



# Top Ten COBRA Mistakes and How to Avoid Them

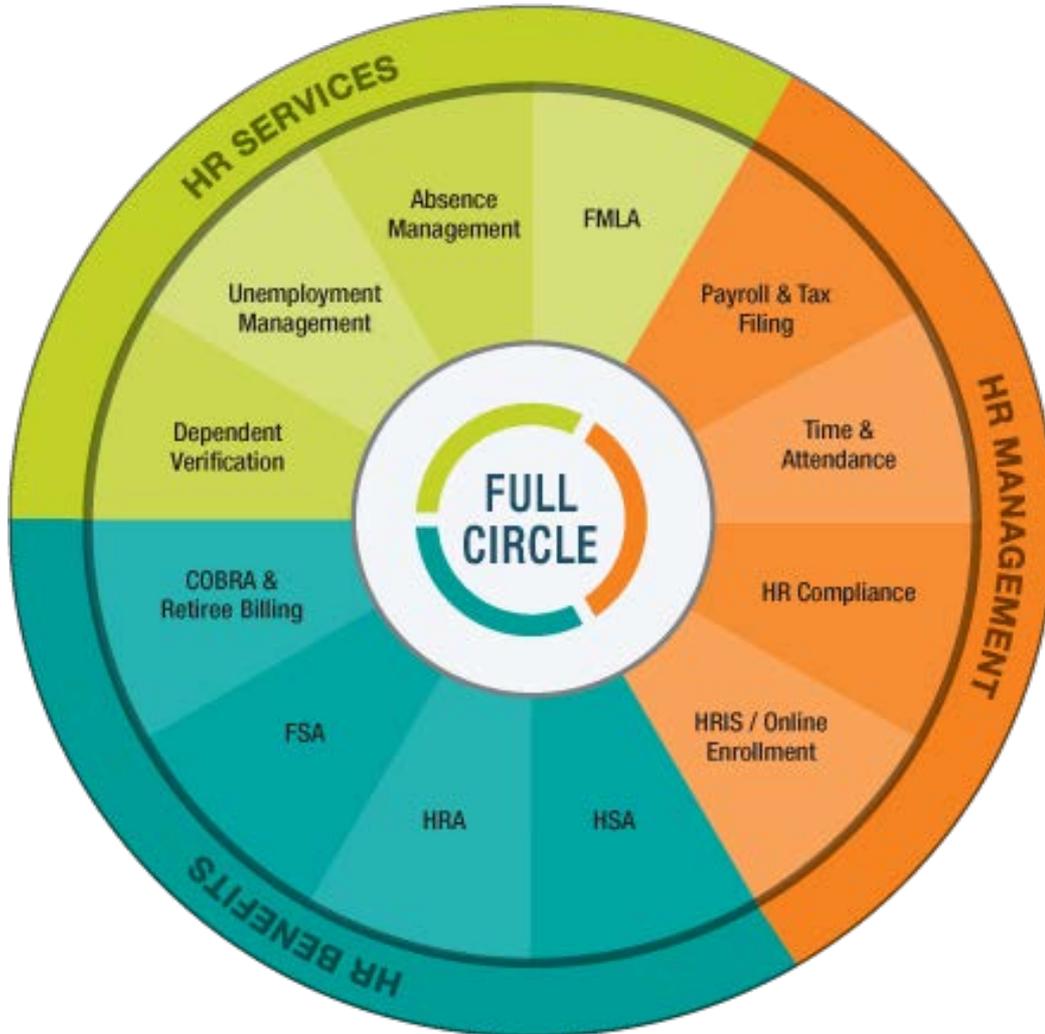
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# What is COBRA?



- “COBRA” = Consolidated Omnibus Budget Reconciliation Act of 1986, as amended
- Provides for continuation of existing group health plan coverage for qualifying employees, covered spouses and covered dependents
- Legally protected right under the Internal Revenue Code, Employee Retirement Income Security Act of 1974, and the Public Health Service Act

# Which Employers Must Comply?



- Employed at least 20 or more employees in prior year
  - On at least 50% of typical business days
  - Controlled group aggregation rules apply
- Determined using full-time equivalents
  - Part-time employees counted; up to 8 hours per day, 40 hours per week maximum
- Downsizing employer rule
  - Shrinking: subject to COBRA until calendar year after the average is less than 20 and can't drop COBRA for grandfathered recipients
- Statutory Exemptions:
  - Church = Yes
  - Government = No

# Consequences of Failing to Comply with COBRA



- IRS excise taxes of \$200/day
- Statutory penalties of \$110/day
- Qualified beneficiaries can sue to recover COBRA coverage
  - Claims may not be covered by plan or stop-loss policy
- Courts may impose “other equitable relief”
- Attorney fees imposed if plaintiff is successful in court



