

COBRA Tips™

A Publication of OnQue Technologies, Inc.

Questions and Answers from the COBRA Help Desk, Part III

Frequently (and Not-So-Frequently) Asked Questions

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Every month we respond to numerous COBRA questions from our broker and employer customers. The questions cover a wide range of topics, 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 third in a series of articles in which we offer a smattering of the more interesting and informative COBRA questions and answers:

- Is Voluntary Coverage Subject to COBRA?
- Must My Client Offer COBRA to an Illegal Alien?
- Anticipating Legal Separation (What's Legal About It?)
- Must We Offer COBRA to a Former Employee Who Moves Out of State?
- Postal Worker Says Certificate of Mailing Won't Hold Up in Court

Is Voluntary Coverage Subject to COBRA?

Broker: Is it true that voluntary health coverage is subject to COBRA?

OnQue: A voluntary plan is not subject to COBRA if the employer meets the Department of Labor (DOL) safe harbor requirements, which are:

1. The plan must be completely voluntary, with no employer contributions;
2. The employer may not endorse the plan in any manner; and,
3. The employer's involvement must be strictly limited to:
 - a. permitting the insurer to promote or publicize the plan directly to employees;
 - b. collecting premiums through payroll deductions; and,
 - c. remitting the premium payments to the insurer.

These requirements appear to be straightforward; compliance should be easy to maintain and easy to prove when challenged. However, there is a catch in the language—a word that gives attorneys something to argue about: *endorse*. Is a manager's recommendation to an employee deemed a company endorsement of the plan? Maybe, maybe not. The answer depends on many factors, including who is making the call. And those calls are generally made by attorneys, who argue about it, and federal judges, who make the final decision. If that decision goes against the employer, the dollars fed the litigation machinery will likely be trivial when compared to the cost of paying the family's medical bills.

Employers are sometimes free to sidestep this issue completely by including voluntary plans in their COBRA offering. I imagine that the administrative burden would be minor compared to the task of ensuring compliance with the DOL safe harbor requirements, particularly in light of the endorsement issue. However, many employers have no choice,

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because their insurers prohibit continuation of voluntary plans by requiring them to meet the safe harbor requirements.

Must My Client Offer COBRA to an Illegal Alien?

Broker: I have a client who just discovered that a recently terminated employee is an illegal alien. Is my client required to offer him COBRA continuation coverage?

OnQue: Neither the statute nor the regulations address this issue directly. However, the regulations provide that continuation coverage may be terminated for any reason the plan would terminate coverage for a similarly situated nonCOBRA enrollee.

A fraudulent act, such as submitting false information on an insurance application, may be considered sufficient justification for terminating coverage, provided the plan documents support that position. If that argument holds up, then it seems reasonable to conclude that the individual has no COBRA rights, because his participation in the plan was fraudulent in the first place. However, your client should consult with an attorney before denying continuation coverage to the former employee.

Anticipating Legal Separation (What's Legal About It?)

Employer: I have an employee who has asked for his wife to be taken off the health insurance. They are separating but it is not legal yet. Am I correct in my understanding that the wife can elect COBRA coverage once the separation is finalized?

OnQue: Yes. Following are some key points to keep in mind in such cases:

- For the separation of marriage partners to be recognized as a qualifying event, it must result in a loss of coverage, which typically does not occur until the separation is sanctioned by the state. This means that the couple must first receive a judgment of separation from a state court—living separate and apart does not constitute legal separation until a state court makes it so. Then, the administrator can terminate dependent coverage if such action is required under the plan rules.
- Some states, such as Louisiana, do not recognize the separation of marriage partners as a legal matter. Simply living separate and apart in those states is not a qualifying event, because such separation generally does not result in a loss of coverage to the employee's dependents.
- Employees planning to separate or divorce often terminate dependent coverage before receiving a judgment from the court. COBRA regulations resolve the problem by providing that a qualifying event will occur on the date of the judgment, even though the dependents were not covered at that time.

For more information on this issue, see [What Happens When a Spouse is Dropped From the Plan in Anticipation of Divorce?](#) on the COBRA Tips page at www.onque.com.

Must We Offer COBRA to a Former Employee Who Moves Out of State?

Employer: We offer 2 mutually exclusive medical insurance plans. One is an HMO for in-state employees and the other is a PPO for out-of-state employees. One of our in-state employees has left employment, moved out of state and is seeking medical

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coverage under COBRA. Are we able to change his enrollment from the HMO to the PPO under COBRA coverage?

OnQue: You must present both the HMO and the PPO continuation coverage options to the former employee.

You must offer the HMO coverage because the IRS final regulations require plan administrators to always notify qualified beneficiaries of their continuation rights, even if the coverage is of no apparent value to them. While that requirement may seem illogical on its face, the final decision regarding the value of the coverage must be determined by the qualified beneficiary, not by the employer or plan administrator. For example, the former employee could decide to move back to the HMO service area before his COBRA election period expires. Thus, you must deliver the appropriate qualifying event notice and election form to the former employee.

However, because the qualified beneficiary has moved outside the HMO service area, you must also offer him the opportunity to elect the alternative PPO coverage, provided such coverage is available to any group of active employees and is extended to the qualified beneficiary's new location. The IRS final regulations require employers to make the alternative coverage available "...not later than the date of the qualified beneficiary's relocation, or, if later, the first day of the month following the month in which the qualified beneficiary requests the alternative coverage".

Be aware that the regulations do not require you to incur extraordinary costs under such circumstances, and you need not modify the plan to make it more useful to the qualified beneficiary.

Postal Worker Says Certificate of Mailing Won't Hold Up in Court

Employer: When I took an event mailing to the post office, I was told by the postal worker that a "Certificate of Mailing" would not hold up in court. The clerk went on to say that we should use "Certified Mail" without a return receipt. He said that with certified mail you can go on line and use the tracking number to see who signed for the mail item. Obviously, I would like to use proof of mailing that will stand up in court. Can you advise me?

OnQue: The federal courts have ruled that a notice mailed via first-class mail is presumed to have been properly delivered. The challenge to the administrator is in proving that the notice was mailed in the first place. That is where the Certificate of Mailing comes in—when this method is used, it is presumed that the document was delivered, while the certificate proves when and to whom it was mailed.

However, Certified Mail may or may not provide evidence of delivery. The primary problem with that method is that someone must sign for the delivery. Consider the possibilities:

Imagine that a former employee claims he did not elect COBRA coverage because he did not receive a qualifying event notice. The postal service records indicate that a house guest, not the former employee, accepted delivery. Was the notice properly delivered to the recipient? It is possible the question would be left to a federal judge to decide. Why take that risk?

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Next, consider what you must do when the notice is returned because no one was available to sign for it. First, you must invest more time and money in this process, because you are still obligated to deliver the notice. And because the delivery deadline has not changed, your risk of being out of compliance is increasing because your timeframe for delivery is shrinking. The Certificate of Mailing, on the other hand, leaves no room for argument by the qualified beneficiary, because it proves that the notice was delivered via first-class mail.

Visit the USPS website to learn more about [Certificate of Mailing](#) and [Certified Mail](#).

Related COBRA Tips

- [What Happens When a Spouse is Dropped From the Plan in Anticipation of Divorce?](#)
- [Are You Using The Safest Method To Deliver COBRA Notices?](#)

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