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ERISA@40: ERISA, COBRA, and the ACA

This is the third in a multi-part series of articles to be published over the next several months celebrating the 40th birthday of the Employee Retirement Income Security Act. ERISA was signed into law by President Gerald Ford on September 2, 1974 — Labor Day. This landmark law regulates many aspects of employer-sponsored retirement and welfare benefit plans. The series looks back to explore how the employer-sponsored employee benefits industry has evolved, highlights lessons learned, and looks forward to what employers may expect in the future.

This article examines COBRA, health care legislation enacted a decade after ERISA in order to provide a temporary continuation coverage option to workers and their dependents who lose job-based health coverage. In the years since its enactment, COBRA has served a crucial role in offering bridge coverage to many people who otherwise would have had to try and secure coverage on the individual insurance market. Now, with the ACA's marketplace in effect, these individuals can opt for marketplace coverage that is not limited in duration. Additionally, depending on their income, they may be eligible for a marketplace premium subsidy. We discuss below the prospects for COBRA coverage in future years given the availability of the marketplace coverage option.

Then and Now

In 1974 when ERISA was enacted, the average cost of a new house was approximately $34,900, with an average size of under 1,600 square feet. The average daily cost for an inpatient hospital visit was $110, and the average cost for delivering a baby and post-natal care was $1,000.

In 2014, the average cost of a new house is approximately $320,000, with average square footage last year of 2,600. Daily costs for inpatient hospital stays averaged $1,960 in 2011, and the average cost for delivering a baby — including pre- and post-natal care — is $8,800.

Background on COBRA

The central focus of congressional efforts in passing ERISA in 1974 was the safeguarding of pension — not health and welfare — benefits. Most of the substantive requirements for pension plan coverage and benefits, such as vesting, participation, and funding rules, do not apply to health and welfare plans. ERISA as enacted regulated health and welfare plans only with respect to information disclosure, fiduciary responsibility, and participant remedies.

COBRA: Where it All Started

The idea behind COBRA came from an organization called the Older Women's League (OWL), which sought to protect health coverage rights for women following a divorce or the death of a spouse.

A decade later, however, Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to address growing concern over workers and their dependents experiencing health coverage gaps. Prior to COBRA, an individual losing coverage under a job-based group health plan without the immediate option of participating in a group health plan sponsored by a subsequent employer or by a spouse's employer (or of obtaining other coverage like Medicaid or Medicare) would have to turn to the individual health insurance market. There, an individual could be denied coverage due to a pre-existing condition. Moreover, the cost of premiums on the individual market was prohibitive to many, and increasingly so as individuals aged.

Since its enactment in 1986, COBRA has required employers with at least 20 employees in the prior calendar year to offer continuation coverage under their group health plan following certain work or life events (termed "qualifying events") that result in a loss of coverage, such as termination of employment, reduction in hours, divorce, and aging out of dependent child status. Continuation coverage is available for up to 18 or 36 months following the loss of coverage, depending on the reason underlying the coverage loss. Additionally, COBRA gives individuals entitled to coverage (known as "qualified beneficiaries") specific notice and coverage election rights and limits the amount that plans may charge qualified beneficiaries for the coverage. Generally, qualified beneficiaries include covered employees, along with their spouses and dependent children who are covered under the group health plan the day before the qualifying event.

Enter the Affordable Care Act

The Affordable Care Act (ACA), enacted in 2010, altered the health coverage landscape for qualified beneficiaries by creating the health insurance marketplace (also known as the "exchange") intended to make affordable health insurance coverage available to individuals. Marketplace coverage became available nationwide on January 1, 2014. Individual marketplace policies must offer certain "essential health benefits" (see our February 27, 2013 *For Your Information*) and issuers cannot refuse coverage based on pre-existing conditions. Marketplace enrollees whose household income is between 100% and 400% of the federal poverty level may be eligible for financial assistance in the form of a low income premium subsidy to defray the cost of coverage.

While ACA did not change any of COBRA's substantive requirements, it provides qualified beneficiaries the marketplace alternative. Similar to employer plans, the marketplace offers "special enrollment" periods during which individuals can enroll in a marketplace plan outside of annual open enrollment. Under marketplace rules, an individual losing job-based coverage may elect a marketplace plan either 60 days before or 60 days after the loss of coverage date. To learn more about marketplace special enrollment rules in general, please see our August 4, 2014 *For Your Information*.

