COBRA - When Did *That* Change?
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A Q&A on COBRA and its Never-Ending Challenges
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QUESTION: If an employer makes a mistake or wants to make an exception, is the carrier required to abide by the employer's request?

ANSWER: I often advise employers, "If you stay within the compliance provisions of the law, the law will protect you. But if you fail -- or make an exception -- you step outside the protection of the law and your insurer may not support your mistake or your exception decision."

We were recently asked by a client to make an exception and accept a late COBRA payment. Of course, the client has the final decision but, as a compliance administrator, it is our job to be sure the employer understands the consequences of their exception request.

The payment was clearly late. The envelope was postmarked six days after the end of the grace period. COBRA law requires the payment be sent by the grace period. Since the postmarked enveloped had been scanned with the payment, we had proof of the late payment.

I explained that the employer could make an exception but the carrier would likely not support the exception, so the employer would truly be funding any claims the COBRA participant may have.

"What? He is on the list for a transplant -- we aren't going to pay for that!" The employer changed his mind about making an exception.

What provided protection for the employer was the proof of the postmark. Prior to the 1999 final regulations, payment was required to be RECEIVED by the grace period. However, the final regulations specify that the payment must be SENT by the grace period. Many employers doing their own COBRA administration may have thrown away their proof and would have been forced to accept the payment. Even worse is when employers find themselves in a personal situation--they are friends with the ex-employee, etc.

COBRA law is an employer law, not an insurer law. The law provides minimum guidelines and, of course, an employer can go above and beyond the law. But the insurer is not required to follow the decision if the employer chooses to expand the law.

What if an employer fails to properly offer COBRA? Why should the carrier have to pay for the employer's mistake?

I have seen carriers (especially network plans) reinstate coverage to provide the appearance of insurance. This provides access to network providers, but every claim submitted is adjudicated (by network discounts) and sent to the employer for payment, or paid by the carrier and billed to the employer.

I have even seen the employer receive no help from the carrier and simply provide the COBRA participant self-addressed envelopes so that all claims can be sent direct to the employer for payment - and without any discounts - paid as billed.

Even stop-loss carriers will not support COBRA mistakes or exceptions. In these instances, the employer may discover the true meaning of "self-insured."

QUESTION: I recently heard about a court case involving an Initial COBRA Rights Notice. What is that and when should it be provided?

ANSWER: Northwest Airlines recently won a case concerning their denial of COBRA continuation offering to an employee's ex-spouse. Could your clients have won?

When the Northwest Airlines employee and his wife originally enrolled in the group medical plan, the company sent an Initial COBRA Rights Notice to the last address given; it was addressed to both the employee and the spouse. As required, this notice advised the couple of their rights to continue medical coverage should they experience a COBRA qualifying event. It also explained the 60 days to notify the employer of COBRA qualifying events of which the employer may not be aware (legal separation, divorce or child no longer eligible).

This is the purpose of the Initial Rights Notice. It should be provided as a separate notice sent to the home of all covered employees and their dependents within 30 days of their coverage effective date. Dependents residing at a different address from the employee should be provided with a separate notice.

Back to the Northwest case: A few months after the insurance effective date, the employee and his wife stopped cohabiting. The wife filed for legal separation and obtained a judgment to that effect two years later. Neither the employee nor the spouse notified the employer of their ceasing to live together, their legal separation or the change of address. During open enrollment after the separation, the employee elected to drop his wife from the coverage. Once the employee told the ex-wife her coverage had been canceled, she contacted Northwest Airlines to inquire about her COBRA continuation rights.

After determining the date of legal separation to be many months prior to the notice currently being given, Northwest Airlines refused to offer COBRA continuation standing on the 60 days to notify requirement. The ex-spouse said she never received the Initial Rights Notice. She sued Northwest Airlines for wrongful termination of her health coverage.

Northwest Airlines records proved that the COBRA Initial Rights Notice had been properly addressed to both the employee and covered spouse at the last known address. The plan administrator also provided proof of their established process for initial notices that were returned. This notice had not been returned.

The district court granted summary judgment to the employer. Since Northwest Airlines could prove it had told the employee and covered dependent the rules up front, they were able to enforce the rules when they needed to.

Had the notice not been provided, Northwest Airlines would likely have been required to provide COBRA continuation to the ex-spouse regardless of when the employer was notified.

QUESTION: If the COBRA payment is short of the amount due, can the employer return it?

The 1999 proposed regulations provided for a less than significantly short COBRA payment provision. Unfortunately, the proposed regulation did not define "significantly short" or "less than." Obviously, they received many comments requesting a definition.

You are familiar with the phrase "Be careful what you ask for"? What the government calls less than significantly short, I think most people would define as a whole lot short!

The January 10, 2001, Final COBRA Guidelines defined the term "less than significantly short" as:

An amount is not significantly less than the amount the plan requires to be aid for a period of coverage if and only if the shortfall is no greater that the lesser of the following two amounts: (1) fifty dollars or (2) 10% of the amount the plan requires to be paid.

By the new provisions, if a COBRA payment is received and it is less than significantly short, the employer has two choices: accept the payment as payment in full, or notify the qualified beneficiary of the deficiency and grant a reasonable period for payment. As a safe harbor, the regulations provide that a period of 30 days after the notice is provided is a reasonable period for this purpose.

No, the guidelines do not provide direction if the deficiency is not paid. Most suspect the answer would be something like if the majority of the COBRA premium has been

accepted and a period of at least 30 days has passed, the assumption of coverage has been made.

So is it a situation of eat it now or eat it later? Do we really want to ask?

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