COBRA—Helpful Tips
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I. APPLICABILITY

1. **Public and private sector COBRA laws operate in like manner**. In general, the COBRA law that applies to state and local governmental employers works the same way as the COBRA law that applies to companies and corporations. There are a few differences, such as one additional qualifying event (Chapter 11 bankruptcy) in the private sector COBRA law and different enforcement mechanisms. But, by and large, the private and public sector COBRA statutes operate in the same manner.

2. **Receipt of Public Health Service (PHS) Act funds**. A political subdivision of a state, or an agency or instrumentality of a state or political subdivision, does NOT have to receive funds under the PHS Act in order for a group health plan that it maintains to be subject to COBRA requirements.

COBRA requirements apply to "each group health plan that is maintained by any State that receives funds under this chapter, by any political subdivision of such a State, or by any agency or instrumentality of such a State or political subdivision[.]" A plan that is of, or contributed to by, an employer is maintained by the employer.

The clause "that receives funds under this chapter" only modifies the word "State." It does not modify the terms "political subdivision" or "agency or instrumentality."

Accordingly, if a political subdivision (or agency or instrumentality of a state or political subdivision) does not receive PHS Act funds, it is nevertheless subject to COBRA requirements if it is located in a state that receives funds under the PHS Act. (All states receive funds under the PHS Act.)

Exception: An early COBRA ruling by the U.S. District Court for the Western District of Oklahoma (*Janie Shahan v. Jackson County Memorial Hospital*, Case No. CIV-88-813-T, filed May 31, 1989) held that a plan maintained by a plan sponsor that does not receive PHS Act funds is not subject to COBRA requirements. That decision, which applies only to the Western District of Oklahoma, remains in effect until superseded by another ruling.

3. **Exemption for small employers**. In general, a plan maintained by an employer that had fewer than 20 employees on a typical business day during the preceding calendar year is exempt from COBRA requirements. For purposes of determining whether an employer has 20 employees, only common law employees are counted.

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

Each full-time employee is counted as one employee and each part-time employee is counted as a fraction of an employee. For instance, if, in accordance with an employer's employment practices, 40 hours per week is considered full-time, a part-time employee that works 20 hours per week would count as .5 (one-half) of an employee. An employer may determine the number of its employees on a daily basis or on a pay period basis.

Examples:

Example 1: In 2007, a township had 18 employees, all full-time. In January 2008, the town hired four more full-time employees. One employee terminated employment in March 2008. The township's group health plan is not obligated to offer COBRA continuation coverage to the terminated employee because the township employed fewer than 20 employees during the preceding calendar year (2007). However, the plan would be subject to COBRA continuation of coverage requirements for someone who experiences a COBRA qualifying event in 2009 because the township employed at least 20 employees during the preceding calendar year (2008).

Example 2: A small municipality permits elected officials and independent contractors who perform services for the municipality to participate in its group health plan. If the municipality counts the elected officials and independent contractors as "employees," it has more than 20 employees; if it does not count elected officials and contractors, it has fewer than 20 employees. The plan is not subject to COBRA continuation of coverage requirements because only common law employees are counted for purposes of determining whether the 20-employee requirement is met.

4. **Other exemptions**. The following group health plans are exempt from requirements of the public sector COBRA law: any plan maintained for employees by the government of the District of Columbia or any territory or possession of the United States or any agency or instrumentality of those governments; a church plan (within the meaning of section 414(e) of the Internal Revenue Code); a plan maintained by the federal government for its employees. (The Federal Employees Health Benefits Program is subject to temporary continuation of coverage requirements under a separate law.)

5. **Plan jointly maintained**. If a group health plan is jointly maintained by nonfederal governmental employers and at least one of those employers employed 20 or more employees on a typical business day during the preceding calendar year, the plan is subject to COBRA requirements, including with respect to employees of the employers that have fewer than 20 employees.

6. **Retirees**. Group health plan coverage for retirees (and their dependents) that is maintained by a state or local governmental employer that employed at least 20 employees on a typical business day during the preceding calendar year is subject to COBRA requirements, regardless of whether the retiree coverage is provided by the same plan that covers active employees or a separate plan.

The public sector COBRA law provides, in pertinent part, that "each group health plan that is maintained by any State . . . by any political subdivision of such a State, or by any agency or instrumentality of such a State or political subdivision" must offer COBRA coverage to qualified beneficiaries.

The public sector COBRA law defines the term "group health plan" as having the meaning given that term in 5000(b) of the Internal Revenue Code of 1986. Section 5000(b)(1) defines "group health plan" as "a plan (including a self-insured plan) of, or contributed to by, an employer . . . to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families." A group health plan for retirees provides health care to "former employees."

The term "covered employee" means an individual who is "or was" provided coverage under the plan by virtue of the performance of services by the individual for the plan sponsor. Thus, the term "covered employee" also encompasses retirees.

