

## Legal Q&A

By **Laura Mueller**, TML Legal Counsel

### **Q. What is COBRA?**

A. COBRA stands for the Consolidated Omnibus Budget Reconciliation Act. It is a health benefit program enacted by the federal government in 1986. 29 U.S.C. § 1161 *et seq*; 42 U.S.C. § 300bb-1 *et seq*. COBRA allows an employee to continue to receive employer-provided health benefits at the expense of the employee after the employee becomes ineligible for coverage under the employer's personnel policies.

### **Q. Do cities have to participate?**

A. COBRA covers all group health plans maintained by government entities, including cities, if the city employees twenty or more employees. 42 U.S.C. § 300bb-1 *et seq*. If a city provides health coverage to its employees, the city must follow COBRA and allow an employee to continue coverage under its plan if the employee elects to do so. Eligible health coverage includes group health plans that are medical care and may include hospital care, physician care, surgery, prescription drugs, and dental and vision care. A city that does not already offer health care coverage to its employees or their dependents does not have to participate.

### **Q. When would an employee be offered continued health benefits under COBRA?**

A. Coverage must be offered to "qualified beneficiaries." A qualified beneficiary is an individual who was covered by the city's group health plan the day before a "qualifying event" occurred and who is either an employee, a spouse of an employee, a former spouse of an employee, or an employee's dependent child.

### **Q. What is a "qualifying event"?**

A. A "qualifying event" is an event that causes an individual to lose group health coverage. A qualifying event could include the death of a covered employee, termination of an employee for any reason other than "gross misconduct," reduction in the hours of a covered employee's employment with the city, divorce or legal separation of a covered employee and spouse, or a child's loss of dependent status. 42 U.S.C. § 300bb-3.

### **Q. If a qualifying event occurs, what does the city have to do?**

A. If a city provides group health coverage, and an individual has certain qualifying events that may entitle the individual to continuation of health coverage under COBRA, the city must inform its health benefit plan administrator of the qualifying event. Some cities administer their own COBRA continuation coverage, while others have their health benefit provider administer their COBRA coverage. If a city administers its own COBRA coverage, the city would generally inform its benefits plan of the qualifying event and then administer the coverage under federal law. If a city has its health benefits plan

administer its COBRA coverage, the health plan is informed of the qualifying event by the city.

After certain types of qualifying events—such as termination of the employee, reduction in hours of the employee, or the death of an employee—a city has 30 days to give notice to the administrator. However, for other qualifying events—such as divorce, legal separation, or a child’s loss of dependent status under the plan—the employee is the one responsible for informing the COBRA benefits administrator.

If the city receives notice of an employee’s qualifying event, it should work with the employee to give notice to the appropriate administrator, even if notice of the qualifying event triggering the coverage would ordinarily be the employee’s responsibility. After the COBRA benefits plan administrator has notice of the event, the administrator is responsible for providing an election notice and other documentation to the employee in question. The administrator can also deny coverage for certain reasons, but must give notice to the employee in question. If the city has questions regarding who administers its COBRA coverage, it should contact its health benefits plan and its city attorney. 42 U.S.C. § 300bb-6.

**Q. Does the city still have to offer COBRA coverage if an employee is terminated for cause?**

A. An employee and his dependents will generally be eligible for continuation of health coverage under COBRA even if the employee is fired for cause. However, an employee who is fired for “gross misconduct” would not be eligible for COBRA coverage or the COBRA subsidy described below. Unfortunately, the term “gross misconduct” is not specifically defined in COBRA or in regulations that implement COBRA. Therefore, whether a fired employee has engaged in gross misconduct will depend on the specific facts and circumstances. Generally, it can be assumed that being fired for most ordinary reasons, such as excessive absences or generally poor performance, does not amount to “gross misconduct.” But “gross misconduct” may include illegal activities such as stealing, embezzling, or other mishandling of employer funds or property; violence and threats of violence that are related to the workplace; or drunk driving on the job. If the employee is fired for “gross misconduct,” the city would not be required to provide the employee and the employee’s dependents continuation coverage under COBRA. The “gross misconduct” exception to COBRA continuation coverage would not apply to a situation in which the employee is allowed to resign rather than be fired. 42 U.S.C. § 300bb-3.

**Q. Does a city have to give an employee COBRA coverage if the employee quits?**

A. Quitting, retiring, being fired, or being laid off all count as qualifying events for COBRA continuation coverage. 42 U.S.C. § 300bb-3.

**Q. Does a city have to give an employee COBRA coverage if the employee chooses to go part-time or has reduced hours due to an injury or disability?**

A. An employee whose hours are reduced and would lose health coverage under the city's plan, whether because the employee chooses to go part-time or the city requires it, would be eligible for COBRA continuation coverage. This includes the situation in which the employee is absent from work due to disability, a temporary layoff, extended leave, or for any other reason besides Family Medical Leave Act (FMLA) leave.

