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November 18th, 2021

COBRA: A Continuing Conversation



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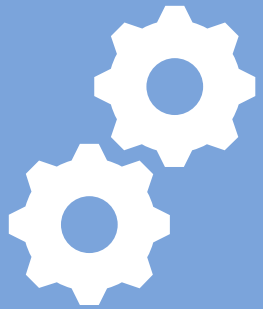


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Outbreak Period



Resources regarding the Outbreak Period rules:

- [IRS Notice 2021-58](#) - COBRA Extensions due to COVID-19
- Brown & Brown Updated Guidance - [COBRA, HIPAA and Claims Timeframes](#)

COBRA Overview

What is COBRA?

[Consolidated Omnibus Reconciliation Act of 1985](#) (Title 29 USC, Chapter 18, part 6—Continuation Coverage and Additional Standards for Group Health Plans)

- Applicable to certain employers and employee organizations
- Plans sponsored by unions may also be subject to COBRA
- Applicable to group health care plans
- It is the right to continue as a participant in the employer-sponsored group health care plan
- Generally, the individual will receive the benefits he or she had the day before the qualifying event

Employers Subject to COBRA

Applicable to employers with 20 or more employees on more than 50% of the typical business days during the previous calendar year

- All common law employees must be counted, whether they have health coverage or not
- Part-time employees are to be counted on a pro-rata basis
- Self-employed individuals, independent contractors and directors are not counted

Church plans and federal government plans are exempt from the requirements under COBRA

- State employer plans are subject to the Public Health Services Act requirements which generally parallel COBRA requirements
- A fully-insured plan may be subject to state continuation laws

Benefits Subject to COBRA

All group health plans maintained by an employer (as long as the employer is subject to COBRA)

Group health plan IRS definition ([26 CFR § 54.4980B-2](#)):

- “a plan maintained by an employer or employee organization to provide **health care** to individuals who have an employment-related connection to the employer or employee organization or to their families”
 - “whether provided directly or through insurance, reimbursement or otherwise”
 - Maintained - any plan of, or contributed to by an employer or employee organization . . . or, if there is no employer contribution, a plan under which identical coverage would not be available at the same cost, but for the individual’s employment-related connection. (See 26 USC, §5000, Certain group health plans)

Individual insurance policies may also be subject to COBRA if maintained by the employer

Benefits Subject to COBRA

Group Health Care Plans



Health care means “diagnosis, cure, mitigation, treatment or prevention of disease, and any other undertaking for the purpose of affecting any structure or function of the body...” ([IRC § 213\(d\)](#) Definitions)

Medical (health insurance, telehealth, or e-visit plans)	Stand-Alone Wellness Plans providing significant medical care
Dental	Health FSA (special rules apply)
Vision	Employee Assistance Plans (if they provide treatment)
Prescription Drug Plans	Health Reimbursement Arrangements
On-Site Medical Clinics (except for first-aid care providing during working hours)	

Think “fix the body.”

COBRA Premiums

COBRA Premiums generally may not exceed 102% of the applicable “premium” (cost to the plan) for similarly situated employees/beneficiaries

- Fully insured plans:
- Entire premium (employee’s and employer’s contribution) plus 2%
- Self-insured plans:
- Must use an actuarially determined rate or past cost method that reflects actual cost of the benefit across all participants

COBRA premiums must be maintained for an entire pre-determined 12-month period, except:

- If the plan previously charged less than the maximum;
- During a period of disability extension as allowed by COBRA; or
- The Qualified Beneficiary (QB) changes coverage, such as during a period of open enrollment

Short Payment Rule

If payment is short by an amount that is “not significant,” employer must either:

- Accept payment as payment in full, or
- Notify QB of deficiency and allow 30 days from the date of the notification to correct the deficiency

“Not significant” is defined in the final COBRA regulations to be the lesser of \$50 or 10%

Example: A QB owes \$345.00 for COBRA coverage and pays \$325.00. The payment is short an amount that is “not significant” because the amount of the shortfall (\$20) is less than \$50 and less than 10% (\$34.50). The short payment rule applies.

