Qualified Beneficiaries Who Divorce With No Notice to the Plan

Divorce from a covered employee is an important event under COBRA for two basic reasons. First, as explained in Section VII, when it causes a covered spouse or dependent child to lose coverage under the plan, it is a qualifying event that gives the spouse and children the right to elect up to 36 months of COBRA coverage. Second, as explained in Section VII's treatment of the multiple qualifying event rule, divorce can be a second qualifying event. As such, it can extend—from 18 months to 36 months—the basic COBRA period already in place for the affected spouse and children (flowing from an earlier termination or reduction in hours of the covered employee's employment).

> Legal Separation That Causes Loss of Coverage May Be Qualifying Event. As explained in Section VII, if it will cause a spouse or child of the covered employee to lose coverage under the plan, legal separation can be either an initial qualifying event or a second qualifying event. For plans that terminate coverage for legal separation, this discussion should be read as if it includes legal separation.

Under COBRA, the plan administrator must be notified within 60 days that a divorce has occurred. If timely notice is not provided, the plan is not required to provide COBRA election materials when divorce is the first qualifying event. What should a plan do when this notice requirement is not met? The considerations are discussed in detail in Section XVII, but the following is a short list of issues to consider:

- The plan administrator should recognize that informal, oral notice will be sufficient to trigger the plan's obligation to offer COBRA.
- The plan administrator should recognize that notice may not even be required if the plan has independent knowledge that a covered employee and spouse have divorced (as discussed in Section XVII).
- The plan must be able to prove that required notices, including the initial and election notices, were provided to the qualified beneficiary and that the notices clearly explained the need to notify the plan of any divorce.
- Assuming that the plan can prove that it had no independent knowledge of the divorce and that adequate notices were provided, the plan should be confident in denying COBRA to a qualified beneficiary whose divorce is not reported.

For the reasons discussed in Section VII regarding the multiple qualifying event rule, however, it is less certain whether notice of divorce must be provided under the multiple qualifying event rule. Of course, if a plan has no knowledge that a divorce has occurred, as a practical matter it won't know to extend the period.

Anticipation of Divorce or Legal Separation

The IRS COBRA regulations expand the anticipation-of-qualifying-event rule to include an "employee's eliminating the coverage of the employee's spouse in anticipation of a divorce or legal separation." Specifically, if a covered employee eliminates or reduces the coverage of the covered employee's spouse in anticipation of their divorce (or legal separation), then upon receiving notice of the divorce (or legal separation) a plan that is required to make COBRA continuation coverage available to the spouse must begin to make coverage available as of the date of the divorce (or legal separation).[223] If the group health plan coverage is modified after the covered employee eliminates or reduces the spouse's coverage, then the modified coverage must be made available to the divorced or separated spouse.[224]

Mistakes Happen. Failing to recognize a drop of coverage in anticipation of divorce is a common compliance mistake. For more information on correcting and avoiding COBRA compliance mistakes, see Section XXIV.

Example: Elimination of Coverage During Legal Separation. A group health plan permits employees to elect to cover their spouses. The plan provides that coverage terminates for an employee's spouse upon divorce, but there is no loss of coverage under the terms of the plan when a spouse and covered employee become legally separated. A few weeks after Albert, a covered employee, legally separates from his spouse, Brenda, he revokes Brenda's coverage under the plan in anticipation of their later divorce. (Assume that Brenda does not obtain a court order requiring Albert to maintain coverage.)*

Is Brenda entitled to COBRA coverage upon the legal separation or upon the later divorce?

The triggering event of legal separation did not cause a loss of coverage for Brenda under the terms of the plan. Thus, it is not a qualifying event.

Under the IRS COBRA regulations, Albert's discontinuation of Brenda's coverage must be disregarded in determining whether their subsequent divorce caused her loss of coverage.† If the discontinuation of her coverage is disregarded, the plan must apparently assume that she remained covered up to the time of the divorce. Assuming that she was covered at the time of the divorce, it is clear that divorce causes a loss of coverage for spouses under the terms of the plan. Therefore, the divorce is a qualifying event even though Brenda's actual loss of coverage occurred before the divorce as a result of Albert's anticipatory action. Consequently, Brenda is entitled to elect COBRA coverage, but her COBRA coverage would begin only with the divorce.‡ (Thus, Brenda has no coverage under the plan for the period preceding the divorce and after Albert dropped her coverage.)

* *See Hall v. Glenn O. Hawbaker Inc.*, 2006 WL 3250869 (M.D. Pa. 2006) (employee dropped covered spouse during legal separation in anticipation of divorce); *cf. Charles O. Hiler & Sons, Inc. v. Cole*, 605 N.E.2d 235 (Ind. Ct. App. 1992) (employee, who was separated from spouse, filed for divorce and failed to re-enroll his spouse during open enrollment when employer knew of separation; the parties agreed that the qualifying event had not occurred).