Example: A covered employee retires at age 59 from a position with a municipality. He and his wife continue their group health plan coverage under the municipality's group health plan for retirees. Under the terms of the plan, a retiree and the retiree's eligible dependents may remain covered under the plan until the retiree becomes entitled to Medicare. At that point, both the retiree and any covered dependents lose coverage under the plan. Six years after the covered employee retires, he becomes entitled to Medicare and coverage under the plan ends for him and his wife.

The retiree is not eligible for COBRA because his Medicare entitlement is not a qualifying event for him. However, his spouse is eligible for up to 36 months of continuation coverage because she has experienced a qualifying event—she lost plan coverage because of the covered employee's Medicare entitlement. (Note that if she first becomes entitled to Medicare after the date of the election of COBRA coverage and before the expiration of the 36-month period of continuation coverage, the plan may terminate her coverage as of the effective date of her Medicare entitlement.)

II. ELIGIBILITY

1. **Eligibility not limited to common law employees**. While only common law employees are counted for purposes of determining whether an employer employs at least 20 employees on a typical business day, individuals who are eligible for COBRA coverage (qualified beneficiaries) may include agents, self-employed individuals, independent contractors and their employees, directors, political appointees, elected officials and their dependents who participate in a group health plan.

The term "qualified beneficiary" includes a "covered employee" in the case of a qualifying event that is the termination of employment or reduction of employment hours.

The term "covered employee" includes an individual who is or was provided coverage under a group health plan by virtue of the performance of services for one or more persons maintaining the plan. Thus, the term "covered employee" is not limited to common law employees and may include anyone who obtains coverage under the plan because he or she performs services for the plan sponsor.

2. **Dependents who are qualified beneficiaries**. The spouse and a dependent child of a covered employee who experience a COBRA qualifying event are qualified beneficiaries.

Also, a child born to, or placed for adoption with, the covered employee during a period of COBRA continuation coverage is a qualified beneficiary.

Example 1: A covered employee and his wife are covered under a public sector employer's group health plan that is subject to COBRA requirements. His wife is six months pregnant when he terminates employment. They elect COBRA continuation coverage. When the baby is born, the covered employee can add the child to his COBRA coverage as a qualified beneficiary. The covered employee must comply with plan procedures for doing so, such as notifying the plan of the child's birth within 30 days of the date of birth. The COBRA premium may change if the plan charges a different amount for employee-plus-spouse-plus child(ren) coverage than for employee-plus-spouse coverage.

Example 2: A single employee terminates employment and elects 18 months of COBRA coverage. Two months after electing COBRA coverage, he marries and enrolls his new wife for coverage under the plan. Fourteen months later, he dies in an automobile accident. The surviving spouse is not a qualified beneficiary because she was not covered under the plan on the day before the initial qualifying event (the covered employee's termination of

employment). She did not become a qualified beneficiary by virtue of her spousal status even after she became covered under the plan.

Because she is not a qualified beneficiary, her husband's death is not a COBRA qualifying event for her. Thus, not only is she not entitled to an expansion of continuation coverage to 36 months from the date of the initial qualifying event (which would have been the case had the covered employee's death constituted a second qualifying event), but the plan may terminate her coverage in accordance with the terms of the plan, such as on the day after the date of the covered employee's death or on the last day of the month of death. The plan is not obligated to allow the surviving spouse to remain covered through the end of the 18-month period of coverage associated with the covered employee's termination of employment.

Example 3: The husband of a retiree had plan coverage as the spouse of the retiree. She died and he was allowed to maintain coverage under the retiree plan as the surviving spouse. He remarried and the retiree plan permitted him to cover his new wife under the plan. A few years later, they divorced. The divorced spouse in this case is not a qualified beneficiary because she was not the spouse of the "covered employee." Rather, she was the spouse of the covered employee's surviving spouse.

3. **Qualified beneficiaries must experience a qualifying event**. Qualifying events are designated events that, except for the COBRA continuation of coverage requirements, would cause qualified beneficiaries to lose coverage under a group health plan that was in effect for them on the day before the qualifying event. COBRA rights do not accrue to an individual who loses plan coverage for any reason other than a designated qualifying event or for whom coverage under the plan was not in effect on the day before the qualifying event. There are five qualifying events under the public sector COBRA law:

(a) The death of the covered employee;

(b) The termination (other than by reason of gross misconduct), or reduction of hours, of the covered employee's employment;

(c) The divorce or legal separation of the covered employee from the employee's spouse;

(d) The covered employee becoming entitled to Medicare benefits;

(e) A dependent child ceasing to be a dependent under the generally applicable requirements of the plan.

Example: Under the terms of an employer's plan, dependent children generally are covered until age 19 (up to age 25 if a full-time student). Coverage ends earlier if a dependent child marries. A covered employee's daughter marries at age 18. The employer informs the covered employee that his daughter would be eligible for COBRA coverage if she ages out, but does not qualify for COBRA if she gets married. The employer is incorrect. A COBRA qualifying event includes a child ceasing to be a dependent under the generally applicable requirements of the plan. That means ceasing to be a dependent child for any reason under

the terms of the plan, including marriage. Thus, the daughter is entitled to elect 36 months of COBRA continuation coverage. Also, she may add her husband to her coverage.

