

In This Issue

This is the third issue in a series of the McGraw Wentworth Benefit Advisor's that will be devoted to an in-depth review of the 1999 Final and Proposed Regulations. These issues will be presented in a chart format that provides the following information:

- *Each question addressed in the 1999 Final and Proposed Regulations and the corresponding section of the Internal Revenue Code (IRC) in which the question is addressed.*
- *The answers for each of the questions addressed in the Final and Proposed Regulations.*
- *Commentary on the difference between the initial 1987 Proposed Regulations (as they have been amended by previous legislation and clarified by case law) and the 1999 Final and Proposed Regulations.*

If you are interested in reviewing a copy of the 1999 Final and Proposed Regulations, you can access the text of the regulations through the McGraw Wentworth website at www.mcgrawwentworth.com. If you have any questions regarding the material outlined in this Benefit Advisor, please contact your McGraw Wentworth Account Manager.

COBRA Regulations

1999 - THE FINAL AND PROPOSED IRS REGULATIONS

On April 7, 1987, Proposed COBRA Regulations were released to provide employers with guidance regarding the requirements of coverage continuation. These Proposed Regulations were amended over the course of the next 12 years by several pieces of legislation and case law. This legislation and case law have clarified many gray areas of the initial COBRA regulations (e.g. Geissal v. Moore Medical Corp.).



On February 3, 1999, the Department of Treasury released Final COBRA Regulations. In conjunction with the release of the 1999 Final Regulations, the Department of Treasury released a new set of Proposed Regulations and requested comment on certain gray issues of COBRA that have been identified through the administration of the continuation requirements over the last decade. Employers are required to comply with the Final Regulations and are encouraged to comply with the new Proposed Regulations effec-

tive the first plan year following January 1, 2000. Until that date, employers must operate in a "good faith standard" which could include following the 1999 Final and Proposed Regulations.

For the purposes of this *Benefit Advisor*, we will refer to the following three pieces of legislation:

- **1987 Proposed Regulations:** Initial regulations released in 1987 to provide guidance on meeting continuation requirements.
- **1999 Final Regulations:** These regulations replace the 1987 Proposed Regulations and incorporate the changes made by legislation and case law over the course of the last 12 years.
- **1999 Proposed Regulations:** These regulations were issued concurrently with the Final Regulations to invite comment and clarify gray areas remaining in the 1999 Final Regulations.

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The 1999 Final Regulations were issued in a question/answer format, similar to the format of the 1987 Proposed Regulations. In ad-

dition, several questions and answers are “reserved” under the 1999 Final Regulations. These “reserved” issues are addressed in the 1999 Proposed Regulations that the Department of

Treasury requested comments on, prior to finalizing the regulations. The scope and provisions in these Proposed Regulations may change based upon the comments received by the IRS.

SECTION/QUESTION	FINAL/PROPOSED REGULATIONS	KEY DIFFERENCES FROM PREVIOUS PROPOSED REGULATIONS/CASE LAW
SECTION 54.4980B-5 COBRA CONTINUATION COVERAGE		
<p>Question 1: What is COBRA continuation coverage?</p>	<p>If a qualifying event occurs, each qualified beneficiary (other than a qualified beneficiary for whom a qualifying event will not result in an immediate or deferred loss of coverage) must be offered the opportunity to elect the group health plan coverage that is provided to similarly situated non-COBRA beneficiaries (ordinarily, the same coverage that a qualified beneficiary had in effect the day prior to the qualifying event). If coverage under the plan is modified for similarly situated non-COBRA beneficiaries, then COBRA continuation coverage may be modified in the same way. If continuation coverage varies in any way from the coverage made available to similarly situated non-COBRA beneficiaries, then the coverage offer does not meet the requirements of COBRA. COBRA continuation coverage must not be conditioned upon or discriminate on the basis of lack of evidence of insurability.</p> <p>With respect to a qualified beneficiary who is a child born to or placed for adoption with a covered employee during COBRA continuation coverage, the child is entitled to elect immediately the same coverage available to dependent children of active employees provided the covered employee has that coverage at the time of birth or placement for adoption.</p>	<p>With the exception of the reference to the coverage of a child born to or placed for adoption with a covered employee, this section is very similar to the information provided in the 1987 Proposed Regulations.</p> <p>Please note, a child born to or placed for adoption with a covered employee is considered a qualified beneficiary and the child has individual election rights during open enrollment.</p>
<p>Question 2: What deductibles apply if COBRA continuation coverage is elected?</p>	<p>Qualified beneficiaries who elect COBRA are generally subject to the same deductible requirements as similarly situated non-COBRA beneficiaries. If a qualified beneficiary has accumulated amounts to the deductible prior to COBRA, then the qualified beneficiary will retain the accumulated amounts in the same manner as if no qualifying event occurred.</p>	<p>This question and answer is similar to the 1987 Proposed Regulations. The accumulation of the family deductible is clarified by specifying the accumulated family deductible is determined by the members of the family that elect COBRA continuation and the amount of deductible each qualified beneficiary in the family satisfied prior to the qualifying event.</p>

