



# COBRA

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# COBRA Overview



# What Is COBRA?

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[Consolidated Omnibus Reconciliation Act of 1985](#) (found in the Public Health Services Act §§ 2201 - 2208)

- 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

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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 as a fraction of a full-time/eligible employee, with the fraction based upon the number of hours worked divided by the number of hours an employee must work to be considered full-time/benefits eligible under the health plan.
- Self-employed individuals, independent contractors and directors are not counted

A fully-insured plan may be subject to state continuation laws

- Such laws may apply to self-insured governmental plans too



# 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 provided during working hours)	

Think “fix the body.”



# 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”
  - » **Maintained** - 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)
- “whether provided directly or through insurance, reimbursement or otherwise”

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



# Qualified Beneficiaries (QB):

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## Employee/Former Employee

- Employee/former employee
- Includes independent contractors, self-employed persons, partners and employees
- May include retirees in cases involving employer bankruptcy
- Covered because they are performing or have performed services for employer

## Legal spouse (including same-sex spouses)

- Have an independent right to elect

## Dependent children

- May include dependent children of domestic partner (if plan documents include DP children as dependents under the plan)
  - Have an independent right to elect
  - Could be eligible for COBRA upon termination of domestic partner relationship

## Domestic Partner

- Not considered a qualified beneficiary
  - No independent right to elect
  - Employee may elect to continue their own coverage and their domestic partner's coverage if the domestic partner loses coverage due to the employee's termination or reduction of hours.

## Covered on Plan Immediately Preceding Qualifying Event

- Exception: Employee's/former employee's newly-acquired (born or adopted) dependent added to the plan after a QE is also a QB
  - This could also include a new dependent of a dependent child with a QE (child of dependent child (i.e., grandchild of employee/former employee))



# QB Rights Under COBRA

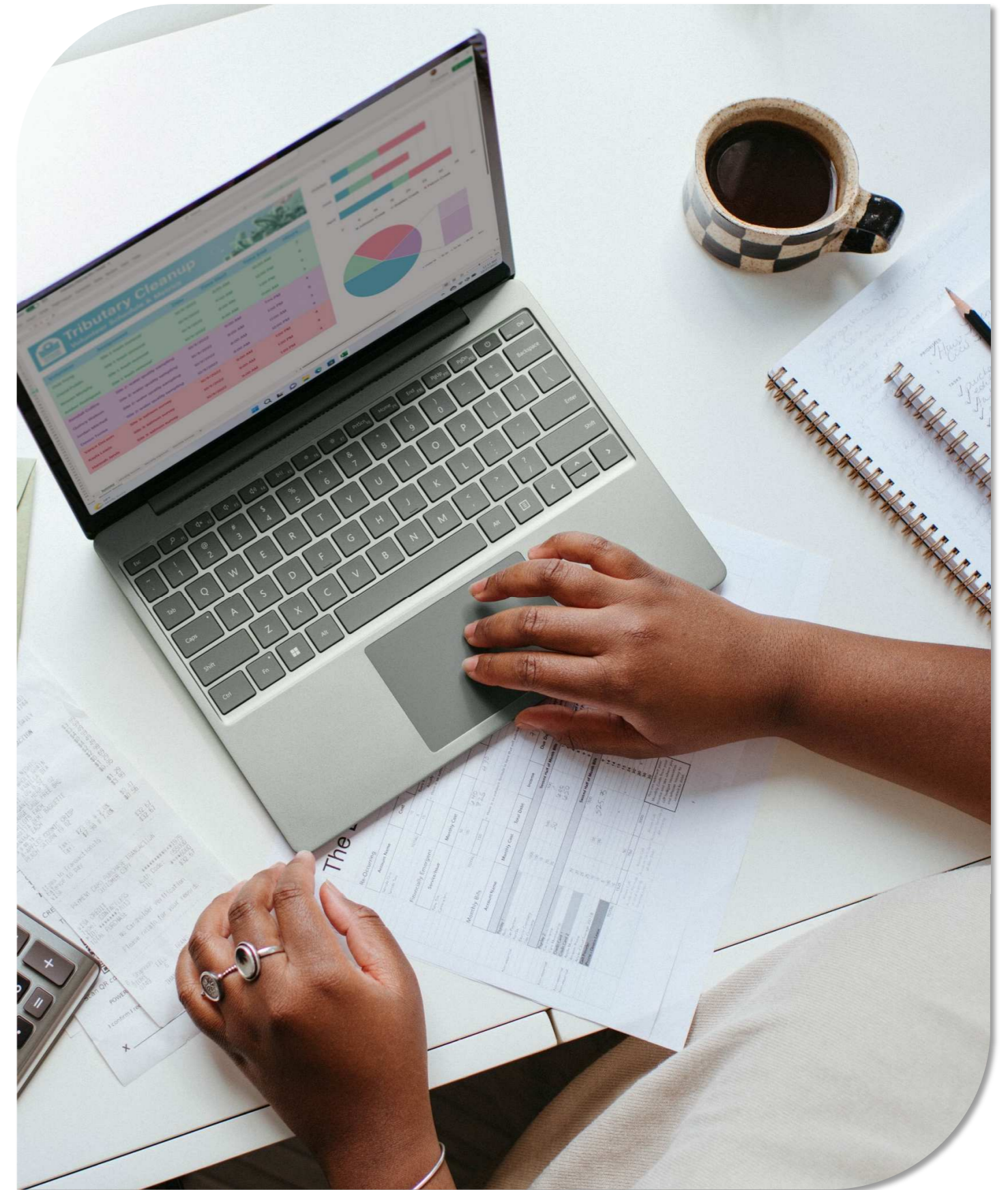
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**Must be offered coverage that is the same as the coverage in place before the qualifying event**