4. **Independent election rights**. Except as provided in item 5 of this section, each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is independently entitled to elect, within the election period, continuation coverage under the plan. Also, when more than one qualified beneficiary elects COBRA coverage in connection with the same qualifying event, a group health plan cannot condition a qualified beneficiary's right to maintain his or her COBRA coverage for the maximum period on any other qualified beneficiary maintaining his or her COBRA coverage.

Example 1: An employee terminates employment and he, his wife and dependent child lose coverage under a group health plan on that account. The COBRA premium for family coverage is unaffordable, but the couple can afford the premium for COBRA coverage of a single individual. The covered employee and spouse elect COBRA continuation coverage only for the dependent child. They are entitled to do so because the child's COBRA rights are independent of those of the covered employee; that is, the covered employee need not also elect COBRA coverage in order for the child to be eligible for COBRA coverage.

Example 2: An employee terminates employment and he, his wife and dependent child lose coverage under a group health plan on that account. They elect COBRA coverage and are charged the appropriate COBRA premium for family coverage. A few months later, they attempt to obtain lower cost individual health insurance coverage. The health insurance issuer agrees to sell an individual health insurance policy that covers the employee and his child, but declines to accept the employee's spouse because she has several preexisting medical conditions.

The combined cost of an individual policy that covers the employee and his child plus the cost of COBRA coverage for his spouse at the single employee rate would be less than the COBRA premium for family coverage. The employee and child voluntarily drop their COBRA coverage (effective on the last day of the month for which the employee paid the family premium) and purchase the individual policy. The spouse is entitled to maintain her COBRA coverage at the single employee rate.

5. **Limits on independent election rights**. If a covered employee and spouse are covered as a family unit on the day before the qualifying event (the covered employee's termination of employment) and they both wish to elect COBRA coverage, the plan may require that they do so as a family unit.

Example: An employee and his spouse are covered under the employer's group health plan as a family unit. The employee terminates employment and the plan offers them COBRA coverage at the appropriate premium charge for coverage of an employee plus spouse. Their combined premium charges for COBRA coverage at the single employee rate, if they were to separately elect COBRA coverage, would be less than the premium charge for employee plus spouse. The plan is not required to permit them to separately elect COBRA coverage at the

single employee rate. However, if one of them chooses not to take COBRA coverage, the other would be entitled to elect COBRA coverage at the single employee rate.

6. **Domestic partners do not have independent COBRA rights**. A domestic partner is not a "qualified beneficiary" because he or she is not the "spouse" of the covered employee. Therefore, a domestic partner does not have independent COBRA rights.

However, the employee, as a qualified beneficiary, has the right to continue the coverage that is made available to similarly situated employees who have not experienced a COBRA qualifying event. If those employees are permitted to elect domestic partner coverage, an employee who has experienced a qualifying event that is the termination of employment or a reduction of employment hours also is permitted to elect continuation coverage for a domestic partner.

If the employee declines to do so, the domestic partner could obtain continuation coverage if the employer and insurance carrier (if applicable) voluntarily choose to provide it. (COBRA does not prevent an employer from offering continuation coverage to individuals who are not qualified beneficiaries.)

Example 1: An employee and her domestic partner are covered under the employer's group health plan. The cost to the plan for their coverage is based on the plan's cost tier for employee-plus-one-dependent. The employee terminates employment. She is entitled to elect COBRA coverage for herself and her domestic partner at the appropriate COBRA premium charge for employee-plus-one-dependent.

Example 2: An employee and his domestic partner are covered under his employer's group health plan at the time of his death. The plan is not obligated to offer COBRA continuation coverage to the employee's domestic partner (although nothing in the public sector COBRA law would prohibit the plan from voluntarily providing continuation coverage to the domestic partner).

7. **Gross misconduct**. An employee's termination of employment by reason of the employee's gross misconduct is not a qualifying event and, therefore, neither the employee nor his covered dependents are qualified beneficiaries. Accordingly, the plan may decline to offer them COBRA continuation coverage (although nothing in the public sector COBRA law would prohibit an employer or plan from offering continuation coverage to the employee and/or the employee's dependents when the employee's employment is terminated by reason of gross misconduct). An employee can challenge an employer's finding of gross misconduct in court.

III. COBRA NOTICES

1. **Notices required of employers or plans**. A state or local governmental employer or the administrator of the employer's group health plan is obligated to notify an individual of his or her COBRA rights at the time of commencement of coverage under the plan and again following a COBRA qualifying event. A notification of COBRA "rights" must address all of

the requirements an individual is responsible for meeting in order to elect and maintain COBRA continuation coverage for the maximum period, including the requirement to notify the plan of certain events within 60 days.