## Mistake #1

Assuming COBRA Doesn't  
Apply to All Group Health  
Plans

# Plans and Programs Subject to COBRA



- Medical
- Prescription Drug
- Dental
- Vision
- Substance Abuse
- Mental Health
- Disease Management Programs
- Health Flexible Spending Accounts
- Health Reimbursement Accounts
- Employee Assistance Programs (maybe)
- Wellness Programs (maybe)
- On-site Clinics (maybe)

# Unaffected Plans and Programs



- Life Insurance
- Short-Term Disability
- Long-Term Disability
- Accidental Death & Dismemberment
- Dependent Care FSA
- Long-Term Care Plan
- On-site Gyms
- Health Savings Account Contributions Program
- Medical Savings Account
- Workers' Compensation
- On-site Clinics (maybe)

# Wellness Program Rules



- Benefits of wellness programs must be offered if such benefits provide “medical care”
- Wellness incentives
  - Don’t have to offer to COBRA beneficiaries if \$ outside the health plan
  - May not have to reduce COBRA premium by amount of premium reduction offered to active employees
  - Must offer incentives such as lower deductibles, copayments, etc.

# Tips for Avoiding Mistake #1



- Review employee assistance programs, on-site clinics and wellness program
  - Do they provide “medical care”?
- Remember that a health FSA under a cafeteria plan is subject to COBRA
- Don’t assume HIPAA excepted benefits are also excepted from COBRA



## Mistake #2

Failing to Recognize That A  
Leave of Absence Could Be A  
Qualifying Event

# What is a Qualifying Event?



- Seven qualifying events:
  - Termination of employment
  - Reduction in hours
  - Divorce or legal separation
  - Death of covered employee
  - Dependent child ceasing to be a dependent under the plan
  - Entitlement to Medicare
  - Bankruptcy (retirees only)
- Event must cause a “loss of coverage”
- What is not a qualifying event?
  - Modification or termination of plan
  - Chapter 11 bankruptcy for non-retiree
  - Employee’s failure to pay required premiums

# FMLA Leave of Absence



- Beginning of FMLA leave **is not** a qualifying event
- Termination of FMLA leave **is** a qualifying event **if** employee does not return to work
  - Even if employee did not maintain coverage during FMLA leave
  - Even if employee doesn't repay premiums in arrears during leave

# Non-FMLA Leave of Absence



- If non-FMLA leave is a reduction in hours and results in loss of coverage, then it is a qualifying event
  - No loss of coverage, no qualifying event
- When should election notice be sent?
- When does the COBRA coverage period begin?

## Tips for Avoiding Mistake #2



- Offer COBRA coverage to employees on FMLA leave only if employee does not return from FMLA leave
- Address non-FMLA leaves of absence in leave policy
  - Options
    - Treat start of non-FMLA leave as qualifying event
    - Treat end of non-FMLA leave as qualifying event
    - Treat start of non-FMLA leave as qualifying event, but offer alternative coverage
  - Having no policy is a bad policy!



# Mistake #3 Failing to Provide COBRA Election Notice

# Election Notice



- Must be provided to each affected qualified beneficiary
  - Employee
  - Covered dependents
  - Covered spouses
- Can use single election notice if all reside at same address
- Must be sent within 14 days after receiving notice of qualifying event (or 44 days after qualifying event if employer is also plan administrator)
- Caution if using DOL's model election notice verbatim

## Tips for Avoiding Mistake #3



- Routinely run audits of employee data
- Timely communicate employee data to COBRA TPA
- Fixing a failure to provide a notice
  - Provide notice as soon as possible!
  - May require drafting special COBRA election forms and special election procedures



## Mistake #4

# Failing to Document Delivery of Election Notices

# Delivery of Election Notice



- Burden on employer to prove delivery of COBRA election notice to qualified beneficiaries
  - Do not need to prove actual receipt
- Can be mailed by certified mail or first class general mail to last known address
- Hand delivery allowed, but not recommended
- Electronic delivery allowed (provided it complies with DOL electronic notice regs), but not recommended

# Tips for Avoiding Mistake #4



- If qualified beneficiaries do not reside at same address, must separately deliver election notice to each qualified beneficiary
- Establish written procedures for preparing and sending election notices
- If mailing:
  - Check all employee records for most up-to-date mailing address
  - Confirm employee's address during exit interview
  - Consider using certified mail
- If delivering by hand, get signed and dated receipt from qualified beneficiary
  - However, mailing is a better option



