

The following information is a section from Burt Carney's seminar on Employment Law. It is provided to give a rudimentary overview of what independent schools must do to be in compliance with COBRA if the school has a group health plan. If you have specific questions about COBRA, please contact your health insurance provider.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (29 USC § 1161 *et seq.*, and 42 USC § 300bb-1 *et seq.*)

COBRA applies to employers who offer a health care plan and employ 20 or more employees. A part-time employee counts as a fraction of a full-time employee. Churches and church operated schools are exempt from COBRA. Lay-board, independent (Category III) schools must be in compliance with COBRA.

COBRA provides eligible employees and certain family members the right to continue health care coverage, at the employee's expense, under the employer's group health plans. Coverage may continue after certain "qualifying events" (for example, termination of employment, death of the employee) that would otherwise cost the individual or his/her family their health coverage.

Qualifying Events:

The law spells out seven specific "qualifying events" that trigger an employee's or beneficiary's right to elect COBRA coverage.

1. Termination of a covered employee's employment.

As a general rule, COBRA rights are triggered when an employee leaves his or her job, whether the termination was voluntary or involuntary. An employee who is fired for cause is entitled to COBRA coverage unless the firing was due to the employee's gross misconduct. The law does not define gross misconduct. However, in a clear-cut case where the employee committed say a felony on the job, the employer would be on solid ground in denying the employee's COBRA coverage. Note: Employment law experts indicate that this a grey area so it is safer to offer the COBRA coverage than to deny it for wrongdoing unless the wrongdoing is major offense. (coverage period can be up to **18 months**)

2. Reduction in a covered employee's hours.

Again, the reduction in the covered employee's hours may be voluntary or involuntary. For example, an employee may qualify for COBRA coverage if he or she switches from full-time to part-time and is no longer eligible for health coverage. (coverage period can be up to **18 months**)

3. Disabled beneficiary.

A qualified beneficiary that is determined under Title II, or under XVI of the Social Security Act to have a disability at the time of a termination of

employment or reduction in hours. Initial coverage is for up to 18 months. If beneficiaries want an 11-month extension added to the 18 months, they must notify the plan administrator within 60 days of the disability determination and before the 18-month COBRA period expires. They must also notify the administrator if the person is no longer disabled. (coverage period can be up to **29 months**)

4. Death of a covered employee.

Any family member who is a qualifying beneficiary becomes separately entitled to elect COBRA coverage. (coverage period is for **36 months**)

5. Divorce or legal separation of a covered employee.

Divorce or separation typically results in loss of coverage for the employee's ex-spouse. Other qualifying beneficiaries (children) may also lose coverage as a result of the divorce or separation. Each qualifying beneficiary has a separate right to elect COBRA coverage. (coverage period can be up to **36 months**)

6. Commencement of a covered employee's entitlement to Medicare benefits.

The triggering event is entitlement to Medicare benefits, not his/her eligibility for benefits. Thus the key date is the employee's enrollment in the Medicare program. An employer cannot force an eligible employee to enroll in Medicare. The employer's plan remains the primary payer unless the employee elects otherwise. Qualifying beneficiaries who lose their coverage when an employee enrolls in Medicare are eligible for COBRA coverage. (coverage period can be up to **36 months**)

7. Cessation of coverage for a dependent child.

Plans typically cut off dependent coverage for children above a certain age. When a dependent's coverage ceases, he or she is eligible for COBRA coverage. (coverage can be up to **36 months**)

8. The employer's filing for bankruptcy.

As a general rule, a reduction of health coverage or termination of an employee's health plan does not trigger COBRA coverage rights. But a special rule applies if the employer files for bankruptcy. A substantial elimination of coverage within one year before or after filing a bankruptcy proceeding is treated as a loss of coverage. Only employees who retired at any time before the substantial elimination of coverage and their spouses and dependents are entitled to COBRA coverage. (coverage period can be up to **36 months**)

Electing COBRA Coverage:

COBRA coverage is not automatic. A health plan can condition the availability of coverage on whether the participant (employee) elects to have coverage in a

timely fashion. The election period must begin no later than the date the beneficiary loses coverage on account of a qualifying event and must not end before the date that is **60 days** after the later of (1) the date the beneficiary loses coverage or (2) the date notice is given to the beneficiary of the right to elect COBRA coverage. An election is deemed to be made on the date it is sent to the plan administrator.

