBRA Continuation Coverage Election Notice must be written in a manner calculated to be understood by the average plan participant and contain the following information:

- The names of the plan under which COBRA is available; and the name, address, and telephone number of the party responsible under the plan for the administration of COBRA
- Identification of the QE
- Identification, by status or name, of the qualified beneficiaries who are recognized by the plan as being entitled to elect continuation coverage with respect to the QE, and the date on which the coverage under the plan will terminate (or has terminated), unless continuation coverage is elected

- A statement that each individual who is a QB with respect to the QE has an independent right to elect continuation coverage, that a covered employee or the spouse of the covered employee (or was the spouse of the covered employee on the day before the QE occurred) may elect continuation coverage on behalf of all other qualified beneficiaries with respect to the QE, and that a parent or legal guardian may elect continuation coverage on behalf of a minor child
- An explanation of the plan's procedures for electing continuation coverage, including an explanation of the time period during which the election must be made, and the date by which the election must be made
- An explanation of the consequences of failing to elect or waiving COBRA coverage
- A description of the COBRA coverage that will be made available under the plan, if elected, including the date on which such coverage will commence, either by providing a description of the coverage or by reference to the plan's SPD
- An explanation of the maximum period for which COBRA coverage will be available under the plan, if elected; an explanation of the continuation coverage termination date; and an explanation of any events that might cause continuation coverage to be terminated earlier than the end of the maximum period
- A description of the circumstances (if any) under which the maximum for continuation coverage may be extended due to either the occurrence of a second QE or a determination by the Social Security Administration that the QB is disabled, and the length of any such extension
- In the case of a notice that offers continuation coverage with a maximum duration of less than 36 months, a description of the plan's requirements regarding the responsibility of qualified beneficiaries to provide notice of a second QE, and notice of a disability determination under the Social Security Act, along with a description of the plan's procedures for providing such notices, including timeframes for providing such notices, and the consequences of failing to provide such notices (the notice should also explain the responsibility of a QB to provide notice that a disabled QB has subsequently been determined to no longer be disabled)
- A description of the amount, if any, that each QB will be required to pay for continuation coverage
- A description of the due dates for payments, the QB's right to pay on a monthly basis, the grace periods for payment, the address to which payments should be sent, and the consequences of delayed payment and non-payment
- An explanation of the importance of keeping the administrator informed of the current addresses of all participants or beneficiaries under the plan who are or may become QBs
- A statement that the notice does not fully describe continuation coverage or other rights under the plan, and that more complete information regarding such rights is available in the plan's SPD or from the plan administrator

29 C.F.R. 2590.606-4(b).

For a model, see COBRA Election Notice and Form.

What Are the Requirements for a Qualified Beneficiary Making a COBRA Election?

The QB's COBRA coverage is contingent on timely electing COBRA coverage with the COBRA Election Notice. The election period for COBRA coverage must begin no later than the date the QB would lose coverage on account of the QE and the election period must not end before the date that is 60 days after the later to occur of:

- The health care coverage is lost on account of the QE or

- The COBRA Election Notice is provided to the QB of her or his right to elect COBRA continuation coverage

26 C.F.R. § 54.4980B-6, Q&A-1.

An election is considered made on the date it is sent to the plan administrator. If the election is made during the time frames described above, coverage must be provided from the date that coverage would have been lost. (26 C.F.R. § 54.4980B-6, Q&A-3).

If during the election period, a QB waives COBRA continuation coverage, the waiver can be revoked at any time before the end of the election period. Revocation of the waiver is an election of COBRA continuation coverage. However, if a waiver of COBRA continuation coverage is later revoked, coverage need not be provided retroactively (that is, from the date of the loss of coverage until the waiver is revoked). Waivers and revocations of waivers are considered made on the date they are sent to the employer or plan administrator. (26 C.F.R. § 54.4980B-6, Q&A-4).

Each QB (including a child who is born or placed for adoption with a covered employee during a period of COBRA continuation coverage) must be offered the opportunity to make an independent election, or have such election made by the covered employee, to receive COBRA continuation coverage. (26 C.F.R. § 54.4980B-6, Q&A-6).

