

VII. Qualifying Events: What Triggers COBRA?

- | | |
|---|--|
| <p>A. Overview of Qualifying Events</p> <p>B. Termination of Employment (Event #1)</p> <p>C. Reduction of Hours (Event #2)</p> <p>D. Divorce or Legal Separation (Event #3)</p> <p>E. Death of the Covered Employee (Event #4)</p> <p>F. A Dependent Child’s Ceasing to Be a Dependent Under the Plan (Event #5)</p> <p>G. Entitlement to Medicare (Event #6)</p> <p>H. Bankruptcy (Event #7)</p> | <p>I. [Reserved]</p> <p>J. Not All Losses of Health Coverage Are Caused by Triggering Events</p> <p>K. Triggering Event Must Cause Loss of Coverage</p> <p>L. Special Issues: Leaves of Absence</p> <p>M. Special Issues: Severance Agreements and Severance Pay</p> <p>N. Special Issues: COBRA and Bankruptcy</p> <p>O. Special Issues: Loss of Coverage in Anticipation of Qualifying Event</p> |
|---|--|

A. Overview of Qualifying Events

1. General Rule

COBRA requires employers to offer a COBRA election to qualified beneficiaries when there is:

- a triggering event listed in the statute¹
- that causes (or will cause) a loss of plan coverage
- within the maximum coverage period
- while the plan is subject to COBRA.

When these elements exist, there is a COBRA qualifying event.²

ERISA describes the rule this way: A COBRA qualifying event is a specified triggering event, “which, but for the continuation coverage required [by COBRA], would result in the loss of coverage of a qualified beneficiary.”³ The IRS COBRA regulations provide that an event is a qualifying event if it (a) is one of the specified triggering events; (b) causes the covered employee, spouse, or dependent child to lose coverage during the maximum coverage period; and (c) occurs while the plan is subject to COBRA.⁴

Step-by-Step Compliance Guide. For practical guidance identifying COBRA qualifying events based on the detailed information provided in this Section, consult Section XXXVIII, which contains EBIA’s useful step-by-step compliance guide.

¹ We refer to these listed events as “triggering events,” even though that term is not used in the statute or regulations, in order to distinguish more clearly between the two main components of a COBRA qualifying event—namely, (a) the occurrence of one of the listed triggering events; and (b) the occurrence of a loss of coverage caused by the triggering event.

² Treas. Reg. §§ 54.4980B-4, Q/As-1(a) and -1(d). Indeed, a court may dismiss a complaint for COBRA coverage that fails to allege that a triggering event (e.g., termination of employment) caused the qualified beneficiary to lose coverage. *Fenner v. Favorite Brands Int’l, Inc.*, 25 F. Supp. 2d 870 (N.D. Ill. 1998). See also *Clausell v. Bayer Corp.*, 2015 WL 5146704 (E.D.N.C. 2015) (court dismissed case because employee had experienced no loss of coverage).

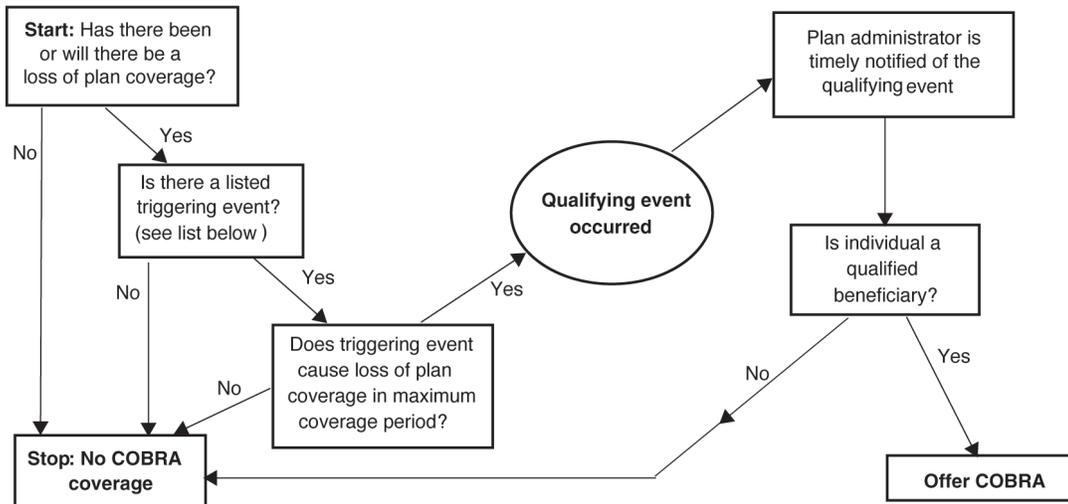
³ ERISA § 603.