At the time of commencement of coverage under the plan, the plan must provide a written notice of COBRA rights to each covered employee and the spouse of the covered employee (if applicable). The spousal notification requirement is designed to protect the spouse by ensuring that the spouse has the necessary information and ability to directly exercise his or her COBRA rights. In other words, the law intends that a spouse's COBRA rights not be left to the discretion of the employee nor be dependent upon an employee taking necessary action on a timely basis on behalf of the spouse. In-hand delivery of the notice to employees at the workplace does not constitute delivery to the spouse. The initial notice either must be addressed to both the employee and spouse or separate notices must be provided.

The employer of a covered employee must notify the plan administrator of the following three qualifying events within 30 days of the date of the qualifying event: death of the covered employee; termination of the covered employee's employment (other than by reason of gross misconduct) or a reduction of the covered employee's employment hours below the level necessary to remain eligible for plan coverage; and the covered employee becoming entitled to Medicare benefits (if the employee's Medicare entitlement will result in loss of a qualified beneficiary's coverage under the plan).

The plan administrator must notify qualified beneficiaries of their COBRA rights within 14 days of the date on which the plan administrator is notified of a qualifying event by the employer or a qualified beneficiary. (Any notification to a qualified beneficiary who is the spouse of a covered employee is treated as notification to all other qualified beneficiaries residing with the spouse at the time the notification is made.)

2. **COBRA election notice not received**. Following timely notification of a qualifying event, a group health plan is responsible for sending the COBRA rights notice to a qualified beneficiary's last known address (unless the employer provides the notice in person, such as during an exit interview). A plan may choose to send the notice via first class mail or via certified mail. While the plan is required to send the notice, it is not obligated to ensure that the qualified beneficiary receives the notice.

If the 60-day COBRA election period expires without an election being made, the qualified beneficiary loses his right to elect COBRA coverage. Accordingly, if a COBRA notice is not received within 30 days after a qualifying event, it would be prudent for a qualified beneficiary to inquire of the employer or plan regarding the status of his or her COBRA notice. Moreover, a qualified beneficiary can protect his right to elect COBRA coverage by notifying the plan administrator in writing within 60 days of the qualifying event of his desire to elect COBRA coverage.

3. **Notices required of qualified beneficiaries**. It is extremely important for qualified beneficiaries to realize that in the case of certain events, they are obligated to notify the group

health plan administrator within 60 days of the event. Failure to do so may result in loss of eligibility for COBRA coverage or an extension of COBRA coverage.

Each covered employee or qualified beneficiary is responsible for notifying the plan administrator of the occurrence of the following two qualifying events within 60 days after the date of the qualifying event: the divorce or legal separation of the covered employee from the employee's spouse; and a dependent child ceasing to be a dependent under the generally applicable requirements of the plan.

The employee or qualified beneficiary also must notify the plan administrator within 60 days of a second qualifying event that occurs during the initial 18-month period of continuation coverage (or during the 29-month period of continuation coverage if a disability extension applies) in order for the 18- or 29-month period to be extended to 36 months.

Qualified beneficiaries who wish to take advantage of the 11-month disability extension (from 18 to 29 months) generally must notify the plan administrator of the disabled qualified beneficiary's disability determination under title II or title XVI of the Social Security Act on a date that is both within 60 days after the date of the determination (when the determination is issued during the initial 18-month period) and within the initial 18-month period of coverage. The 11-month extension applies to both the disabled qualified beneficiary and non-disabled family members because the law provides that if the 11-month disability-based extension applies to a qualifying event, it applies "with respect to all qualified beneficiaries."

If the date of the Social Security disability determination is before the date of the COBRA qualifying event, a qualified beneficiary can meet the 60-day requirement by notifying the plan administrator of the disability determination within an alternative 60-day period specified by the plan, such as within the 60-day COBRA election period. If the plan does not specify an alternative 60-day period, the qualified beneficiary is required to notify the plan of the disability determination only within the initial 18-month period of continuation coverage.

If a final determination is made that a qualified beneficiary is no longer disabled under title II or title XVI of the Social Security Act, the qualified beneficiary is required to notify the plan administrator of the final determination within 30 days after the date of that determination.

IV. COVERAGE

1. **Date COBRA coverage begins**. Generally, COBRA coverage begins as of the date of the qualifying event. However, a group health plan may choose to start COBRA coverage as of the later coverage loss date. For instance, under the terms of a group health plan, an enrollee who experiences an event that results in loss of plan coverage continues to be covered through the end of the month in which the event occurs. Under such a plan, if an employee terminates employment on March 6, his coverage under the plan would continue through March 31 and COBRA coverage would begin on April 1.

2. **Election period**. The law affords an individual a period of at least 60 days in which to decide whether to elect COBRA continuation coverage. The election period ends not earlier

than 60 days after the later of the date coverage under the plan ends because of a qualifying event or the date of the notice of right to elect COBRA continuation coverage.

