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Compliance Buzz

Tax Reform and Tax Advantaged Benefits

After months of debate on tax reform, Congress passed the "Tax Cuts and Jobs Act" (H.R. 1) to overhaul the tax code. Items of interest for tax advantaged benefits include the dependent care flexible spending account, adoption assistance, education assistance programs, transportation plans, and the individual mandate under the ACA.

With implementation starting in January, the impact of "Tax Cuts and Jobs Act" would be felt all throughout early 2018. Tax reform legislation removes the ACA's individual mandate requirement for months beginning after 12/31/18 and onward. [Read more >](#)



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Health Benefits 101



What are Documentation



COBRA Part IV: Common Pitfalls



Today's Agenda:

- COBRA and Health Care FSAs In Depth
- Calculating Premiums for HRAs In Depth
- COBRA and Leaves of Absence
- COBRA in Mergers & Acquisitions
- Summary

Note: our discussion will focus on federal continuation and leave laws. Please review the laws of your particular state before developing your procedures for continuation.



COBRA and Health Care FSAs In Depth

COBRA and Health Care FSAs In Depth

- **Health Care FSAs are “Group Health Plans”**
 - Plan providing medical care and maintained by Employer
 - True of general purpose and limited purpose Health Care FSAs
- **Generally, Subject to COBRA**
 - Can result in unfavorable consequences to employer
 - **Might allow employee to elect COBRA with low or no balance, and elect maximum in new plan year**
 - If qualifies as an “Excepted Benefit” under HIPAA employers can limit their COBRA obligation for the Health Care FSA

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**
 - COBRA is offered only for an account that is not overspent
 - Amount available for reimbursement exceeds the amount that individual would owe in premium for the rest of the year
 - Premium is up to 102% of cost of coverage
 - Prior year rollovers are included in amount available for reimbursement

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**
 - COBRA is offered only through end of Health Care FSA plan year
 - Shortens maximum coverage period of 18, 29, or 36 months
 - Prevents new elections from being made, but
 - If plan allows rollover, QB must have access to rollover dollars through end of maximum coverage period the same as active employees

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**
 - Example 1:
 - Angie has a \$1,200 Health Care FSA election
 - She has made \$400 in deposits
 - \$150 has been reimbursed
 - She has \$1,050 in her account and could be charged up to \$816 in premium for the rest of the year (102% of \$800)
 - She is not overspent and must be offered COBRA through the end of the plan year

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**

- Example 2:

- Mike has a \$1,200 Health Care FSA election
- He has made \$400 in deposits
- \$398.70 has been reimbursed
- He has \$801.30 in his account and could be charged up to \$816 in premium for the rest of the year
- He is overspent, and does not need to be offered COBRA

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**
 - Example 3:
 - Sally is in the same situation as Mike (\$1,200 Health Care FSA election, \$400 in deposits, \$398.70 reimbursed)
 - Sally's employer only charges 100% of premium for the Health Care FSA
 - Since her remaining premium is \$800 and she has \$801.30 in her account, she must be offered COBRA for the remainder of the plan year

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**
 - Example 4:
 - Sally's plan has rollover and her employer does not require a new election for active employees to access their rollover funds
 - She has paid her monthly premium for the Health Care FSA but at the end of the plan year still has \$406 in her account
 - Sally can access those funds with no further premium during the next plan year, through the end of her COBRA maximum coverage period

COBRA and Health Care FSAs In Depth

- **Limited COBRA obligation for Excepted Benefits**
 - Example 5:
 - John works for Sally's employer and elected \$1,200 this year
 - He had also rolled over \$350 from a prior plan year
 - At the time his termination, he had deposited \$400 and was reimbursed \$640
 - If we only looked at current year elections, he would be overspent (\$800 in owed premium > \$560 remaining benefit)
 - However, because of his prior rollover, he has a \$910 remaining benefit, and must be offered COBRA for the rest of the plan year

COBRA and Health Care FSAs In Depth

- **“Excepted Benefit” Rule**
 - Means the Health Care FSA is not subject to HIPAA portability provisions
 - The Health Care FSA must be set up to qualify as “excepted benefit” by plan design (not by specific employee)
 - If Health Care FSA is not an excepted benefit, full COBRA obligations apply

