

## Questions and Answers from the COBRA Help Desk

*Frequently (and Not-So-Frequently) Asked Questions*

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Every month the OnQue staff responds to numerous COBRA questions posed by our broker and employer customers. The questions we field over a month's time typically cover a broad range of COBRA subtopics, from the commonplace to the obscure, and our responses run the gamut as well—from the simple and straightforward to the complex and cautionary. This COBRA Tip™ is the first in a series of articles in which we offer a smattering of the more interesting and, hopefully, informative COBRA questions and answers.

### **Notification Requirements When Terminating COBRA**

**Client:** I understand that we have 30 days to notify a former employee that his 18-month COBRA benefits are going to expire. Is that correct?

**OnQue:** That is incorrect. The Department of Labor's 2004 regulations require plan administrators to notify qualified beneficiaries in writing when terminating COBRA coverage *early* (prior to the end of the maximum coverage period).

#### ***Early Termination***

It is interesting to note that the regulations do not set a specific time frame for notification in the case of early termination. Instead, the DOL requires the plan administrator to provide the notice "as soon as practicable" following the decision to terminate coverage. While that language may seem somewhat vague, it is necessary because it allows for circumstances in which it is not possible or "practical" to provide the notice well in advance of the COBRA termination date. Though not recommended, the administrator may even provide the notice *after* the COBRA termination date, provided the action was taken as soon as practicable following the decision to terminate coverage. (Listening to attorneys argue about what is practicable and what is not would be very interesting, indeed.)

#### ***Normal Termination***

Plan administrators are not required to notify qualified beneficiaries about the normal expiration of their COBRA coverage (coverage that has gone full-term). However, if a conversion option is available, COBRA qualified beneficiaries must be notified of their right to elect that option within 180 days prior to the expiration of COBRA continuation coverage. The best way to handle this is to provide a notice that reminds the qualified beneficiary that his or her COBRA coverage is about to end. That notice should include an explanation of conversion rights.

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## COBRA & Health Reimbursement Arrangements

**Client:** We have a client who maintains an HRA. They have a participant who recently terminated and has elected to participate in COBRA. We have two basic questions:

1. What notifications must be made for the HRA portion of COBRA?
2. We understand that a qualified beneficiary who has elected continuation coverage under COBRA must pay an “applicable premium” for the period of coverage. How do we determine the applicable premium?

**OnQue:** Our COBRA Tip of January 3, 2005, provides a good overview of the COBRA issues relating to HRAs: [“HRAs: Are They Subject to COBRA?”](#).

Regarding your questions:

### ***What notifications must be made for the HRA portion of COBRA?***

There are no special notification requirements with respect to HRAs; the general notice, the qualifying event notice and election form should list the HRA as a benefit subject to COBRA.

### ***How do we determine the applicable premium?***

This is a tough question, because the IRS guidelines leave much to be desired (that’s an understatement), although the agency has promised to issue more specific guidelines in the future.

As stated in the article referenced above, the premium should be based on the “actuarially determined” cost to provide coverage under the plan. Here’s the problem—HRAs have not been available long enough to provide the utilization data needed to make accurate actuarial calculations. Further, the cost of actuarial determination may be too high for many small employers to bear.

Alternatively, the employer could look to the carrier for assistance in determining the appropriate premium, particularly in the first plan year. After that, premium calculation could be based on claims experience.

Unfortunately, a formula for calculating HRA premiums does not exist and no one has a handle on how to calculate the premiums accurately. Actuarial determination is probably the best bet for ensuring compliance, though its benefits are limited by the factors mentioned earlier.

## COBRA & Medicare

**Client:** A former employee and his spouse elected COBRA after losing coverage because of his non-FMLA leave of absence. Their COBRA coverage started on 8/01/2004. On 10/1/2005 the former employee became entitled to Medicare A & B. I have terminated his COBRA coverage because of the Medicare entitlement. It is my understanding that his spouse is now entitled to continue her coverage for a total of 36 months from the start of COBRA. Is that correct? (COBRA OnQue® did not automatically create the extension.)

**OnQue:** It appears that the spouse is not eligible to receive the extension to 36 months, because a second qualifying event has not occurred. You are correct in your understanding that the COBRA statute identifies Medicare entitlement of a former

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employee as a second qualifying event for the covered spouse and dependent children. However, on February 13, 2004, the Internal Revenue Service issued Revenue Ruling 2004-22, which effectively eliminated the possibility of a COBRA beneficiary being qualified for that extension. (To review the details of that ruling, please refer to OnQue's COBRA Tip, "[IRS Rules COBRA Not Extended After Medicare Entitlement](#)".)

In a nutshell, the ruling states that if the eligibility rules do not require the plan to drop an active employee from coverage when he/she becomes entitled to Medicare, then COBRA covered dependents are likewise ineligible to receive an extension of coverage as a result of the former employee's Medicare entitlement. And, because the law prohibits plans from using Medicare entitlement as a reason to drop an employee's coverage in the first place, the revenue ruling effectively eliminates Medicare entitlement as a second qualifying event.

