



2019 Employee Benefits Webinar Series

Continuation Coverage

Chris Beinecke

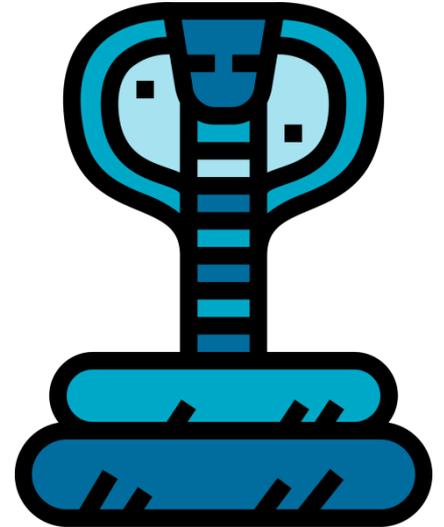
March 21, 2019



WORLD CLASS. LOCAL TOUCH.

Agenda

- COBRA – The 30,000 Foot View
- COBRA – Simple Concept, Tedious Administration
- COBRA – Odds and Ends
- Other Continuation Coverage Laws



COBRA

The 30,000 Foot View

What is COBRA?

- **C**onsolidated **O**mnibus **B**udget **R**econciliation **A**ct of 1985
- COBRA is a parallel law that exists in ERISA, the Tax Code, and the PHSA
- Generally, requires most group health plans (GHPs) to allow a temporary continuation of coverage under certain circumstances when eligibility is lost



Who is subject to COBRA?

Subject to COBRA

- All private sector GHPs maintained by employers with at least 20 employees on more than 50 percent of business days in previous calendar year
- All public sector GHPs sponsored by state & local governments

Not subject to COBRA

- Small employers with < 20 employees in the previous calendar year
- GHPs claiming church plan status
- Federal government GHPs (although other continuation rules may apply)

The COBRA rules for MEWAs and AHPs are unclear and should depend on whether the GHP qualifies for single employer treatment (certain AHPs). The agencies are still working through this.

Employer's Administrative Duties

- 1 Identify GHPs subject to COBRA
- 2 Provide timely notice of COBRA rights at enrollment & disclose in SPD
- 3 Create and implement notice requirements & procedures for Covered Employees and Qualified Beneficiaries
- 4 Timely identify Qualifying Events
- 5 Provide timely notice of COBRA rights after a QE to each QB losing coverage
- 6 Determine whether an individual has made a valid and timely election of COBRA coverage.
- 7 Provide COBRA coverage as required to each person who validly elects it
- 8 Determine and administer collection of premiums for COBRA coverage

COBRA

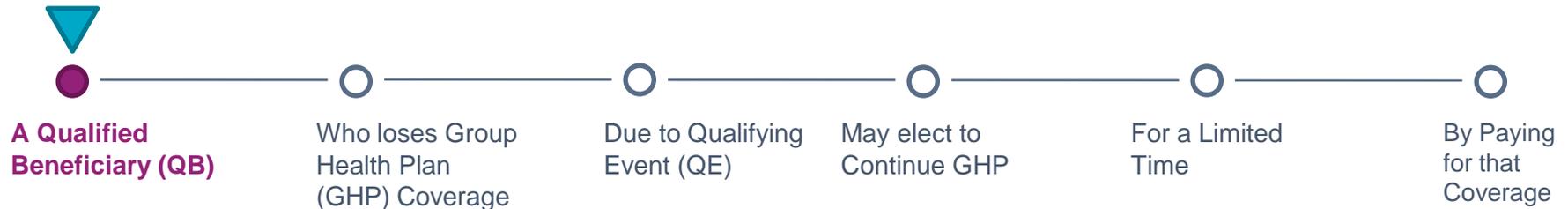
Simple Concept, Tedious
Administration

Qualified Beneficiary (QB)

- A QB is an individual covered by a GHP on the day before a COBRA qualifying event occurs and includes:
 - A covered employee
 - A covered spouse and/or covered dependent child(ren)
 - Any child born to or placed for adoption with a covered employee during COBRA coverage

Domestic partners are not QBs, although their children might be under state law. Employers often offer COBRA-like coverage on similar terms to domestic partners which becomes a contractual obligation under the plan.