If the individual sent in only \$300.00 the shortfall (\$45) would be significant because \$45.00 is more than the lesser of \$50 or 10% (\$34.50). The short payment rule does not apply.

Qualified Beneficiaries (QB)

Employee/Former Employee

- Includes retirees, independent contractors, self-employed persons, partners and employees
- Covered because they are performing or have performed services for Employer
- Legal Spouse (including same-sex spouses)
- Dependent Children

Covered on Plan Immediately Preceding Qualifying Event

- Newly-acquired dependents added to the plan after a QE are also QBs

QB Rights under COBRA

Must be offered coverage that is the same as the coverage in place before the qualifying event

QBs have same rights as similarly-situated active employees

- Open enrollment rights
- HIPAA special enrollment rights
- Plan Modifications – If employer changes group health plan for active employees, this change also applies to COBRA QBs
- Each QB has an independent right to elect COBRA

Qualifying Events

Employee Termination / Reduction in Hours

Qualifying Event	<ul style="list-style-type: none"> ▪ Termination of Employment (other than for gross misconduct)⁽¹⁾ ▪ Reduction in Hours ▪ Leave of Absence (non-FMLA) ▪ Temporary Layoff ▪ Failure to return to active employment after FMLA leave⁽²⁾
To Whom Continuation Applies	Employee, spouse and dependents
Maximum Coverage Period	18 months from qualifying event or date of loss of coverage, if later
Maximum Cost	102% of rate

(1) There is no specified definition of gross misconduct in the COBRA regulations, and courts have not established consistent standards. Seek legal advice before denying COBRA coverage

(2) COBRA continuation must be extended even if employee did not maintain coverage during FMLA leave

Disability Extension

How is Disability Defined?	Determined by Social Security Administration
Who must be disabled?	Employee, spouse or dependent
When must disability occur?	Any time within the first 60 days following qualifying event
To Whom Continuation Applies	Employee, spouse and dependents
Maximum Coverage Period	29 months from the date of event or date of loss of coverage, if later (18 months plus 11-month extension)
Requirements for Extension	QB must provide to Plan Administrator the SSA's determination of total disability during first 18 months of COBRA coverage, and within 60 days of receipt of determination letter
Maximum Cost	102% Mos. 1-18 150% Mos. 19-29

Divorce or Legal Separation

Qualifying Event	Divorce or Legal Separation (in states recognizing legal separation)
To Whom Continuation Applies	Former spouse and dependents losing eligibility for coverage
Maximum Coverage Period	36 months from the date of event or date of loss of coverage, if later
Notice Requirements	Within 60 days of qualifying event, covered employee or qualified beneficiary must notify Plan Administrator
Maximum Cost	102% of premium

Death of Employee

Qualifying Event	Death of Employee
To Whom Continuation Applies	Former spouse and dependents losing eligibility for coverage
Maximum Coverage Period	36 months from the date of event or date of loss of coverage, if later
Maximum Cost	102% of premium

Dependent Reaching Age Limit

Qualifying Event	Dependent no longer eligible for coverage due to reaching maximum age under Plan
To Whom Continuation Applies	Dependents losing eligibility for coverage
Maximum Coverage Period	36 months from the date of event or date of loss of coverage, if later
Notice Requirements	Within 60 days of qualifying event, qualified beneficiary must notify Plan Administrator
Maximum Cost	102% of premium

Other Qualifying Events

- Covered employee's Medicare entitlement (if it causes a loss of group health plan eligibility)
 - Typically applies to retiree plans
- Employer bankruptcy (retiree plans only)
- Anticipation rule (coverage lost due to anticipated divorce or lay-off)
- Increase in the premium or contribution that must be paid by a covered employee, or the spouse or dependent child as a result of a qualifying event

Multiple Qualifying Events

Applicable to spouses and dependents

When a 36-month event occurs during an 18-month COBRA continuation period, the affected QB(s) may extend coverage for up to a total of 36 months from the original qualifying event date.

