

COBRA BUSINESS REORGANIZATIONS

Seller Retains COBRA Obligation: The final regulations provide, in both sales of stock and assets, such as a division or plant, that the seller retains the obligation to make COBRA continuation coverage available to existing qualified beneficiaries.

Buyer Obtains COBRA Obligation If Seller Ceases To Maintain A Group Health Plan: The new proposed regulations provide that the buyer is responsible for providing COBRA continuation coverage to existing qualified beneficiaries if the seller ceases to maintain a group health plan for **any employee**. This secondary liability for the buyer applies in all stock sales and in all sales of substantial assets in which the buyer continues the business operations associated with the assets without interruption or substantial change.

COBRA Obligation By Contract: The new proposed regulations make clear that the parties to a business transaction are free to allocate the responsibility for providing COBRA continuation coverage by contract, even if the contract imposes responsibility on a different party than would the new proposed regulations. If, however, the party allocated responsibility under the contract defaults on its obligation, and if, under the new proposed regulations, the other party would have the obligation to provide COBRA continuation coverage in the absence of a contractual provision, then the other party would retain that obligation.

Asset Sale When Health Insurance Is Maintained: This type of asset sale is one in which, after purchasing a business as a going concern, the buyer continues to employ the employees of that business and continues to provide those employees exactly the same health coverage that they had before the sale (either by providing coverage through the same insurance contract or by establishing a plan that mirrors the one that provided benefits before the sale). The application of the rules in the new proposed regulations to this type of asset sale would require the seller to make COBRA continuation coverage available to the employees continuing in employment with the buyer. Ordinarily, the continuing employees would be very unlikely to elect COBRA continuation coverage from the seller when they can receive the same coverage (usually at much lower cost) as active employees of the buyer.

Stock Sale Examples

Example 1. Selling Group S consists of three corporations, A, B, and C. Buying Group P consists of two corporations, D and E. P enters into a contract to purchase all the stock of C from S effective July 1, 2002. Before the sale of C, S maintains a single group health plan for the employees of A, B, and C. P maintains a single group health plan for the employees of D and E. Effective July 1, 2002, the employees of C become covered under P's plan. On June 30, 2002, there are 48 qualified beneficiaries receiving COBRA continuation coverage under S's plan, 15 of whom are M&A qualified beneficiaries with respect to the sale of C. (The other 33 qualified beneficiaries had qualifying events in connection with a covered employee whose last employment before the qualifying event was with either A or B.)

Result: Under these facts, S's plan continues to have the obligation to make COBRA continuation coverage available to the 15 M&A qualified beneficiaries under S's plan after the sale of C to P. The employees who continue in employment with C do not experience a qualifying event by virtue of P's acquisition of C. If they experience a qualifying event after the sale, then

the group health plan of P has the obligation to make COBRA continuation coverage available to them.

Example 2. Selling Group S consists of three corporations, A, B, and C. Each of A, B, and C maintains a group health plan for its employees. Buying Group P consists of two corporations, D and E. P enters into a contract to purchase all of the stock of C from S effective July 1, 2002. As of June 30, 2002, there are 14 qualified beneficiaries receiving COBRA continuation coverage under C's plan. C continues to employ all of its employees and continues to maintain its group health plan after being acquired by P on July 1, 2002.

Result: Under these facts, C is an acquired organization and the 14 qualified beneficiaries under C's plan are M&A qualified beneficiaries. A group health plan of S (that is, either the plan maintained by A or the plan maintained by B) has the obligation to make COBRA continuation coverage available to the 14 M&A qualified beneficiaries. S and P could negotiate to have C's plan continue to make COBRA continuation coverage available to the 14 M&A qualified beneficiaries. In such a case, neither A's plan nor B's plan would make COBRA continuation coverage available to the 14 M&A qualified beneficiaries unless C's plan failed to fulfill its contractual responsibility to make COBRA continuation coverage available to the M&A qualified beneficiaries. C's employees (and their spouses and dependent children) do not experience a qualifying event in connection with P's acquisition of C, and consequently no plan maintained by either P or S has any obligation to make COBRA continuation coverage available to C's employees (or their spouses or dependent children) in connection with the transfer of stock in C from S to P.