QBs have same rights as similarly-situated active employees

- Open enrollment rights – add new dependents and change plan options (if true for active employees)
- HIPAA special enrollment rights
- Plan modifications – If employer changes group health plan for active employees, this change also applies to COBRA QBs

QBs have independent rights to elect COBRA coverage



# COBRA Premiums



# COBRA Premiums

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**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 COBRA applicable premium amount;
  - » 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.



# COBRA Premiums

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## Premiums generally due monthly

### Initial premium payment

- Due 45 days from when COBRA is elected (regardless of when in the 60-day election period the election occurs)
- Includes payment for any retroactive coverage provided
- Coverage may be terminated retroactively if payment for coverage already provided is not timely

### Subsequent monthly premium payments

- Can be due 1<sup>st</sup> of the month for payment with a prospective effect
- 30-day grace period for late payments

# COBRA Premiums

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## Required premium grace periods of at least 30 days

Coverage may be suspended during grace periods, if:

- **Information is provided upon request by a health care provider:**
  - About a QB's coverage status during the initial premium payment, and any subsequent grace period for subsequent premium payments information; **and**
- **Information is provided to a provider who has not yet received payment**
  - With respect to a qualified beneficiary for whom coverage may be retroactively terminated if timely payment is not made by the end of the grace period; **and**
- **Information is provided to the provider stating the QB does not have coverage, but will have coverage retroactively**
  - To the first date of the period if timely payment is made
  - If a plan cancels coverage prospectively if it has not received payment by the first day of a period of coverage



# Insignificant Deficiency

If payment is short by an amount that is “not significant,” the plan 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.
  - » Employer cannot suspend coverage during this grace period.
- Coverage may be terminated if deficient amount is not corrected.
- “Not significant” is defined in the final COBRA regulations to be the lesser of \$50 or 10% of applicable premium.

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% of the applicable premium (\$34.50).

## The short payment rule applies.

Employer must notify QB of the deficiency and allow 30 days to correct the deficiency – or accept the payment in full.

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% of the applicable premium (\$34.50).

## The short payment rule does not apply.

Employer is not required to notify QB of the deficiency before terminating coverage - must still comply with general 30-day grace period rule.

# Qualifying Events



# Employee Termination/Reduction in Hours

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

<sup>(1)</sup>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.

