



# The Top 10 Concepts Agents Need To Know About COBRA

**Co-Presented by:**

**Joan Fusco**  
**Chief Compliance Officer**  
**Savoy**

**Trey Tompkins**  
**President**  
**Admin America, Inc.**

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# TODAY'S CO-PRESENTER

## **Joan Fusco, Chief Compliance Officer of Savoy**



Joan Fusco is the Chief Compliance Officer at Savoy, a northeast regional general agency that supports and services over 2,000 brokers. Savoy is headquartered in Florham Park, NJ and with offices in NY, Long Island, Hamilton, NJ, Marlton, NJ, Philadelphia, PA, and Newark, DE. Joan joined Savoy in April 2003 and serves staff and broker partners for all Savoy office locations keeping everyone abreast of Federal and state regulatory, legislative, compliance, and dynamic benefit issues, especially of a complex and/or unusual nature. She also conferences with brokers and employers on specific situations.

Joan has over 35 years of experience in the insurance field focused on research and training. Previous to her employment at Savoy, Joan was the Compliance and Quality Manager for Horizon BCBSNJ for 10 years and founded, managed and instructed their Continuing Education school. In that capacity, she attended the Small Employer Health Board (SE H) meetings since its inception and also served as the representative on the Board or Horizon BCBSNJ. She has regularly attended the SE H Board meetings since that time representing NJ brokers bringing her expertise to the board and providing information to the community she serves.

Joan is the chair of the NJ Commissioner's Life and Health Advisory Board, served as a member of the National Association of Health Underwriter's (NAHU) Legislative Council, and Professional Development Committee. Joan currently Co-Chairs the NAHU Compliance Corner Working Group where she provides webinars for and answers health insurance related questions for NAHU members across the country. Joan was part of the NAHU committee that created and instructs for the PPACA certification for brokers to this day. She also represents Savoy on the General Agency Council for the NAHU. Joan is insurance producer licensed in NY, NJ, PA, and DE. She has been a member of NAHU since 1996 and legislative and education chair for the state and at the chapter level from 1996-2013.

Joan earned the Health Insurance Associate (HIA) designation in 1994, the Professional Academy of Health Management (PAHM) designation in 1996, the Registered Health Underwriter (RHU) designation in 1999 and is PPACA (Patient Protection and Affordable Care Act) certified from the American College and the NAHU.



# TODAY'S CO-PRESENTER

## **Trey Tompkins, President of Admin America, Inc.**



Trey Tompkins serves as President of Admin America, Inc. Admin America is based in Alpharetta, Georgia and is an independent administrator and consultant for ERISA plans including Section 125 Flexible Benefit Plans, Section 105 Health Reimbursement Arrangements and COBRA. Admin America works primarily with small to medium-sized employers. In addition to managing Admin America's 20 full-time benefit professionals, Trey's area of expertise is providing plan design and compliance consulting services for clients and their benefits advisors. Prior to taking on his current position in 2007, Trey served as the in-house legal counsel for Admin America beginning in 1996.

Trey is a native of Atlanta. He earned an undergraduate degree from Vanderbilt University, a J.D. degree from the University of Georgia School of Law and an MBA degree from Georgia State University's J. Mack Robinson College of Business. Prior to joining Admin America, Trey worked in private legal practice in metropolitan Atlanta.

Trey is a frequent Continuing Education presenter to health insurance professionals around the country regarding federal rules governing group health plans, including the effects of federal health care reform within the small group health plan marketplace. Additionally, Trey's role at Admin America has allowed him to present employee benefit plans to thousands of employees through their employers' open enrollment education meetings.

Trey has previously served as President of NAHU's Georgia and Atlanta Chapters and other various board positions within the organization's state and local chapters and currently serves as the Georgia Chapter's Ethics Chairman. Trey is a past Chairman and Treasurer of the Political Action Committee affiliated with NAHU's Georgia Chapter (GAHUPAC). Trey previously served on NAHU's national Legislative Council and its Employer Based Plans Subcommittee and has been a contributor to the America's Health Insurance Plans (AHIP) published series on Employee Healthcare Benefits.

