

LEMLE & KELLEHER, L.L.P.

MODERN MANAGEMENT

Consolidated Omnibus Budget Reconciliation Act: COBRA

© Lemle & Kelleher, LLP 2007, 2008

Baton Rouge

One American Place
301 Main Street
Suite 1100
Baton Rouge, LA 70825
Phone: 225.387.5068
Fax: 225.387.4995

Houston

Bank of America Center
700 Louisiana St.
Suite 2060
Houston, TX 77002
Phone: 713-247-0030
Fax: 713-247-0024

New Orleans

Pan-American Life Center
601 Poydras Street
21st Floor
New Orleans, LA 70130
Phone: 504.586.1241
Fax: 504.584.9142

Shreveport

Louisiana Tower
401 Edwards Street
10th Floor
Shreveport, LA 71101
Phone: 318.227.1131
Fax: 318.227.1141

Table of Contents

COBRA	Page
INTRODUCTION	1
CONTINUING COVERAGE.....	1
WHO IS ENTITLED?	2
Coverage	2
Qualifying Events	2
Qualified Beneficiaries	3
RIGHTS AND RESPONSIBILITIES.....	3
Notice.....	3
Summary Plan Description.	3
COBRA General Notice.....	3
COBRA Qualifying Event Notices.....	4
COBRA Election Notice.....	4
COBRA Notice of Unavailability of Continuation Coverage.....	4
COBRA Notice of Early Termination of Continuation Coverage.....	5
Special Rules for Multiemployer Plans.....	5
Election	5
BENEFITS.....	5
DURATION.....	6
Maximum Periods	6
Early Termination.....	6
Extension	7
Disability.....	7
Second Qualifying Event.....	7
CONVERSION.....	8
PAYING FOR COBRA BENEFITS	8
ABOUT LEMLE & KELLEHER, L.L.P.	10
YOUR LEMLE & KELLEHER LABOR & EMPLOYMENT LAW TEAM CONTACT INFORMATION.....	10

INTRODUCTION

Prior to 1986, many employees and their families who lost their group health coverage because of serious life events faced serious risks and difficult choices. When Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985, however, those employees and families then had the option of continuing their coverage under the employer's group health plan, at least for limited periods of time. Accordingly, now if an employee is fired, changes jobs voluntarily, or gets divorced, he or she need not face the same pre-1986 choices.

CONTINUING COVERAGE

COBRA amended the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Public Health Service Act to require employers to provide temporary health coverage under their Group Plans. COBRA requires such continuing coverage to be offered to covered employees, their spouses, their former spouses, and their dependent children when coverage would otherwise be terminated due to certain specific events, including death of the covered employee, termination, or reduction in the hours of a covered employee's employment for reasons other than gross misconduct, divorce or legal separation, entitlement to Medicare, and a child's loss of dependent status.

The covered employee entitled to COBRA is responsible for payment of premiums, plus a 2% administrative charge, which can be more costly than their payments while covered by the Group Plan because the employer no longer pays a portion of such premium. But the COBRA payment is usually less expensive than a new private health insurance plan. Nevertheless, while COBRA mandates continuing coverage, it lasts for a limited time.

Generally, COBRA applies to all group health plans maintained by private-sector employers (with at least 20 employees) or by state and local governments. COBRA does not apply to the Federal Government, churches or certain church-related organizations. A group health plan under COBRA consists of an employer established or maintained program to provide families with medical care, regardless of whether it is provided through insurance, health maintenance, employer's assets or otherwise. Group health plans include employer-sponsored group health and dental plans, as well as health flexible spending arrangements under a company's cafeteria plan. Life insurance is not considered medical care, nor are disability benefits.

Generally, health plans covered by COBRA are governed by ERISA. As such, employers are not required to establish plans or provide particular benefits, but employers are required to comply with ERISA's rules in creating their group plans.

WHO IS ENTITLED?

In order to be covered by COBRA, three requirements must be satisfied:

1. The group health plan must be covered by COBRA;
2. A qualifying event must occur; and
3. There must be a qualified beneficiary for such event.