3. **COBRA continues health care benefits**. Ordinarily, a qualified beneficiary is entitled to the same health benefits he had on the day before the qualifying event (but see paragraphs 5, 6 and 7 of this section). Health benefits include inpatient and outpatient care, physician care, surgery and other major medical benefits, prescription drugs and any other health care benefits, such as dental and vision benefits.

4. **Core and non-core coverage**. Because qualified beneficiaries have the same rights as similarly situated individuals who have not experienced a COBRA qualifying event, if benefits such as medical, vision, dental and prescription drug benefits are offered through separate plans, a qualified beneficiary may elect continuation coverage with respect to any or all of the plans if similarly situated active employees and their dependents are permitted to do so. Even if all benefits are provided under a single plan, a qualified beneficiary may selectively elect benefits if active employees and their dependents are permitted to do so under the plan.

5. **Employer modifies plan benefits**. If coverage under a group health plan is modified for similarly situated non-COBRA enrollees, then coverage made available to qualified beneficiaries is modified in the same manner. For instance, an employer might add or discontinue coverage of dental and vision benefits for employees and their dependents. In that event, individuals receiving COBRA continuation coverage would gain or lose, as applicable, dental and vision benefits also.

6. **Open enrollment periods**. COBRA qualified beneficiaries have the same right as similarly situated active employees to choose to be covered under another group health plan or under another benefit package within the same plan, or to add or eliminate coverage of family members during an open enrollment period.

7. **Qualified beneficiary relocates outside region-specific plan's service area**. If a qualified beneficiary's COBRA coverage is through a region-specific plan, such as an HMO, and the qualified beneficiary ceases to be eligible for that coverage because he or she relocates outside the plan's service area, his COBRA coverage may terminate under that plan. If all coverage provided by the employer to its employees is region-specific and not available in the area to which the qualified beneficiary is relocating, the employer is not required to make any other coverage available to the relocating qualified beneficiary. On the other hand, if an employer offers other group health plan options to employees that would cover services provided in the area to which the qualified beneficiary is moving, the employer's obligations are as follows:

> (a) If all plan options are made available to all employees, then the employer must make all plan options available in the area to which the qualified beneficiary is relocating.

(b) If the region specific plan option and one or more options (that could cover services in the area to which the qualified beneficiary is relocating) are available for the class of employees to which the qualified beneficiary is most similarly situated, the employer would be obligated to offer only those alternative options. This is true even if additional options are available to other classes of employees.

(c) If there are no options other than the region-specific option for the class of employees to which the qualified beneficiary is most similarly situated, but there are one or more options available for other classes of employees (that could cover services in the area to which the qualified beneficiary is relocating), the qualified beneficiary is entitled to select from among those options.

8. **Duration of COBRA coverage**. If the qualifying event is a covered employee's termination of employment or reduction of employment hours, the maximum period of continuation coverage for the employee and his or her covered dependents is 18 months. Individuals determined to be disabled under Title II or Title XVI of the Social Security Act, and their non-disabled covered family members, may qualify for an 11-month extension of COBRA coverage, from 18 to 29 months, if certain conditions are met. Other qualifying events call for a maximum period of coverage of 36 months.

9. **Multiple Qualifying Events**. A qualified beneficiary, other than the covered employee, who experiences more than one qualifying event is entitled to an extension of COBRA coverage from 18 months (or 29 months) to 36 months if all of the following conditions are met:

(a) The initial qualifying event is the covered employee's termination, or reduction of hours, of employment, which calls for an 18-month period of continuation coverage;

(b) The second qualifying event that gives rise to a 36-month maximum coverage period occurs during the initial 18-month period of continuation coverage (or within the 29-month period of coverage if a disability extension applies);

(c) The second event would have caused a qualified beneficiary to lose coverage under the plan in the absence of the initial qualifying event;

(d) The individual was a qualified beneficiary in connection with the first qualifying event and is still a qualified beneficiary at the time of the second qualifying event; and

(e) The individual meets any applicable COBRA notice requirement in connection with a second qualifying event, such as notifying the plan administrator of a divorce within 60 days after the divorce.

Example 1: Under the terms of the plan a dependent child ceases to be a dependent when the child attains age 19. An employee terminates employment. He, his wife and daughter elect COBRA continuation coverage for a period of 18 months. During the 18-month period, the daughter attains age 19. Her father notifies the plan of that event within 60 days, as required by the COBRA law. She has experienced a second qualifying event (her 19th birthday)

because she meets all of the conditions listed above. Thus, she is entitled to an expansion of continuation coverage from 18 to 36 months. Her parents' 18-month period of continuation coverage remains unchanged.

Example 2: Under the terms of an employer's group health plan, the dependents of a current employee do not lose coverage when the employee becomes entitled to Medicare. An employee terminates employment and he and his wife elect 18 months of COBRA continuation coverage. Eight months later the covered employee becomes entitled to Medicare. His wife is not entitled to an expansion of her COBRA coverage from 18 to 36 months because she would not have lost coverage had her husband become entitled to Medicare while still employed. Therefore, his becoming entitled to Medicare during an 18-month period of coverage based on his termination of employment is not a second qualifying event for his wife.