COBRA and Health Care FSAs In Depth

- **Must meet three conditions to be deemed an “Excepted Benefit”**
 1. **Maximum Benefit Condition**

Health Care FSA annual election cannot exceed two times the employee’s salary reduction for the plan year, or if greater, the amount of the employee’s salary reduction election for the Health Care FSA, plus \$500

*Most non-Excepted Benefit Health Care FSAs violate the Affordable Care Act preventive services provision, but not all

COBRA and Health Care FSAs In Depth

- **Must meet three conditions to be deemed an “Excepted Benefit”**

2. Availability Condition

Participants with Health Care FSA coverage must also have other group health plan (not other excepted benefits) coverage available during the plan year from the employer

*Most non-Excepted Benefit Health Care FSAs violate the Affordable Care Act preventive services provision, but not all

COBRA and Health Care FSAs In Depth

- **Must meet three conditions to be deemed an “Excepted Benefit”**

3. COBRA Premium Condition

The maximum amount of premium that could be charged for the Health Care FSA equals or exceeds the maximum benefit available under the Health Care FSA for the year

*Most non-Excepted Benefit Health Care FSAs violate the Affordable Care Act preventive services provision, but not all

COBRA and Health Care FSAs In Depth

- **Test 1 of 3: Maximum Benefit Condition**
 - Health Care FSAs solely funded by employee meet this condition
 - If there is an employer contribution, it must be limited
 - **Employer can contribute up to 100% match of employee salary reduction election**
 - This could affect a plan's ability to pass nondiscrimination testing
 - **Employer can contribute up to \$500 per participant, even if that is greater than an employee's salary reduction election**

COBRA and Health Care FSAs In Depth

- **Test 1 of 3: Maximum Benefit Condition**
 - Health Care FSAs solely funded by employee meet this condition
 - Examples that qualify
 - **Employee elects \$1,000, Employer matches 75% (\$750)**
(Annual election of \$1,750 is not more than two times the employee's salary reduction)
 - **Employee elects \$300, Employer contributes \$500**
(Annual election exceeds twice the salary reduction, but is not more than \$500 more than the reduction amount)

COBRA and Health Care FSAs In Depth

- **Test 1 of 3: Maximum Benefit Condition**
 - Examples that qualify
 - **Employer seed contribution of \$250 to all full time employees (Employer contribution less than \$500 for any employee)**
 - Examples that do not qualify
 - **Employee makes no election; Employer contributes \$750 to Health Care FSA for all employees eligible for Health Care FSA**
 - **Employee makes no election; Employer contributes \$750 to Health Care FSA for employees who enroll in major medical plan***

**This is an example of a plan design that could be a non-Excepted Benefit, but ACA compliant*

COBRA and Health Care FSAs In Depth

- **Test 1 of 3: Maximum Benefit Condition**
 - Examples that do not qualify
 - **Employee elects \$500, Employer contributes \$750 to Health Care FSA for all employees who make any salary reduction election**

COBRA and Health Care FSAs In Depth

- **Test 1 of 3: Maximum Benefit Condition**
 - What about Flex Credits? Are cafeteria plans with credits considered an employer contribution or an employee contribution? It Depends!
 - **If the employee can take the credits as cash, they are deemed to be salary reduction amounts**
 - **If the employee cannot take the credits as cash and must direct them into the Health Care FSA or toward other cafeteria plan benefits, they are deemed employer contributions**

COBRA and Health Care FSAs In Depth

- **Test 2 of 3: Availability Condition**
 - Participants with Health Care FSA coverage must also be eligible for their employers' group health plan coverage
 - Other coverage does not include other “Excepted Benefits” such as dental or vision coverage, must be major medical
 - If a Health Care FSA does not meet the Availability condition, it is also violating the preventative services mandate of the Affordable Care Act, so such designs are not permitted

COBRA and Health Care FSAs In Depth

- **Test 2 of 3: Availability Condition**
 - Examples that qualify
 - Employer offers all employees the group major medical plan and the Health Care FSA with the same eligibility criteria
 - Employer offers major medical coverage to employees working 30 hours or more per week, but the Health Care FSA is only open to employees working 40 or more hours per week
 - The Health Care FSA has a longer waiting period than the major medical, but all who are eligible for the FSA are eligible for major medical