- The broad definition of “Covered Employee” can include non-employees (this is a MEWA) and former employees (e.g. retirees)



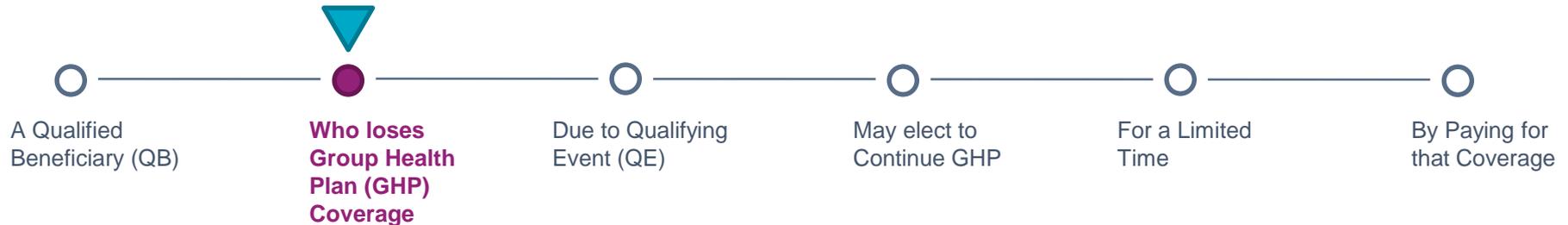
What GHPs are subject to COBRA?

Employer-sponsored plans that pay or provide medical care are subject to COBRA

- Medical
- Prescription Drug
- Dental
- Vision
- Telemedicine
- HRAs
- Health FSAs
- Many Wellness Programs
- Many EAPs
- Many Onsite/Offsite Clinics

Generally, the following plans DO NOT pay or provide medical care and are NOT subject to COBRA:

- HSAs
- Long-Term Care
- Group Term Life
- Hospital & Other Indemnity
- AD&D
- Short & Long Term Disability
- Exercise/Fitness Programs
- Onsite First Aid Facilities



General COBRA Notice

Timing

- Generally, 90 days from the GHP coverage effective date
- OR
- If earlier, the deadline for providing election notice

SPD

- Can use SPD for this notice but:
- Must be sent to covered employee and spouse, and
 - Must be sent within time from for providing general notice

Single Notice

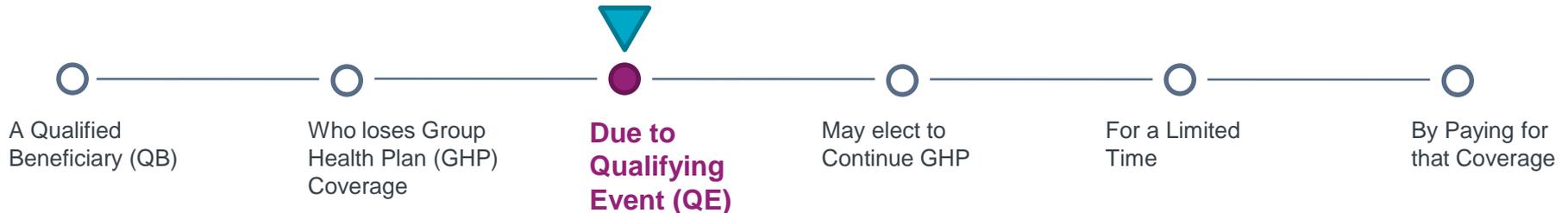
- Single notice addressed to employee and spouse is ok if:
- They reside at the same location, and
 - Spouse's coverage commences before deadline for providing general notice

U.S. Department of Labor provides a [model notice](#) for this purpose.

Qualifying Events (QE)

1. Loss of coverage due to termination of employment (gross misconduct exception)
2. Loss of coverage due to a reduction in hours (e.g. FT to PT)
3. Death of covered employee
4. Divorce or legal separation (if legal separations cause a loss of eligibility)
5. Dependent child ceases to be a dependent under the plan
6. Covered employee becoming entitled to Medicare benefits (retiree coverage only)
7. Employer's bankruptcy, but only for health coverage for retirees and their families

Note: Other situations might result in a loss of eligibility, but they do not trigger COBRA rights.



COBRA Election Notice

Timing

- If employer is also the plan administrator, 44 days after occurrence of QE
- Otherwise, 14 days after plan administrator has received notice of QE

Who

- Must be furnished to each QB

Single Notice

- May use single notice, addressed to covered employee and family, if all reside at same location

U.S. Department of Labor provides a [model notice](#) for this purpose, although it is common for plans to use their own notices that borrow from the model instead of using the model.