Coverage

COBRA covers group health plans sponsored by employers with at least 20 employees for at least 50% of the previous calendar year. COBRA applies to both full-time and part-time employees. Coverage commences the day immediately after a qualifying event.

The number of employees is determined by looking at the previous year's employment. If, for a majority of the year, the employer had 20 or more employees, then the employer will be covered by requirements for the following year. If an employer loses employees during the year so that the number of employees drops below 20, the employer must continue COBRA coverage for the remainder of that year, but, if it had less than 20 employees for the majority of that year, it will not be required to offer COBRA coverage for the following year.

“Employee” is broadly defined to include partners, full-time employees, and part-time employees. A small employer exemption applies when an employer counts each full-time employee as one employee and each part-time employee as a fraction of an employee, based on average number of hours worked compared to a full-time employee, and such amount is less than 20.

If an employer is in a group of employers under common control, different rules apply. All employees of all the employers under common control are aggregated for purposes of determining whether the “under 20-employees” rule applies. If there are 20 or more employees employed by all of the employers combined, then COBRA applies to each employer.

Qualifying Events

“Qualifying events” are those that cause an individual to lose his or her group health coverage. These include termination or reduction in hours of work, death of employee, divorce or legal separation, loss of dependent status, a covered employee's entitlement to Medicare coverage, loss of “dependent child” status under plan rules, and (in the case of retiree health coverage only) the bankruptcy of an employer, but only if this event causes a loss of health coverage. The type of qualifying event determines who the qualified beneficiaries are and the length of continuing coverage available.

Qualified Beneficiaries

A qualified beneficiary is someone who was covered by a group health plan on the day before a qualifying event occurred that caused him or her to lose coverage. Only certain individuals are considered qualified beneficiaries, and the type of qualifying event determines who can be considered qualified when it happens. To be qualified, the individual must be a covered employee, that employee's spouse or former spouse, or that employee's dependent child. A child born to or placed for adoption with or by a covered employee is automatically qualified. Agents, independent contractors, and directors who participate in the group plan are also qualified, but they are not if they do not participate because they are not "employees."

RIGHTS AND RESPONSIBILITIES

Group health plans must provide covered employees and their families with certain notices explaining their COBRA rights. They must also have rules for how COBRA continuation coverage is offered, how qualified beneficiaries may elect continuation coverage, and when it can be terminated.

Notice

Summary Plan Description. COBRA rights provided under a plan must be described in the plan's summary plan description ("SPD"). The SPD gives important information about the plan, including what benefits are available, the rights of participants and beneficiaries, and how the plan works. ERISA requires group health plans to provide an SPD within 90 days after an employee first becomes a participant in the plan (or within 120 days after the plan is first subject to the reporting and disclosure provisions of ERISA). Also, if there are material changes to the plan, it must provide a summary of material modifications ("SMM") not later than 210 days after the end of the plan year in which the changes become effective; if the change is a material reduction in covered services or benefits, the SMM must be furnished not later than 60 days after the reduction is adopted. A participant or beneficiary covered under the plan may request a copy of the SPD and any SMMs (as well as any other plan documents), which must be provided within 30 days of a written request.

COBRA General Notice. Group health plans must give each employee and each spouse who becomes covered under the plan a general notice describing COBRA rights. The general notice must be provided within the first 90 days of coverage. Group health plans can satisfy this requirement by providing the plan's SPD within this time period, as long as it contains the general notice information. The general notice should contain the information an employee needs to know in order to protect his or her COBRA, including the name of the plan and someone the employee can contact for more information, a general description of the continuation coverage provided under the plan, and an explanation of any notices the employee must give the plan to protect his or her COBRA rights.

COBRA Qualifying Event Notices. Before a group health plan must offer continuation coverage, a qualifying event must occur, and the group health plan must be notified of the qualifying event.

The employer must notify the plan if the qualifying event is:

- Termination or reduction in hours of employment of the covered employee;
- Death of the covered employee;
- Covered employee's becoming entitled to Medicare; or
- Bankruptcy of the employer.