COBRA and Health Care FSAs In Depth

- **Test 2 of 3: Availability Condition**
 - Examples that do not qualify
 - Employer offers major medical coverage only to full-time employees but the Health Care FSA to both full-time and part-time
 - Employer offers the Health Care FSA on date of hire, but imposes a 60-day waiting period for major medical coverage
 - Employer offers major medical enrollment only at hire (or special enrollment), but the Health Care FSA affords an annual enrollment opportunity

All of the above will violate the ACA preventive service mandate

COBRA and Health Care FSAs In Depth

- **Test 3 of 3: COBRA Premium Condition**
 - The maximum amount that the Health Care FSA can require to be paid for a year of COBRA continuation coverage (i.e., the maximum COBRA premium) equals or exceeds the maximum benefit available under the Health Care FSA for the year
 - Most Health Care FSAs will qualify due to premiums being equal to salary reduction amounts remaining (plus a possible 2%)
 - Employers with large employer contributions could fail to meet this condition if it makes it unlikely for employees to use the maximum benefit
 - Unclear whether or how rollovers from prior years affect this

COBRA and Health Care FSAs In Depth

- **COBRA Premiums for Health Care FSAs**
 - Any qualified beneficiary (QB) can elect COBRA and could be charged full premium to elect coverage
 - Example: divorced spouse elects COBRA on Health Care FSA, owes full premium even as employee continues to pay, both have access to balance
 - Employers can be more generous in how premium is charged

COBRA and Health Care FSAs In Depth

- **COBRA Premiums for Health Care FSAs**
 - If only one QB elects COBRA, can use Health Care FSA to pay for spouse and dependent expenses (e.g. employee termination)
 - Can allow an employee to pre-pay (pre-tax) Health Care FSA premiums



Calculating Premiums for HRAs In Depth

Calculating Premiums for HRAs In Depth

- **Health Reimbursement Arrangements are “Group Health Plans”**
 - Plan providing medical care and maintained by Employer
 - True of any HRA
 - **Deductible reimbursement**
 - **Coinsurance reimbursement**
 - **Co-pay reimbursement**
 - **Section 213 general purpose**

Calculating Premiums for HRAs In Depth

- **Health Reimbursement Arrangements are usually not Excepted Benefits**
 - Some HRAs are considered also to be FSAs, but not all: by definition, the maximum reimbursement paid out of an FSA must be less than 500% of the value of the FSA
 - **Violate Maximum Benefit rule if can pay more than \$500 in a year, because entirely employer funded**
 - **Violate COBRA premium rule because premium cannot be based on maximum benefit being reached, but utilization**
 - **Violate COBRA premium rule if plan carries over from year to year**

Calculating Premiums for HRAs In Depth

- **COBRA obligations apply, but how is it offered?**
 - If HRA is integrated with the employer's major medical plan
 - **QB is offered combined option, the same as active employee**
 - **Must be allowed to waive the HRA and only take the major medical plan, but cannot be HRA-only**
 - **COBRA premium would be a combination of health plan plus HRA premium**
 - **COBRA premium will be based on the level of coverage**
 - Single, limited family, family
 - Premium will be the same in each category

Calculating Premiums for HRAs In Depth

- **COBRA obligations apply, but how is it offered?**
 - If HRA is integrated with other group coverage or covers only Excepted Benefits (e.g., dental/vision-only HRA)
 - **QB is offered stand-alone HRA option**
 - **If integrated elsewhere possibly require evidence of other coverage**
 - **COBRA premium is calculated for the HRA only**

Calculating Premiums for HRAs In Depth

- **How to calculate premium: Actuarial Method**
 - Reasonable estimate of the cost of providing coverage for such period for similarly situated beneficiaries
 - Same as a self-funded health plan
 - Will cost money to determine
 - Little IRS guidance exists to assist employers

Calculating Premiums for HRAs In Depth

- **How to calculate premium: Past Cost Method**
 - The cost to the plan for similarly situated beneficiaries for the same period occurring during the preceding determination period...adjusted by...the percentage increase or decrease in the implicit price deflator of the gross national product
 - Not based on individual's claims data or maximum benefit
 - Cannot be used if there is a significant difference in coverage from one year to the next