† Treas. Reg. §54.4980B-4, Q/A-1(c).

‡ Rev. Rul. 2002-88, 2002-52 I.R.B. 995.

3. Administering the Anticipation-of-Divorce Rule

The facts of the above example assume that Albert dropped Brenda's coverage in anticipation of divorce. Things are not always so clear in the real world. Initially, all the facts the administrator may have are that (a) an employee terminated a spouse's coverage as the employee's dependent, (b) the employee and spouse later divorced, and (c) the (now former) spouse has notified the plan administrator of the divorce and is requesting COBRA coverage for up to 36 months from the divorce. That seems to be an insufficient basis for the administrator to determine that the former spouse is entitled to elect COBRA coverage under the anticipation-of-divorce rule. The rule requires that the employee should have eliminated the spouse's coverage "in anticipation of" the divorce that subsequently occurred. In other words, the administrator has to determine what the employee's actual knowledge (did the employee anticipate divorce?) and employee's subjective intent (Did the employee terminate the spouse's coverage "in anticipation of" the divorce?) at the time the employee eliminated the spouse's coverage. This may involve questioning the employee, the spouse or others regarding whether and when the employee anticipated a divorce. Additionally, the administrator will have to determine whether the employee eliminated coverage "in anticipation" of the divorce. In some cases, the parties will have already commenced divorce proceedings or there may be other documentary evidence that supports the conclusion that the employee anticipated the divorce. In other cases, conceivably all the relevant information may reside with the employee (who may have harbored the intent to divorce his or her spouse, but had never acted on that intent or communicated that intent to anyone before eliminating the spouse's coverage).

Some plan administrators have a practice (even though not required by COBRA) of automatically sending a letter to spouses and dependents who have been dropped, to advise them that they no longer have coverage and to remind them that to protect their COBRA rights, they must notify the plan administrator of any divorce or legal separation (legal separation need be mentioned only if, under the terms of the plan, coverage is lost as a result of legal separation) that has occurred or may subsequently occur. In addition, some description of the plan's policies on anticipation of divorce would have to appear in the COBRA initial notice, especially if the plan will require the spouse to provide information to substantiate that the loss was in anticipation of divorce—e.g., a copy of the petition for divorce to establish when the parties first took action to dissolve the marriage.

Consider the case of Tim, a covered employee, and his spouse, Shirley, who is also covered under Tim's group health plan; they agree to divorce after ten years of marriage. Things remain quite amicable after the divorce petition is filed. Shirley gets a new job and, because the premiums are lower under the new employer's group health plan, Shirley enrolls in that plan and Tim drops Shirley's coverage during a regular open enrollment period. (Assume that the plan administrator does not know why Shirley's coverage is dropped and has no knowledge that Tim and Shirley are getting divorced.) Shirley and Tim's divorce becomes final six months after the petition was filed. One week after the divorce is entered, Shirley's employer goes out of business and ceases to maintain any plan for employees. Shirley, therefore, wishes to become covered again under Tim's plan. She notifies the plan administrator of the divorce in a timely way. (See Section XVII.) Is she entitled to a COBRA election under Tim's plan?

Shirley's notice of divorce will present two problems for the plan administrator. First, Shirley was not covered under the plan on the day before the divorce, so she does not fall within the definition of a COBRA qualified beneficiary (see Section IX). However, after consulting plan records, the administrator sees that Shirley had been covered under the plan six months before the divorce.[225] Consequently, the administrator may question whether Shirley's coverage was dropped in anticipation of the divorce. If it

was, the administrator would disregard the earlier loss of coverage in determining whether the divorce caused the loss, would essentially treat Shirley as having been covered under the plan on the day before the divorce, and would send her a COBRA election notice.

However, short of obtaining an affidavit from Shirley and Tim regarding the circumstances of their marital relationship, how is the administrator to determine whether Tim dropped Shirley's coverage in anticipation of the later divorce? A plan administrator will want to examine all of the facts and circumstances surrounding a loss of coverage to determine whether it was in anticipation of divorce (assuming that the plan could even obtain accurate knowledge of such facts and circumstances). The plan administrator will have to make a judgment about the employee's subjective motivation for reducing or eliminating a spouse's coverage and decide whether to offer COBRA coverage on that basis.

Caution Regarding Insurers. Insured plans and self-insured plans with stop-loss coverage should consult with their carriers in connection with issues arising under the anticipation-of-divorce rule that could result in a dispute with the carrier about whether an individual spouse is clearly entitled to COBRA coverage.

Consultation with legal counsel in each individual circumstance is advisable as well; each will require a different analysis of the facts and of the attendant risks.