Special Calendar Issue for Contracted School Employees. If contract employees do not receive new contracts, are terminated, resign, or retire, but are paid on a 12-month basis, they could lose COBRA protection if they don't make a COBRA decision within 60 days after their last school meeting. If they wait to late August or early September to indicate they want coverage, it could be past the 60-day period and be too late. Schools should trigger the qualifying event after the last required meeting by sending out the **qualifying event notice**.

If the employer provides non-core health care (i.e. vision and/or dental coverage) in addition to core health care coverage, COBRA covers the entire health care package, but does not cover life insurance.

COBRA Premiums:

The employer may require the employee to pay for COBRA coverage. As a general rule, the employer can charge no more than 102% of the “applicable premium” for the COBRA coverage period. The extra 2% should cover administrative costs. The average employee qualifies for 18-months of coverage.

Disabled individuals who are eligible for 29 months of coverage may be charged up to 150% of the cost for coverage beyond the original 18-month COBRA period.

The law says that the applicable premium is what it costs the plan for coverage for similarly situated non-COBRA beneficiaries for the same period. The payment plan must allow payment for COBRA coverage to be made in monthly installments. However, a plan can also allow payments at other intervals (for example, weekly, quarterly, or semiannually).

Retroactive Premium Payment Plan. COBRA law prohibits employers from requiring the payment of any premium before the 45th day from the election date. This gives the employee time to think about purchasing COBRA. The 60-day election plus the 45-day premium due date is 105 days. (Once premiums begin to be paid by the former employee, there is a 30-day grace period for each premium before coverage can be cancelled.)

COBRA Notices

There are a lot of required notices under this law. Be sure to keep a log book and document that the notices have been given.

General COBRA Notice. (In earlier years this was call the Initial Notice.) The employer's notice responsibilities begin when an employee signs up for the employer's health plan. This might be a new full-time employee or a current employee that has moved from temporary status or part-time status to full-time status and now qualifies to be covered by the medical insurance. Each employee must be sent a General COBRA Notice of his/her COBRA continuation rights at the time of commencement of coverage, or at least within 90 days of when coverage begins. (If a qualifying event occurs during the initial 90-day period, you can satisfy the general notice requirement by providing the more detailed election notice that is discussed below.) Note: The 90-day period corresponds with the statutory period for furnishing each participant with a copy of the health insurance's summary plan description (SPD).

The General COBRA Notice can be a single notice mailed to a covered employee and the covered employee's spouse if they reside at the same address. If the employer hand delivers the general notice to a covered employee at the workplace, the delivery is deemed adequate for the employee, but would not constitute notification to the spouse. A spouse would have to be separately notified of his/her COBRA rights. There is no requirement to send an General COBRA Notice to a dependent child(ren), even if the general notice requirement is triggered early by a qualifying event involving the child(ren).

Under new regulations finalized in 2004, the General COBRA Notice requirement could be satisfied with the information being included in the summary plan description (SPD) of the plan as long as it was provided within the timing requirements of the notice. If a plan chooses to satisfy its SPD and general notice obligations with a single document, the contents must meet the obligations required for both the General COBRA Notice and the SPD.

ACSI recommends that the initial notification be mailed first class with either certified mail or a **certificate of mailing** documentation. The certificate of mailing is less expensive than certified mail and doesn't require a signature. The mailing receipt should be retained in the employee's personnel file so that the employer can prove that notification was given if a problem arises later.