Calculating Premiums for HRAs In Depth

- **How to calculate premium: Other options**
 - Past Cost method cannot be used in first year – no prior claims data
 - If HRA allows carryover, cannot reliably predict available benefit using Past Cost method
 - If cannot use Past Cost, and do not want to hire an actuary, what do you do?
 - **Some employers choose to forego charging premium or charge \$1**
 - **Will not get in trouble if you charge more favorable rates, but you are giving away coverage**

Calculating Premiums for HRAs In Depth

- Premiums are just one part of the issue with HRAs
- **Must determine HRA coverage amount**
 - When HRA is offered to more than just employee (i.e. family coverage), issues arise
 - **What about claims already applied toward deductible – credited to one spouse or both?**
 - **Spouse/QB gets ongoing accruals, as does employee in divorce**
 - **IRS assumes both have access to full HRA; may result in additional employer liability, especially if large carryovers and spend down**

Calculating Premiums for HRAs In Depth

- **Must determine HRA coverage amount**
 - Plan designs can affect coverage amount
 - **Carryover from year-to-year, spend-down options post-termination**



COBRA and Leaves of Absence

COBRA and Leaves of Absence

- **Leaves of Absence generally**
 - Leave of absence could be paid or unpaid
 - Leave of absence could be subject to FMLA or USERRA, or taken in accordance with employer policies for other reasons
 - **We will review FMLA and unprotected leaves of absence**
 - Leave of absence, in general, is a reduction of hours, and if it results in a loss of coverage, will be a COBRA qualifying event

COBRA and Leaves of Absence

- **FMLA Leave**

- FMLA applies to all public –sector employers regardless of size (e.g., governmental employers, school districts, etc.)
- FMLA applies to all private sector employers that have 50 or more employees in the current or prior year
- Employee requesting FMLA leave must have worked for the employer at least 12 months and worked at least 1,250 hours in the 12 months prior to the FMLA leave
- Certain life events allow the employee to take FMLA leave

COBRA and Leaves of Absence

- **FMLA Leave**
 - Employer cannot terminate an employee's health coverage during FMLA
 - Taking FMLA leave is not a COBRA qualifying event
 - If paid leave is used during FMLA, premium contributions continue uninterrupted

COBRA and Leaves of Absence

- **FMLA Leave**

- If FMLA is unpaid, 3 ways to collect premium

- Pre-pay full amount (cannot force this option)

- Pay-as-you go (after-tax contributions)

- Collect upon return (catch-up payments)

- When is COBRA offered?

- When FMLA ends, if employee does not return to work, can terminate coverage and must offer COBRA

- If employee gives notice of termination while on FMLA leave, can terminate coverage as of that date and must offer COBRA

COBRA and Leaves of Absence

- **FMLA Leave**

- What coverage to offer?

- **COBRA is offered based on the coverage that was in place on the day before the first day of FMLA leave**

- What if Employee doesn't pay?

- **If employee fails to pay premium during FMLA leave, or voluntarily drops coverage during FMLA leave, technically the employer is to offer COBRA at the end of the FMLA leave**

COBRA and Leaves of Absence

- **FMLA Leave**

- What if Employee doesn't pay?

- **Might need to maintain coverage on behalf of employee in order to reinstate upon return**

- Can collect unpaid premiums from employee

- Check with insurance carrier before cancelling coverage during an FMLA leave!

COBRA and Leaves of Absence

- **Other Leaves**

- Short paid leaves under an employer’s policy will not trigger COBRA rights because eligibility is not lost as a result
- Unpaid leaves usually will be a “reduction in hours” below eligibility – check your plan documents!
 - **If a reduction in hours due to leave results in lost eligibility, offer COBRA at the start of leave**
 - **If you want to allow longer leaves without a loss, approve with carrier and put it in the Plan document**

COBRA and Leaves of Absence

- **Other Leaves**

- If you have a leave of absence policy that extends coverage during non-protected leave:

- **If an employee terminates employment while on non-protected leave, COBRA should be offered**
 - **If an employee fails to pay premium while on non-protected leave, COBRA should be offered**