<sup>(2)</sup>COBRA continuation must be extended even if employee did not maintain coverage during FMLA leave.

# Disability Extension

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How is Disability Defined?	Determined by Social Security Administration
Who Must Be Disabled?	Employee, spouse or dependent
When Must Disability Determination Occur?	Any time within the first 60 days of COBRA coverage
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 (if disabled QB remains a part of the coverage unit)

# 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 applicable premium



# Death of Employee

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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 applicable premium

# Dependent Ceasing to be Eligible

Qualifying Event	Dependent no longer eligible for coverage, examples: -reaching maximum age under plan, -termination of domestic partner relationship -for domestic partner's dependent child
To Whom Continuation Applies	Dependent children 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 applicable premium

# Other Qualifying Events

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- Covered employee's Medicare entitlement (if it causes a loss of group health plan eligibility)
  - » Typically applies only to retiree coverage due to Medicare Secondary Payer Rules
- 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 (e.g., employee switches from FT to PT and premium increases due to change in hours), 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 (or 29-month period if a disability extension has occurred), the affected QB(s) may extend coverage for up to **a total of 36 months from the later of: the original qualifying event date or the date active coverage ends.**

### Example

- John and Jane are covered by Jane's employer's health plan. Jane left her employment on July 15, 2022, and elected COBRA coverage for herself and John beginning 8/1/2022. The couple divorces on 1/18/2024 while each are still QBs.
  - » Jane's employment termination results in an 18-month maximum COBRA continuation period for both John and Jane (from 8/1/2022 until 1/31/2024)
  - » John may extend his COBRA coverage for up to an additional 18 months (until 7/31/2025), a total of 36 months from the loss of active coverage
  - » Jane's coverage was not affected by the divorce, and her COBRA continuation coverage will end 1/31/2024 (after 18 months from the date of the original loss of coverage)

A termination of employment following a reduction of hours that previously resulted in a Qualifying Event is considered a single 18-month event and would not result in an extension beyond the initial 18-month coverage period.

# Special Rules for Medicare

## 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's first Medicare entitlement occurs within the last 18 months of active employment, when the employee has a COBRA qualifying event (retirement or reduction in hours), the covered spouse and dependents will be permitted to elect COBRA continuation coverage for a period of up to 36 months from the employee's Medicare entitlement date. The employee's maximum coverage period will be up to 18 months from the date of the qualifying event.

## Example

James is actively working for a company with hundreds of employees. James turns age 65 on October 15, 2023. **James and his spouse (Mary) are actively enrolled in the group health plan. James enrolls in Medicare in September, for an October 1, 2023 effective date. James retires on April 30, 2024 and maintains employer sponsored coverage until his retirement.**

### James can elect COBRA

- His Medicare *entitlement* was before the qualifying event, and his maximum coverage period is **18 months starting May 1, 2024.**

### Mary can elect COBRA

- **Maximum coverage period: ends 36 months from James' Medicare entitlement** (30 months from the date coverage was lost plus six months of coverage during James' active employment)
- If James does not maintain his employer coverage (while he is enrolled in Medicare) until his retirement, Mary would not be eligible for COBRA.



# Special Rules for Medicare

When MSP rules apply and the employee has **elected COBRA and then enrolls in Medicare:**

- The employee's COBRA coverage will end when the employee becomes covered by Medicare.
- The employee's spouse and dependents remain subject to the 18-month COBRA coverage period for employee termination/ reduction of hours, unless they become covered by another group health plan or Medicare, or they stop paying the COBRA premiums.

## Example

Same as previous example (retires October 15, 2023), except that James' Medicare entitlement does not begin until June 1, 2024.

- James can elect COBRA continuation coverage at the time he retires. James' COBRA coverage will end on June 1, 2024 due to Medicare entitlement.
- Mary continues to be eligible for COBRA continuation coverage for up to 18 months from James' retirement date, regardless of James' subsequent Medicare entitlement.
  - Mary will lose eligibility for COBRA if she gains other group health coverage or Medicare entitlement during her maximum coverage period.
  - James' Medicare entitlement typically is not a second qualifying event (resulting in a total of 36-months of coverage) due to MSP rules.

