

Part I

Section 4980B.—Failure to Satisfy Continuation Coverage Requirements of Group Health Plans

26 C.F.R. 54.4980B-7: Duration of COBRA continuation coverage (Also 26 C.F.R. 54.4980B-4)

Rev. Rul. 2004-22

ISSUE

For purposes of the COBRA continuation coverage requirements of section 4980B of the Internal Revenue Code, is the Medicare entitlement of a covered employee a second qualifying event for a qualified beneficiary if the Medicare entitlement would not have resulted in a loss of coverage for the qualified beneficiary under the group health plan that is providing the COBRA continuation coverage?

FACTS

Employee E and E's spouse are covered under a group health plan subject to the COBRA continuation coverage requirements of section 4980B of the Internal Revenue Code. E is not entitled to Medicare benefits. E terminates employment (but not by reason of gross misconduct). E and E's spouse lose coverage under the plan as a result of E's termination of employment. The plan offers them the right to elect COBRA continuation coverage for a period of up to 18 months. E's spouse elects and pays for COBRA continuation coverage timely. Before the 18-month period has expired, E becomes entitled to Medicare benefits by reason of the attainment of age 65. E's spouse is still receiving COBRA continuation coverage under the plan at the time E becomes entitled to Medicare benefits. E's spouse notifies the plan of E's becoming entitled to Medicare benefits within 60 days after E became so entitled. Employees and their spouses receiving coverage under the plan by virtue of an employee's current employment status are not treated differently under the plan on account of their being

age 65 or older, nor on account of their being entitled to Medicare benefits by reason of the attainment of age 65.¹

LAW AND ANALYSIS

Section 4980B of the Code requires certain group health plans to make continuation coverage available to certain individuals who would otherwise lose their coverage under the plan as a result of certain occurrences (the COBRA continuation coverage requirements). Section 4980B imposes an excise tax if a plan subject to the COBRA continuation coverage requirements fails to comply with them.

Under section 4980B, the obligation of a plan to make COBRA continuation coverage available arises in connection with a qualifying event. The individuals to whom COBRA continuation coverage must be made available are qualified beneficiaries.

Under Q&A-1 of §54.4980B-3 of the Miscellaneous Excise Tax Regulations, a qualified beneficiary is any individual who is covered under a group health plan on the day before a qualifying event by virtue of being on that day a covered employee or the spouse or a dependent child of a covered employee. However, a covered employee can be a qualified beneficiary only in connection with a qualifying event that is a termination (or reduction of hours) of the covered employee's employment or that is the bankruptcy of the employer. Under Q&A-2 of §54.4980B-3, a covered employee is generally any individual who is or was provided coverage under a group health plan by virtue of the performance of services for the employer maintaining the plan or by virtue of membership in the employee organization maintaining the plan. Under Q&A-1(f) of

¹ The Medicare Secondary Payer (MSP) provisions of the Social Security Act that apply with respect to individuals entitled to Medicare based on the attainment of age 65 -- generally referred to as the "working aged" MSP provisions (section 1862(b)(1)(A), 42 U.S.C. 1395y(b)(1)(A)) -- include two restrictions on most group health plans that are subject to the COBRA continuation coverage requirements. (The working aged MSP provisions and the COBRA continuation coverage requirements both include an exception for plans maintained by an employer with fewer than 20 employees. However, they differ in how the 20 employees are counted, creating the possibility that a plan exempt under one law will be subject to the other law.)

First, the working aged MSP provisions prohibit a group health plan from taking into account that an individual (or the individual's spouse) who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to Medicare benefits by reason of the attainment of age 65. Second, the working aged MSP provisions also require a group health plan to provide that any individual age 65 or older (and the spouse age 65 or older of any individual) who has current employment status with an employer is entitled to the same benefits under the plan under the same conditions as any individual (or spouse) under age 65.

The MSP provisions also prohibit a large group health plan (a plan of an employer that employs at least 100 employees) from taking into account that an individual or a member of an individual's family who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to Medicare based on disability. (42 U.S.C. 1395y(b)(1)(B).) In addition, the MSP provisions generally prohibit a plan from taking into account that an individual is eligible for or entitled to Medicare benefits based on end stage renal disease during a coordination period of 30 months. (42 U.S.C. 1395y(b)(1)(C).)

§54.4980B-3, an individual ceases to be a qualified beneficiary if the individual does not elect COBRA continuation coverage by the end of the election period; an individual also ceases to be a qualified beneficiary when the plan no longer has an obligation to make COBRA continuation coverage available to the individual under the rules prescribing how long COBRA continuation coverage must be made available.

Section 4980B(f)(3) of the Code lists six categories of events and defines them as qualifying events if, but for the COBRA continuation coverage required to be provided, they would result in a loss of coverage of a qualified beneficiary. The categories of qualifying events include the termination (other than by reason of gross misconduct), or reduction of hours, of a covered employee's employment and the covered employee's becoming entitled to Medicare benefits under title XVIII of the Social Security Act. Q&A-1(c) of §54.4980B-4 defines what is a loss of coverage for purposes of determining if a listed event is a qualifying event, requiring that the listed event cause the covered employee or the covered employee's spouse or dependent child to cease to be covered under the same terms and conditions as in effect immediately before the event. Q&A-1(c) of §54.4980B-4 clarifies that a loss of coverage need not occur immediately after the event so long as it occurs before the end of the maximum coverage period.