COBRA in Mergers & Acquisitions

COBRA in Mergers & Acquisitions

- **Virtually all business reorganizations will raise COBRA issues**
- **Two COBRA issues will most commonly arise in a business reorganization:**
 - “New QBs” —Some employees of one of the entities may lose coverage (i.e., experience a qualifying event) as a result of the transaction
 - “Existing QBs” —Former employees of one of the acquired entities may be enrolled in or entitled to enroll in COBRA coverage at the time of the transaction

COBRA in Mergers & Acquisitions

- A third issue that can arise is allocation of existing COBRA obligations incurred by the entity being sold
- New and existing QBs will trigger COBRA obligations in a business reorganization
- Determining COBRA obligations in a reorganization involves two steps:
 1. Identify the who are “M&A QBs”
 2. Determine which entity is responsible for providing the COBRA coverage

COBRA in Mergers & Acquisitions

- The definition of an M&A QB depends upon whether the business reorganization is a stock sale or an asset sale
- **Stock Sale**
 - A “transfer of stock in a corporation that causes the corporation to become a different employer or a member of a different employer”

COBRA in Mergers & Acquisitions

- **Stock Sale, continued**
 - Individual must meet two requirements to be a “M & A QB”
 - **The individual’s qualifying event must have occurred prior to or in connection with the stock sale; and**
 - **The individual must either:**
 - Be a covered employee whose last employment prior to the qualifying event was with the acquired organization; or
 - Have experienced a qualifying event in connection with a covered employee whose last employment prior to the qualifying event was with the acquired organization

COBRA in Mergers & Acquisitions

- **Asset Sale**

- An asset sale is “a transfer of substantial assets, such as a plant or division or substantially all the assets of a trade or business.”
- The “selling group” is the controlled group of businesses that includes the entity that is selling the assets.
- The “buying group” is the controlled group of businesses that includes the entity that is buying the assets.
 - **There is no acquired organization in an asset sale.**

COBRA in Mergers & Acquisitions

- **Asset Sale, continued**
 - Individual must meet two requirements to be a “M & A QB”
 - **The individual’s qualifying event must have occurred prior to or in connection with the asset sale; and**
 - **The individual must either:**
 - Be a covered employee whose last employment prior to the qualifying event was associated with the assets being sold; or
 - Have experienced a qualifying event in connection with a covered employee whose last employment prior to the qualifying event was associated with the assets being sold

COBRA in Mergers & Acquisitions

- **Asset Sale, continued**
 - An asset sale is a qualifying event for a covered employee whose employment immediately before the sale was associated with the purchased assets unless:
 - **The employee does not lose coverage under a GHP of the selling group (no loss of coverage); or**
 - **The buying group is a successor employer and the employee is employed by the buying group immediately after the asset sale (no triggering event)**

COBRA in Mergers & Acquisitions

- **Responsibility for COBRA obligations may be assigned by contract.**
 - However, if the parties fail to comply with the contract, COBRA obligations will be allocated under the Regulations
- **In the absence of an agreement, the general rule is that the selling group is obligated to provide the COBRA coverage**
 - This is based on the idea that the individual is entitled to COBRA coverage from the plan under which the individual was covered

COBRA in Mergers & Acquisitions

- In the absence of an agreement, the general rule is that the selling group is obligated to provide the COBRA coverage
 - If the selling group continues to maintain any group health plan after the reorganization, one of the group health plans of the selling group must provide COBRA coverage to the M&A QB

COBRA in Mergers & Acquisitions

- If the selling group ceases to provide any group health plan to any employee in connection with the reorganization, one of the buying group's group health plans must provide coverage to the M&A QBs if:
 - The reorganization is a stock sale; or
 - The reorganization is an asset sale and the buying group is a successor employer



Summary of Key COBRA Concepts

- Know what triggers COBRA coverage
- Understand how COBRA premiums must be calculated
- Be aware of Plan design differences that can affect how COBRA is offered
- Pay close attention to notice deadlines, mailing/postmark dates, and recordkeeping
- Communicate with your carriers and administrators if you encounter special issues

Questions?

Thank you for attending!

Any questions can also be addressed by e-mail or phone:

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