⁴ Treas. Reg. § 54.4980B-4, Q/A-1(a); see also *Fritz v. Health & Welfare Dep’t of the Constr. and Gen. Laborers’ Dist. Council of Chicago and Vicinity*, 2001 WL 34085714 (N.D. Ill. 2001) (qualifying event cannot occur before a plan is subject to COBRA, but court applies exception for multiple qualifying events); *Chacosky v. The Hay Group*, 1991 WL 12170 (E.D. Pa. 1991).

2. Framework for Analysis

The following chart describes the steps to take in analyzing whether or not a COBRA election should be offered.

Exceptions. The analysis below (in particular, a trigger causing a loss) does not work well in at least two instances: (a) when coverage is lost in connection with leave taken under the Family and Medical Leave Act (FMLA) of 1993 (see subsection L); and (b) when coverage is reduced or eliminated in anticipation of a qualifying event (see subsection K).



In the following subsections, we discuss the elements of a qualifying event in more detail.

3. The Seven Triggering Events

COBRA specifies seven triggering events that can be qualifying events if they result in a loss of coverage:

- voluntary or involuntary termination of the covered employee’s employment other than by reason of gross misconduct;
- reduction of hours of the covered employee’s employment;
- divorce or legal separation of the covered employee from the employee’s spouse;
- death of the covered employee;
- a dependent child ceases to be a dependent under the generally applicable requirements of the plan;
- a covered employee becomes entitled to benefits under Medicare; and
- an employer’s bankruptcy, but only with respect to health coverage for retirees and their families (this triggering event does not appear in the PHSA).⁵

⁵ ERISA § 603; Code § 4980B(f)(3); Treas. Reg. § 54.4980B-4, Q/A-1.

Different Events for Different Qualified Beneficiaries. A covered employee can be a qualified beneficiary entitled to elect COBRA only with respect to the triggering events of termination of employment, reduction of hours, and bankruptcy of the employer.* These three triggering events also apply to spouses and dependent children, along with the triggering events of divorce/legal separation, death of a covered employee, and a covered employee's becoming entitled to Medicare, which apply only to spouses and dependent children. When the trigger is a child's ceasing to be a dependent, COBRA applies only to the dependent child. Details about who is entitled to elect COBRA are found in Section IX.

* Treas. Reg. § 54.4980B-3, Q/A-1(d).

B. Termination of Employment (Event #1)

The termination of a covered employee's employment (other than for gross misconduct) is a triggering event whether it is voluntary or involuntary. Indeed, "apart from facts constituting gross misconduct, the facts surrounding the termination...are irrelevant in determining whether a qualifying event has occurred."⁶ Therefore, termination of employment includes retirement. It also includes voluntary quitting, layoffs, other employer-initiated discharges (other than for gross misconduct), strikes, and lockouts.⁷

Question: Is it permissible for a terminated employee, near the end of the 18 months of COBRA coverage, to be rehired for a month and then elect another 18 months of COBRA coverage?

Answer: Assuming that the employer is willing and plan coverage starts on the date of hire, this is acceptable—although the insurer might object if the sole reason the individual is rehired is to extend COBRA coverage. Courts have held that COBRA is not required following "sham" terminations of employments.*

* See, e.g., *Powell v. Strategic Outsourcing Inc.*, 2009 WL 746253 (S.D. Tex. 2009).

COBRA Obligations During COVID-19 Pandemic. Faced with challenges relating to the COVID-19 pandemic, many employers are implementing terminations, furloughs, and layoffs of portions of their workforce, and general COBRA rules continue to apply. For frequently asked questions regarding COBRA obligations during the pandemic, see Section VI.

1. Tendering a Resignation

Tendering a resignation is not a triggering event. As one court noted:

an employee may give days, weeks, or even months prior notice, which an employer will accept. In the interim the employment relation continues. Only when the employee leaves the company, or has his hours reduced to the point of losing coverage, does a qualifying event occur, thereby triggering the administrator's duties under COBRA.⁸

2. Employee Transfers Within Single Company

While neither the statute nor regulations address the situation, it is clear that, when a covered employee simply transfers from one position within an employing entity to another, there is no termination of employment even if the transfer causes a loss of coverage under a group health plan of the employer.

⁶ Treas. Reg. § 54.4980B-4, Q/A-2. See, e.g., *Olick v. Kearney*, 451 F. Supp. 2d 665 (E.D. Pa. 2006), *aff'd*, 2012 WL 4239423 (3d Cir. 2012) (employee who learned from his COBRA notice that he was terminated may not have been given timely notice).

⁷ Treas. Reg. §§ 54.4980B-4, Q/As-1(g), Example 2 and -2. *But see Powell v. Strategic Outsourcing Inc.*, 2009 WL 746253 (S.D. Tex. 2009) (COBRA not required following "sham" termination of employment).

⁸ *Mlsna v. Unitel Commc'ns, Inc.*, 41 F.3d 1124 (7th Cir. 1994).