# **TODAY'S AGENDA: WORKING THROUGH COBRA'S CORE ELEMENTS**

1. Which Employers Are Subject to COBRA?
2. Which Types of Plans Are Subject to COBRA?
3. Which Individuals Are Qualified Beneficiaries?
4. What Types of Coverage Losses Are Qualifying Events?
5. What Notices Does COBRA Require?
6. What Coverage Rights Do Qualified Beneficiaries Have?
7. How Long Does COBRA Continuation Last?
8. What Does COBRA Coverage Cost?
9. How Is COBRA Impacted In Mergers and Acquisitions?
10. What Issues Are Raised By State Continuation Laws?



# What Is COBRA?

- Consolidated Omnibus Budget Reconciliation Act of 1985
- COBRA is the federal law that allows for group health plan continuation coverage when a Qualified Beneficiary (QB) loses coverage due to a Qualifying Event (QE).

# The Core Elements of COBRA

1. Except For Plans Sponsored By Certain Exempt Employers...
2. Qualified Beneficiaries...
3. Who Lose Coverage...
4. Under A Group Health Plan...
5. Due To A Qualifying Event...
6. Must Be Offered...
7. The Right To Elect Continuation of Group Health Plan Coverage...
8. For A Limited Time...
9. On A Self-Pay Basis

# Which Employers Are Subject to COBRA?

- Generally all employers that are not eligible for an exemption are subject to COBRA
- There are two primary exemptions
  - Small Employer Exemption
  - Church Plan Exemption

# Employers Subject to Federal COBRA

## (Consolidated Omnibus Budget Reconciliation Act 1985)

- Generally, employers, including self-insured employers, as well as non-profit organizations with 20 or more on payroll (including full time, part time, union and non-union) for more than 50% of business days in the preceding calendar year must offer COBRA continuation of the group health plan.
- Churches are not subject to Federal COBRA.
- Applies to medical, dental, vision, and **HRAs.**
- **Does not apply to the QSEHRAs 1-1-2017**
- Note: IRS 414 (affiliated) applies
- Foreign employees count

# Determining Federal COBRA

- The employer determines the number of hours that equal full time. He can elect up to 40 hours for Federal COBRA purposes. Those working less than full time count as fractions.  
Example: A company has 10 FT employees working 40 hours per week. They also have 30 PT employees working between 1 and 39 hours for a total of 480 hours every week. 40 FT hours divided into 480 PT hours equals 12 FT equivalents. The 10 FT plus 12 “FTEs” equal 22 on the payroll. If there have been 20 or more for more than 50% of the typical business days of the preceding year, the group must comply with COBRA.

# The Small Employer Exception

- Employers With Less Than 20 Full-Time Equivalent Employees Are Exempt From COBRA
  - Full-Time Status and Equivalency Fractions Based On Employer's Own Definition of Full-Time (Capped at 8 hours per day or 40 hours per week)
- Applicable On A Calendar Year Basis For Most Groups
  - Based On Employer's Count From Prior Calendar Year
  - Measured Each Business Day
  - Exempt if FTE Count is Less Than 20 on Majority of Business Days
- Foreign Employees Count
- Control Group Rules (IRC Section 414) Apply
- Self-Employed Individuals and 1099 Contractors Do Not Count



# A Small Employer Exception Scenario

- Company A offers group health plan coverage to its employees who regularly work 32 hours per week.
- In 2017, Company A has 10 Full-Time Employees working who typically work 40 hours per week.
- Company A also has 30 Part-Time Employees who all work less than 30 hours per week but aggregate 480 hours each week.
- 480 hours divided by 32 hours equals 15 full-time equivalent employees.
- 10 Full-Time Employees plus the 15 full-time equivalents yield a COBRA count of 25 FTEs.
- Assuming this situation applied for at least 27 weeks in 2017 (the majority of the year), Company A would be subject to COBRA for all of 2018.

