

# COBRA SMALL EMPLOYER EXEMPTION

Small-employer plans group health plans are excepted from COBRA.

## **Less Than 20 Employees**

A small-employer plan is a group health plan maintained by an employer that normally employed fewer than 20 employees during the preceding calendar year.

## **On 50 Percent Of Its Typical Business Days**

An employer is considered to have normally employed fewer than 20 employees during a particular calendar year if, and only if, it had fewer than 20 employees on at least 50 percent of its typical business days during that year.

All full-time and part-time common law employees of an employer are taken into account in determining whether an employer had fewer than 20 employees; however, an individual who is not a common law employee of the employer is not taken into account. Thus, the following individuals are not counted as employees for purposes of this determination even though they are referred to as employees for all other purposes of continuation coverage regulations

- (1) Self-employed individuals (within the meaning of section 401(c)(1));
  - (2) Independent contractors (and their employees and independent contractors);
- and
- (3) Directors (in the case of a corporation).

## **Determining Number Of Employees - Daily Basis v. Pay Period Basis**

The basis in determining the number of employees must be used for the entire year for which the number of employees is being determined. If an employer determines the number of its employees on a daily basis, it must determine the actual number of full-time employees on each typical business day and the actual number of part-time employees and the hours worked by each of those part-time employees on each typical business day. Each full-time employee counts as one employee on each typical business day and each part-time employee counts as a fraction, with the numerator of the fraction equal to the number of hours worked by that employee and the denominator equal to the number of hours that must be worked on a typical business day in order to be considered a full-time employee.

If an employer determines the number of its employees on a pay period basis, it must determine the actual number of full-time employees employed during that pay period and the actual number of part-time employees employed and the hours worked by each of those part-time employees during the pay period. For each day of that pay period, each full-time employee counts as one employee and each part-time employee counts as a fraction, with the numerator of the fraction equal to the number of hours worked by that employee during that pay period and the denominator equal to the number of hours that must be worked during that pay period in order to be considered a full-time employee.

The determination of the number of hours required to be considered a full-time employee is based upon the employer's employment practices, except that in no event may the hours required to be considered a full-time employee exceed eight hours for any day or 40 hours for any week.

A small-employer plan is generally excepted from COBRA. If, however, a plan that has been subject to COBRA (that is, was not a small-employer plan) becomes a small-employer plan, the plan remains subject to COBRA for qualifying events that occurred during the period when the plan was subject to COBRA. The rules are illustrated by the following examples:

**Example 1.** An employer maintains a group health plan. The employer employed 20 employees on more than 50 percent of its working days during 2001, and consequently the plan is not excepted from COBRA during 2002. Employee E resigns and does not work for the employer after January 31, 2002. Under the terms of the plan, E is no longer eligible for coverage upon the effective date of the resignation, that is, February 1, 2002. The employer does not hire a replacement for E. E timely elects and pays for COBRA continuation coverage. The employer employs 19 employees for the remainder of 2002, and consequently the plan is not subject to COBRA in 2003. The plan must nevertheless continue to make COBRA continuation coverage available to E during 2003 until the obligation to make COBRA continuation coverage available ceases. The obligation could continue until August 1, 2003, the date that is 18 months after the date of E's qualifying event, or longer if E is eligible for a disability extension.

**Example 2.** The facts are the same as in Example 1. The employer continues to employ 19 employees throughout 2003 and 2004 and consequently the plan continues to be excepted from COBRA during 2004 and 2005. Spouse S is covered under the plan because S is married to one of the employer's employees. On April 1, 2002, S is divorced from that employee and ceases to be eligible for coverage under the plan. The plan is subject to COBRA during 2002 because X normally employed 20 employees during 2001. S timely notifies the plan administrator of the divorce and timely elects and pays for COBRA continuation coverage. Even though the plan is generally excepted from COBRA during 2003, 2004, and 2005, it must nevertheless continue to make COBRA continuation coverage available to S during those years until the obligation to make COBRA continuation coverage available ceases under the rules of Sec. 54.4980B-7. The obligation could continue until April 1, 2005, the date that is 36 months after the date of S's qualifying event.

**Example 3.** The facts are the same as in Example 2. C is a dependent child of one of the employer's employees and is covered under the plan. A dependent child is no longer eligible for coverage under the plan upon the attainment of age 23. C attains age 23 on November 16, 2005. The plan is excepted from COBRA with respect to C during 2005 because the employer normally employed fewer than 20 employees during 2004. Consequently, the plan is not obligated to make COBRA continuation coverage available to C (and would not be obligated to make COBRA continuation coverage available to C even if the plan later became subject to COBRA again).