**Q. How is health insurance coverage handled if the employee is off work on FMLA and becomes ineligible for health coverage under a city's plan?**

A. Usually, a qualifying event occurs if absence from work would cause the employee and the employee's family to lose coverage under the city's group health plan. That rule does not apply, however, when employees take leave that is protected under the FMLA. If an employee is eligible for FMLA leave and takes the leave, the city is required to maintain the employee's health insurance under the same conditions as before the leave (including any arrangement regarding payment of premiums). This means that the city must continue to pay whatever amount of premium it paid before the individual went on leave, and the individual must pay the same amount that was required before the employee went on FMLA leave. However, if an employee stays on leave past the 12 weeks of leave mandated by the FMLA for certain cities (generally those with more than 50 full-time employees), the extended absence would likely be a qualifying event that would require continuation coverage under COBRA.

**Q. Who pays for the coverage?**

A. Who pays for the coverage depends on when the individual became eligible for continuation coverage and why the individual became eligible. In most cases, the city can choose to pay for part or all of the COBRA continuation coverage, or can require the individual to pay for the coverage. The maximum amount charged to these individuals cannot exceed 102 percent of the cost to the plan for coverage of similarly-situated individuals who are still eligible for coverage. The additional two percent can be charged as an administrative cost. The individual can pay the premium on a monthly basis if desired and will either reimburse the city or pay the health benefits plan (depending on how the city decides to administer COBRA continuation coverage). 42 U.S.C. § 300bb-2. Also, the person administering the COBRA continuation coverage must give the individual at least 45 days after the individual elects to have the coverage to pay the first premium payment. But the plan can terminate coverage if the individual does not pay within the 45-day time frame.

The American Recovery and Reinvestment Act of 2009 added a COBRA subsidy for some COBRA-eligible individuals. If the individual becomes eligible for COBRA continuation coverage between September 2008 and February 2010 due to an involuntary termination of employment, the former employee will be required to pay only 35 percent of the cost of COBRA coverage if the individual wishes to participate in the city's health insurance plan (for the first nine of 18 months for which the individual is eligible for continuation coverage). Cities are then required to pay the remaining 65 percent of the

premium, but are entitled to a credit for that payment on their quarterly payroll tax return (Form 941). For more information on how a city will be reimbursed for the cost of the coverage, see the Internal Revenue Service's Web site at [www.irs.gov](http://www.irs.gov). For more information on the American Recovery and Reinvestment Act, please see [www.recovery.gov](http://www.recovery.gov).

An individual can be ineligible or become ineligible for the continuation coverage subsidy if the individual is eligible for other group health coverage (such as through a new employer's plan or a spouse's plan) or if the employee's termination of employment was for gross misconduct. If the qualifying event occurred after February 2010, this provision does not apply and the city decides how much, if any, to pay.

**Q. Does the health coverage offered have to be the same as what current employees have?**

A. The continuation coverage must be identical to the coverage that is currently available under the plan to similarly-situated individuals who are covered under the city's group health plan as employees or employees' dependents. Usually this will be the same coverage the individual had immediately before losing coverage with the city. The coverage must offer the same benefits, choices, and services as what current employees and dependents are receiving. However, the individual is also subject to the same rules and limits that would apply to current employees or dependents, such as co-payment requirements, deductibles, and coverage limits. Also, any changes made to the plan that would apply to current employees and their dependents would also apply to any with COBRA continuation coverage. 42 U.S.C. § 300bb-2.

**Q. How long does coverage have to continue?**

A. Coverage lasts for a limited period of either 18 or 36 months. The period for which continuation coverage must be available depends on why the individual lost coverage in the beginning. However, the city and its health plan may provide longer periods of coverage beyond the maximum period required by law.

If the reason an individual is eligible for COBRA coverage is the end of employment or reduction of employee's hours, the individual and his dependents are eligible for up to 18 months of coverage. For any other "qualifying event," the individual and the individual's dependents must be offered a maximum of 36 months of continuation coverage.

In addition, coverage may be extended if another qualifying event occurs while the individual is already on COBRA continuation coverage. 42 U.S.C. § 300bb-2.

## **COBRA RESOURCES**

### **Department of Labor**

Basic Information:

<http://www.dol.gov/dol/topic/health-plans/cobra.htm>

FAQs:

[http://www.dol.gov/ebsa/faqs/faq\\_consumer\\_cobra.HTML](http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.HTML)

Sample Notices: <http://www.dol.gov/ebsa/cobramodelnotice.html>

**Internal Revenue Service**

COBRA Premium Subsidy: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>