Example:

- John and Jane are covered by Jane's employer's health plan. Jane left her employment on July 15, 2020, and elected COBRA coverage for herself and John beginning 8/1/2020. They have up to an 18-month COBRA continuation period, from 8/1/2020 until 1/31/2022.
- The couple divorces on 1/18/2022 – John's coverage due to divorce would end 1/31/2022. He may extend his COBRA coverage for up to an additional 18 months, through 7/31/2023 - a total of 36 months from the original qualifying event date. Jane's coverage was not affected by the divorce, and her COBRA continuation coverage will end 1/31/2022 (after 18 months).

A termination of employment following a reduction of hours that previously resulted in a Qualifying Event is considered a single 18-month event.

Notices

General Notice

Also referred to as an initial COBRA notice

- General notice must be provided within 90 days after coverage begins
- Must be written to be understood by average plan participant
- Single notice may be provided to covered employee and spouse at same address

The DOL model notice may be obtained at:

[Model Notice](#)

Once you are at the website click on "Regulations" to download the notice (also available in Spanish).

Delivery of General Notice

Notices must be provided to all plan participants in a manner that is reasonably anticipated to reach all participants

- First class mail, addressed to the employee and spouse (if covered), to the last known address will meet this requirement
- A single notice to both the employee and spouse (if covered) is sufficient as long as the spouse resides at the same location as the covered employee

Electronic delivery is also acceptable if it meets the standards of §2520.104b-1(c) of the delivery requirements

- The employee and/or covered spouse will need to prospectively agree to electronic notification

Election Notice

Election notice must be provided to QBs within 14 days after plan administrator is notified of the qualifying event

When employer is plan administrator, notice must be provided within 44 days of later of qualifying event or loss of coverage (if delayed notice rule applies)

Allow 60-days for election period

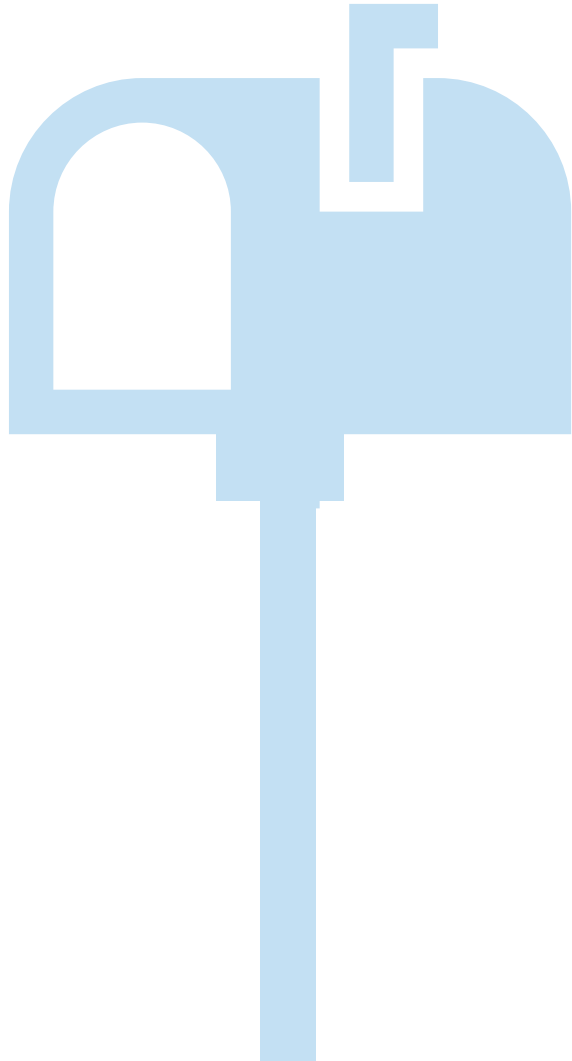
- From the *later of* the qualifying event, the loss of coverage date or the date the notice is “provided”

The DOL model notice may be obtained at:

[Model Notice](#)

Once you are at the website click on “Regulations” The model is downloaded (also available in Spanish).