Court case example: In a 1997 case where a beneficiary used COBRA, then stopped paying for coverage and then requested coverage under COBRA again, the 4th Circuit Court of Appeals said that the employer did not have to continue her COBRA coverage because she had allowed the coverage to lapse. But, said the court, because she had not received a COBRA notice originally from the plan administrator, the plan administrator owed \$36,500 due to the failure to comply with COBRA notice rules. The fact that the employee knew about COBRA was not the dispositive issue—it was that the employer had not given the required notice.

In addition to providing individual notices to employees and their spouses, the employer must include an explanation of COBRA rights in the summary plan description (SPD) of the employer's health plan.

Employer Notice of Qualifying Event. Within 30 days of a qualifying event (loss of job, reduced working hours, death of the employee, and enrollment of the employee in Medicare), a qualifying event notice should be mailed first class to the school's insurance plan administrator, with the employer retaining **certificate of mailing** documentation.

Employee/Family Member Notice of Qualifying Event. Employees or their family members must notify plan administrators within 60 days of other types of qualifying events (divorce, legal separation, loss of dependent status) under the plan. In general, the 60-day time frame begins to run on the date of the qualifying event or the date on which coverage would be lost, whichever is later. The notice must be given to a "party that customarily handles employee benefits matters."

After receiving a notice of qualifying event from an employee or family member, plans are required to notify individuals whenever a plan determines that an individual is not eligible for COBRA.

COBRA Election Notice. Use the new model COBRA Election Notice that contains all the information individuals need to decide whether to elect COBRA coverage. The notice describes available health plan options, premium payment requirements, the consequences of failing to elect COBRA, and how COBRA coverage could be extended due to disability or a second qualifying event. This notice must be provided within 14 days after the plan administrator receives a notice of qualifying event from the employer or from the qualified beneficiary. COBRA Election Notices must be provided to all individuals (e.g., spouses, etc.) who are qualified beneficiaries with respect to a particular qualifying event.

COBRA coverage must be elected by a qualified beneficiary within 60 days of the latest of: (a) the date of the qualifying event; (b) the date on which there is a loss of coverage; or (c) the date on which the qualified beneficiary is informed through the plan's SPD or the general COBRA notice of his/her obligation to provide notice and the procedures for providing such notice.

Notice of Unavailability of Continuation Coverage. A plan administrator must furnish a Notice of Unavailability of Continuation Coverage whenever the plan administrator denies coverage after receiving any notice from a participant, beneficiary, or other individual concerning divorce/legal separation, a dependent child ceasing to satisfy eligibility requirements, a second qualifying event, or a request for disability extension. This is true regardless of the basis for the denial. The notice must explain why an individual is not entitled to continuation coverage. The plan administrator must provide the notice within 14 days after receiving a notice of qualifying event.

Notice of Termination of Continuation Coverage. There are several reasons that health coverage may terminate early. Perhaps the biggest one is the participant not making the required monthly payments. A plan administrator must notify any qualified beneficiary whose COBRA coverage terminates before the end of the maximum COBRA period. The notice must explain the reason coverage was terminated, provide the date of termination, and describe any rights the qualified beneficiary may have to elect alternative group or individual coverage such as a conversion right. The notice must be provided “as soon as reasonably practicable.” Following the plan administrator’s determination that continuation coverage will terminate.

Compliance Strategies:

Make sure the key personnel responsible for the human resources of the Christian school are familiar with COBRA and the requirements of COBRA. Medium and larger size schools should seriously consider having a third-party vendor take care of the COBRA responsibilities. They keep track of changes in the law and regulations and do a better job in keeping track of notices, etc.