10. **A single 18-month period for reduction of hours and employment termination.** Termination of employment and a reduction of employment hours constitute variations of a single qualifying event. An employee who loses group health plan coverage due to a reduction of employment hours and who terminates employment before the end of the 18-month period of continuation coverage associated with a reduction of hours is not entitled to any additional coverage.

Example: An employee takes a leave of absence from his job with a municipality for personal reasons. He is eligible for, and elects, COBRA continuation coverage based on a reduction of employment hours. He resigns three months later. His maximum period of COBRA coverage ends 18 months after it began due to the reduction of employment hours; he is not entitled to a new 18 month period from the employment termination date.

11. **Plan coverage continues without regard to COBRA.** If, under the terms of a plan, coverage continues for a period of time at the same benefit and premium levels without regard to COBRA continuation coverage, a plan is not required to offer the qualified beneficiary a maximum period of COBRA coverage from the point at which coverage ends because continuation coverage a plan provides without regard to COBRA counts toward the total of 18 (or 29 or 36) months of continuation coverage to which a qualified beneficiary is entitled.

Example: A plan provides that coverage does not end until 6 months after the termination of employment. (The 6-month extension is automatic under the terms of the plan; the individual is not choosing between that extension and COBRA continuation coverage.) Plan benefits remain the same and the premium charged, if any, does not exceed the amount that similarly situated non-COBRA plan enrollees are required to pay. In the case of an individual who is entitled to 18 months of continuation coverage, the plan may limit its offer of COBRA continuation coverage to 12 months (the 12-month period that follows the expiration of the automatic 6-month extension).

12. **Employers may offer qualified beneficiaries a choice of coverage.** A state or local government employer is permitted to offer a terminated employee a choice between COBRA and alternative coverage.

Example: An employer offers a terminated employee the choice between 18 months of COBRA continuation coverage, for which the individual will be charged 102 percent of the applicable premium, and 6 months of alternative continuation coverage for which the employer will pay the full cost. If the individual rejects COBRA continuation coverage in favor of the alternative coverage, then, at the expiration of the alternative coverage (in this example, after 6 months), the individual is not entitled to any additional continuation coverage under COBRA.

13. **Health plan ID card**. The employer or the plan decides whether a qualified beneficiary retains his or her health plan card or is issued a new one. For instance, a plan may wish to issue a new card that identifies the coverage as COBRA continuation coverage or directs health care providers to submit claims to a different address.

V. PREMIUMS

1. **Payee and address to which payments are remitted**. The employer or, in the case of an insured plan, the insurance carrier that issues the group policy determines the payee to which a COBRA premium payment is to be made and the address to which the payment is to be sent. That information should be included by the employer or group health plan administrator in the COBRA election notice along with information regarding the amount of the premium and due dates for submitting premium payments.

2. **Payer may elect monthly installments**. A group health plan may offer various payment options for COBRA premiums, such as monthly, quarterly, semi-annually or annually. Although a qualified beneficiary may choose to pay COBRA premiums on a quarterly, semi-annual or annual basis, if payment on those bases are options under the plan, a plan must permit payments to be made in monthly installments at the option of the payer.

3. **Someone other than the qualified beneficiary may pay premiums**. The COBRA statute expressly permits plan administrators to require payment of a premium for any period of COBRA coverage, but does not require that a qualified beneficiary actually be the one to pay for the continuation coverage. A third party, such as a hospital or new employer, may pay on behalf of the qualified beneficiary. Plans and employers must accept, from third parties, payment on behalf of a qualified beneficiary. However, the ultimate responsibility for assuring that payment is made in a timely manner rests with the qualified beneficiary. If a third party payer fails to pay on time, the plan may terminate the qualified beneficiary's COBRA coverage.

4. **Premium payments must be timely**. The initial premium payment is "timely" if made within 45 days after the date of the election of COBRA coverage. Thereafter, a premium payment for any period of COBRA coverage is timely if made within 30 days after the date due or within a longer period that applies to or under the plan. (A plan may terminate an individual's COBRA coverage effective the first day of a period for which timely payment is not made.)

5. **Payment is made on the date sent**. A payment is made on the date that it is sent. Accordingly, if a payment is postmarked within the applicable 45-day or 30-day grace period, it is timely even if the plan receives the payment after the grace period expires. A plan is entitled to rely on the postmark on the envelope in which the payment is remitted in determining whether the payment is made on a timely basis. If a qualified beneficiary makes a payment in person, he or she should get a receipt showing the date the payment was made and the period to which the payment applies.

6. **Payment is short by insignificant amount**. If a payment is deficient by an insignificant amount, a plan may accept the payment as satisfying the plan's payment requirement or afford the qualified beneficiary a reasonable period of time (at least 30 days) to remit the shortfall. CMS adopts the standard established by the Internal Revenue Service: an amount is not significantly less than the amount due for a period of coverage if the shortfall does not exceed the lesser of $50 or 10 percent of the amount due.

