

Frequently Asked Questions By Employers

- 1. We have an employee out on leave under the Family and Medical Leave Act (FMLA) and have heard that she is not coming back to work. We've been maintaining her health coverage during the leave. If she doesn't return, or if she tells us she's not returning, do we have to offer her COBRA coverage?**

In either of those scenarios she would be entitled to COBRA coverage, but the timing is slightly different for each. If she fails to return to work after her leave, a qualifying event for COBRA purposes occurs for the employee (and spouse or dependents) on the last day of FMLA leave. Her maximum COBRA coverage period, usually 18 months, would be measured from the last day of FMLA leave. If the employee tells you before the end of her leave that she will not be returning to work, the qualifying event occurs on the date she informs you of her plans. Her maximum coverage period would begin on that day. Should the rumors prove true and the employee not return, note that you may not require her to repay the insurance premiums you paid during her leave before offering her COBRA.

- 2. We know COBRA continuation coverage may be terminated if we don't receive "timely payment" of the premium. Do we have to allow a grace period?**

In general, you must allow qualified beneficiaries a 30-day grace period to make late payments. This grace period is measured from the first day of the period for which coverage is being continued (that is, 30 days from the due date).

- 3. One of our employees just dropped his medical coverage for himself, his wife and his dependent children. Should the wife and children be offered COBRA coverage?**

No. Voluntarily dropping coverage is not considered a qualifying event for purposes of COBRA. For spouses, the only qualifying events are the employee's termination of employment or reduction in hours to fewer than the number required for plan participation, divorce or legal separation, the employee's death, and the employee's enrollment in Medicare. For dependent children, these same qualifying events apply, plus one additional event — the child's "aging out," that is, the child's loss of dependent status under the plan's terms.

- 4. Our group-health premium rates for active employees and their dependents just went up. We have several former employees on COBRA continuation coverage. Can we increase their COBRA premiums?**

The applicable COBRA premium must be computed and fixed before the "determination" period begins. The determination period is any 12-month period selected by the plan. It must be applied consistently from year to year. It is an accounting period and is not tied to any particular qualified beneficiary's qualifying event date or anniversary of the beginning of continuation coverage. If your carrier increased premiums in the middle of the determination period, you may not pass on these mid-year increases to COBRA participants (but must wait for the next determination period to begin), except in the following limited circumstances: You were previously charging less than the 102% allowed under COBRA (that is, you were subsidizing COBRA premiums). In this case, you may require qualified beneficiaries to pay an increased amount, but not more than the maximum 102%. If a qualified beneficiary becomes eligible for a disability extension (generally for up to an additional 11 months), you may charge up to 150% of the allowable premium. A qualified beneficiary changes coverage during the period and the premium for the new coverage is more.

- 5. One of our employees is getting a divorce and wants to take his wife off our group health coverage. Can he do that?**

He can, but you still likely would need to provide her with the option to elect COBRA coverage once the divorce is final. COBRA coverage must be offered when a qualified beneficiary loses coverage because of a qualifying event. Under IRS regulations, any attempt at eliminating or reducing coverage "in anticipation" of a qualifying event (such as divorce or legal separation) is disregarded in determining whether the event causes a loss of coverage. Therefore, if the employee dropped the wife's coverage in anticipation of the divorce, the group health plan would be required to make COBRA coverage available to the wife, effective on the date of the divorce or legal separation. Your employee, however, would be well advised to consult with his divorce attorney. The loss of coverage before a divorce or legal separation does not constitute a qualifying event, and the group health plan is not required to make COBRA coverage available for any period before the date of the divorce or legal separation. If the wife is left without health insurance coverage for a time before the divorce is final, your employee could find himself responsible for her uninsured bills.

- 6. What is "gross misconduct" for the purposes of COBRA coverage?**

Under COBRA regulations, you do not have to offer health-insurance continuation coverage to an employee who is terminated for "gross misconduct." Unfortunately, neither the regulations nor the law itself define this term, nor has the IRS issued guidance on the subject. Some courts have ruled that the term will be defined by the unemployment laws of the state in which the employee works. Be careful before denying someone coverage, though. Gross misconduct must be "gross" - an example would be a bank employee embezzling from the bank. Excessive absenteeism, incompetence, or defying a supervisor--although typically grounds for termination--would probably not be considered gross misconduct.

- 7. We just terminated an employee for what we consider to be "gross misconduct." We know that health-care continuation coverage under COBRA need not be offered to someone terminated for gross misconduct. If we don't offer him COBRA and we're wrong in our assessment of his conduct, what penalties could we be looking**

at?

An employer that fails to comply with COBRA is liable for an excise tax under the Internal Revenue Code. In general, the tax is \$100 per day for each qualified beneficiary affected by the violation. In addition, a plan administrator (which is often the employer) can be personally liable under ERISA for \$110 per day for each qualified beneficiary who is not notified of his or her continuation rights.

8. We just hired a new employee who has declined health insurance under our group plan because he prefers to keep the COBRA coverage from his previous employer. If we're not in an open-enrollment period when his COBRA expires, what happens?