Notice of Unavailability

When

- When plan administrator determines COBRA (or an extension) is not available after receiving:
 - Notice of QE or 2QE
 - Notice that the individual has SSA determination of disability

Timing/How

- Same period as would be required for providing election notice
- May use single notice addressed to covered employee and family, if all reside at same location

Contents

- Reason COBRA is unavailable

Note: Can provide information about alternative coverage options (e.g., conversion), but this is not required

COBRA Election and Initial Payment

- A 60 day election period begins on the later of:
 - (i) the date GHP coverage is lost; or
 - (ii) the date the election notice is sent to the QB
- The election period can be tolled for the QB's incapacity
- A QB has 45 days to pay initial premium after electing COBRA (maximum 105 day free look to determine if COBRA "needed")



COBRA Election and Initial Payment

- Each QB has an independent right to elect COBRA and which GHP coverage to continue
- An employer is only initially required to offer the GHP coverage in effect the day before the QE (but could permit QBs to change options)
- QBs must generally be treated the same as similarly situated active employees
- QBs can make election changes and add dependents at annual enrollment or through HIPAA special enrollment

Note: Only dependents added due to birth or adoption are also QBs. Other added dependents do not have COBRA rights independent of the covered QB (i.e. No 2QE rights).



Duration of COBRA Coverage

Qualifying Event	Coverage Length
Loss of coverage due to termination of employment	18 months
Loss of coverage due to a reduction in hours	18 months
Death of covered employee	36 months
Divorce or legal separation	36 months
Dependent child ceases to be a dependent under the plan	36 months
Covered employee becoming entitled to Medicare benefits (retiree coverage only)	36 months
Employer's bankruptcy, but only for health coverage for retirees & their families	36 months



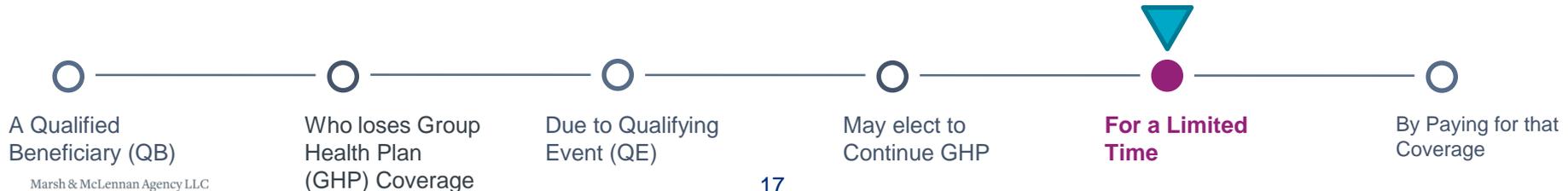
Special Situations – Disability Extension



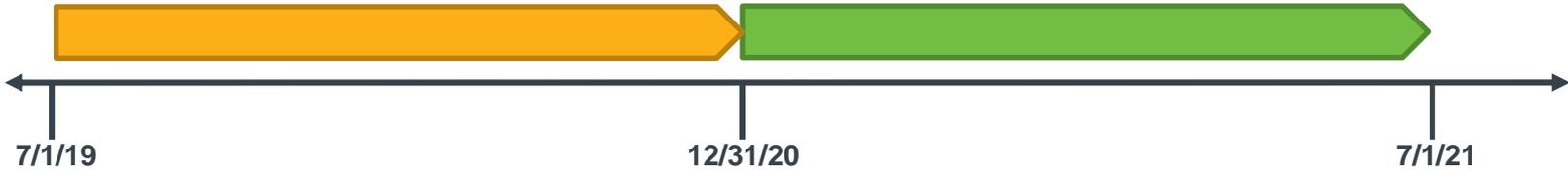
A disability extension of up to 11 months is available if...

- The initial QE is a termination or reduction in hours
- Any covered QB is determined disabled by SSA before or within first 60 days of COBRA coverage
- Plan administrator must be notified before the end of the initial 18 month COBRA period & within 60 days of the later of:
 - The date of the SSA determination;
 - The date of the initial QE;
 - The date the QB would lose coverage because of the QE; or
 - The date the QB is made aware of the notice procedure

Note: This is the relaxed notice standard from the DOL regulations.



Special Situations – 2nd Qualifying Events (2QE)



Up to 36 months is available for spouses and dependents if...