### MSP rules apply to employers with:

- 20 or more employees if Medicare entitlement is due to age
- 100 or more employees if Medicare entitlement is due to disability
- Special rules for ESRD

Specific counting rules apply and differ based on reason for entitlement

# Notices and Elections



# General Notice

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Also referred to as an initial COBRA notice.

- General notice must be provided within 90 days after active coverage begins
- Must be written to be understood by average plan participant

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

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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) at 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 the ERISA electronic delivery safe harbor requirements (with respect to both employee and covered spouses):

- It's possible a single notice could be furnished to a shared home email address
- Given the administrative burden of obtaining affirmative consent from covered spouses, providing the COBRA initial notice via first-class mail is generally considered best practice



# Notice Requirements for Employees/QBs

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

- Qualifying event date;
- Loss of coverage date; or
- Date they were first notified of notice obligations (typically through receiving the Initial/ General COBRA Notice).

**Notice requirement triggered by following events (initial or second qualifying events):**

- Divorce or legal separation
- A covered dependent ceasing to be an eligible dependent under the terms of the plan

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

**Reasonable procedures established by plan administrator must be followed.**



# Notice Requirements for Employers

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

- 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.

# Plan Administrator's Election Notice

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

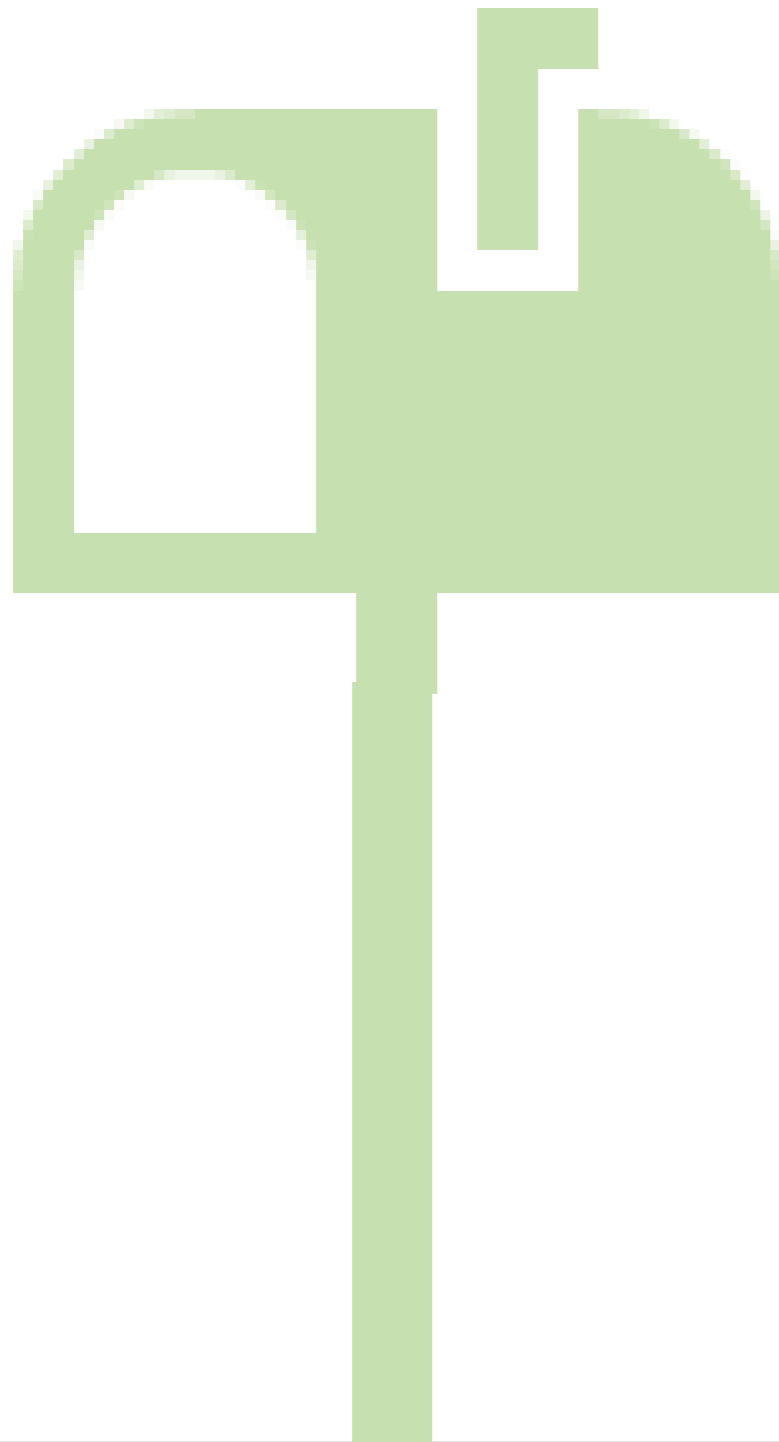
- When employer is plan administrator, notice must be provided within 44 days of later of qualifying event or loss of coverage (if delayed notice rule applies).