Notice of Unavailability of COBRA Coverage by the Plan Administrator to QBs

In the event that the plan administrator receives notice from a covered employee or QB or other individual relating to a QE, second QE, or determination of disability by the Social Security Administration, and determines that the individual is not entitled to COBRA coverage, the plan administrator shall provide the individual an explanation as to why the individual is not entitled to COBRA coverage. The notice must be written in a manner calculated to be understood by the average plan participant, and must be furnished by the administrator within 14 days of receipt of the notice of the QE. 29 C.F.R. 2590.606-4(c). For a model, see COBRA Unavailability Notice.

Notice of Early Termination of Continuation Coverage

If the plan is providing COBRA coverage to one or more QBs with respect to a QE, the plan administrator must provide notice to each such QB of any termination of continuation coverage that takes effect earlier than the end of the maximum period of COBRA coverage. The notice must be written in a manner calculated to be understood by the average plan participant, and shall contain the following information:

- The reasons that continuation coverage has terminated earlier than the end of the maximum period of COBRA coverage applicable to such QE
- The date of termination for COBRA coverage
- Any rights the QB may have under the plan or under applicable law to elect an alternative group or individual coverage, such as a conversion right

The Notice of Termination of COBRA Coverage must be furnished as soon as possible following the administrator's determination that continuation coverage shall terminate. 29 C.F.R. 2590.606-4(d). For a model, see COBRA Early Termination Notice.

Special Rules for the COBRA Election Notice, Notice of Unavailability of COBRA Coverage, and Notice of Termination of COBRA Coverage

A plan administrator may provide notice to a covered employee and the covered employee's spouse by furnishing a single notice addressed to both the covered employee and the covered employee's spouse if, on the basis of the most recent information available to the plan, the covered employee's spouse resides at the same location as the covered employee. An administrator may provide notice to each QB who is the dependent child of a covered employee and the covered employee's spouse if, on the basis of the most recent information available to the plan, the dependent child resides at the same location as the individual to whom such notice is provided.

These notices must be furnished in a manner consistent with the requirements of 29 C.F.R. 2520.104b-1, including the requirements for the use of electronic media.

HOW DO HIPAA AND COBRA INTERACT?

Upon certain "special enrollment events" under HIPAA, individuals who previously declined group health plan coverage for themselves and their dependents (and who are otherwise eligible) are provided a special enrollment period to enroll in the coverage without regard to the open enrollment period. One of these special enrollment events is the employee's or employee's dependent's loss of other health care coverage. For example, if a covered employee experiences a QE and the covered employee's spouse previously declined coverage under the spouse's employer's group health plan, the covered employee, the covered employee's spouse, and any other dependents have a special enrollment right under HIPAA to enroll in the spouse's employer's group health plan prior to the next open enrollment period. The employee or dependent must request special enrollment within 30 days of the loss of the other coverage.

HOW DOES COBRA AFFECT ELIGIBILITY FOR HEALTH INSURANCE MARKETPLACE COVERAGE?

If a covered employee has a QE, he or she also has the opportunity to enroll in a plan offered through a Health Insurance Marketplace (Marketplace). An offer of COBRA coverage does not affect eligibility for Marketplace coverage or eligibility for the premium tax credit. The Marketplace coverage must be selected within 60 days before or 60 days after the loss of coverage due to the QE, or the QBs must wait until the next open enrollment period.

If an employee or dependent chooses to elect COBRA following a QE, the employee or dependent will have another opportunity to request special enrollment in a Marketplace plan once the COBRA coverage has expired. For these purposes, the individual must receive the maximum period of COBRA coverage available without early termination. An individual must request special enrollment within 30 days of the loss of COBRA coverage for enrollment in coverage under a Marketplace plan within 60 days before or 60 days after the loss of COBRA coverage. If the COBRA coverage is terminated early with no special enrollment opportunity, the employee or dependent will have to wait until the next open enrollment period to enroll in another group health plan or the Health Insurance Marketplace.

HOW DO THE FAMILY MEDICAL LEAVE ACT (FMLA) AND COBRA INTERACT?

The taking of leave under FMLA does not constitute a QE except in the following situations:

- An employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employee's employer.