Delivery of Election Notice



First class mail, addressed to the employee and spouse (if covered), to the last known address will meet this requirement

- A single notice to both the employee and spouse (if covered) is sufficient as long as the spouse resides at the same location as the covered employee

Electronic delivery is also acceptable if it meets the standards of §2520.104b-1(c) of the delivery requirements

- The employee and/or covered spouse will need to prospectively agree to electronic notification

Notice of Unavailability

Plan administrator (even if employer) must give notice within 14 days after receipt of notice of qualifying event if COBRA coverage is not available

Possible reasons:

- COBRA coverage not available (e.g., similarly-situated active employees are no longer offered coverage, or employer is no longer subject to COBRA)
- Employer is not offering COBRA due to gross misconduct (recommended, not required)
- Not an eligible COBRA qualified beneficiary (e.g., domestic partner)
- Beneficiary did not timely provide notice of certain qualifying events (e.g., divorce or legal separation, dependent reaching limiting age or total disability status)
- Election or initial premium payment deadline missed

Plan administrator must notify individual of reason for COBRA unavailability

Notice of Early Termination

Must notify QBs when continuation coverage terminates before end of maximum coverage period

Must notify as soon as *practicable*

Must contain the following information:

- Reason for early termination
- Date of coverage termination
- Any conversion rights available ⁽¹⁾

⁽¹⁾ Conversion notice is also required during last 6 months of COBRA coverage period (if COBRA does not end early), when conversion applies to the group health plan.

Reasons for Early Termination

- 1 QB fails to make timely payment
- 2 QB becomes covered by another group health plan after the COBRA election
- 3 QB first becomes entitled to Medicare (Part A or Part B) after the date of the COBRA election
- 4 Employer ceases to provide any group health plan
- 5 QB ceases to be disabled according to SSA

Requirements for Plan Sponsors

The following, if they give rise to a loss of coverage, are qualifying events that must be reported by the employer:

- The death of the covered employee
- The employee's termination (for other than by reason of gross misconduct)
- A reduction in hours of the covered employee
- The Medicare entitlement of the employee
- Chapter 11 bankruptcy



Timing: No later than 30 days after the date on which a qualified beneficiary loses coverage under the plan due to the qualifying event

Requirements for Employees/QBs

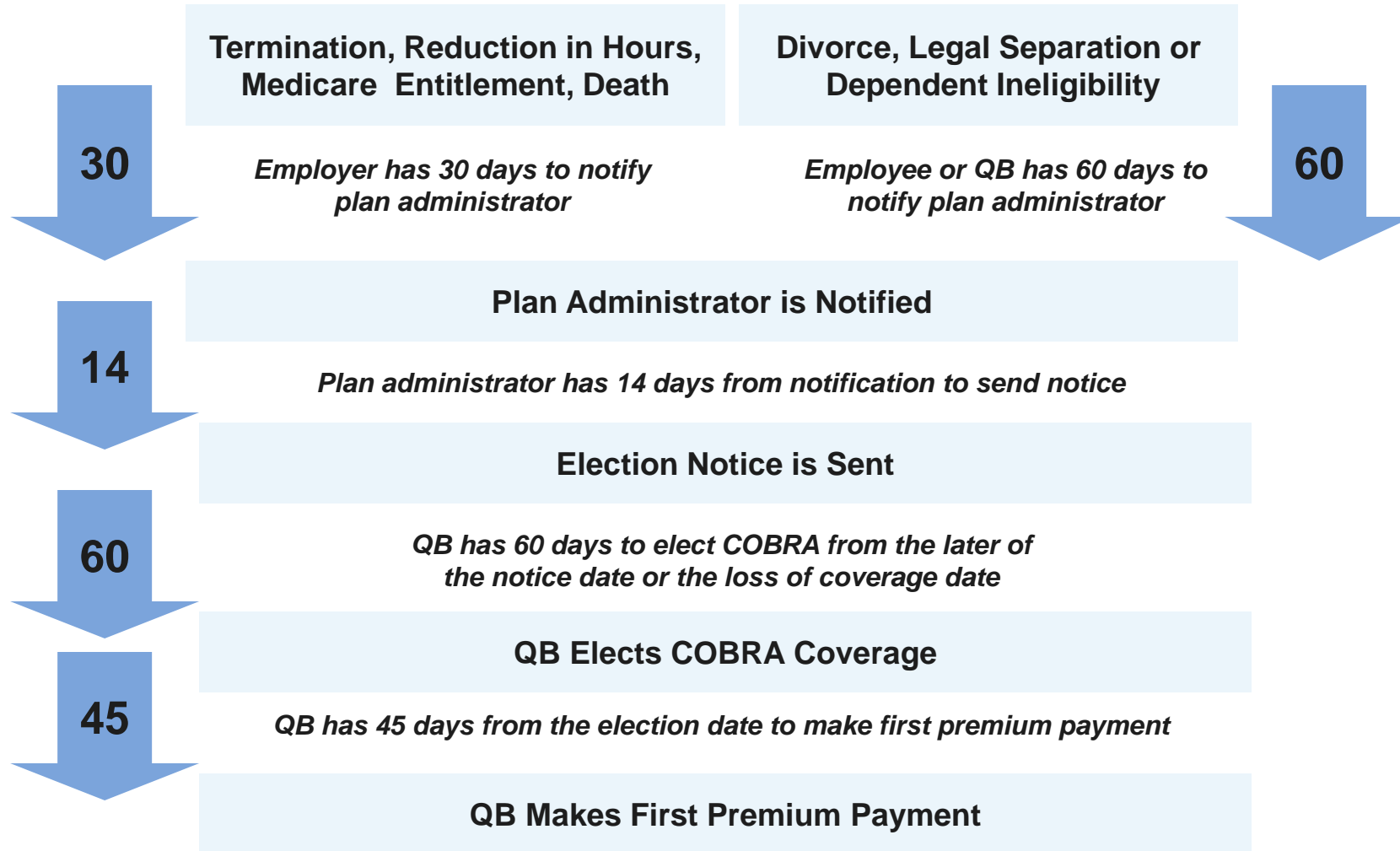
Covered employees and QBs are generally required to notify plan administrator within 60 days or later of:

- Divorce or legal separation;
- A covered dependent ceasing to be dependent under the terms of the plan;
- Qualifying or second qualifying event;
- Loss of coverage; or
- Date they were first notified of notice obligations.

Reasonable procedures established by plan administrator must be followed

QBs determined to be disabled by SSA are generally required to notify plan administrator within 60 days of receipt of determination and before end of original 18-month continuation period

The COBRA Timeline



Special Rule for Medicare

There is a potential extension of coverage for the spouse and covered dependents of an employee that is enrolled in Medicare and the employer's group health care plan

- If the employee has **Medicare prior to COBRA** and has an 18-month COBRA event within 18 months after Medicare entitlement, the spouse and covered dependents must be allowed to have COBRA for up to 36 months after the employee's Medicare entitlement date

Example:

James is actively working and turns age 65 on October 15, 2021. He enrolls in Medicare during the initial enrollment period and his Medicare entitlement starts October 1, 2021. His spouse Mary is also covered by the group health plan.

- James retires on April 30, 2022. James can elect COBRA coverage because his Medicare entitlement was before the qualifying event, and his maximum coverage period is 18 months from his May 1, 2022 qualifying event.
- Mary can elect COBRA coverage. Her coverage period will be 30 months from the date coverage was lost due to James' retirement (36 months from October 1, 2021, minus six months of coverage during James' active employment after his Medicare coverage began).

Special Rule for Medicare

- If the employee has **elected COBRA and then enrolls in Medicare**, the spouse and dependents remain subject to the 18-month COBRA coverage period (because active employees and spouses would not lose coverage due to Medicare entitlement)

Example:

Same as previous page, except that James' Medicare entitlement does not begin until June 1, 2022.

- James can elect COBRA continuation coverage at the time he retires. However, his COBRA coverage will end on June 1st due to his first Medicare entitlement.
- Mary continues to be eligible for COBRA continuation coverage. She can stay on COBRA for up to 18 months from James' retirement date, unless she gains other group health coverage or Medicare entitlement during her COBRA coverage period.