Example 3. The facts are the same as in Example 2, except that C ceases to employ two employees on June 30, 2002, and those two employees never become covered under P's plan.

Result: Under these facts, the two employees experience a qualifying event on June 30, 2002 because their termination of employment causes a loss of group health coverage. A group health plan of S (that is, either the plan maintained by A or the plan maintained by B) has the obligation to make COBRA continuation coverage available to the two employees (and to any spouse or dependent child of the two employees who loses coverage under C's plan in connection with the termination of employment of the two employees) because they are M&A qualified beneficiaries with respect to the sale of C.

Example 4. Selling Group S consists of three corporations, A, B, and C. Buying Group P consists of two corporations, D and E. P enters into a contract to purchase all of the stock of C from S effective July 1, 2002. Before the sale of C, S maintains a single group health plan for the employees of A, B, and C (and their families). P maintains a single group health plan for the employees of D and E (and their families). Effective July 1, 2002, the employees of C (and their families) become covered under P's plan. On June 30, 2002, there are 25 qualified beneficiaries receiving COBRA continuation coverage under S's plan, 20 of whom are M&A qualified beneficiaries with respect to the sale of C. (The other five qualified beneficiaries had qualifying events in connection with a covered employee whose last employment before the qualifying event was with either A or B.) S terminates its group health plan effective June 30, 2002 and begins to liquidate the assets of A and B and to lay off the employees of A and B.

Result: Under these facts, S ceases to provide a group health plan to any employee in connection with the sale of C to P. Thus, beginning July 1, 2002 P's plan has the obligation to make COBRA continuation coverage available to the 20 M&A qualified beneficiaries, but P is not obligated to make COBRA continuation coverage available to the other 5 qualified beneficiaries with respect to S's plan as of June 30, 2002 or to any of the employees of A or B whose employment is terminated by S (or to any of those employees' spouses or dependent children).

Asset Sale Examples

Example 5. Selling Group S provides group health plan coverage to employees at each of its operating divisions. S sells the assets of one of its divisions to Buying Group P. Under the terms of the group health plan covering the employees at the division being sold, their coverage will end on the date of the sale. P hires all but one of those employees, gives them the same positions

that they had with S before the sale, and provides them with coverage under a group health plan. Immediately before the sale, there are two qualified beneficiaries receiving COBRA continuation coverage under a group health plan of S whose qualifying events occurred in connection with a covered employee whose last employment prior to the qualifying event was associated with the assets sold to P.

Result: These two qualified beneficiaries are M&A qualified beneficiaries with respect to the asset sale to P. Under these facts, a group health plan of S retains the obligation to make COBRA continuation coverage available to these two M&A qualified beneficiaries. In addition, the one employee P does not hire as well as all of the employees P hires (and the spouses and dependent children of these employees) who were covered under a group health plan of S on the day before the sale are M&A qualified beneficiaries with respect to the sale. A group health plan of S also has the obligation to make COBRA continuation coverage available to these M&A qualified beneficiaries.

Example 6. Selling Group S provides group health plan coverage to employees at each of its operating divisions. S sells substantially all of the assets of all of its divisions to Buying Group P, and S ceases to provide any group health plan to any employee on the date of the sale. P hires all but one of S's employees on the date of the asset sale by S, gives those employees the same positions that they had with S before the sale, and continues the business operations of those divisions without substantial change or interruption. P provides these employees with coverage under a group health plan. Immediately before the sale, there are 10 qualified beneficiaries receiving COBRA continuation coverage under a group health plan of S whose qualifying events occurred in connection with a covered employee whose last employment prior to the qualifying event was associated with the assets sold to P.