- The employee does not return to employment with the employer at the end of the FMLA leave.
- The employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan before the end of the maximum coverage period.

The satisfaction of these three conditions does not constitute a QE if the employer eliminates, on or before the last day of the employee's FMLA leave, coverage under a group health plan for the class of employees (while continuing to employ that class of employees) to which the employee would have belonged if the employee had not taken FMLA leave.

The QE described above is considered to have occurred on the last day of the FMLA leave. The maximum coverage period is measured from the date of the QE (i.e., the last date of the FMLA leave). If, however, coverage under the group health plan is lost at a later date, and the plan provides for the extension of the required periods, then the maximum coverage period is measured from the date when coverage is lost. If an employee fails to pay the employee portion of premiums for coverage under a group health plan during FMLA leave, or declines coverage under a group health plan during FMLA leave, this does not affect the determination of whether or when the employee has experienced a QE. Additionally, any state or local law that requires coverage under a group health plan to be maintained during a leave of absence for a period longer than the requirement under FMLA is disregarded for purposes of determining when a QE occurs under COBRA.

Even if recovery of premiums is permitted under 29 C.F.R. 825.213, the right to COBRA coverage cannot be conditioned upon the employee's reimbursement of the employer for premiums the employer paid to maintain the employee's coverage under a group health plan during the employee's FMLA leave.

26 C.F.R. § 54.4980B-10.

WHAT ARE THE PENALTIES FOR FAILURE TO COMPLY WITH THE COBRA REQUIREMENTS?

A failure to comply with the detailed COBRA requirements can subject the employer to penalties under the Code and ERISA. If the plan does not comply with the COBRA requirements, the Code imposes an excise tax on the employer maintaining the plan (or in the multiemployer plan context, on the plan itself). ERISA gives certain parties, including QBs who are participants or beneficiaries in the group health plan, the right to file a lawsuit to redress COBRA non-compliance.

Excise Taxes Under the Code for COBRA Compliance Failures

Code section 4980B(f) contains an excise tax sanction for COBRA non-compliance with respect to a QB of $100 (but not more than $200 per family) for each day of the non-compliance period (COBRA Excise Tax). The COBRA Excise Tax is reported on IRS Form 8928, Return of Certain Excise Taxes under Chapter 43 of the Internal Revenue Code.

- **Non-compliance period.** The "non-compliance period" begins on the date the COBRA failure first occurs and ends on the earlier of the date the COBRA failure is corrected, or the date that is six months after the last day of the QB's applicable COBRA coverage period.
- **Persons liable for the COBRA excise tax.** For single-employer group health plans, this is generally the employer that maintains the plan. For multiemployer plans, the plan is liable. Certain third-party administrators can, in some circumstances, be liable for the COBRA Excise Tax.

Code Section 4980B(e)—Caps on the COBRA Excise Tax

The COBRA Excise Tax is capped for unintentional failures that are due to reasonable cause and not willful neglect. For single-employer plans, the maximum amount that can be imposed for unintentional failures during an employer's tax year is the lesser of:

- 10% of the amount paid or incurred by the employer (or the predecessor employer) during the preceding tax year for group health plans –or–
- $500,000.

For multiemployer plans, the maximum tax that can be imposed on the plan for inadvertent failures during the plan's taxable year is the lesser of:

- 10% of the total amount paid or incurred by the trust during the tax year to provide medical care –or–
- $500,000.

Code Section 4980B(c)(4)—Third-Party Liability for the COBRA Excise Tax

The maximum tax that can be imposed on a third party (e.g., an insurance carrier) for all inadvertent failures during a taxable year is $2 million.

Code Section 4980B(c)(4)(C)—Minimum COBRA Excise Tax

A minimum COBRA Excise Tax will be imposed where:

- There is a failure to comply with the COBRA coverage requirements with respect to a QB that is not corrected before the date the IRS notifies the employer that an income tax examination will be initiated –and–
- The failure occurred or continued during the period under examination.

If the IRS determines that the failure is de minimis, the amount of the tax per beneficiary will be the lesser of $2,500, or the amount of tax that would be imposed. If the failure is more than de minimis, the COBRA Excise Tax will be the lesser of $15,000, or the amount of tax that would be imposed.