# The Church Plan Exception

- Church Plans Are Also Exempt... But Not Charities
- Entities Affiliated With Churches Are Exempt
  - “Affiliation” is a complex question
    - Church’s role in corporate governance
    - Financial assistance provided by church
    - Denominational requirement for employees or customers
- Advocate Health Care Network v. Stapleton (June ‘17)
  - Confirmed ERISA exemption for plans begun by religious organization but maintained by church affiliates but did not address definition of affiliation
  - Generally supported a very broad ERISA exemption
  - Arguably applies to COBRA analysis as well

# Which Plan Types Are Subject to COBRA?

- Virtually all types of group health plans are subject to COBRA
- Three statutory requirements to be considered a COBRA covered plan
  - Plan must be maintained by an Employer (or Employee Organization)...
  - to Provide “Medical Care” (as defined under Code Section 213)...
  - to individuals with an employment related connection to the Employer (or Employee Organization)
- There is no requirement that the coverage is marketed to employers as “group” coverage

# Examples of Coverage Types Subject To COBRA?

- Major Medical Plans
- Dental Plans
- Vision Plans
- Rx Plans
- Health FSAs
- HRAs

# Examples of Coverage Types Exempt From COBRA?

- HSAs and MSAs
- Long Term Care
- Life Insurance and AD&D
- Disability
- Hospital Indemnity
- On-Site Fitness Facilities

# Coverage Types To Which COBRA Might Apply

- Employee Assistance Programs
- Wellness Plans
- On-Site Medical Clinics
- Discount Programs
- Cancer / Specific Disease Plans



# Which Individuals Are Qualified Beneficiaries?

- Qualified Beneficiary status is important because they each have an independent right to elect COBRA continuation for themselves (and to make their own independent elections at open enrollment)
- Three Types of Individuals Can Be Qualified Beneficiaries
  1. Covered “Employees”
    - Includes self-employed individuals, independent contractors, former employees and leased employees
  2. Spouses and Dependent Children of Covered Employees
  3. Children born to or adopted by a Covered Employee during a COBRA continuation period
- Other individuals who may have been covered under the plan (such as domestic partners) are not entitled to elect COBRA on their own but may have their coverage continued as a qualified dependent of a Qualified Beneficiary who elects COBRA continuation

# What Other Criteria Impact Qualified Beneficiary Status?

- Covered Employees and Spouses and Dependent Children of Covered Employees must have:
  - been covered on the day before a Qualifying Event
  - by virtue of their status as a Employee, Spouse or Dependent
- Coverage the day before a Qualifying Event is not required when:
  - coverage was eliminated earlier in anticipation of a Qualifying Event (for example during a divorce proceeding) or
  - coverage was wrongfully denied or not offered
- Coverage for one day is sufficient to bestow Qualified Beneficiary status

# What Types of Coverage Losses Are Qualifying Events?

- Qualifying Events are specified situations that cause that cause an individual to lose coverage.
- If a situation would not require coverage to be lost, it does not trigger COBRA rights.
- Specified Event Types
  - Termination of Employment (other than for “Gross Misconduct”)
  - Reduction of Hours
  - Divorce or Legal Separation
  - Death of a Covered Employee
  - Dependent Child Ceasing To Be An Eligible Dependent Under the Terms of the Plan
  - Entitlement to Medicare
  - Bankruptcy

# The “Gross Misconduct” Exception

- **What is "gross misconduct"?**
  - Intentional, wanton, willful, deliberate, or reckless acts or deliberate indifference to an employer's interest.
  - Many acts that prompt an employer to terminate an employee are those done in violation of the employer's known standards. Those acts may not constitute gross misconduct for COBRA purposes unless they go beyond simple negligence or incompetence.
  - Only the court system can say for sure what is and is not gross misconduct.
  - Good faith but incorrect application of the exception does not excuse a failure to offer COBRA
  - Therefore, employers should rely on this COBRA exception with extreme caution. Consultation with Legal Counsel is always advisable in these situations.