Example: Employee Transfers Within Single Company. Tom is an employee of Hefty Corporation, which maintains manufacturing divisions around the country. Tom is covered under a group health plan maintained for employees of the division located in New York. Tom is transferred to a division in Montana, which causes him to lose coverage under the New York plan for himself, his wife, and his dependent children. Because he remains a full-time employee of Hefty, however, Tom's transfer is not a triggering event. Thus, even though his transfer caused a loss of coverage under the New York plan, it is not a COBRA qualifying event for Tom or any member of his family. This is the result whether or not Hefty's Montana division has a group health plan for its employees.

3. *Employee Transfers Within Controlled Group*

Neither the statute nor regulations address the issue of employee transfers within a controlled group of corporations or other entities. However, both ERISA and the IRS COBRA regulations define "employer" to include not only the "person for whom services are performed" but any other entity that is a member of that person's controlled group—i.e., all members of a group described in Code § 414(b) (controlled groups of corporations), Code § 414(c) (trades or businesses under common control), Code § 414(m) (affiliated service groups), or Code § 414(o) (other arrangements described in regulations).⁹ (These complicated rules, which sweep in all sorts of related organizations, are beyond the scope of this manual. For a more extensive discussion of these rules, consult *401(k) Plans* (Thomson Reuters/Tax & Accounting, 1994-present, updated quarterly).)

In addition, the IRS COBRA regulations define "employee" as an individual eligible to be covered under a group health plan "by virtue of the performance of services for the employer maintaining the plan..."¹⁰ Moreover, except for purposes of the small employer exception, the regulations define "employment relationship" (including "termination of employment of an employee") with reference to the definition of "employee."¹¹ Consequently, it appears that when a covered employee simply transfers from one employing entity to another within the same controlled group, there is no termination of employment even if the transfer causes a loss of group health plan coverage.

Example: Transfer Between Related Corporations. When Barbara's full-time employment with ABC Company is terminated, she is immediately hired into a full-time position with XYZ Company. Both companies are wholly owned subsidiaries of Alphabet Corporation and thus are part of the same controlled group. As a result of her transfer, Barbara loses coverage under the ABC group health plan for herself and her dependent child. However, it appears that Barbara's employment has not terminated because she remains employed by the same controlled group of corporations. Therefore, neither she nor her child would be entitled to elect COBRA under the ABC plan.

⁹ ERISA § 607(4); Treas. Reg. § 54.4980B-2, Q/A-2. See Code § 414(t)(2) (listing Code § 4980B as an applicable section).

¹⁰ Treas. Reg. § 54.4980B-3, Q/A-2(a)(1). There is no separate definition of the term "employer maintaining the plan." The regulation expressly provides that this definition of employee applies for all purposes under the regulation except the small employer exception, for which special rules are provided in Treas. Reg. § 54.4980B-2.

¹¹ Treas. Reg. § 54.4980B-3, Q/A-2(a)(2). Special rules regarding the definition of "employee" for purposes of the small employer exception are found at Treas. Reg. § 54.4980B-2, Q/A-5(c).

Does This Conclusion Make Us Queasy? Well, a little bit. A court technically is not bound to follow the IRS COBRA regulations when it is interpreting ERISA's COBRA provisions. (See Section III.) Even though the ERISA § 607(4) definition of employer is quite clear about incorporating the controlled group rules, if Barbara in the above example lost all health coverage because XYZ didn't maintain any plan for its employees, it is possible that a court might stretch to give her COBRA coverage under the ABC plan. However, we are not aware of any guidance or authority suggesting that COBRA should be offered in these circumstances, nor do we believe that employers consider such transfers to be qualifying events.

4. Mergers, Acquisitions, and Reorganizations

Whether and how terminations of employment occurring in connection with corporate mergers, acquisitions, and reorganizations constitute COBRA triggering events is discussed in Section XII.

5. Gross Misconduct Exception

a. Termination for Gross Misconduct Is Not Qualifying Event for Any Affected Person

The triggering event of termination of employment does not include termination because of gross misconduct. When a covered employee is terminated for gross misconduct, there is no qualifying event for the covered employee, or for the spouse or dependent children. None of them is entitled to a COBRA election.¹²

¹² See *Mlsna v. Unitel Commc'ns, Inc.*, 41 F.3d 1124 (7th Cir. 1994); *Rodriguez-Soto v. Presbyterian Med. Anesthesia Group*, 2019 WL 1349991 (D.P.R. 2019); *Berry v. Frank's Auto Body Carstar, Inc.*, 2011 WL 4360075 (S.D. Ohio 2011), *aff'd*, 2012 WL 3553505 (6th Cir. 2012); *Collins v. Aggreko, Inc.*, 884 F. Supp. 450 (D. Utah 1995) (*citing Mlsna*).