

## Employee Benefits Series



HOW TO AVOID

# The Top 10 COBRA Mistakes



# How to Avoid the Top 10 COBRA Mistakes

## Introduction

[COBRA](#) is a federal law that requires group health plans sponsored by employers with **20 or more employees** to offer employees and their family members (including legally married same-sex spouses who are otherwise eligible for coverage under the plan) the option to continue benefits for limited periods of time when coverage under the plan would otherwise end due to certain [qualifying events](#). The law sets rules for how and when continuation coverage must be offered, how employees and their families may elect COBRA, and what circumstances justify terminating coverage. It also requires employers and plans to provide [specific notices](#) in connection with administering COBRA.

With so many requirements under COBRA, it's easy to make a mistake—but a violation can be costly. If a plan does not comply with COBRA, the employer maintaining the plan may be liable for a [tax penalty](#) of \$100 per employee or family member (up to \$200 per family) for **each day** of noncompliance, subject to a statutory limit of up to \$500,000 for unintentional violations that are due to reasonable cause and not willful neglect. [ERISA](#) provides for additional penalties and gives affected persons—as well as the Department of Labor—the right to file a lawsuit.



Complying with COBRA is the direct responsibility of the [plan administrator](#). Many group health plans are administered by the employer that sponsors the plan, but plans are also frequently administered, in whole or in part, by another individual or organization separate from the employer, such as a professional benefits administration firm. (Both "employer" and "plan administrator" are used herein to refer to the entity responsible for managing the plan.) If you have any questions regarding your obligations under the law, please consult a knowledgeable employment law attorney or the [Employee Benefits Security Administration](#) at 1-866-444-3272.

### ***Mistake #1. Thinking Your Group Health Plan is Not Subject to COBRA (or That You Don't Have a Group Health Plan)***

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COBRA generally applies to private-sector [group health plans](#) maintained by employers that have **at least 20 employees on more than 50% of their typical business days** in the previous calendar year. It's important to remember that [both full- and part-time employees are counted](#) to determine whether a plan is subject to COBRA. Each part-time employee counts as a fraction of a full-time

## How to Avoid the Top 10 COBRA Mistakes

employee, equal to the number of hours the part-time employee worked divided by the hours an employee must work to be considered full-time.

Some employers who meet this threshold mistakenly believe that COBRA does not apply to **arrangements outside of major medical coverage**. In fact, the definition of "group health plan" is broad enough to include, for example, some [Health Reimbursement Arrangements](#) (HRAs) offered by an employer. For purposes of COBRA, a group health plan includes [any arrangement an employer](#)



[establishes or maintains to provide employees or their families with medical care](#), including:

- Inpatient and outpatient hospital care;
- Physician care;
- Surgery and other major medical benefits;
- Prescription drugs; and
- Dental and vision care.

If there is any question as to whether COBRA applies to a particular plan, or if your company has common ownership interests which may affect your employee headcount, be sure to consult with an attorney or a benefits professional to ensure compliance.

### *Mistake #2. Forgetting About State Law*

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Don't assume that federal COBRA is the only law your company needs to worry about when it comes to continuation of coverage requirements. Many states have enacted what are commonly referred to as "**mini-COBRA**" laws, which typically require continuation of group health plan coverage provided by employers with fewer than 20 employees. Some states have benefits that are identical to those required by federal COBRA, while others have significantly different benefits; in some cases, benefits may be more favorable to plan participants. States may also have different requirements for employee eligibility and different maximum periods of coverage. Employers of **all sizes** should consult with employment law counsel and/or their [state insurance departments](#) to determine if a state mini-COBRA law applies to their plans and if so, how the state's law differs from federal COBRA.

## How to Avoid the Top 10 COBRA Mistakes

### *Mistake #3. Not Sending Required Notices or Providing Inaccurate or Insufficient Information in the Notices*

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Group health plans are required to provide [qualified beneficiaries](#) (generally employees, current or former spouses—including legally married same-sex spouses, and dependent children) with **specific notices explaining their COBRA rights**. Some of the key [notice requirements](#) under COBRA include:

- [COBRA General Notice](#). A group health plan must provide a general notice describing COBRA rights to an employee and his or her spouse who become covered under the plan, **within the first 90 days of coverage**. This requirement may be satisfied by including the notice in the [summary plan description](#) (SPD) and giving the SPD to the employee and to the spouse within the time limit.
- [COBRA Election Notice](#). Within 14 days after receiving notice of a qualifying event, the plan administrator must provide qualified beneficiaries with an election notice, in person or by first class mail, which describes their rights to COBRA and how to make an election.

There are **very specific requirements** as to what information must be included in these notices. One way to avoid mistakes is to use the [Model General Notice](#) and the [Model Election Notice](#) provided by the U.S. Department of Labor, filling in the blanks with your plan information. Other notices, such as the [Notice of Unavailability of Continuation Coverage](#) and the [Notice of Early Termination of COBRA Coverage](#), should be sent to qualified beneficiaries as necessary.

