

Does COBRA Apply to You?

by Erwin Kratz, Fennemore Craig, P.C.

Employers with between 1 and 50 employees are often unaware whether the numerous federal and state employment laws—such as the Title VII discrimination statutes, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA)—apply to them.

Most of these laws apply only to employers that have more than a threshold number of employees specified in each statute. As companies add employees, they should periodically evaluate whether their growth has pushed them over one of these thresholds.

The threshold number of employees is not the same for all such laws. For example, the FMLA generally applies to companies with 50 or more employees, while the ADA applies to companies with 15 or more employees.

Figuring out when a company first becomes subject to a particular law is made even more complicated by the fact that the way the law requires employees be counted varies, depending on which law is being applied. This can cause employers to unintentionally violate the law as they add employees, which can result in expensive government investigations, fines, and even litigation with employees.

One such law that is often overlooked is the Consolidated Omnibus Budget Reconciliation Act (COBRA), the federal law that requires group health plans to offer extended coverage to their employees who lose coverage under the employer's group health plan as a result of a "qualifying event" (usually the termination of employment).

COBRA also requires employers' group health plans to give detailed notice to employees of their COBRA rights and imposes excise taxes for

failing to comply with COBRA's requirements.

COBRA's 'Small Employer' Exception

Under COBRA's "small employer" exception, an employer's group health plan is required to comply with COBRA if the employer "normally" employed 20 or more employees in the previous calendar year.

Normally employing fewer than 20 employees in a particular calendar year means that the company employed fewer than 20 employees on 50 percent or more of the company's typical business days that year.

Employers can determine the number of employees on either a daily basis or on a pay period basis, as long as they apply that basis to all their employees and to the entire year for which they are determining the number of employees.

Which Employees Count?

All full-time and part-time common-law employees count toward the total number of employees. Anyone who is not a common-law employee does not count. Therefore, self-employed people, independent contractors, and corporate directors do not count as employees, even if they are covered by the employer's group health plan.

Employers beware, though: These individuals generally *are* treated as employees for all other COBRA purposes. For example, an employer might have to offer COBRA continuation coverage to an independent contractor who loses coverage under the employer's group health plan as a result of a COBRA qualifying event, even though the employer does not need to count the independent contractor as an employee when determining whether COBRA applies to the group health plan in the first instance.

How Is a Part-Time Employee Counted?

While part-time employees count toward the 20-employee threshold, they do not count as a whole employee. Part-time employees count as a fraction of an employee, depending on the number of hours they work as compared with the number of hours someone is expected to work in order to be considered a full-time employee.

For example, if an employee must work 40 hours per week to be considered full time, a part-time employee who works 20 hours per week would count as half of an employee. The number of hours required to be full time is determined by the employer's practices, but in no event can an employer require more than 8 hours in a day or 40 hours in a week to be considered full time.

Other Considerations

There are a number of other complicating factors to watch out for. First, all members of the same control group must be considered in determining whether a particular member employed fewer than 20 employees the previous calendar year, even if all members of the control group do not participate in the same group health plan.

Second, for multiemployer plans, the determination must be made independently for each participating employer. Therefore, if a multiemployer plan that is not subject to COBRA adds an employer that employed more than 20 employees the previous year, the entire plan instantly becomes subject to COBRA.

Finally, company mergers and spin-offs create many other issues that are beyond the scope of this article. When in doubt, it is wise to consult counsel.

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