Verrill

Retiree Medical Coverage: Just Get the COBRA Waiver

by Karen K. Hartford on October 2, 2023

The interaction between employer-provided retiree medical coverage and COBRA[1] is complex. Many employers incorrectly assume they do not have to offer COBRA at retirement if they offer a retiree medical plan or a retiree health reimbursement arrangement (HRA), but the calculus is not that simple. Whether there is a requirement to offer COBRA and if so, to whom and when, depends on a number of factors as discussed below. Given the recent rise in COBRA litigation and the potential penalties for COBRA notice violations, we recommend employers consider routinely seeking informed waivers of COBRA coverage at retirement.

COBRA Continuation Coverage

The premise of COBRA is straightforward: if a group health plan covered individual (a "qualified beneficiary") experiences a qualifying event *and* that event results in a loss of coverage under the group health plan, COBRA continuation coverage must be offered for the time periods specified in the law.

COBRA continuation coverage is the same coverage that the individual had on the day before the qualifying event. COBRA enrollees are responsible for 100% of the cost of the coverage (both the employee and the employer portions) plus up to a 2% administrative fee.

Two COBRA-qualifying events apply to employees and dependents alike:

- the employee's termination of employment, and
- the employee's reduction in hours of employment.

If one of these events results in a loss of coverage under the group health plan, the plan must offer the affected qualified beneficiaries 18 months of COBRA continuation coverage.

[1] COBRA stands for Consolidated Omnibus Budget Reconciliation Act of 1985, as amended. It is a federal law that applies to employers with 20 or more employees and provides employees with the right to continue coverage for a limited time under their employer's group health plans.

Verrill

In addition, qualified beneficiaries who are covered dependents may experience one of the following qualifying events:

- the covered employee's death,
- the covered employee becoming entitled to Medicare,[2]
- divorce or legal separation from the covered employee, or
- a dependent child ceasing to be a dependent under the terms of the plan.

When one of these events results in a loss of coverage under the group health plan, the plan must offer affected qualified beneficiaries 36 months of COBRA continuation coverage.

Retirement as a Qualifying Event

When a covered employee retires, they experience a qualifying event – termination of employment. The question then becomes whether such event results in a loss of coverage requiring a COBRA offer.

Retiree Medical Coverage – Identical Coverage Under Same Plan

If an employer extends coverage for retirees under the same active employee plan that the employee had pre-retirement, and the coverage – including the cost of coverage to the individual – is identical both pre- and post-retirement, there is no loss of coverage and therefore no requirement to offer COBRA.

CAUTION: In this circumstance, if the extended coverage is subsequently lost prior to the applicable maximum COBRA period (*i.e.*, 18 or 36 months), then the retiree and any covered dependents will experience a COBRA qualifying event at the time of the subsequent loss, requiring an offer of COBRA continuation coverage for the applicable maximum period.

This outcome can be avoided if the employer requires all retirees and their covered dependents to sign a COBRA waiver at retirement as a condition of participating in the employer's retiree medical coverage. Note that COBRA waivers do not become effective until the COBRA election period (typically 60 days) has expired, and qualified beneficiaries may make changes to their election until it becomes effective.

[2] The details regarding the extent to which Medicare entitlement is or is not a COBRA-qualifying event is beyond the scope of this blog post.

Verrill

Retiree Medical Coverage – Different Coverage or a Separate Plan

If an employer offers its retirees coverage under the same plan as the retiree had pre-retirement but on different terms (*i.e*., different benefit coverage, different cost to the individual) or coverage under a separate plan, the retiree is considered under the law and regulations to have experienced a loss of coverage and must be offered COBRA. A loss of coverage will be deemed to occur even if the retiree is eligible for Medicare and the employer offers a Medicare supplement plan or a contribution to a retiree HRA to be used for Medicare premiums, and even if the employer coverage is more generous than Medicare or the employer fully subsidizes the retiree coverage. Put simply, when an employer offers retirees coverage on different terms or coverage under a separate plan, it cannot avoid its obligation to offer COBRA. The employer can, however, condition participation in its retiree medical coverage upon the waiver of COBRA.

Retiree Medical Coverage Offered for a Fixed Period**:** If at the time of retirement an employer offers the retiring employee a choice between COBRA or retiree coverage for a fixed period (*e.g*., 12 months, 36 months, etc.), and the employee elects the retiree coverage, no additional COBRA right will arise at the end of the fixed period.

CAUTION**:** If retiree coverage is offered for a fixed period and a second COBRA qualifying event, such as the death of the retiree, occurs before the end of such fixed period and results in the loss of coverage for covered dependents, such dependents will be entitled to an offer of COBRA at the time of the loss.

This outcome can be avoided if the employer takes steps to ensure that:

- its plan documents specify that retiree coverage of dependents will also last for the specified fixed period and will not be lost upon the occurrence of any subsequent COBRA qualifying event that occurs prior to the end of that fixed period; and
- all qualified beneficiaries are informed at the time of the employee's retirement that by electing retiree coverage for a fixed period, they have waived future COBRA rights.

Retiree Medical Coverage Offered for an Indefinite Period: If at the time of retirement an employer offers the retiring employee a choice between COBRA or retiree coverage for a period of time that cannot be quantified at the start (*e.g.,* until the occurrence of a future event such as the retiree's death or the retiree's entitlement to Medicare), the employer would be well-advised to collect COBRA waivers from all qualified beneficiaries. Without the waivers, any qualified beneficiary who subsequently loses coverage due to the occurrence of a COBRA qualifying event must be offered COBRA.

Conclusion

The interaction between retiree medical coverage and COBRA is complicated, the penalties and excise taxes for COBRA notice violations can be costly, and lawsuits for the failure to offer COBRA or to compel coverage can be costly and time-consuming. Small changes in plan language and taking action to seek informed waivers from qualified beneficiaries can make a big difference. Please contact a member of Verrill's Employee Benefits & Executive Compensation Group if you have questions regarding retiree medical coverage and COBRA.

Please contact a member of Verrill's Employee Benefits & Executive Compensation Group if you have any questions regarding retiree medical coverage and COBRA.

Karen K. Hartford
Partner
T (207) 253 4910
email