In order to increase awareness of the marketplace option, the DOL has updated its model COBRA notices to point out the availability of marketplace coverage for qualified beneficiaries and to explain that individuals may qualify for lower costs on marketplace plans. For more information on the updated model COBRA notices, see our June 3, 2014 *For Your Information*.

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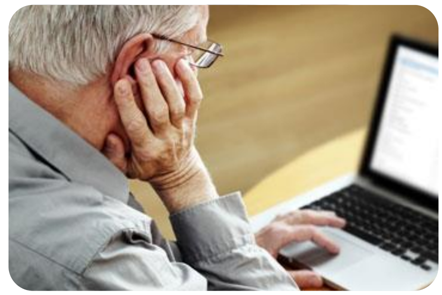
The Role of COBRA in a Marketplace World

Marketplace coverage may be less expensive than COBRA, particularly for individuals who can qualify for the premium subsidy. And, unlike COBRA, it is not limited in duration. Accordingly, many anticipated that the availability of the marketplace option to those losing job-related coverage would make COBRA coverage effectively irrelevant. So who enrolls in COBRA anymore?



Notwithstanding the attractive cost and duration of marketplace coverage, COBRA coverage continues to be a desirable option in several specific circumstances. First, as we explain in our June 3, 2014 *For Your Information,* COBRA can serve as a bridge to fill coverage gaps after job-based coverage has ended but before marketplace coverage becomes effective. These gaps occur because marketplace coverage following a loss of job-related coverage is effective, at the earliest, on the first day of the calendar month following the marketplace election. COBRA coverage, on the other hand, is generally retroactive to the date of the coverage termination.

For example, an individual who loses job-based coverage on August 1 would not have effective marketplace coverage until September 1, even if he or she makes a marketplace election immediately. Likewise, an individual who is terminated on August 30 with job-based coverage lasting through the end of the calendar month of termination (i.e., August 31) would have only until August 31 — a single day — to select a marketplace plan in order to secure coverage effective September 1. Qualified beneficiaries in these situations can sign up for COBRA coverage retroactive to the coverage termination date to fill the gap, and then simply disenroll from COBRA coverage by not paying the COBRA premium for subsequent coverage periods once marketplace coverage becomes effective.

Our ERISA@40 Series

We've published two other articles thus far in the series:

ERISA@40: A History Lesson

ERISA@40: ERISA Preemption and the ACA

Additionally, qualified beneficiaries who have already met or are close to meeting an annual deductible or out-of-pocket limit may wish to continue their current coverage rather than start anew with a marketplace plan. Those undergoing a course of treatment for an ongoing condition (for example, cancer treatment or pregnancy care) may wish to maintain access to the same network of available providers rather than risk having to switch providers, which might be necessary given the narrow provider networks available in many marketplace plans to date. Yet others losing job-based coverage may anticipate gaining other coverage in short order, such as through another job or by becoming eligible for Medicare, and, therefore, may want to continue current coverage for an anticipated short time period.

Thoughts on the Future of COBRA

With the marketplace still a relatively new and unfamiliar option, Congressional action to repeal or modify COBRA is unlikely in the near future. Additionally, the fact that marketplace coverage is available only on a prospective (i.e., first of the month following plan selection) basis secures the present status of COBRA as a critical tool for avoiding coverage gaps.

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That said, if marketplace special enrollment rules allow an individual to enroll in coverage effective retroactive to the date of the loss of job-based coverage, marketplace coverage could obviate the need for COBRA coverage — at least from a timing perspective. Even short of a complete repeal of COBRA, Congress could decide to reduce the maximum length of COBRA coverage in light of marketplace options. Furthermore, the availability of more robust provider networks through marketplace plans could make COBRA coverage a less desirable choice for qualified beneficiaries undergoing a course of treatment for an ongoing condition.

For the time being, though, it seems COBRA is here to stay — albeit likely serving more circumscribed, targeted purposes.

In Closing

Several decades after its enactment, the future of COBRA coverage is a hot topic of discussion among employers, employer trade associations, and other stakeholders in the employee benefits world. Because COBRA administrative trends could be key in shaping the role of COBRA going forward in a marketplace world, employers may wish to determine if, as many expect, fewer qualified beneficiaries opt for COBRA. Of those who do enroll in COBRA coverage, employers may want to track how many drop that coverage when marketplace annual open enrollment comes around.

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