# What Notices Does COBRA Require?

- Initial Notice
- Election Notice
- Notice of Unavailability of COBRA Coverage
- Notice of Termination of COBRA Coverage
- Qualifying Event Notice To Plan Administrator
- Notice of COBRA Premiums Short By Insignificant Amount
- Open Enrollment Materials
- Summary Plan Descriptions (SPD)
- Summaries of Material Modifications (SMM)
- Summaries of Benefits and Coverage (SBC)
- Disclosures to Health Care Providers

# COBRA's Two Most Important Notices

- **Initial Notice**

- To be provided to covered employees and his or her covered spouse (if any) within 90 days of first enrollment
- A COBRA election letter (following a Qualifying Event or a SPD with the required language satisfies the requirement
- Failure to provide Initial Notice bars employer from enforcing the Participant's notice obligations (such as notice of a divorce)

- **Election Notice**

- To be provided to Qualified Beneficiaries within 44 (14+30) days of a Qualifying Event
- Should be sent via First Class Mail (with Proof of Mailing Certificate – as opposed to Certified or Registered)



# Consequences of Failing To Provide Required Notices

- **Initial Notice**

- Failure to provide Initial Notice bars employer from enforcing the Participant's notice obligations (such as notice of a divorce)

- **Election Notice**

- Health Insurance and Stop Loss Contracts commonly have contractual provisions which condition COBRA coverage on timely compliance with COBRA's notification, election and payment deadlines (to reduce adverse selection). Employers who fail to meet COBRA's requirements may end up self-insuring the claims of Qualified Beneficiaries

- **All Required Notices**

- Courts have discretionary authority under ERISA to impose fines of \$110 per day per letter.
- Seldom awarded but a valuable potential leverage point for a plaintiff in any post-employment lawsuit

# Other Recommended COBRA Notices

- Confirmation of Elections
- Coupon Books or Monthly Statements
- Notice of Extension of COBRA Coverage
- Notice of Denial of COBRA Coverage Due To Gross Misconduct
- Term Notice At Expiration of Maximum Coverage Period
- Notice of Change of COBRA Premium
- Late Premium Payment Reminder Letters
- Change of Address Form
- Letter To Dependent Child Regarding Loss of Dependent Status
- Notice To Spouses and Children Dropped From Coverage
- Letter To Qualified Beneficiaries Attaining Age 65

# Rights of Each Qualified Beneficiary

- Independent Right To Elect Coverage
- 60 Days From Later of the Qualifying Event Date or the Postmark Date of the Election Letter to Make Election
- Additional 45 Days After Making Election to Make Initial COBRA Payment
- Right To Pick Which Coverages To Continue But Generally Cannot Change Coverage Until Open Enrollment
  - Exception for Moving Out of HMO Service Area
- At Open Enrollment:
  - May Drop, Add or Change Coverages
  - May Drop or Add Covered Family Members
- HIPAA Special Enrollment Rights

# Continuation Rights of Military Reservists Called To Active Duty

- Reservists Called To Active Duty Have Continuation Rights Under Both COBRA and USERRA
- USERRA Provides for 24 Months of Continuation Coverage and Applies To All Employers (No Small Employer Exception)
- For the First 31 Days of Deployment, Employers Must Continue Normal Employer Contribution (Much Like FMLA)
- After 31 Days of Deployment, Employers May Charge Reservists up to 102% of the Full Cost of Benefits.

# How Long Does COBRA Coverage Typically Last?

- Basic Maximum Coverage Periods (From The Date of Coverage Loss)
  - 24 Months For:
    - Employee's Termination or
    - Reduction of Hours
  - 36 Months For:
    - Employee's Death
    - Employee's Divorce or Legal Separation From Spouse
    - Covered Employee Becoming **Entitled** To Medicare
    - Dependent Child Ceasing To Be An Eligible Dependent
  - Up To The Life of The Retiree or Widow Plus 36 Months:
    - Bankruptcy of a Plan Sponsor of a Retiree Health Plan

# How May COBRA Coverage Be Extended?

- Medicare Disability Extension
  - Additional 11 Months Beyond 18 Month COBRA Period For All Qualified Beneficiaries In The Family
  - Individual Must Have Been Disabled (As Deemed By SSA) In First 60 Days of COBRA Coverage
  - Individual Must Notify Employer Within 60 Days of Disability Determination But No Later Than 18 Months After COBRA Began
- Multiple Qualifying Events (Only Applies To Spouse and Children)
  - Up To 36 Total Months For Spouse or Child
  - Employee's Death, Employee's Divorce or Legal Separation From Spouse or Child Ceases To Be A Dependent
- Pre-Termination Medicare Entitlement
  - Up To 36 Months From Date of Employee's Medicare Entitlement For Spouse or Child