- The initial QE is a termination or reduction in hours
- A 2QE occurs that is the death of the employee, divorce/legal separation, loss of dependent status, or Medicare entitlement (if retiree coverage)
- Plan Administrator must be notified during the initial 18 month COBRA period (or 29 month with disability extension) and can require within 60 days of the 2QE



Special Situations – COBRA and Medicare

- If Medicare is effective first, there is no effect on a QB's right to elect COBRA
 - The QB who is the covered employee still gets up to 18 months of COBRA
 - Spouse and dependent QBs qualify for a period of COBRA coverage of up to 36 months measured from the Medicare effective date (example below)

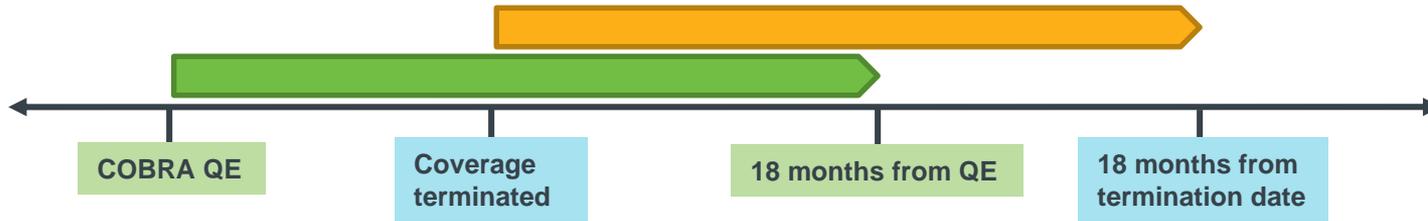


- If COBRA is effective first or on the same day as Medicare, things change...
 - GHPs may be written to terminate COBRA for the Medicare enrollee when this occurs
 - Spouses and dependents do not qualify for an extension



Special Situations – Accidental Deferred Loss

- We know that a failure to provide the COBRA election notice tolls the COBRA election period
- What happens when I also forget to terminate your coverage?

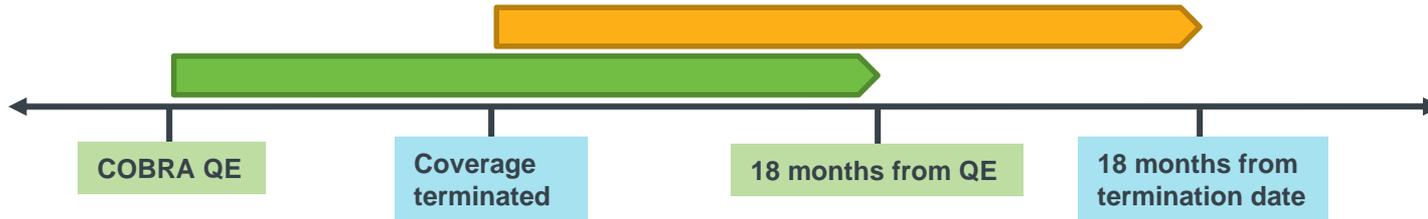


- Good argument for employer to run COBRA from QE and require retroactive payment
- May have difficulty recovering paid claims if QB does not elect COBRA



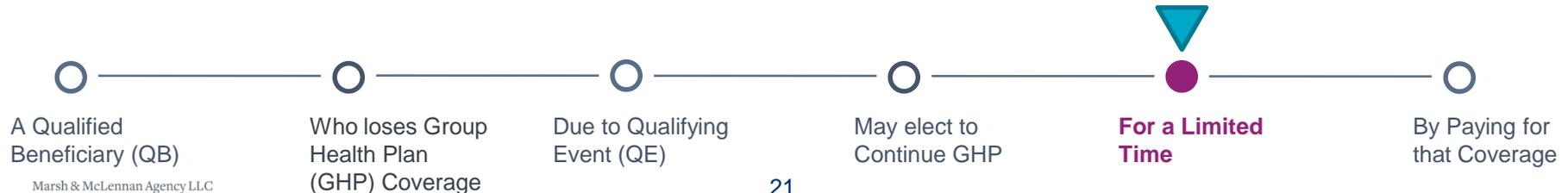
Special Situations – Intentional Deferred Loss

- What happens when the deferred loss of coverage is intentional?