The employer has 30 days after the event occurs to provide notice to the plan.

The covered employee (or one of the qualified beneficiaries) must notify the plan if the qualifying event is:

- Divorce;
- Legal separation; or
- A child's loss of dependent status under the plan.

The plan must have procedures for how to give notice of the qualifying event, and the procedures should be described in both the general notice and the plan's SPD. The plan must allow at least 60 days after the date on which the qualifying event occurs for the qualified beneficiary or employee to give this notice. If the plan does not have reasonable procedures for how to give notice of a qualifying event, notice can be accomplished by contacting the person or unit that handles employee benefits matters. If the plan is a multiemployer plan, notice can also be given to the joint board of trustees, and, if the plan is administered by an insurance company (or the benefits are provided through insurance), notice can be given to the insurance company.

COBRA Election Notice. When the plan receives a notice of a qualifying event, the plan must give the qualified beneficiaries an election notice, which describes such beneficiaries' rights to continuation coverage and how to make an election. The notice must be provided within 14 days after the plan administrator receives the notice of a qualifying event. The election notice should contain all of the information needed to understand continuation coverage and that which is required to make an informed decision whether or not to elect such coverage. It should also provide the name of the plan's COBRA administrator and state how to get more information.

COBRA Notice of Unavailability of Continuation Coverage. Group health plans may sometimes deny a request for continuation coverage or for an extension of continuation coverage. If so, the plan must give the person who requested it a notice of unavailability of continuation coverage. The notice must be provided within 14 days after the request is received, and the notice must explain the reason for denying the request.

COBRA Notice of Early Termination of Continuation Coverage. Generally, continuation coverage must be made available for a maximum period (18, 29, or 36 months). The group health plan may terminate continuation coverage earlier, however, for any of a number of specific reasons. When a group health plan decides to terminate continuation coverage early for any reason, the plan must give the qualified beneficiary a notice of early termination. The notice must be given as soon as practicable after the decision is made, and it must describe the date coverage will terminate, the reason for termination, and any rights the qualified beneficiary may have under the plan or applicable law to elect alternative group or individual coverage, such as a right to convert to an individual policy.

Special Rules for Multiemployer Plans. Multiemployer plans are allowed to adopt some special rules for COBRA notices. First, a multiemployer plan may adopt its own uniform time limits for the qualifying event notice or the election notice. A multiemployer plan also may choose not to require employers to provide qualifying event notices, and instead to have the plan administrator determine when a qualifying event has occurred. Any special multiemployer plan rules must be set out in the plan's documents (and SPD).

Election

To elect COBRA continuation coverage, a covered employee must be given an election period of at least 60 days (starting on the later of the date he or she is furnished the election notice or the date he or she would lose coverage) to choose whether or not to elect continuation coverage.

All qualified beneficiaries for a qualifying event may independently elect continuation coverage. This means that if both the covered employee and his or her spouse are entitled to elect continuation coverage, each may decide separately whether to do so. The covered employee or the spouse must be allowed, however, to elect on behalf of any dependent children or on behalf of all of the qualified beneficiaries. A parent or legal guardian may elect on behalf of a minor child.

If continuation coverage is waived during the election period, the qualified beneficiary must be permitted later to revoke his or her waiver of coverage and to elect continuation coverage as long as such revocation occurs during the election period. Under those circumstances, the plan need only provide continuation coverage beginning on the date the waiver is revoked.

BENEFITS

Once continuation coverage is elected, the coverage must be identical to the coverage that is currently available under the plan to similarly situated active employees and their families. The beneficiary will also be entitled, while receiving continuation coverage, to the same benefits, choices, and services that a similarly situated participant or beneficiary is currently receiving under the plan, such as the right during an open

enrollment season to choose among available coverage options. Such beneficiary will also be subject to the same rules and limits that would apply to a similarly situated participant or beneficiary, such as co-payment requirements, deductibles, and coverage limits. The plan's rules for filing benefit claims and appealing any claims denials also apply.