# How May COBRA Coverage End Early?

- Failure To Pay COBRA Premium On Time
- When Employer Ceases To Provide Any Group Health Plan
  - Controlled Group Rules and Successor Employer Rules Apply
- When COBRA Continuant Obtains Other Group Health Coverage
- Medicare Entitlement
- Qualified Beneficiary in Disability Extension Period Is Deemed To No Longer Be Disabled
- For Cause
  - Fraudulent Enrollment or Claims

# COBRA Traps For Medicare Eligible Individuals

- COBRA Coverage Is Not Creditable Coverage For Medicare Part B “Special Enrollment Periods”
  - It is not coverage due to “current employment”
  - May delay individual’s access to Part B upon termination of COBRA
  - May result in late enrollment penalties for Part B
    - Can last for the remainder of the individual’s lifetime
- Can be creditable coverage for Part D

# COBRA's Limited Application To Health FSAs

- COBRA Only Must Be Offered To Qualified Beneficiaries Covered Under A FSA With A Positive Account Balance at the Time of the Qualifying Event
- Coverage Only Continues For The Remainder of the Plan Year
- Creates Potential For Qualified Beneficiaries To Manipulate Rules To Receive Full Benefits For Minimal COBRA Contributions

# What Does COBRA Coverage Cost?

- For Insured Plans, Continuant Pay the Full Premium Being Charged By the Carrier; 100% of the Employee and Employer Contribution.
- For Self-Funded Plans, Continuant Pay Either:
  - a Reasonable Estimate of the Cost of Providing Coverage, Determined on an Actuarial Basis; or
  - the Cost to the Plan for the Preceding Determination Period (with a Cost-Of-Living Adjustment) if Coverage Under the Plan Has Not Significantly Changed from the Preceding Determination Period to the Current Determination Period
- The Employer May Charge an Additional 2% COBRA Administration Fee
- For Those Who Extend Coverage From 18 to 29 Months Due to Medicare Disability, the Employer May Charge 150% of the Total Premium During the Extension Period.

# Annual Limitation On Modifying COBRA Premiums

- COBRA Premiums Must Be Computed and Fixed Prior To Beginning of 12 Month Determination Period
- Insurer Rate Increase Does Not Justify Change
- Employers Need To Timely Communicate Annual Rate Increases To Qualified Beneficiaries Or They May End Up Locked In to Accepting COBRA Payments That Don't Cover Their Cost For Providing The Continued Benefits
- Plan Changes For Legitimate Business Reasons Should Justify Passing Along Premium Increase

# Managing COBRA in Mergers and Acquisitions

- Stock Sale vs. Asset Sale
  - **Stock Sale**
    - Buyer Acquires All of The Assets and Liabilities from the Seller
    - Typically Has No Qualifying Event As Part of the Transaction Itself As No Legal Impact on Employees
    - Buyer May Make Personnel Changes That Generate Standard Qualifying Events
  - **Asset Sale**
    - Buyer Acquires Assets Typically Without Liabilities
    - Employees Have Termination of Employment Qualifying Event with Seller If They Go With Assets To the Buyer
    - COBRA Coverage Offered By Seller if Any Plans Maintained
    - Buyer May Be “Successor Employer” If Assets Are Deployed To Carry On Seller’s Business In Which Case Employees and QBs of Seller Can Continue COBRA Coverage with the Buyer

# State Continuation Variations To Consider

- Applicable Only To Fully Insured Plans
- Applicable Only For In State Carriers
- Typically Only Applicable To Major Medical
- Can Be Shorter or Longer Than COBRA
- May Apply To Fewer Losses of Coverage
- May End Early Based On Eligibility For Other Plans
- Varying Notification Requirements
- Varying Employer Contribution Requirements
- Varying Time Frames For Individuals To Elect
- Special Continuation Rules For Different Classes of Individuals
  - Seniors, Displaced Workers, Widows, Disabled Individuals, Medicaid Eligibles





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