



**COBRA Compliance**

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**COBRA Topics**

- ▶ COBRA Defined
- ▶ Who is Subject to COBRA?
- ▶ Who is Not Subject to COBRA?
- ▶ Plans Subject to COBRA
- ▶ Benefits Subject to COBRA
- ▶ Qualified Beneficiaries
- ▶ Qualifying Events
- ▶ COBRA Terminating Events
- ▶ Risks of Non-Compliance
- ▶ Audit Procedures

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### COBRA Defined

- ▶ Consolidated Omnibus Budget Reconciliation Act (COBRA)
  - Applies under the following circumstances:
    - Voluntary or involuntary job loss
    - Reduction in hours worked
    - Death, divorce, and other life events
- ▶ COBRA provides continuation of health insurance coverage that otherwise would be lost due to certain qualifying events.
- ▶ Provides health insurance coverage to individuals during a transitional period - until they obtain coverage through a new employer.

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### Who is Subject to COBRA?

- ▶ All employers with 20 or more employees on 50% of their typical business days during the preceding calendar year.
  - Part-time employees must be counted on a pro-rated basis.
  - Self-employed individuals, independent contractors, and directors are not counted

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### Who is Not Subject to COBRA?

- ▶ Certain small plans, certain church plans and federal government plans.
- ▶ Small employers are exempt for qualifying events occurring in the current calendar year
  - An employer is small if there were fewer than 20 employees employed on a typical business day during the previous calendar year
  - All employees must be counted, not just those covered under the group health plan
  - All employees of related employers must be counted
  - State laws for "mini-COBRA" may apply to employers with less than 20 employees.

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### Plans Subject to COBRA

- ▶ Group Health Insurance Plans
  - Satisfies two criteria:
    - 1) provides medical care, and
    - 2) is maintained by an employer
- ▶ Dental, vision, and prescription drug plans
- ▶ HMO
- ▶ Defined Contribution Plans
- ▶ Flexible Spending Accounts
- ▶ Health Reimbursement Arrangements
- ▶ Employee Assistance Plans (EAP)
- ▶ Wellness Programs

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### Qualified Beneficiaries

- ▶ A Qualified Beneficiary (QB) is an individual who is covered under the employer's group health insurance plan on the day before a qualifying event takes place.
- ▶ The QB is the covered employee, the spouse of the employee, and any dependent children.
- ▶ Each QB has the same rights under the group health insurance plan as a "similarly situated active employee."

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### Qualifying Events

$$\begin{array}{c}
 \text{EVENT} \\
 + \\
 \text{LOSS OF COVERAGE} \\
 = \\
 \text{COBRA QUALIFYING EVENT}
 \end{array}$$

If a Qualifying Event occurs causing a loss of coverage under the group health insurance plan, COBRA must be offered.

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### 18-Month Qualifying Events

- ▶ Voluntary Termination
- ▶ Involuntary Termination
  - Gross Misconduct exception
- ▶ Reduction of hours below the minimum requirement to participate in the health plan

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### 18-Month Extension

- ▶ Applies if during the 18-month coverage period:
  - The covered employee dies;
  - The covered employee divorces or legally separates; or
  - The covered employee's child ceases to be a dependent;
- ▶ Then the maximum coverage period for the spouse or child QB becomes 36 months measured from the same date that the original 18-month period started.

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### 29-Month Disability Extension

- ▶ Applies if all of the following conditions are met:
  - A QB is disabled (as determined by the SSA) during the first 60 days of COBRA continuation coverage;
  - The qualifying event was the covered employee's termination of employment or reduction in hours; and
  - The QB notifies the plan administrator within 60 days after the SSA determination of disability and before the end of the original 18-month maximum coverage period;
- ▶ Then the maximum coverage period for all QB's (including the employee) who became eligible for COBRA as a result of the same qualifying event is extended to 29 months measured from the same date that the 18-month period started.

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### 36-Month Qualifying Events

- ▶ Death of the Employee
- ▶ Employee's Medicare Entitlement
- ▶ Divorce or Legal Separation of employee
- ▶ Dependent Child Ceasing to be a Dependent
- ▶ Bankruptcy of the Employer

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### Qualifying Events Defined

- ▶ Entitlement to Medicare:
  - If the covered employee becomes eligible to Medicare in the 18 months BEFORE the triggering event (termination of employment or reduction in hours, then the maximum coverage period for the spouse and dependent children ends 36 months after the covered employee became entitled to Medicare.
- ▶ Employer Bankruptcy (Retiree Plan Only):
  - Certain retirees and their related qualified beneficiaries may have a maximum coverage period far exceeding the 18-36 months
  - Maximum period may be the qualified beneficiary's lifetime

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### Election Period and Time Frames

- ▶ The employer must notify the Plan Administrator of a qualifying event within 30 days of the event.
- ▶ The Plan Administrator must notify the employee of their rights under COBRA within 14 days from the date they received notice from the employer.
- ▶ The QB must elect COBRA coverage within 60 days from the receipt of the Qualifying Event Notice from the Plan Administrator.