Code Section 4980B(b)(3)-- The Inadvertent Failure Rule

The COBRA Excise Tax will not be imposed on any failure during any period for which it is established to the satisfaction of the IRS that none of the persons who would be liable for the COBRA Excise Tax knew, or would have known by exercising reasonable due diligence, that the failure existed.

Code Section 4980B(c)(1)—30-Day Grace Period

The COBRA Excise Tax does not apply to any failure if (1) the failure is due to reasonable cause and not willful neglect, and (2) the failure is corrected within 30 days after the beginning of the first date any of the persons liable for the COBRA Excise Tax knew, or by exercising reasonable diligence would have known, that such failure existed.

Code Section 4980B(c)(2)—Correction of Failure

A failure is considered corrected if:

- The COBRA failure is retroactively undone to the extent possible –and–
- The QB is placed in a financial position that is as good as such beneficiary would have been in had such failure not occurred

Code Section 4980B(c)(5)—Waiver of the COBRA Excise Tax by the IRS

If the COBRA failure is due to reasonable cause and not due to willful neglect, the IRS may waive part or all of the COBRA Excise Tax to the extent that the tax would be excessive relative to the failure involved.

In determining whether to exercise its authority to waive the COBRA Excise Tax, the IRS will take into account the efforts made by the employer or other entity in complying with the COBRA rules. Several factors will be considered, including the quality of the employer's compliance program with respect to, for example, (1) the training of individuals responsible for operational compliance, and (2) the preparation of written instructions for such individuals.

Another factor is the extent to which the compliance program has been designed based on competent professional advice, such as legal and actuarial counsel, and to the extent to which such program is updated, based on such advice to reflect changes in the law or other circumstances. Another factor is the extent to which the operation of the compliance program is monitored to assure the independence of auditors. (See Audit Techniques and Tax Law to Examine COBRA Cases (Continuation of Employee Health Care Coverage), published by the IRS (March 2012) (IRS Audit Techniques))

Employers that are concerned about their COBRA administration should review the IRS examination procedures in this area, which can be found in IRS Audit Techniques.

HOW DOES THE DOL ENFORCE THE COBRA REQUIREMENTS?

As noted initially, the DOL's COBRA responsibility is limited to the disclosure and notification requirements under COBRA. A penalty of up to $110 per day may be assessed under ERISA section 502(c)(1) by a federal court against the employer for a failure to provide an initial COBRA notice or an election notice. An employer or plan that has COBRA failures may be subject to other penalties under ERISA, including both criminal and civil penalties. A participant can also file suit under ERISA section 502(a)(1)(B), which permits lawsuits by participants or beneficiaries to receive benefits due to her or him under the terms of the plan, enforce rights under the terms of the plan, or to clarify rights to future benefits. In a successful lawsuit for COBRA coverage, a court typically awards an amount equal to the medical bills, which is sometimes reduced by any payments the participant would have otherwise paid.

Gabriel S. Marinaro
Special Counsel, Katten Muchin Rosenman LLP

Gabriel Marinaro serves as special counsel in the Employee Benefits and Executive Compensation group. His practice focuses on all aspects of employee benefits and executive compensation. He regularly counsels publicly traded and privately held companies, tax-exempt organizations, and governmental entities on a variety of employee benefits and executive compensation matters. Gabe regularly advises both employers and executives on a wide range of executive compensation matters, including drafting employment agreements, equity compensation arrangements, severance agreements and bonus plans. Gabe provides guidance on nonqualified deferred compensation plans both for for-profit companies and tax-exempt clients. Gabe regularly drafts nonqualified deferred compensation arrangements, including supplemental executive retirement plans, and change in control agreements. Additionally, Gabe advises employers and executives on issues under Code Sections 409A, 457(f), 457A, 162(m), 280G and 83 regarding compensation arrangements for executives.

Gabe assists both publicly traded and privately held companies with equity compensation matters, including drafting equity incentive plans, securities filings, award agreements, and other documentation surrounding the implementation of an equity incentive plan and the underlying awards. Gabe also has drafted and advised on profits interests plans and unit appreciation rights plans for limited liability companies.