COMPLIANCE OVERVIEW

COBRA – Covered Employers and Health Plans

The Consolidated Omnibus Budget Reconciliation Act (COBRA) gives workers and their families who lose their employer-sponsored health benefits the right to continue group health coverage for limited periods of time under certain circumstances, such as a job loss, reduction in hours worked, death, divorce and other life events.

Most employer-sponsored group health plans are subject to COBRA's continuation coverage requirements. However, some employers, such as churches and small employers, are exempt from COBRA. In addition, certain welfare benefit plans, such as long-term and short-term disability plans are not subject to COBRA because they do not provide medical care.

This Compliance Overview summarizes the rules for determining whether an employer or group plan must satisfy COBRA continuation coverage requirements.

LINKS AND RESOURCES

DOL resources:

- Employer's Guide to Group Health Continuation Coverage under COBRA
- Frequently Asked Questions on COBRA Continuation Health Coverage
- Frequently Asked Questions on COBRA Premium Assistance under the ARPA (now expired)
- Final rule on COBRA notice requirements

Subject to COBRA

- ☑ Private-sector, state and local government employers that sponsor group health plans providing medical care and had 20 or more employees on typical business days during the preceding year
- ☑ All employees of employers that are under common control must be counted

Exemptions

- Small employers and church employers are exempt from COBRA but may be subject to continuation coverage requirements under state law.
- Plans that do not provide medical care are not subject to COBRA.

Which Employers Are Subject to COBRA?

Most private-sector employers that maintain group health plans for their employees must comply with COBRA's continuation coverage requirements. This includes, for example, corporations, partnerships and tax-exempt organizations. However, COBRA does not apply to group health plans maintained by **small employers** (fewer than 20 employees) or **churches**. There are also special coverage rules for governmental employers.

> ***Impact of State Continuation Coverage*** – Many states have laws similar to COBRA that apply to fully insured group health plans, including plans maintained by churches and employers with fewer than 20 employees. These are sometimes called **mini-COBRA laws**. Thus, even if a plan is not subject to federal COBRA, it may nevertheless be required to provide continuation coverage under state insurance law. Self-insured health plans maintained by private-sector employers are typically not subject to state continuation coverage requirements.

Small Employer Exception

Who qualifies for the small employer exception?

A group health plan is not subject to COBRA for a calendar year if the employer maintaining the plan normally employed **fewer than 20 employees** on typical business days during the preceding calendar year.

Small employer plans are not subject to COBRA for the entire calendar year for which they qualify for this exception. This means that if a qualifying event occurs during a calendar year for which the small employer exception applies, it does not trigger COBRA rights or obligations. To help avoid benefits disputes, employers that become newly eligible for the small employer exemption due to a reduction in personnel should **notify employees** that COBRA coverage will not be available for qualifying events that occur during the relevant calendar year.

Small employers, especially those with fluctuating workforce numbers that are around the 20-employee threshold, may decide not to take advantage of the small employer exception and continue offering COBRA coverage. However, before offering COBRA coverage during a calendar year for which the small employer exception applies, the employer should consult with its health insurance issuers or stop-loss carrier.

Key Point

If a plan has been subject to COBRA and becomes eligible for the small employer exception, the plan remains subject to COBRA for qualifying events that occurred during the period when the plan was subject to COBRA.

Example: An employer employs 20 or more employees on typical business days during 2021. Therefore, the employer must comply with COBRA for qualifying events occurring in 2022. Rob, an employee, terminates employment on Jan. 31, 2022, and timely elects and pays for COBRA continuation coverage. The employer employs fewer than 20 employees during 2022. Beginning in January 2023, the employer has a small-employer plan and is not required to comply with COBRA

for purposes of qualifying events that occur during 2023. However, the employer must continue to make COBRA available to Rob for his maximum COBRA continuation period. The obligation would continue until Aug. 1, 2023, which is 18 months after the date of Rob's qualifying event (or longer, if Rob is eligible for a disability extension).

Counting Employees

An employer is considered to have normally employed fewer than 20 employees during a particular calendar year if it had fewer than 20 employees **on at least 50 percent of its typical business days during that year**.