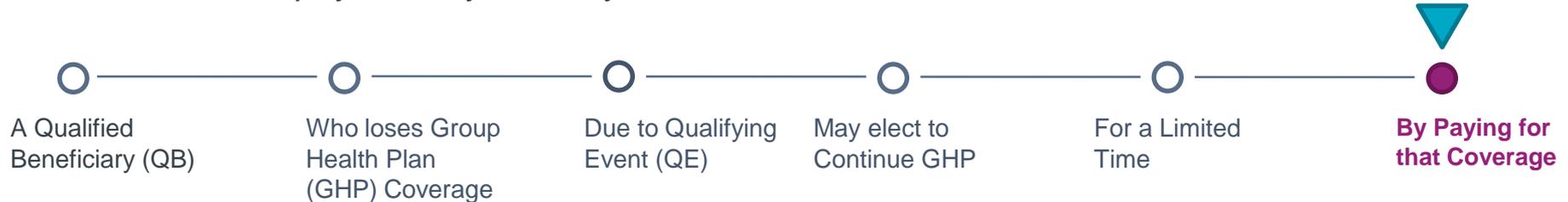
- If an employer wants COBRA to run from the QE date, we recommend providing the COBRA election notice in connection with the QE date and communicating that the extended period of coverage will count toward COBRA

Note: A loss of subsidized COBRA coverage is not a special enrollment event for the public health insurance exchange.



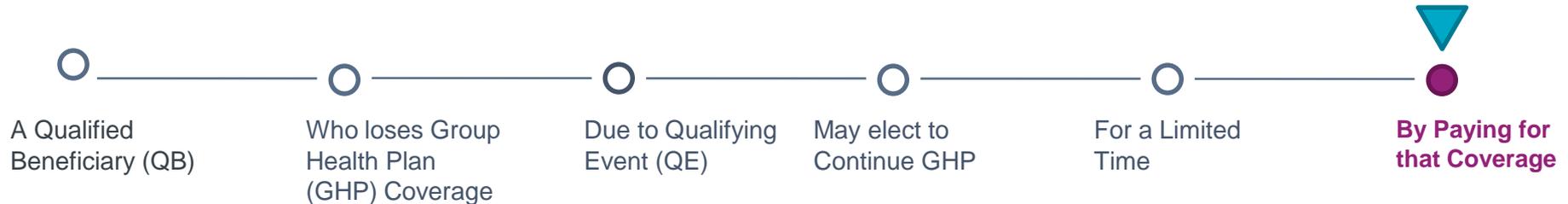
Applicable COBRA Premium

- 102% (or 150% for disability extension) of the applicable premium
- “Applicable premium” – Cost to the GHP of providing coverage for similarly situated non-COBRA beneficiaries
- Insured Plans – Premium charged by carrier
- Self-Funded Plans – limited guidance
 - Must be based on actuarially sound principles
 - Should reflect actual cost for providing coverage to similarly situated non-COBRA beneficiaries
- Must allow payment by monthly installment but can administer other methods



COBRA and Premium Payment

- Employer has 2 options with premium grace periods (45 day initial payment grace period and 30 day grace period thereafter):
 - Option 1: Continue coverage and retroactively cancel coverage if either the COBRA election or premium payment is not timely made (GHP may have to chase paid claims)
 - Option 2 : Cancel coverage and retroactively reinstate it upon a timely election and/or payment (GHP holds claims until payment received)
- We believe most employers choose Option 2 for the initial payment but Option 1 thereafter
- An employer may retroactively terminate COBRA for non-payment which is not an impermissible rescission of coverage under the Affordable Care Act



Notice of COBRA Termination

When

- When COBRA terminates before the end of the maximum COBRA continuation period

Timing/How

- Must be provided as soon as practical following a decision to terminate COBRA coverage

Contents

- Reason for early termination
- Effective date of termination
- Alternative coverage options (e.g., conversion)

COBRA

Odds & Ends

Delivery of COBRA Notices

What works

- Mailing by certified mail or 1st class regular mail to last known address is deemed delivered
- In-hand delivery to employee – please document this
- What to do about non-employee QBs? Mailbox rule?