Any changes made to the plan's terms that apply to similarly situated active employees and their families will also apply to qualified beneficiaries receiving COBRA continuation coverage. If a child is born to or adopted by a covered employee during a period of continuation coverage, the child is automatically considered to be a qualified beneficiary receiving continuation coverage.

DURATION

Maximum Periods

Continuation coverage under COBRA is available for a limited period of time of 18 or 36 months. The length of time for which continuation coverage must be made available depends on the type of qualifying event that gave rise to the COBRA rights. A plan, however, may provide longer periods of coverage beyond the maximum period required by law. When the qualifying event is the covered employee's termination of employment or reduction in hours of employment, qualified beneficiaries are entitled to a maximum of 18 months of continuation coverage.

If the qualifying event is the end of employment or reduction of the employee's hours, and the employee became entitled to Medicare less than 18 months before the qualifying event, COBRA coverage for the employee's spouse and dependents can last until 36 months after the date the employee becomes entitled to Medicare. For all other qualifying events, qualified beneficiaries are entitled to a maximum of 36 months of continuation coverage.

Early Termination

Continuation coverage may be terminated earlier than the end of the maximum period for under these circumstances:

- Premiums are not paid in full on a timely basis;
- The employer ceases to maintain any group health plan;
- A qualified beneficiary begins coverage under another group health plan after electing continuation coverage, as long as that plan doesn't impose an exclusion or limitation affecting a preexisting condition of the qualified beneficiary;
- A qualified beneficiary becomes entitled to Medicare benefits after electing continuation coverage; or
- A qualified beneficiary engages in conduct that would justify the plan in terminating coverage of a similarly situated participant or beneficiary not receiving continuation coverage.

If continuation coverage is terminated early, the plan must provide the qualified beneficiary with an early termination notice.

Extension

Under the 18-month period of continuation coverage, a beneficiary may become eligible for an extension of the maximum time period in two circumstances: disability or a second qualifying event.

Disability. If any one of the qualified beneficiaries in a beneficiary's family is disabled and meets certain requirements, all of the qualified beneficiaries receiving continuation coverage due to a single qualifying event are entitled to an 11-month extension of the maximum period of continuation coverage (for a total maximum period of 29 months of continuation coverage). The plan can charge qualified beneficiaries an increased premium, up to 150 percent of the cost of coverage, during the 11-month disability extension. The disabled qualified beneficiary must be adjudicated by the Social Security Administration ("SSA") as disabled at some point during the first 60 days of continuation coverage, and, the disability must continue during the rest of the 18-month period of continuation coverage.

The disabled qualified beneficiary or another person on his or her behalf must notify the plan of the SSA determination. The plan can set a time limit for providing this notice of disability, but the time limit cannot be shorter than 60 days, starting from the latest of:

- The date on which SSA issues the disability determination;
- The date on which the qualifying event occurs; or
- The date on which the qualified beneficiary receives the COBRA general notice.

The disability extension may be terminated if the SSA determines that the disabled qualified beneficiary is no longer disabled. The plan can require qualified beneficiaries receiving the disability extension to notify it if the SSA makes such a determination, although the plan must give the qualified beneficiaries at least 30 days after the SSA determination to do so.

Second Qualifying Event. Again, under the 18-month maximum period of continuation coverage, a beneficiary may become entitled to an 18-month extension (giving a total maximum period of 36 months of continuation coverage) when a second qualifying event occurs, including the death of a covered employee, the divorce or legal separation of a covered employee and spouse, a covered employee's becoming entitled to Medicare, or a loss of dependent child status under the plan.

The second event can be a second qualifying event only if it would have caused a loss in coverage under the plan in the absence of the first qualifying event. If a second qualifying event occurs, the plan must be notified.

CONVERSION

Group health plans whose beneficiaries' coverage terminates under the plan, must provide the option to convert from group health coverage to an individual policy. The plan must provide the same option when the maximum period of continuation coverage ends. The conversion option must be offered not later than 180 days before continuation coverage ends. The premium for an individual conversion policy may be more expensive than the premium of a group plan, and the conversion policy may provide a lower level of coverage. The conversion option is not available, however, if continuation coverage is terminated before the end of the maximum period for which it was made available.