7. **Choosing to pay for a limited period of coverage**. An individual may pay for a limited period of coverage beginning with the first month of coverage.

Example: A covered employee lost his group health plan coverage because of termination of employment. One month later (before receiving a COBRA election notice), he became covered under another employer's group health plan. He incurred medical expenses during the one-month period of non-coverage. By the time he received the COBRA election notice and elected COBRA coverage, three months' premiums were due to bring his COBRA account current. Because he only needed one month of COBRA coverage, he remitted a check for one month's premium. The plan must accept that payment and apply it to the first month of coverage. The plan cannot condition the first month of coverage on the qualified beneficiary also paying for the second and third months of coverage.

A plan may require payment of a premium for any period of continuation coverage, but must, at the option of the payer, permit payments to be made in monthly installments. COBRA coverage ends on the date on which coverage ceases under the plan by reason of a qualified beneficiary's failure to make timely payment of any premium required under the plan. Thus, the law does not obligate a qualified beneficiary to maintain COBRA coverage for a specified period; rather, a qualified beneficiary may discontinue COBRA coverage by declining to remit a timely payment for any month of coverage.

8. **Prorated premium**. A plan cannot charge a full month's premium for a partial month of coverage.

Example: A covered employee's daughter attained age 25 on September 21 and ceased to be covered as his dependent under a county's group health plan as of that date. The plan offered her 36 months of COBRA coverage beginning on September 21, but charges a full month's premium for September. That charge is excessive.

A plan cannot charge more than 102 percent of the applicable premium "for any period of continuation coverage." A plan that charges a full month's premium for a partial month of

continuation coverage charges more than 102 percent of the applicable premium for that period. Thus, a plan may charge no more than the appropriate prorated amount for a partial month of coverage. For instance, if the daughter's monthly COBRA premium (102 percent of the plan's applicable premium) is $360 per month, the plan may charge no more than $120 for the 10-day period of coverage from September 21 through September 30.

9. **When a COBRA premium cannot be charged for a partial month of coverage**. If, under the terms of a plan, coverage continues for a period of time beyond a qualifying event without additional charge, a plan cannot charge a COBRA premium for that period.

Example: A divorce between a covered employee and his spouse became final on April 12. Under the terms of the group health plan, coverage continues for a divorced spouse through the end of the month in which the divorce becomes final with no additional charge to the employee or employer. The plan cannot charge the divorced spouse a prorated COBRA premium amount for the period April 12 through April 30 because under the terms of the plan: coverage is not lost until May 1; and, the plan receives payment for the spouse's coverage for the full month of April through employer and employee contributions. A plan cannot charge duplicate payments for any period, or partial period, of coverage. Thus, May is the first month for which the plan may charge a COBRA premium.

However, the plan is still entitled to measure the maximum period of continuation coverage from the date of the qualifying event (in this case April 12). That is, the plan may count the alternative coverage provided without additional charge under the terms of the plan for the period April 12 through April 30 as part of the 36 months of continuation coverage applicable to a qualifying event that is a divorce. Of course, the plan can begin counting the 36-month period from the coverage loss date (May 1) if it wishes because plans are free to provide a longer period of coverage than that required by the COBRA law.

VI. Other Group Health Plan Coverage and COBRA

1. **General rule**. Subject to the condition specified in paragraph 2 of this section, if an individual first becomes covered under any other group health plan, as an employee or otherwise, after the date of the election of COBRA coverage, the plan may terminate that individual's COBRA coverage as of the effective date of the other group health plan coverage. However, if an individual first becomes covered under another group health plan on or before the date of the COBRA election, the individual is entitled to elect and maintain COBRA coverage for the maximum period. The U.S. Supreme Court in *Geissal v. Moore Medical Corporation*, 118 S. Ct. 1869 (1998) held that the COBRA law operates in that manner.

2. **Condition**. In order for a plan to terminate an individual's COBRA coverage due to other group health plan coverage, the other group health plan coverage cannot contain any exclusion or limitation with respect to any preexisting condition of the individual, other than such an exclusion or limitation that does not apply to, or is satisfied by, the individual in accordance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA). (HIPAA imposes certain limitations on a plan's ability to implement a preexisting condition

exclusion period. One of those limitations is that a preexisting condition exclusion period, which cannot exceed 12 months (18 months in the case of late enrollment), must be reduced day-for-day by prior creditable coverage an individual has on his enrollment date in the plan. If the individual has at least 12 (or 18) months of prior creditable coverage, the preexisting condition exclusion period under the plan is reduced to zero and, therefore, does not apply to that individual.)

3. **Eligibility for other coverage not a basis for terminating COBRA**. Eligibility for other group health plan coverage does not affect an individual's right to elect and maintain COBRA coverage for the maximum period. An individual must actually become "covered" under another group health plan that meets the condition specified in paragraph 2 of this section after the date of the COBRA election in order for a plan to terminate the individual's COBRA coverage on the basis of other group health plan coverage.