Result 1: These 10 qualified beneficiaries are M&A qualified beneficiaries with respect to the asset sale to P. Under these facts, P is a successor employer described in paragraph (c) of this Q&A-8. Thus, a group health plan of P has the obligation to make COBRA continuation coverage available to these 10 M&A qualified beneficiaries.

Result 2: The one employee that P does not hire and the family members of that employee are also M&A qualified beneficiaries with respect to the sale. A group health plan of P also has the obligation to make COBRA continuation coverage available to these M&A qualified beneficiaries.

Result 3: The employees who continue in employment in connection with the asset sale (and their family members) and who were covered under a group health plan of S on the day before the sale are not M&A qualified beneficiaries because P is a successor employer to S in connection with the asset sale. Thus, no group health plan of P has any obligation to make COBRA continuation coverage available to these continuing employees with respect to the qualifying event that resulted from their losing coverage under S's plan in connection with the asset sale.

Example 7. Selling Group S provides group health plan coverage to employees at each of its two operating divisions. S sells the assets of one of its divisions to Buying Group P1. Under the terms of the group health plan covering the employees at the division being sold, their coverage will end on the date of the sale. P1 hires all but one of those employees, gives them the same positions that they had with S before the sale, and provides them with coverage under a group health plan.

Result 1: Under these facts, a group health plan of S has the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to the sale to P1. (If an M&A qualified beneficiary first became covered under P1's plan after electing COBRA continuation coverage under S's plan, then S's plan could terminate the COBRA continuation coverage once the M&A qualified beneficiary became covered under P1's plan, provided that the remaining conditions of Q&A-2 of Sec. 54.4980B-7 were satisfied.)

Result 2: Several months after the sale to P1, S sells the assets of its remaining division to Buying Group P2, and S ceases to provide any group health plan to any employee on the date of that sale. Thus, under Q&A-1 of Sec. 54.4980B-7, S ceases to have an obligation to make COBRA continuation coverage available to any qualified beneficiary on the date of the sale to P2. P1 and P2 are unrelated organizations.

Result 3: Even if it was foreseeable that S would sell its remaining division to an unrelated third party after the sale to P1, under these facts the cessation of S to provide any group health plan to any employee on the date of the sale to P2 is not in connection with the asset sale to P1. Thus,

even after the date S ceases to provide any group health plan to any employee, no group health plan of P1 has any obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to the asset sale to P1 by S. If P2 is a successor employer under the rules of paragraph (c) of this Q&A-8 and maintains one or more group health plans after the sale, then a group health plan of P2 would have an obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to the asset sale to P2 by S (but in such a case employees of S before the sale who continued working for P2 after the sale would not be M&A qualified beneficiaries). However, even in such a case, no group health plan of P2 would have an obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to the asset sale to P1 by S. Thus, under these facts, after S has ceased to provide any group health plan to any employee, no plan has an obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to the asset sale to P1.

Example 8. Selling Group S provides group health plan coverage to employees at each of its operating divisions. S sells substantially all of the assets of all of its divisions to Buying Group P. P hires most of S's employees on the date of the purchase of S's assets, retains those employees in the same positions that they had with S before the purchase, and continues the business operations of those divisions without substantial change or interruption. P provides these employees with coverage under a group health plan. S continues to employ a few employees for the principal purpose of winding up the affairs of S in preparation for liquidation. S continues to provide coverage under a group health plan to these few remaining employees for several weeks after the date of the sale and then ceases to provide any group health plan to any employee.

Result: Under these facts, the cessation by S to provide any group health plan to any employee is in connection with the asset sale to P. Because of this, and because P continued the business operations associated with those assets without substantial change or interruption, P is a successor employer to S with respect to the asset sale. Thus, a group health plan of P has the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries with respect to the sale beginning on the date that S ceases to provide any group health plan to any employee. (A group health plan of S retains this obligation for the several weeks after the date of the sale until S ceases to provide any group health plan to any employee.)