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 Election Notice

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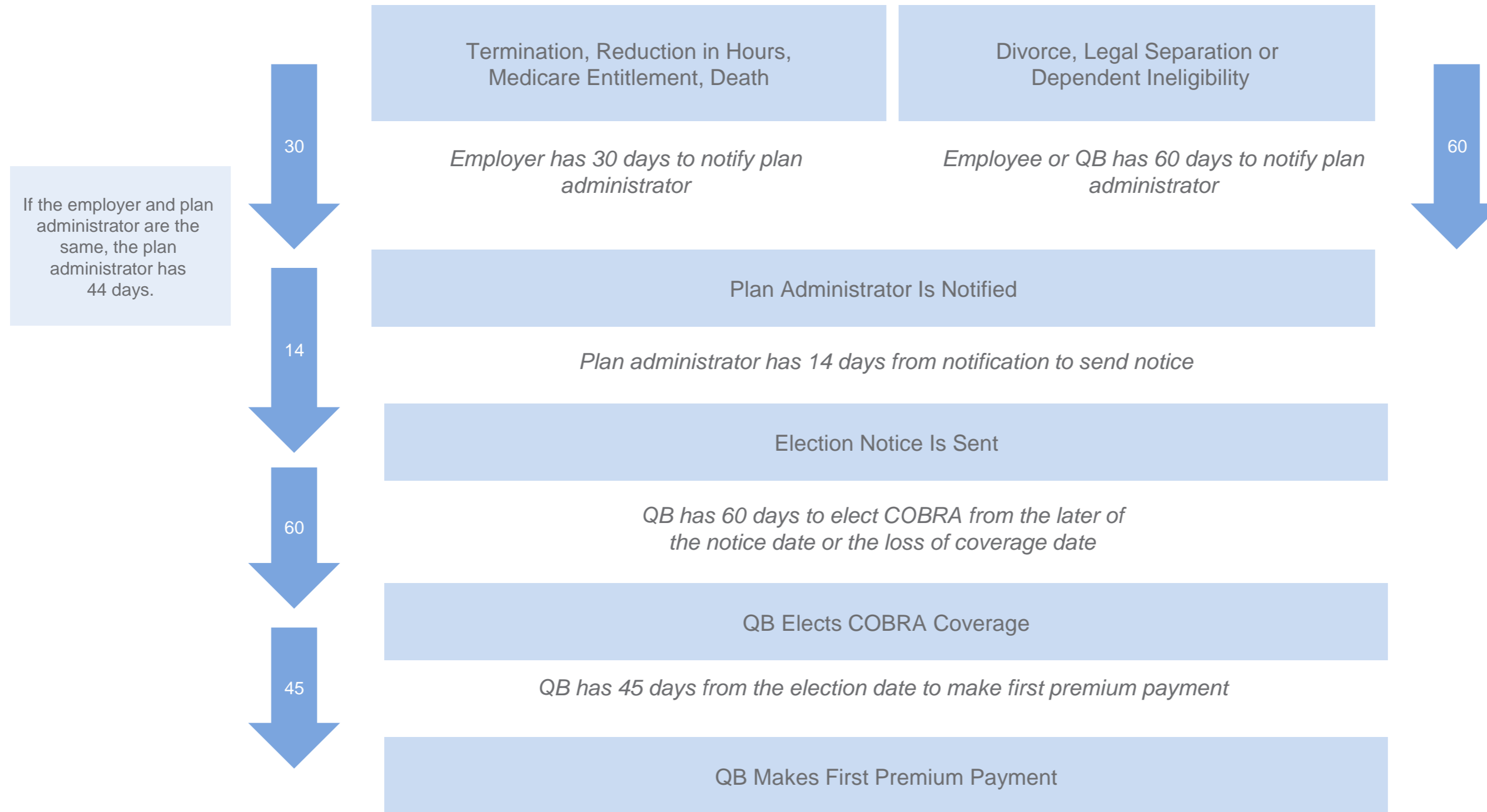
First class mail, addressed to the employee and spouse (if covered) at the last known address will meet this requirement