It is important to have procedures in place for keeping track of when and to whom notices are sent. Consider using a form of delivery that will provide **documentation that the notice was delivered** (such as a return receipt or other written proof of delivery). In the event a qualified beneficiary asserts that he or she did not receive a required COBRA notice, these records can provide evidence of your compliance.

### *Mistake #4. Failing to Include the Spouse (and Other Qualified Beneficiaries) When Sending Required Notices*

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Even if your COBRA notices include all of the information required by law and you provide them to the covered employee within the required time frames, it's still possible to make a mistake if notice is not also given to the **spouse and/or other qualified beneficiaries** (including legally married same-sex spouses who are otherwise eligible for coverage under the plan) as may be required for a particular

## How to Avoid the Top 10 COBRA Mistakes

notice. A plan may generally satisfy the requirement to provide notices under COBRA to a covered employee and his or her spouse by furnishing a single notice addressed to both if, on the basis of the most recent information available to the plan, the two reside at the same location. Similarly, there is typically no requirement to provide a separate notice to dependent children who share a residence with a covered employee or the employee's spouse to whom proper notice is provided.

To **minimize the possibility of errors** involving notice recipients, employees should be required (and periodically reminded) to notify the plan administrator promptly of a separation, divorce, or any other event that results in a spouse and/or dependents no longer living at the same address as the employee. The plan should also have procedures in place to ensure that any changes in address are promptly and accurately recorded.

### *Mistake #5. Not Recognizing When a Qualifying Event Has Occurred*

[Qualifying events](#) are events that cause an individual to lose group health coverage. Recognizing when a qualifying event has occurred is **essential to complying with COBRA** because the employer is responsible for notifying the plan administrator of certain qualifying events, and the group health plan is not required to act until it receives such notice. The employer is required to notify its plan administrator (if other than the employer) **within 30 days** of the occurrence of the following qualifying events:



- Termination or reduction in hours of employment of the covered employee;
- Death of the covered employee; or
- The covered employee becoming entitled to Medicare.

A reduction of hours occurs whenever there is a decrease in the hours that a covered employee is required to work or actually works, but only if the decrease is not accompanied by an immediate termination of employment. For example, an absence from work due to disability, a temporary layoff, or any other reason (other than due to [FMLA](#) leave) is a reduction of hours if there is not an immediate termination of employment. If a group health plan measures eligibility for coverage by the number of hours worked in a given time period, and an employee covered under the plan fails to work the minimum number of hours during that time period, the **failure to work the minimum number of**

## How to Avoid the Top 10 COBRA Mistakes

**required hours** is a reduction of hours of that covered employee's employment and a COBRA qualifying event.

The covered employee or one of the qualified beneficiaries is responsible for notifying the plan if the qualifying event is divorce, legal separation, or a child's loss of dependent status under the plan; however, the plan must have established procedures for how individuals can provide notice of these types of qualifying events. The procedures must describe how, and to whom, notice should be given, and what information must be included in the notice.

### *Mistake #6. Miscalculating the Period of COBRA Coverage*

Employers must offer employees and other qualified beneficiaries (including legally married same-sex spouses who are otherwise eligible for coverage under the plan) the [maximum period of COBRA coverage](#) to which they are entitled. The type of qualifying event determines who the qualified beneficiaries are and the amount of time the plan must offer health coverage to them under COBRA:

Qualifying Event	Qualified Beneficiary	Maximum Period of Continuation Coverage
Termination (except for <a href="#">gross misconduct</a> ) Reduction in hours of employment	Employee Spouse Dependent child	18 months*
Employee entitled to Medicare Divorce or legal separation Death of covered employee	Spouse Dependent child	36 months
Loss of dependent child status	Dependent child	36 months

\* In [certain circumstances](#), qualified beneficiaries entitled to 18 months of COBRA coverage may be entitled to a disability extension of 11 months (for a total maximum period of 29 months), or an extension of an additional 18 months due to the occurrence of a second qualifying event (for a total maximum period of 36 months). Your plan rules, as well as your election notice for any offer of an 18-month period of COBRA, should describe the notice required in either instance for the qualified beneficiary to request an extension of COBRA.

Keep in mind also that certain events, such as failure to pay premiums, may justify [termination of COBRA](#) before the end of the maximum period of coverage.

## How to Avoid the Top 10 COBRA Mistakes

### *Mistake #7. Ignoring Incorrect Premium Payments*

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Employees and other qualified beneficiaries may be required to [pay the full premium](#) for COBRA continuation coverage, even if the employer made a contribution prior to the loss of benefits. The **premium cannot exceed 102% of the cost to the plan** for similarly situated individuals who have not incurred a qualifying event (for qualified beneficiaries receiving the 11-month disability extension of coverage, the premium for those additional months may be increased to 150% of the plan's total cost of coverage). A plan must allow premiums to be paid on a monthly basis.