The federal Health Insurance Portability and Accountability Act (HIPAA) requires employers to offer special enrollment periods for employees such as this one. Under HIPAA, employees and dependents who decline coverage under an employer's plan because they have other coverage have the right to enroll if they lose the other coverage or exhaust COBRA. The person must request enrollment within 30 days of losing coverage. Special enrollment periods must also be offered for "new" dependents, that is, those who become dependents through marriage, birth or adoption. If the employee is eligible for enrollment but is not yet enrolled, that employee may also enroll at this time; likewise, a spouse who has not yet enrolled may enroll upon a birth or adoption. If an employee declines coverage because he or she had other coverage, it's a good idea to get that statement in writing.

9. One of our employees quit and at first declined COBRA continuation coverage. But then she changed her mind before the end of the 60-day election period. Do we have to provide continuation coverage?

Yes, you do. A qualified beneficiary who waives COBRA continuation coverage can revoke the waiver at any time before the end of the election period. However, coverage need only be provided prospectively — that is, it can start on the date the waiver was revoked. Waivers and revocations of waivers are considered made on the date they are sent to the employer or plan administrator.

10. We terminated an employee, and his last day of work was mid-month. He was given a COBRA election form and other COBRA information at that time. Our group health plan requires us to carry him until the end of the month. We know that an employee has 60 days to elect COBRA coverage, but when does that period begin running — on the employee's last day of work or the last day of the month when he actually loses coverage?

This is a common scenario, as many group health plans require that terminated employees be carried until the end of the month. The qualifying event for COBRA purposes is the employee's loss of employment. However, the election period does not end until 60 days after the employer sends the election form to the employee or until 60 days after the loss of coverage, whichever is later. In this case, the 60-day election period starts to run on the last day of the month.

11. When an employee first becomes covered by a group health plan subject to COBRA, we understand that the employee must be provided with an initial notice of COBRA rights. Our employee handbook includes COBRA information, and every new employee gets a copy of the handbook. Does this fulfill the "initial notice" requirement?

If the information in the employee handbook explains an employee's rights to COBRA coverage, then the handbook likely is sufficient notice to the new employee. However, initial notice must also be provided to an employee's spouse when he or she first becomes covered by a group health plan subject to COBRA, and the handbook would not fulfill this requirement. A separate notice must be mailed to the spouse's last known mailing address; the U.S. Department of Labor has said first-class mailing is sufficient. COBRA requires employers to be able to show that proper notice was provided — not necessarily that the notice was received — so be sure to keep documentation proving you sent the notice.

12. An ex-employee in his 12th month of COBRA has become disabled. Is he eligible for the disability extension that expands the usual 18 months of continuation health care coverage to 29 months?

No. Under COBRA rules, a qualified beneficiary is eligible for extended coverage only if he or she was disabled during the first 60 days of COBRA; the disability must occur during this period or have already been in existence then. The beneficiary also needs a determination from the Social Security Administration that he or she was disabled for SSA purposes. It's not enough for the beneficiary to be considered disabled under the employer's long-term disability plan. The SSA determination can be made any time before the end of the initial 18-month COBRA period, but the disability must have existed during the first 60 days of COBRA coverage. A beneficiary must apply to the employer for the extension within 60 days of the SSA determination and before the end of the 18-month COBRA period. The extension also applies to non-disabled family members of the beneficiary who are on COBRA. If an individual was not disabled during the first 60 days, the extension does not apply.

13. When an employee on our group health plan takes leave under the federal Family and Medical Leave Act (FMLA), may we put that employee on COBRA?

An employer must maintain group health coverage for an employee (and covered spouse and dependents) during an FMLA leave as if the employee were not on leave. The leave is not a qualifying event giving rise to COBRA coverage. However, an employee (and covered spouse/dependents) may become eligible to elect COBRA coverage if: the

employee does not return to work after the last day of FMLA leave; the employee was covered under the group health plan on the day before FMLA leave began; and the employee (or spouse/dependents) would, in the absence of COBRA coverage, lose coverage under the group health plan before the end of the maximum coverage period. However, an employee (or spouse or dependent) will not be eligible to elect COBRA coverage if, on or before the employee's last day of FMLA leave, the employer eliminates group health plan coverage for the class of employees to which the employee would have belonged if he or she had not taken leave.

14. We know that COBRA coverage need not be offered to an employee who is terminated for gross misconduct. But what exactly is "gross misconduct"?

Unfortunately neither COBRA's statutory language nor the IRS regulations define the term. The definition is currently evolving through case law. Some courts have ruled that the term should be defined the same way the unemployment laws define the term in the state where the employee worked. Other courts, looking at the dictionary definition of gross misconduct, have ruled that misconduct was gross if it was so outrageous as to "shock the conscience." Although there are no clear-cut guidelines, it appears that excessive absenteeism, poor judgment, defying a supervisor, or poor performance, while typically grounds for termination, would not be enough to warrant denial of COBRA coverage. You should be aware that if an employee is terminated for gross misconduct and an employer decides not to offer COBRA coverage, COBRA also does not have to be extended to the employee's spouse or children. This ineligibility of the spouse/children is one reason some employers do not pursue the gross misconduct rule, feeling it is too harsh a result to impose on the employee's family.