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CHANG, RUTHENBERG & LONG PC

§ 54.4980B-9 Business reorganizations and employer withdrawals from multiemployer plans.
Treasury - Federal Regulations

Check out the "Proofs" needed
in each companies literature
to get HIPAA if you do not get
COBRA

Don't Pick Up COBRA As Part Of Your Next Deal

Negotiating COBRA liability in business transactions . . .

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Recently, we have received a number of questions from business lawyers and their clients regarding the responsibilities of the parties in an acquisition transaction (i.e., a stock sale or an asset sale) under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

As you probably know, COBRA requires many group health plans to offer, to those covered by the plan, the ability to continue coverage under the plan after certain qualifying events occur that would otherwise result in the termination of a person's coverage.

Although we have touched on the topic of dealing with COBRA in acquisition transactions before (see COBRA!, Summer 1997, and

The Return Of COBRA
(With Sharper Fangs And
More Venom) Spring 1999),
we provide a basic approach to
the topic in this article.

Questions That Need To Be Asked

In general, these are the questions that need to be asked and considered:

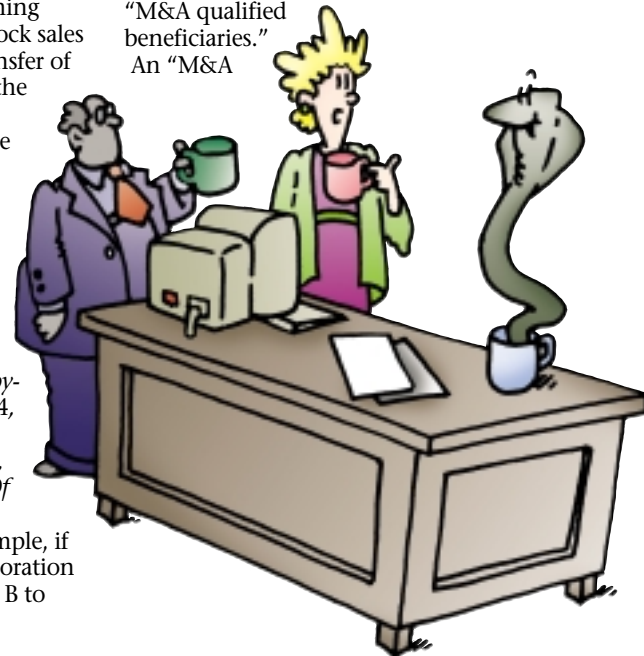
- 1 Has there been a stock sale or an asset sale?
- 2 If so, who (if anyone) has had a COBRA qualifying event?
- 3 If there has been a COBRA qualifying event, which employer is responsible for providing COBRA continuation coverage?

The Treasury regulations governing this area are phrased in terms of stock sales and asset sales. A stock sale is a transfer of stock in a corporation that causes the corporation to become a different "employer" taking into account the controlled group rules. (For more information regarding the controlled group rules, see the series of articles regarding the aggregation of employers and employees: *The Aggregation Of Employers And Employees...What You Don't Know Can Hurt You*, Fall 1994, *The Aggregation Of Employers And Employees...Controlled Groups*, Winter 1994, *The Aggregation Of Employers And Employees...Affiliated Service Groups*, Spring 1995, and *The Aggregation Of Employers And Employees...Leased Employees*, Summer 1995.) For example, if Corporation A owns 100% of Corporation B and sells its stock in Corporation B to

Corporation C (that is not related to Corporation A), a stock sale has occurred because Corporation B ceases to be a member of Corporation A's controlled group and becomes a member of Corporation C's controlled group. An asset sale is a transfer of substantial assets (e.g., a division) or substantially all the assets of a trade or business.

If either a stock sale or an asset sale has occurred, we must identify the group of individuals who must be offered COBRA continuation coverage – the so-called "M&A qualified beneficiaries."

An "M&A



Editors Note: We did the best we could to make sure that the information and advice in this article were current as of the date shown above. Since the laws and the government's rules are changing all the time, you should check with us if you are unsure whether this material is still current. Of course, none of our articles are meant to be specific legal advice to you. If you would like that, just send us an email at contactus@seethebenefits.com or give us a call at (916) 357-5660.

qualified beneficiary" is a qualified beneficiary whose qualifying event occurred prior to or in connection with the sale and who is, or whose qualifying event occurred in connection with, a covered employee whose last employment prior to the qualifying event was associated with:

- The acquired organization in the case of a stock sale; or
- The assets being sold in the case of an asset sale.

Once we have identified the M&A qualified beneficiaries, we must determine if they have experienced a qualifying event. COBRA continuation coverage need not be offered to an M&A qualified beneficiary unless the person has had a COBRA qualifying event. In the case of a stock sale, the sale itself is not a COBRA qualifying event if the employee of the acquired organization continues to be employed by the acquired organization after the sale (even if the employee is no longer provided with group health plan coverage after the sale). However, an asset sale results in a qualifying event with respect to a covered employee whose employment was associated with the purchased assets unless either (i) the buying group is a successor employer (see below) and the employee is employed by the buying group immediately after the sale, or (ii) the covered employee does not lose coverage under a group health plan of the selling group. A "successor employer" is an employer that falls into one of the following categories:

- 1 It continues the business operations associated with the purchased assets without interruption or substantial change;
- 2 It results from a consolidation, merger or similar restructuring of the employer; or
- 3 It is a mere continuation of the employer.

If an M&A qualified beneficiary has had a COBRA qualifying event in connection with a stock sale or an asset sale, we must then determine which employer is responsible for providing COBRA continuation coverage. The "employer" that is responsible is either the "selling group" or the "buying group." The selling group is the controlled group that either (i) includes the corporation being acquired in a stock sale or (ii) includes the trade or business that is selling the assets in an asset sale. The buying group is the controlled group

that either (i) includes the corporation that has been acquired in a stock sale or (ii) includes the trade or business that is buying the assets in an asset sale.

If the selling group continues to maintain a group health plan, the selling group has the responsibility for making COBRA continuation coverage available to the M&A qualified beneficiaries. If the selling group does not continue to maintain a group health plan in connection with the sale (a question of fact), the result depends on whether the acquisition transaction was a stock sale or an asset sale:

- If it was a stock sale, a group health plan maintained by the buying group has the responsibility for making COBRA continuation coverage available to the M&A qualified beneficiaries.
- However, if it was an asset sale, a group health plan maintained by the buying group has the responsibility for making COBRA continuation coverage available to the M&A qualified beneficiaries only if the buying group continues the business operations associated with the assets without interruption or substantial change.

Can You Negotiate Your Way Out Of COBRA Responsibility?

Note that the seller and the buyer can allocate by contract the responsibility to make COBRA continuation coverage available to the M&A qualified beneficiaries.

However, if the responsible party under the contract fails to perform, the party described above continues to have the responsibility for making COBRA continuation coverage available to the M&A qualified beneficiaries.

What To Do?

What should you do if faced with such a transaction? First, each employer should determine if its group health plans are subject to COBRA. If they are, the parties should decide how COBRA is going to be handled and make it part of the purchase agreement. If you need help with your COBRA obligations, please contact us. ❧

For further information or developments on the issues raised in this article, call our office; or e-mail us at: contactus@seethebenefits.com or visit us at: www.seethebenefits.com



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