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### COBRA Terminating Events

- ▶ Reaching the maximum available period for continuation coverage
- ▶ Failure to make a timely premium payment
- ▶ Secure coverage by another group health plan
- ▶ Medicare Part A or Part B entitlement
- ▶ Employer cancellation of all group plans

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### Risks of Non-Compliance

- ▶ Internal Revenue Code Sanctions
  - Nonrefundable excise tax of up to \$100 per day per violation for each day during the noncompliance period
  - Complex minimum and maximum limitations apply
- ▶ ERISA Violations
  - Notice penalties
  - Other judgments, costs or damages
    - Audit and/or enforcement action by DOL
- ▶ Public Health Services Act Violations
  - Applicable to state and local governments
  - Action for "appropriate equitable relief"
- ▶ Private Lawsuits Against Employers and Plans
  - Employers can be liable for payment of health care claims and fines
  - Court levied damages
  - Attorney fees

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### IRS COBRA Audit Procedures Can you Pass?

- ▶ 1. Copy of COBRA coverage procedures manual
- ▶ 2. Copies of COBRA coverage form letters sent to qualified Beneficiaries (determines if letters were sent to all covered participants)
- ▶ 3. Copy of entity's internal audit procedures for COBRA Coverage
- ▶ 4. Copies of all group health plans
- ▶ 5. Details of any past or pending lawsuits related to COBRA
- ▶ 6. The number of qualifying events occurring for the year under investigation up to the present
- ▶ 7. How Qualified Beneficiaries are notified
- ▶ 8. How the Plan administrator is notified of a qualifying event

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**IRS COBRA Audit Procedures  
Can you Pass? (cont'd)**

- ▶ 9. The election of a qualified beneficiary to continue coverage
- ▶ 10. The premium paid by the qualified beneficiary for COBRA coverage
- ▶ 11. A list of all individuals affected by a qualifying event for the period in question.
- ▶ 12. A list of all individuals covered by each plan on the first and last day of the current and preceding years.
- ▶ 13. Specific copies of new hire General Notice letters who show spousal coverage
- ▶ 14. Copies of Federal and State employment tax returns filed to show changes in the number of employees.

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**IRS COBRA Audit Procedures  
Can you Pass? (cont'd)**

- ▶ 15. A review of personnel records which include the following:
  - A. Name and address of each beneficiary
  - B. The qualifying event date
  - C. Copies of COBRA notices (determines eligibility period, coverage was offered and the received their COBRA notice)
  - D. Type of COBRA coverage received
  - E. Premium payments required for COBRA coverage
  - F. Copy of employer's letter to the insurance company/plan administrator notifying them of the qualifying event
  - G. Reason for termination of Cobra properly elected by a participant
  - H. Reason for employment termination.
  - I. Termination for Gross misconduct and denial of COBRA coverage for the same reason
  - J. The examiner has the right to make "third party contacts" with qualified beneficiaries

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**IRS COBRA Audit Procedures  
Can you Pass? (cont'd)**

- ▶ The examiner will also look at the quality of the employer' compliance program, and the training of employees responsible for COBRA.
- ▶ The reason for the new standards in auditing, the IRS has found the EXCISE TAX to be a "gold mine" when it comes to the self reporting form for EXCISE TAX. The audit will include whether the Employer completed the form and sent in the EXCISE TAX when the error was found.

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### Reporting and Excise Taxes for Health Plan Noncompliance

- ▶ **Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code**
  - Historically, the IRS has not been very active in examining health plans for compliance.
  - IRS final regulations require employers to self-report violations of these rules and pay related excise taxes.
  - Must report health plan compliance failures annually on IRS Form 8928.

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### Reporting and Excise Taxes for Health Plan Noncompliance (cont'd.)

- Violations of COBRA, HIPAA and the genetic anti-discrimination law (GINA) can result in excise taxes of \$100 per day per individual affected.
  - Federal healthcare continuation requirements (COBRA).
  - Health plan portability and nondiscrimination requirements (HIPAA).
  - Mental health parity (Mental Health Parity & Addiction Equity Act, or MHPAEA).
  - Minimum hospital stays for newborns and mothers (Newborns' & Mothers' Health Protection Act).
  - Women's Health & Cancer Right Act (WHCRA).
  - Genetic nondiscrimination requirements (Genetic Information Nondiscrimination Act, or GINA).
  - Mandated ACA Notices
  - Coverage of dependent students on medically necessary leaves of absence (Michelle's Law).
  - Health savings account (HSA) and Archer medical savings account (Archer MSA) contribution comparability requirements.

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### Reporting and Excise Taxes for Health Plan Noncompliance (cont'd.)

- ▶ **How Can the Excise Tax Be Avoided?**
  - No excise tax is imposed during the period when the employer did not know, or exercising reasonable diligence would not have known, that a Plan failure existed.
  - Once the Plan failure is discovered, no excise tax will be imposed if the failure was attributable to reasonable cause and the failure is "corrected."
    - "Corrected" means fixing the failure retroactively (to the extent possible) within 30 days of the first date on which the error was known or should have been known, and placing any affected individual in at least the same financial position as he or she would have been had the failure not occurred.
  - IRS Form 8928 and its instructions contemplate clearly that Plan failures must be reported even when they were corrected fully in a timely fashion, such that no excise tax is due.
  - To avoid excise taxes under this new self-reporting regime, employers and administrators of group health plans should have procedures and processes in place that are designed reasonably to ensure compliance.

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## COBRA Penalties

- ▶ Failure to satisfy notification requirements
  - Up to \$114 / day payable to the employee or beneficiary
  - Such other relief as the court, in its discretion, may impose for failure to satisfy notification requirements.
- ▶ Noncompliance with the COBRA rules paid with Form 8928.
  - Excise tax of \$100 / day

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Thank You!



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