- **Check with your state** to see if it has its own “COBRA-like” laws which usually apply to even smaller employers than the federal law.
- Make sure COBRA information is included in your policy manual, **Employee Handbook**, and in materials given to your employees when they enroll in your health plan.
- **IMPORTANT:** Keep a **correspondence log** either on paper or in a computer file. Capture information concerning all dates of NOTICES and correspondence, coverage(s) elected, changes to status, payments received, and enrollee contact details. **Keep good records.** Keep all certificates of mailing in the personnel files.
- Don’t forget to include insurance continues in any **distribution of notices** of benefit or pricing changes.
- Treat continues in a fair and **non-discriminatory manner**. If one qualified beneficiary is favored over another (i.e., extending time on COBRA, which is allowed depending on insurance carrier), you may find yourself having to extend it for everyone.
- **Termination of a Continuee’s Coverage.** Insurance companies do not necessarily terminate continues automatically. Keep control over the process so properly paying continues remain on the plan as long as required.
- **Delinquent payments.** If a continuee is delinquent with payments, and the 30-day grace period has expired, contact the insurance company to remove him/her promptly from the plan. Don’t become a collection

agency. Note: An employer is not required to bill a continuee for premium payments or even give a payment booklet. It is up to the continuee to remit the premium on a timely basis. (Be sure to communicate that to the person receiving continued coverage.)

- Going out on FMLA leave is not a COBRA qualifying event; failing to return to work is.
- When an employee goes on an unpaid leave that is not FMLA, he/she does experience a COBRA-qualifying event (a reduction in hours that causes a loss of coverage).
- Note: In 1998 the U.S. Supreme Court said that **employers cannot deny COBRA coverage** under their health plans to an otherwise eligible beneficiary merely **because he/she is covered under another plan** (e.g., a spouses plan) at the time he/she elects COBRA coverage.
- **Get help when you need it.** You can contact the Employee Benefits Security Administration (EBSA), Office of Regulations and Interpretations at 202-693-8523. Publications on COBRA may be obtained on EBSA's website at <http://www.dol.gov/ebsa> under Publications and Reports. Also check this website <http://www.benefitsolved.com> for helpful information.
- The COBRA rules are complex. Even if you have a good understanding of the requirements, there will always be hard cases with no easy answers. Don't hesitate to **call on the experts**. An incomplete answer or a not-too-sure answer could be costly to your Christian school or could cause an employee to lose much needed health care coverage.
 - Attorney John L. Cooley: 1-800-269-5588
 - WootenHart PLC, Roanoke VA
 - Former Christian school administrator for 10 years.
 - Now providing legal advice for more than 500 Christian schools.
 - Discounted member rate of \$100 for up to 30 minutes of legal work.
 - The bill from WootenHart PLC is sent by mail to your school.

New COBRA Regulations Effective January 1, 2005

COBRA was enacted in 1986 and the IRS did not release final regulations until 1999 and 2001. Those regulations did not include any guidance on what notices should include or any type of model notice for employers to use to comply with the regulations. Many complaints pushed the Department of Labor to give more guidance on what should be incorporated in continuation notices.

On May 26, 2004, new COBRA regulations were printed in the Federal Register that go into effect on November 26th for an employer's medical plan year that starts after that date. For most schools, this would make the effective date January 1, 2005. For a copy of the new regulations go to: www.dol.gov/ebsa. The materials above have been modified to reflect the new changes. But what were some of the main things that were changed?

- Get copies of the newly worded model Initial Notice and Election Notices that must now be used. Please go to: www.dol.gov/ebsa to obtain this information. The new notices replace the 17-year old notices that everyone was using up through 2004. After obtaining them, you will need to make some additions to them. For instance, you must add a description of plan procedures that qualified beneficiaries must follow to provide notice to the new General Notice. The General Notice must also contain the plan's name and who to contact for further information. On the new model Election Notice, you will need to add a description of available coverage options under the plan.
- The new Initial Notice eliminated identification of both the plan administrator and the COBRA administrator and only requires the name, address, and phone number of a party or parties who will provide information about the plan and COBRA upon request.
- Workers must be allowed to provide oral or written notice of a qualifying event to the person or department that handles health benefits or to the insurance company.
- The 60-day notice period for qualified beneficiaries to provide notice of a qualifying event was changed to run from the latest of: (1) the date of the qualifying event; (2) the date on which there is a loss of coverage; or (3) the date on which the qualified beneficiary is informed through the plan's summary plan description (SPD) or the general COBRA notice of his/her obligation to provide notice and the procedures for providing such notice.