What doesn't

- Employer sent notice via certified mail, even though employer knew it had been returned unclaimed
- Mailing notice to employee's home, even though employee was in hospital and no one was checking his mail

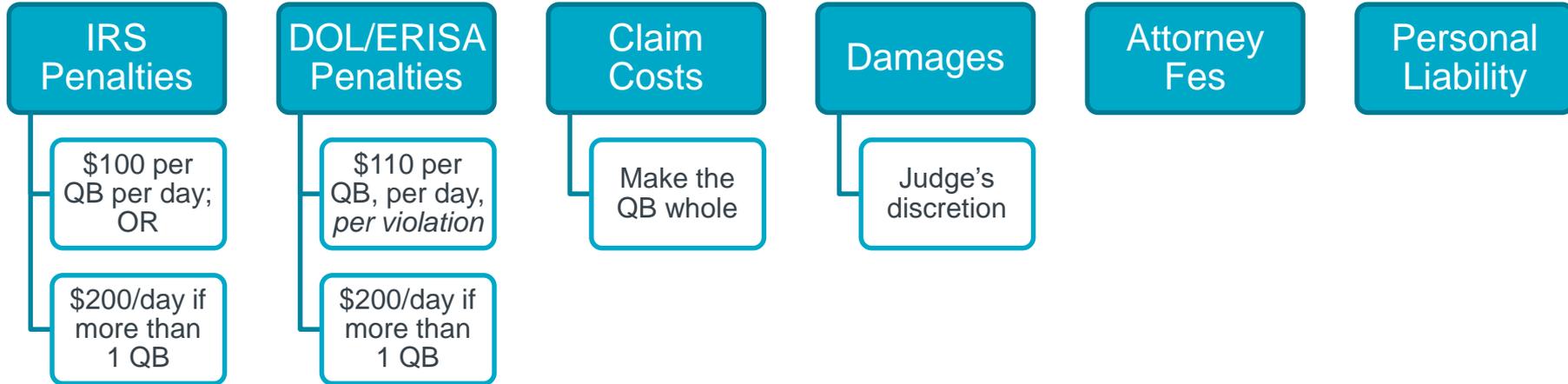
Mergers and Acquisitions

- Parties are free to contractually allocate the COBRA responsibility between each other in a merger or acquisition
- If they do not or a responsible party fails to live up to the terms of the purchase agreement, a set of default rules kick in
- The default rules:
 1. The seller remains liable so long as it continues to maintain a GHP (like for like)
 2. If the seller doesn't maintain a GHP
 - a) The COBRA obligation jumps to the buyer in a stock sale if the buyer maintains a group health plan
 - b) The COBRA obligation only jumps to the buyer in an asset sale if the buyer maintains a group health plan and is a successor employer (otherwise there is no COBRA obligation)
- There is no QE for employees acquired in a stock sale or in an asset sale by a successor employer who are not terminated before the closing date by seller or after the closing date by buyer

Potential Discrimination and Other Issues

- If GHP is self-insured, an employer subsidizing COBRA premiums on a more favorable basis for highly compensated individuals (HCIs) is discrimination under the Tax Code
 - Give the HCI taxable cash without strings attached
- Extending coverage beyond the maximum COBRA period
 - Stop loss coverage might not cover individual
 - Potential 409A issue

Fines & Penalties



Other Continuation Coverage Laws

USERRA

Continuation Rights

- USERRA: Employees absent from employment for service have the right to elect to continue coverage for a limited time
- COBRA: Loss of coverage due to leaving for military service is a qualifying event

Application

- USERRA applies to all public and private employers, regardless of size.
- Applies to “health plans” including medical, health FSAs, HRAs, and certain dental or vision plans
- For covered employees serving in the uniformed services

Differences between USERRA and COBRA

USERRA

- Only covered employee has the election right
- No specified election period timeframe
- Maximum coverage periods: 24 months
- Premium:
 - Less than 31 days: same as active coverage
 - More than 31 days: 102%

COBRA

- Each QB has an independent election right
- Election period is 60 days
- Maximum coverage periods: 18, 29, or 36 months
- Premium: 102% (150% disability extension)

State Continuation

Mini-COBRA

- Many state insurance laws include a “Mini-COBRA” provision applicable to employers with fewer than 20 employees
- Typically operates on the same or similar terms as federal COBRA
- Generally limited to fully insured GHPs (many states limit to medical)

COBRA Extensions

- Some states provide for an extension of continuation coverage after federal COBRA ends (e.g. California, Texas)
- Generally limited to fully insured GHPs

Questions?



HR Professional Credits

Activity ID: 19-3TVFH

Title: Federal Continuation Coverage

Start Date: 3/21/2019

End Date: 3/21/2019

Professional Development Credits: 1



Activity ID: 378294

Title: Federal Continuation Coverage

Start Date: 3/21/2019

End Date: 3/21/2019

Professional Development Credits: 1