Q&A-4 of §54.4980B-7 describes the end of the maximum coverage period. In the case of a qualifying event that is a termination (or reduction of hours) of employment, the maximum coverage period generally ends 18 months after the qualifying event (29 months if a disability extension applies). In the case of a qualifying event that is a covered employee's becoming entitled to Medicare benefits, the maximum coverage period generally ends 36 months after the date of the qualifying event. (Nothing in the statute or regulations prohibits a group health plan from providing coverage that continues beyond the end of the maximum coverage period.)

Q&A-6(b) of §54.4980B-7 describes the circumstances under which a second qualifying event can expand the maximum coverage period of an earlier qualifying event. If a qualifying event that is a termination (or reduction of hours) of employment is followed within the 18-month maximum coverage period (or within the 29-month maximum coverage period in a case in which a disability extension applies) by a qualifying event that gives rise to a 36-month maximum coverage period, then the 18-month (or 29-month) period is expanded to 36 months (measured from the date of the first qualifying event). The expanded period applies only for those individuals who were qualified beneficiaries in connection with the first qualifying event and who are still qualified beneficiaries at the time of the second qualifying event.

The expanded maximum coverage period of Q&A-6 of §54.4980B-7 applies only when the 36-month qualifying event follows the qualifying event that is a termination (or reduction of hours) of employment. (However, Q&A-4(d) of §54.4980B-7 provides a special rule for the measurement of the maximum coverage period in a case where the covered employee's becoming entitled to Medicare benefits precedes the termination (or reduction of hours) of employment; this special rule applies regardless of whether

the Medicare entitlement is a qualifying event.) Because a covered employee is not a qualified beneficiary with respect to any 36-month qualifying event, the expanded period that applies in connection with a second qualifying event will not apply to a covered employee but only to the spouse or a dependent child of a covered employee.

Based on the statute and regulations, for a spouse or dependent child of a covered employee to be entitled to the expanded maximum coverage period when a second qualifying event occurs, the following three conditions must be satisfied²:

- (1) The spouse or dependent child must be a qualified beneficiary in connection with a termination (or reduction of hours) of employment;
- (2) The spouse or dependent child must still be a qualified beneficiary at the time that the 36-month event occurs; and
- (3) The 36-month event must be a qualifying event.

For a 36-month event to be a qualifying event, it must – but for the required COBRA continuation coverage – result in a loss of coverage for the qualified beneficiary under the plan within the maximum coverage period. In the context of determining if a 36-month event is a second qualifying event, it is necessary to ignore the COBRA continuation coverage provided in connection with the qualifying event that is the termination (or reduction of hours) of the covered employee’s employment. The inquiry is whether, in the absence of the first qualifying event, the 36-month event would result in a loss of coverage for the qualified beneficiary under the plan within the maximum coverage period. This determination is made by applying the terms of the plan to the qualified beneficiary as if the covered employee had not experienced the termination (or reduction of hours) of employment and determining if the occurrence of the 36-month event in this hypothetical scenario would result in a loss of coverage for the qualified beneficiary under the plan within 36 months after, generally³, the covered employee’s actual termination (or reduction of hours) of employment.

In the facts described, the first two conditions for E’s Medicare entitlement to be a second qualifying event for E’s spouse are satisfied: E’s spouse is a qualified beneficiary in connection with E’s termination of employment, and E’s spouse is still a qualified beneficiary at the time that E becomes entitled to Medicare benefits.⁴ Thus, whether E’s spouse is entitled to a period of 36 months of COBRA continuation coverage (measured from the date of E’s termination of employment) depends on whether E’s Medicare entitlement is a qualifying event. The group health plan described complies with the working aged Medicare Secondary Payer provisions of the

² This revenue ruling does not address any COBRA notice requirement that a qualified beneficiary may have to satisfy in order to be entitled to the expanded maximum coverage period in connection with a second qualifying event.

³ Q&A-4(b) of §54.4980B-7 of the regulations allows a plan to elect to measure the maximum coverage period from the date of a later loss of coverage rather than from the date of the qualifying event.

⁴ E’s spouse also provided notice to the plan of E’s Medicare entitlement within 60 days after E became so entitled. This is relevant in determining whether E’s spouse has satisfied any COBRA notice requirement that may apply for E’s spouse to be entitled to the expanded maximum coverage period in connection with the occurrence of a second qualifying event.

Social Security Act by not treating a current employee or the employee's spouse differently because either of them has attained age 65 or is entitled to Medicare benefits by reason of the attainment of age 65. Thus, applying the terms of the plan to E's spouse as if E's spouse were receiving coverage under the plan in absence of E's termination of employment, E's becoming entitled to Medicare benefits in the hypothetical scenario of E's not having experienced a termination of employment would not result in a loss of coverage for E's spouse within 36 months after the actual termination of employment. Consequently, E's spouse is not entitled to an expansion of the maximum coverage period by reason of E's Medicare entitlement, and the plan is not required to make COBRA continuation coverage available to E's spouse beyond the end of the 18-month maximum coverage period.

HOLDING

The Medicare entitlement of a covered employee is not a second qualifying event for a qualified beneficiary unless the Medicare entitlement would have resulted (if COBRA continuation coverage, including COBRA continuation coverage due to the first qualifying event, is disregarded) in a loss of coverage for the qualified beneficiary under the group health plan that is providing the COBRA continuation coverage.

DRAFTING INFORMATION

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