If the amount of a premium payment made to the plan is wrong, but is not significantly less than the amount due, the amount paid **will be deemed to satisfy the plan's requirement for the amount that must be paid, unless the plan notifies the qualified beneficiary** of the amount of the deficiency and grants a reasonable period of time (not less than 30 days) to pay the difference. Even if your plan does not send monthly premium notices, it must provide this notice of underpayment or the amount submitted will be treated as full payment.



### *Mistake #8. Treating Employees on COBRA Differently from Similarly Situated Employees Who Are Not on COBRA*

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The continuation coverage offered under COBRA must be [identical to the coverage that is currently available](#) under the plan to similarly situated individuals who are covered under the plan and not receiving COBRA. (Generally, this is the same coverage that the qualified beneficiary had immediately before the qualifying event.) Qualified beneficiaries must receive the **same benefits, choices, and services** as similarly situated non-COBRA participants and beneficiaries under the plan, such as the right during an open enrollment season to choose among available coverage options. Any changes made to the plan's terms that apply to similarly situated active employees and their families will also apply to qualified beneficiaries receiving COBRA continuation coverage.

### *Mistake #9. Terminating COBRA Continuation Coverage Too Early*

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There are [very specific rules](#) regarding when COBRA coverage may terminate prior to the expiration of the maximum period of coverage. In general, a group health plan may terminate COBRA coverage earlier than the end of the maximum period **only for the following reasons**:

## How to Avoid the Top 10 COBRA Mistakes

- Premiums are not paid in full on a timely basis (note that payment is considered made on the date on which it is **sent to the plan**);
- The employer ceases to maintain any group health plan;
- A qualified beneficiary begins coverage under another group health plan after electing COBRA (as long as that plan doesn't impose an exclusion or limitation with respect to a preexisting condition of the qualified beneficiary);
- A qualified beneficiary becomes entitled to Medicare benefits after electing COBRA;
- A qualified beneficiary engages in conduct that would justify the plan in terminating coverage of a similarly situated participant or beneficiary not receiving COBRA (such as fraud).

If continuation coverage is terminated early, the plan must provide each qualified beneficiary with an [early termination notice](#). The notice must be given as soon as practicable after the decision is made and it must describe the date coverage will terminate, the reason for termination, and any rights the qualified beneficiary may have under the plan or applicable law to elect alternative group or individual coverage (such as a right to convert to an individual policy).

### *Mistake #10. Failing to Understand the Relationship Between Medicare and COBRA*

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Whether an employee or family member is covered by **Medicare may affect the right to continuation coverage**. Note the following general rules:

- An employee's spouse or child who loses group coverage because the employee becomes entitled to Medicare may elect [up to 36 months of COBRA](#) continuation coverage.
- Where a spouse or child is already receiving COBRA due to the employee's termination or reduction in hours, the employee's becoming entitled to Medicare may be a [second qualifying event](#)



that would allow the 18-month maximum period of continuation coverage to be extended for an additional 18 months, for a total of up to 36 months.

- If a qualified beneficiary first becomes entitled to Medicare benefits *on or before* the date that COBRA is elected, the qualified beneficiary's

## How to Avoid the Top 10 COBRA Mistakes

entitlement to Medicare benefits cannot be a basis for terminating the qualified beneficiary's continuation coverage.

- If a qualified beneficiary first becomes entitled to Medicare benefits *after* the date on which COBRA continuation coverage is elected, the plan may terminate the qualified beneficiary's COBRA coverage upon the date on which the qualified beneficiary becomes so entitled.
- A qualified beneficiary becomes entitled to Medicare benefits upon the effective date of enrollment in either part A or B, whichever occurs earlier. Thus, merely being eligible to enroll in Medicare does not constitute being entitled to Medicare benefits.

The rules regarding the interaction between Medicare and COBRA can be quite complex and there are other issues related to [coordination of benefits](#) (i.e., who pays first) that may also need to be addressed. If there is any question as to the applicability of COBRA or how continuation coverage may be affected by Medicare, it is best to consult a knowledgeable employment law attorney for specific guidance to ensure full compliance with the law.

### If You Discover a Mistake

Despite the best intentions, there may be times when COBRA notices are not sent by the due date or some other administrative requirement of COBRA is overlooked. **If a mistake is discovered, it should be rectified immediately.** Because tax penalties for noncompliance are generally assessed for [each day of a violation](#), correcting the error as soon as possible may result in lower penalties. Additionally, if an employer becomes aware of a failure to comply with COBRA, and makes no effort to correct it, that failure may become attributable to willful neglect which [eliminates the cap on penalties](#).

**As soon as you realize a mistake has occurred**, you should get in touch with a knowledgeable employment law attorney or a trusted benefits advisor who can guide you on the appropriate next steps and any corrective action that needs to be taken.

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Written and created by: HR 360, Inc. | Last reviewed: February 24, 2016

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