- 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 the ERISA electronic delivery safe harbor requirements (with respect to both employee and covered spouses):

- It's possible a single notice could be furnished to a shared home email address
- Given the administrative burden of obtaining affirmative consent from covered spouses, providing the COBRA initial notice via first-class mail is generally considered best practice

# The COBRA Timeline



# Notice of Unavailability

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Plan administrator (including an employer if they are the plan administrator) must give notice to individual 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 (including an employer if they are the 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<sup>1</sup>

Note: this notice is *not* required when COBRA coverage ends due to the COBRA maximum coverage period expiring.

*(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

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- 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

# Special Issues



# Health FSAs and HRAs

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## Limited COBRA obligations apply to health FSAs if:

- The health FSA is a HIPAA-excepted benefit (i.e., maximum available reimbursement including employer contributions may not exceed 2X the employee's FSA annual salary reduction election (or if greater, the amount of the employee's FSA annual salary reduction amount for the year, plus \$500 **and** employee is **eligible** for employer's group health plan that is not limited to excepted benefits (i.e., major medical coverage)).
- Maximum annual COBRA premium equals or exceeds the maximum annual health FSA coverage amount

## If limited COBRA obligation applies:

- COBRA must be offered only if the total amount of salary reductions less reimbursed expenses prior to the qualifying event results in an underspent account balance; and
- The continuation period for a health FSA is limited to the remainder of the plan year

## 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: Limited COBRA 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 elected minus \$1,000 already spent
- Maximum amount the plan could require as payment for remainder of plan year is **\$1,122**
  - » \$100 a month plus 2% administrative fee = \$102
  - » \$102 X 11 months = \$1,122

Employer need not offer HFSA under special limited COBRA obligation

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

Employee elects annual HFSA benefit of \$2,400 and has \$1,200 in reimbursable claims

- Employee terminates 10/31
- Maximum benefit available for remainder of plan year is **\$1,200**
  - \$2,400 elected minus \$1,200 already spent
- Maximum amount the plan could require as payment for remainder of plan year is **\$404**
  - \$200 a month plus 2% administrative fee = \$202
  - \$202 x 2 months = \$404

Employer must offer HFSA under special limited COBRA obligation



# Impact of FMLA

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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.

Coverage must be reinstated upon return from FMLA leave even if coverage is terminated during leave.



**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

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## Uniformed Service Employment and Reemployment Rights Act of 1994

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



# COBRA and State Law

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

- State continuation requirements may apply to fully-insured plans
- State continuation requirement may apply to non-federal governmental plans

## Example

Kyle's employer has 200 employees. June divorces her spouse (Kyle) and loses eligibility for coverage under Kyle's employer's fully-insured major medical plan. Federal COBRA provides up to 36-months of coverage for June.

- The fully insured plan June is enrolled in is subject to a state law that requires continuation rights beyond 36 months
- The employer must comply with federal COBRA and provide the extended state continuation



An employer whose plan is subject to both COBRA and state continuation law(s) should request the assistance of legal counsel.

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