PAYING FOR COBRA BENEFITS

When calculating COBRA premiums, the plan can include the costs paid by employees and the employer, plus an additional 2 percent for administrative costs. The amount charged to qualified beneficiaries cannot exceed 102% of the cost to the plan for similarly situated individuals covered under the plan who have not incurred a qualifying event.

For qualified beneficiaries receiving the 11-month disability extension, the COBRA premium for those additional months may be increased to 150% of the plan's total cost of coverage for similarly situated individuals. COBRA charges to qualified beneficiaries may be increased if the cost to the plan increases, but generally must be fixed in advance. The plan must allow the required premiums to be paid on a monthly basis, and the plan may allow payments at other intervals.

When continuation coverage is elected, employees need not send any payment with the election form. Initial premium payment may be required within 45 days after the date of COBRA election. Failure to make any payment within that period of time could cause the forfeiture of all COBRA rights. The plan can set premium due dates for successive periods of coverage, but it must provide the option of making monthly payments, and must provide a 30-day grace period for payment of any premium.

If a premium remains unpaid on the first day of a period of coverage, but is paid within the grace period for that period of coverage, the plan has the option to cancel coverage until payment is received and then reinstate the coverage retroactively back to the beginning of the period of coverage. Failure to make payment in full before the end of a grace period could cause forfeiture of all COBRA rights.

If the amount of a payment made to the plan is wrong, but is not significantly less than the amount due, the plan is required to notify the beneficiary of the deficiency and grant a reasonable period to pay the difference. The plan is not obligated to send monthly premium notices. Certain individuals may be eligible for a federal income tax credit that can alleviate the financial burden of monthly COBRA premium payments.

The Trade Adjustment Assistance Reform Act of 2002 (Trade Act of 2002) created the Health Coverage Tax Credit (HCTC), an advanceable, refundable tax credit for up to 65 percent of the premiums paid for specified types of health insurance coverage (including COBRA continuation coverage). The HCTC is available to certain workers who lose their jobs due to the effects of international trade and who qualify for trade adjustment assistance (TAA), as well as to certain individuals who are receiving pension payments from the Pension Benefit Guaranty Corporation (PBGC). Individuals who are eligible for the HCTC may choose to have the amount of the credit paid on a monthly basis to their health coverage provider as it becomes due, or may claim the tax credit on their income tax returns at the end of the year.

ABOUT LEMLE & KELLEHER, L.L.P.

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit www.lemle.com.

YOUR LEMLE & KELLEHER LABOR & EMPLOYMENT LAW TEAM CONTACT INFORMATION

- **E. Fredrick Preis, Jr.**, epreis@lemle.com, (504) 585-6371
- **Eve B. Masinter**, emasinter@lemle.com, (504) 584-9173
- **David R. Taggart**, dtaggart@lemle.com, (318) 934-4014
- **David M. Whitaker**, dwhitaker@lemle.com, (504) 584-9404
- **Louis Colletta, Jr.**, lcolletta@lemle.com, (504) 584-9147
- **Marc R. Michaud**, mmichaud@lemle.com, (504) 585-6386
- **Kimberly C. Delk**, kdelk@lemle.com, (504) 584-9149
- **Bryce G. Murray**, bmurray@lemle.com, (504) 585-6359
- **Bridget A. Dinvaout**, bdinvaout@lemle.com, (504) 586-1241
- **Richard P. Voorhies**, rvoorhies@lemle.com, (504) 584-9121

This booklet is provided to clients and friends of Lemle & Kelleher, L.L.P. The information described is general in nature, and may not apply to your specific situation. Legal advice should be sought before taking action based on the information discussed. Applicable State Bar or Attorney Regulations May Require This Be Labeled as "Advertising." Except as otherwise noted, areas of practice are not certified by the Texas Board of Legal Specialization or other applicable State Bar or regulatory authority.