## Mistake #5

Failing to Establish Reasonable  
Procedures for Notices from  
Qualified Beneficiaries

# Notice the Qualified Beneficiary Owes the Plan



- Qualified beneficiary must notify the plan administrator in the event of:
  - Divorce or legal separation or
  - Child's loss of dependent status
- Plans may also require qualified beneficiaries to provide notice of:
  - Second qualifying event
  - SSA's disability determination begins or ends
- Qualified beneficiary must provide notice within:
  - 60 days after qualifying event or determination of disability
  - 30 days after determination that disability has ended

# Tips for Avoiding Mistake #5



- Plan can establish reasonable notification procedures
  - Explain in SPD and initial COBRA notice
- Can use a specific form for qualified beneficiaries to use if:
  - Easily understandable and
  - Available without cost
- Written notification procedures encouraged; otherwise, an oral notification could be considered sufficient notice to plan administrator



# Mistake #6 Incorrectly Handling COBRA Premiums

# COBRA Premiums



- Monthly payments must be allowed
- Grace period must be allowed of at least:
  - 45 days after election of coverage – must be all premiums through payment date!
  - 30 days after first day of each month
  - Must be consistently applied
- If Qualified Beneficiary is incompetent, payment deadline must be extended
- Plan may pend claims until election and payment received

# Premium Shortfalls



- “Insignificant Shortfall”:
  - Lesser of \$50 or 10% of the premium due
- Plan can take following action for shortfall:
  - If insignificant, accept as full payment of the premium; or notify beneficiary and require repayment within a reasonable period (at least 30 days).
  - If significant, can cancel coverage

## Tips for Avoiding Mistake #6



- Ensure procedures are in place to administer the grace period
- Establish procedures and framework to determine if there is an “insignificant” shortfall
  - Can’t cancel coverage for non-payment, if shortfall is “insignificant”
- Put notification procedures in place to alert qualified beneficiary to shortfall



# Mistake #7 Improperly Handling Retiree Issues

# Retiree Complexities



- Retirement is a qualifying event if retiree loses coverage at termination of employment
- Retiree coverage can be offered in lieu of COBRA coverage
  - If retiree chooses retiree coverage over COBRA, then COBRA does not need to be offered when retiree coverage terminates
  - COBRA must still be offered to dependents upon termination of employment or occurrence of qualifying event
- Retiree coverage can run concurrently with COBRA
  - First 18 months are COBRA
  - Must be carefully drafted in plan

# Tips for Avoiding Mistake #7



- Make sure plan documents, SPD and retiree communications address retiree coverage and COBRA
  - Does COBRA run concurrently with retiree coverage?
  - Is retiree coverage an alternative to COBRA?
- Avoid “vested benefit” arguments
  - Explicitly state retiree coverage is subject to employer’s right to amend or terminate coverage
  - Explicitly state that no rights beyond those offered are being created



# Mistake #8 Failing To Address Affordable Care Act Issues

# Affordable Care Act Concerns



- Interaction of COBRA with Stability Period if using a look back measurement period
  - What if employee no longer measures full-time and loses coverage?
  - COBRA maximum coverage period measured from either
    - Date of qualifying event (reduction in hours) or
    - Date of loss of coverage
- Report COBRA coverage on Form 1095-C

## Tips for Avoiding Mistake #8



- Check COBRA language in plan documents and SPDs if using ACA look-back measurement method to determine plan eligibility
  - When does maximum COBRA coverage period begin, if employee has reduction in hours?
  - Amend if necessary
- Work with payroll provider or benefits consultant to ensure COBRA coverage is properly reported on Form 1095-C



# Mistake #9 Failing to Address COBRA Issues in Mergers and Acquisitions

# Mergers and Acquisitions



- Business reorganizations or acquisitions can cause qualifying events
- Who is responsible for providing COBRA coverage?
- Asset vs. stock sales

# Identifying “M&A Qualified Beneficiaries”



- Qualified beneficiaries who are receiving COBRA under seller’s plan before transaction
- Employees of seller whose employment terminates because of the transaction
  - No qualifying event for seller’s employees who are employed by buyer after stock sale
  - No qualifying event for seller’s employees if buyer is a “successor employer” and employees are employed by buyer immediately after asset sale

# Which Plan Covers M&A Qualified Beneficiaries



- Default rules in regs, but buyer and seller can contract for different rules
- Seller must cover M&A qualified beneficiaries if it maintains any plan after transaction
- Buyer must cover M&A qualified beneficiaries if:
  - Seller ceases to maintain any plan after transaction or
  - Seller doesn't maintain any plan after transaction and buyer is a “successor employer” in asset sale