For purposes of determining whether an employer has 20 or more employees, the following employees must be counted:

- ☑ All common law employees, not just plan participants;
- ☑ Both full-time and part-time common law employees (although a part-time employee counts as a fraction of a full-time employee); and
- ☑ Common law employees working outside of the United States.

An employer may determine the number of its employees on a **daily basis** or on a **pay period basis**. The basis used by the employer must be used with respect to all employees and for the entire year for which the number of employees is being determined. Part-time employees count as a fraction of full-time employees. The fraction is equal to the number of hours that the part-time employee works divided by the number of hours that an employee must work to be considered a full-time employee.

Related Employers

To determine whether the small employer exception applies, all employees of any employer that is under common control with the plan sponsor must be counted. Thus, if an employer is part of a controlled group or affiliated service group (as determined under Code Sections 414(b), (c), (m) or (o)), all employees of the related group must be taken into account.

Determining whether two or more organizations must be treated as a single employer under the controlled group or affiliated service group rules involves a complex analysis of ownership interests, including constructive ownership. Because these rules are so complex, an employer's controlled group or affiliated service group status should be reviewed by legal counsel.

State and Local Governments

State and local government employers must provide continuation coverage under the Public Health Service Act, which has provisions very similar to COBRA's protections, including the small employer exception discussed above. Group health plan coverage for state and local government employees is sometimes referred to as "public sector" COBRA to distinguish it from the requirements that apply to private employers.

District of Columbia, U.S. Territories and the Federal Government

COBRA does not apply to plans sponsored by the governments of the District of Columbia or any territory or possession of the United States. Also, the federal government's group health plan is not subject to COBRA. However, a separate law—the Federal Employees Health Benefits Amendments Act of 1988—requires the federal government to provide continuation coverage.

Churches

Church plans are exempt from COBRA's requirements. A church plan is any employee benefit plan established or maintained by a church or by a convention or association of churches that:

- Is exempt from tax under Section 501 of the Internal Revenue Code (Code); and
- Has not made an election under Code Section 410(d) to have certain tax qualification requirements apply to it.

Determining whether the church plan exemption applies to a particular employer often involves a detailed analysis of the organization's activities and the closeness of its religious affiliation. Under some circumstances, organizations that are not churches (for example, certain hospitals or schools) may qualify for the church exemption if they are closely controlled by or associated with a church or religious denomination.

Employers that are uncertain about whether they fall under the church plan exemption may want to consult with their tax or legal advisors.

What Plans Are Subject to COBRA?

Employer-sponsored group health plans are subject to COBRA's requirements, except for plans sponsored by employers that are not required to comply with COBRA, as described above.

In general, a plan is subject to COBRA if it:

- Provides **medical care;** and
- Is **maintained by an employer**.

"Medical care" broadly includes medical, dental, vision and drug coverage. The following chart provides examples of common welfare benefits provided by employers and indicates whether the benefits are subject to COBRA:

Type of Benefits	Subject to COBRA?
Fully insured group health plans	Yes
Self-funded group health plans	Yes
Dental and vision plans	Yes
Prescription drug plans	Yes
Health flexible spending accounts (FSAs)	Yes, but most FSAs will qualify for a special exception. If a health FSA qualifies for the special exception, the employer is not required to offer COBRA coverage to certain qualified beneficiaries and may limit the duration of COBRA coverage for other qualified beneficiaries to the plan year in which the qualifying event occurs.

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Health reimbursement arrangements (HRAs)	Yes
Health savings accounts (HSAs)	No
Disease-specific policies, such as cancer policies	Yes, if they provide coverage for medical care.
Employee assistance programs (EAPs)	Depends on the EAP's benefits—EAPs that provide medical care are likely subject to COBRA.
Wellness plans	Depends on the wellness plan's benefits—wellness plans that provide medical care are likely subject to COBRA.
Long-term care plans	No
Accidental death and dismemberment (AD&D) plans	No (as long as there is no ancillary benefit for medical care)
Group term life insurance plans	No (as long as there is no ancillary benefit for medical care)
Long-term and short-term disability plans	No (as long as there is no ancillary benefit for medical care)