There are, however, two cases in which an employee's Medicare entitlement may be a first (initial) qualifying event, which means that such entitlement would also be a second qualifying event under COBRA.

**Multiemployer Plans:** Medicare's Secondary Payer rules provide an exception that can be elected by multiemployer plans. That exception applies to employer members having fewer than 20 employees; it permits multiemployer plans to provide that employees and their dependents will be ineligible for coverage when the employee becomes entitled to Medicare due to age. Provided the multiemployer plan is subject to COBRA, that loss of coverage would be considered a first qualifying event for the covered spouse and dependent children.

**Small Employer Exemption:** The second case occurs when an employer is exempt from the Medicare Secondary Payer rules because it has fewer than 20 employees in the current year, but is still subject to COBRA because it had 20 or more employees in the previous year. In such cases, an active employee's Medicare entitlement will be a COBRA qualifying event, provided it results in a loss of coverage under the terms of the group health plan.

According to the IRS ruling, because an active employee's Medicare entitlement results in a first qualifying event under these scenarios, a former employee's Medicare entitlement qualifies as a second qualifying event for the COBRA-covered spouse and dependent children.

Unless your company is exempt from the Medicare Secondary Payer rules because it falls into one of the two categories described above, a second qualifying event did not occur when the former employee became entitled to Medicare. Thus, the spouse is not entitled to an extension of COBRA continuation coverage.

## Counting Employees for COBRA Purposes

**Client:** Where can I find something in writing (that is in simple, non-attorney language) that explains what groups are required to offer COBRA? Am I correct when I tell groups they must offer COBRA this calendar year if they had 20 or more full-time equivalent employees for more than 50% of the working days of the prior calendar year? Please advise.

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**OnQue:** You are generally correct. However, I agree that it would be wise to provide your clients with a comprehensive answer to the question of how to count employees. Following is an excerpt from OnQue's COBRA Tip of July 15, 2003, "[IRS Issues COBRA Revenue Ruling: When small employers receive stock or acquire assets, how are employees counted for COBRA?](#)":

Employers who had an equivalent of at least twenty full-time employees on fifty percent of the business days in the previous calendar year are subject to COBRA. Here are the basic rules for counting the number of employees when determining if an employer must offer COBRA benefits:

- All full-time and part-time employees are counted when determining if an employer had at least twenty employees in the previous calendar year.
- Part-time employees are counted as fractions of full-time employees based on the number of hours worked by full-time employees in that business. For example, if a full-time employee normally works a 6-hour day, then two part-time employees each working three hours a day equal one full-time employee.
- Employers may use either a daily period or a pay period as the basis on which to count these employees. But whichever period is chosen, it must be used uniformly for the entire year.
- If the number of employees is determined on a daily basis, each full-time employee is counted as one employee. A full-time employee works the number of hours (up to 8 per day, 40 per week) considered normal for that business.
- If the number of employees is determined on the basis of a pay period, the employer must count the number of full-time employees working during that period, plus the number of part-time employees and the hours worked by each during that entire pay period.
- Only "common-law" employees are counted -- not independent contractors, self-employed persons and members of the board of directors (unless such members are also common-law employees) - even if these individuals receive employee benefits, such as being covered on the group health plan.
- Common law employees who are nonresident aliens must be counted when determining whether an employer is subject to COBRA requirements.

An easy way to determine the full-time equivalent employee count is to sum the hours worked by your client's part-time and full-time common law employees, then divide that total by the number of hours required to be considered a full-time employee. For example, if 15 employees are full-time (40 hours/week) and 6 work 20 hours per week, then the number of full-time equivalent employees is 18 (720 hours/40 hours).

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## Do We Count Union Employees?

**Client:** When a company has 5 non-union and 15 union employees, is the company subject to COBRA? I'm asking because the union employees are enrolled in group health benefits through the union, not the company.

**OnQue:** If the company employed an equivalent of at least twenty full-time employees on fifty percent of the business days in the previous calendar year, then it is subject to COBRA. That some of those employees are covered under a different plan has no bearing on the company's COBRA obligations.

## Related COBRA Tips

- [Are You Sure You Know the Difference Between Independent Contractors and Employees?](#)
- [Do You Know When It's OK to Terminate COBRA Coverage Early?](#)
- [HRAs: Are They Subject to COBRA?](#)
- [IRS Issues COBRA Revenue Ruling: When small employers receive stock or acquire assets, how are employees counted for COBRA?](#)
- [IRS Rules COBRA Not Extended After Medicare Entitlement](#)
- [Medicare's Effect on COBRA](#)
- [You May Need To Offer Conversion Coverage When COBRA Ends](#)

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