## Tips for Avoiding Mistake #9



- COBRA rules in M&A deals are complex!
- Perform thorough due diligence on COBRA issues
- Make sure COBRA liability is allocated in the purchase agreement



Mistake #10  
Failing to Identify COBRA  
Issues in Severance  
Agreements

# Coordinating COBRA and Severance



- Extension of group health plan coverage and/or COBRA premium subsidies common in severance agreements
- Severance agreements are not a substitute for COBRA compliance
- Poorly drafted severance agreements can cause confusion regarding when COBRA coverage begins

# Special Severance Issues



- Will insured plans or plans with stop-loss insurance cover claims, if COBRA coverage period is extended?
- Pre-tax COBRA premium payments only allowed from severance pay through the end of the year
  - Cafeteria plan must include appropriate language
- Discrimination issues

# Tips for Avoiding Mistake #10



- Address COBRA in severance agreements
  - Be specific!
- Review insurance certificates and policies
  - Will claims be covered if group health plan coverage extends beyond COBRA maximum period?
- Review cafeteria plan documents if offering pre-tax payment of COBRA premiums



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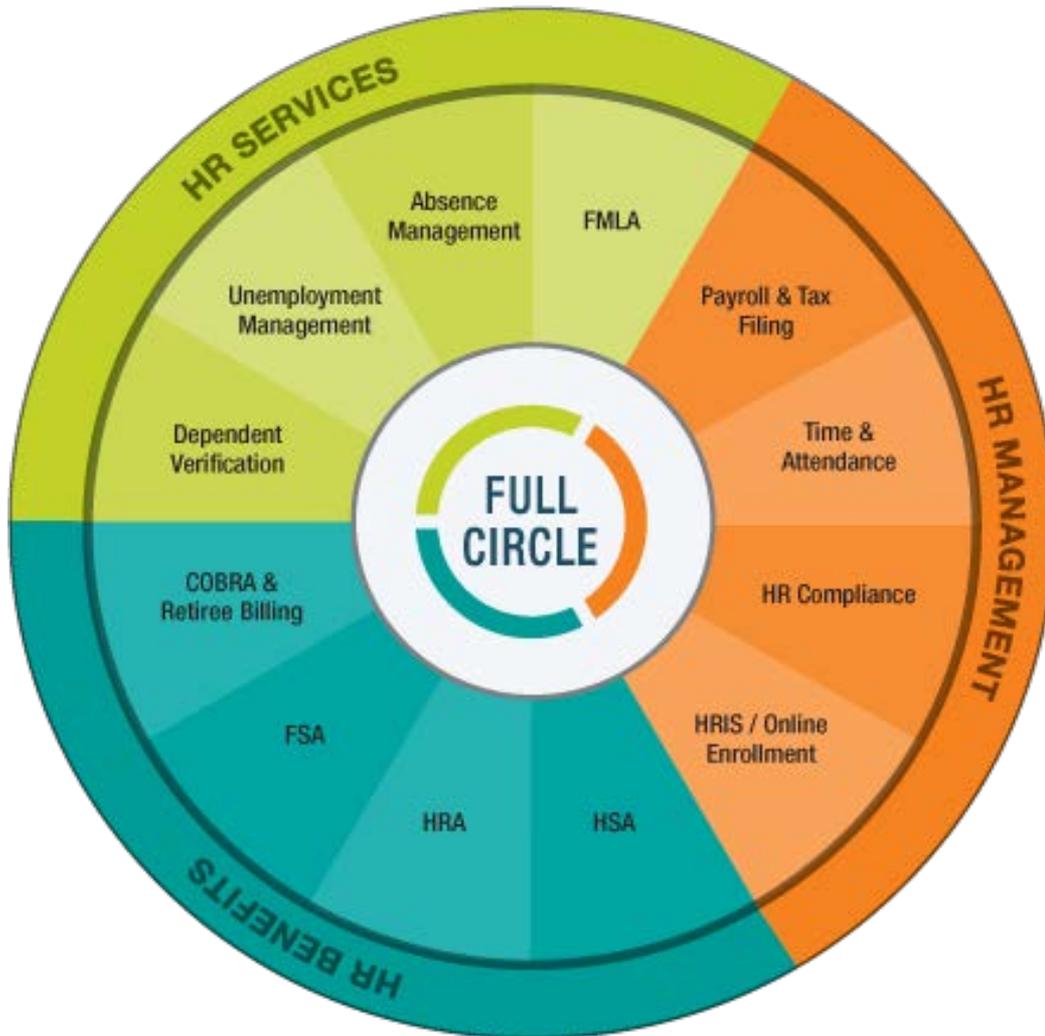
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