Example 1: A covered employee terminates employment and elects COBRA continuation coverage. He is hired by another employer. He considers enrolling in his new employer's plan, but would like to keep his COBRA coverage because it covers prescription drugs and his new employer's plan does not. If under the new plan he will be subject to any exclusion or limitation with respect to any preexisting condition, he may enroll in the new plan and keep his COBRA coverage for the maximum period. However, if he will not be subject to any exclusion or limitation with respect to any preexisting condition, COBRA coverage may be terminated—including prescription drug coverage—on the date on which he becomes covered under his new employer's group health plan.

Example 2: A covered employee terminates employment and elects COBRA continuation coverage. He is hired by another employer. He enrolls in his new employer's plan, which has a 12-month preexisting condition exclusion period. He would like to keep his COBRA coverage because it covers prescription drugs and his new employer's plan does not. He has a total of 10 months of prior group health plan coverage, including COBRA coverage, as of his enrollment date in the new plan. In accordance with the HIPAA law, the plan's 12-month preexisting condition exclusion period is reduced to 2 months. He may enroll in the new plan and keep his COBRA coverage for the maximum period because he is subject to a preexisting condition exclusion period.

Example 3: A covered employee recently terminated employment. He was enrolled in his employer's plan and also was covered under the group health plan of his wife's employer. He is entitled to elect COBRA continuation coverage under his former employer's plan even though he continues to be covered under his wife's plan because he had coverage under her plan before electing COBRA coverage.

VII. MEDICARE AND COBRA

1. **General rule**. As is the case with other group health plan coverage, if an individual first becomes entitled to Medicare after the date of the COBRA election, the plan may terminate an individual's COBRA coverage as of the effective date of Medicare entitlement. However, if an individual first becomes entitled to Medicare on or before the date of the COBRA

election, the individual is entitled to elect and maintain COBRA coverage for the maximum period. This issue also was clarified by the U.S. Supreme Court in *Geissal v. Moore Medical Corporation*, 118 S. Ct. 1869 (1998).

Example 1: A covered employee quits work because of health problems and elects COBRA continuation coverage. Five months later, he becomes entitled to Medicare based on end stage renal disease. The plan may terminate his COBRA coverage as of the effective date of his Medicare entitlement because he first becomes entitled to Medicare after the date of the COBRA election.

Example 2: A covered employee becomes entitled to Medicare Part A several years before retiring. The employee declined to enroll in Medicare Part B while still working. After retiring and electing COBRA continuation coverage, the covered employee signs up for Medicare Part B. The plan cannot terminate his COBRA coverage on account of the Part B Medicare entitlement because that is not the covered employee's "first" Medicare entitlement.

2. **Eligibility for Medicare not a basis for terminating COBRA**. Eligibility to enroll in Medicare does not affect an individual's right to elect and maintain COBRA coverage for the maximum period. An individual must actually first become "entitled" to Medicare benefits (which means that Medicare could pay for covered services) after the date of the COBRA election in order for a plan to terminate the individual's COBRA coverage on the basis of Medicare entitlement.

Example: A covered employee quits work because of health problems and elects COBRA continuation coverage. Five months later, he becomes eligible for Medicare based on end stage renal disease but defers enrolling in Medicare. The covered employee can retain his COBRA coverage because merely being eligible to enroll in Medicare does not constitute being entitled to Medicare benefits.

3. **Special rule**. The COBRA law provides that if a covered employee becomes entitled to Medicare benefits less than 18 months before a qualifying event that is the covered employee's termination, or reduction of hours, of employment, the period of coverage for qualified beneficiaries other than the covered employee does not end before the close of the 36-month period beginning on the date of the covered employee's Medicare entitlement

Example: An employee becomes entitled to Medicare 14 months before he retires. He and his wife are covered under the plan at the time of his retirement (the employee's Medicare entitlement is not a qualifying event because it does not cause his spouse to lose coverage). He is entitled to group health plan benefits for retirees, but dependents are not eligible to participate in the retiree plan. When he retires, his wife elects COBRA continuation coverage. In accordance with a special provision in the COBRA law, she is entitled to a 36-month period of coverage from the date of the covered employee's Medicare entitlement. Thus, in this example, the spouse's 36-month period includes 14 months of coverage under the plan while her husband was still employed and 22 months of COBRA coverage following his termination of employment.

VIII. ENFORCEMENT

1. **Equitable relief**. There is no federal administrative enforcement authority with respect to COBRA continuation coverage as it applies to state and local governmental plans. Rather, the law provides that any individual who is aggrieved by the failure of a state, political subdivision, or agency or instrumentality thereof, to comply with COBRA requirements may bring an action for appropriate equitable relief.

2. **State law claims not preempted**. Also, in *Radici v. Associated Insurance Companies*, 217 F.3d 737 (9th Cir. 2000), the 9th U.S. Circuit Court of Appeals held that the private cause of action for equitable relief afforded individuals by the public sector COBRA law does not preempt state law claims.

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