Special Issues

Health FSAs and HRAs

Health FSA participants are generally offered limited COBRA if:

- The total amount of salary reductions less reimbursed expenses prior to the qualifying event results in an unspent account balance; and
- The continuation period for a Health FSA is limited to the remainder of the plan year
- Unspent account balance available must be greater than the applicable COBRA premium for the coverage period
- Health FSA must be HIPAA-excepted benefit (i.e., maximum available reimbursement including employer contributions may not exceed 2X the employee's annual election plus \$500 and employee is eligible for employer's group health plan that is not limited to excepted benefits)

Health Reimbursement Arrangement (HRA)

- Do not have the same limitations as health FSAs – All participants must be offered COBRA for their HRA, regardless of the account balances
- Health FSAs that are not excepted benefits are also subject to this rule

Health FSA Examples

Health FSA “overspent” situation when HFSA need not be offered under COBRA:

- Employee elects benefit of \$1,200 and incurs \$1,000 in claims in January
- Employee terminates 1/31
- Maximum benefit available for remainder of plan year is \$200 (\$1,200 minus \$1,000)
- Maximum amount the plan could require as payment is \$1,122 (\$102/month X 11 months = \$1,122)
- Employer need not offer HFSA under COBRA

Health FSA Examples

Health FSA “underspent” situation when HFSA must be offered under COBRA:

Employee elects annual HFSA benefit of \$1,200 and has \$600 in reimbursable claims

- Employee terminates 10/31
- Maximum benefit available for remainder of plan year is \$600
- Maximum amount the plan could require as payment is \$204 (\$102/month X 2 months)
- Employer must offer HFSA under COBRA

Impact of FMLA

FMLA leave is not a qualifying event

- Employees cannot lose eligibility for coverage during FMLA (even if coverage is voluntarily dropped during FMLA)

COBRA rights arise at end of leave, or at the point the employee gives unequivocal notice of intent not to return



Note: Employee, spouse or dependent child must have been covered the day before the first day of FMLA or become covered during the FMLA leave.

USERRA

Uniformed Service Employment and Reemployment Rights Act of 1994

- Applies to all group health plans – any size
- 24 months of continuation if group coverage ends
- If active military service is for 30 days or less, charge only the employee share

Comply with COBRA notice rules and you are generally complying with USERRA



COBRA and State Law

COBRA is a federal law that applies to self-insured and fully-insured plans

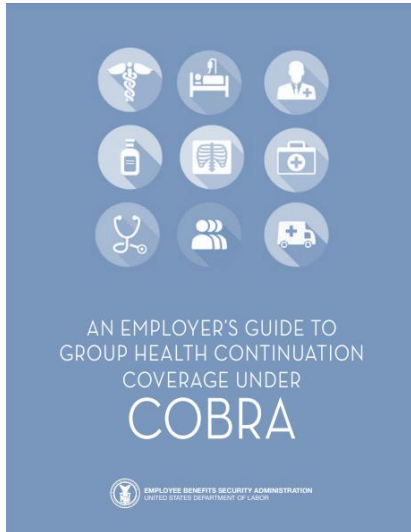
- State continuation requirements apply to fully-insured plans

Example: COBRA provides an ex-spouse up to 36 months of continuation in the event of loss of coverage due to divorce

- Some state laws applicable to fully-insured plans extend this continuation right beyond 36 months
- Provide the COBRA rights and the extended state protection
- State continuation requirements may also apply to self-insured health plans sponsored by governmental entities (state and political subdivisions)

When COBRA and state continuation laws overlap, apply the rule that affords the individual the most protection

Resource Links



An Employer's Guide to Group Health Continuation Coverage under COBRA

EBSA COBRA Continuation Laws & Regulations

- Employer and employee guidance
- Model forms and notices (English/Spanish)

For Employers and Advisers

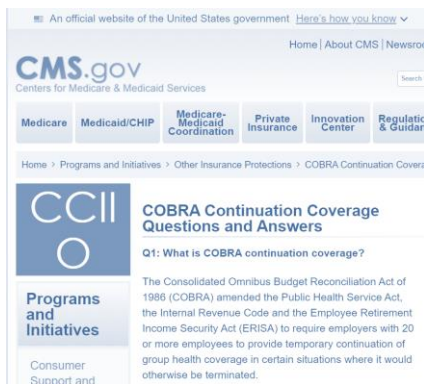
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