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<p>Question 2: What deductibles apply if COBRA continuation coverage is elected? <i>(Continued from page 2.)</i></p>	<p>This section provides several examples of deductible provisions in regard to the following situations:</p> <ul style="list-style-type: none"> ● If the plan has a deductible for each individual, each individual electing COBRA will retain any amounts accumulated to his/her specific deductible before the occurrence of a qualifying event. ● If the plan has a family deductible, then the members of the family who elect COBRA coverage will retain any credits toward the deductible. If the election of COBRA results in two family units (due to divorce), then the family deductible is applied to each family unit according to the family members credits that comprise each unit. ● If earnings determine a plan's deductible, special rules apply. In general, if the COBRA continuant is unemployed, then the deductible that applied as of the date of the qualifying event is the deductible for COBRA. 	
<p>Question 3: How do a plan's limits apply to COBRA continuation coverage?</p>	<p>The plan limits are treated in the same way as deductibles. This applies to day limits on services as well as out of pocket maximum expenses. The accumulated lifetime and annual maximum accumulators satisfied prior to the qualifying event will also apply to COBRA continuation coverage.</p>	<p>There is no material difference from the original 1987 Proposed Regulations.</p>
<p>Question 4: Can a qualified beneficiary who elects COBRA continuation coverage ever change from the coverage received by the individual immediately before the qualifying event?</p>	<p>In general, a qualified beneficiary need only be given the opportunity to continue the coverage he/she had in effect the day prior to the qualifying event. This is true except in the following situations:</p> <ul style="list-style-type: none"> ● If a qualified beneficiary is covered by a region specific plan, such as an HMO, and moves outside the service area of that plan, then the employer must offer the qualified beneficiary the opportunity to enroll in any plan that the employer offers that would be available to similarly situated non-COBRA beneficiaries that move to the area. However, the employer is not required to extend coverage if the employer does not offer any plan to their active employees that has a service area where the COBRA beneficiary is relocating. 	<p>This section contains one key change between the 1987 Proposed Regulations and the 1999 Final Regulations in respect to COBRA beneficiaries who move outside the service area of a region specific plan. The 1999 regulations require a health plan to extend coverage under another plan option to a COBRA beneficiary if an employer has a plan option that could be offered to a similarly situated non-COBRA employee that would relocate to this area. For example, if the employer offers an HMO and a PPO plan, a COBRA participant under the HMO plan that moves out of the service area needs to be offered coverage under the PPO plan. The 1987 Proposed Regulations did not require an employer to extend another plan option unless the employer had employees in the area that the COBRA beneficiary relocated.</p>

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<p>Question 4: Can a qualified beneficiary who elects COBRA continuation coverage ever change from the coverage received by the individual immediately before the qualifying event? <i>(Continued from page 3.)</i></p>	<ul style="list-style-type: none"> ● If an employer has an open enrollment period that is extended to similarly situated non-COBRA beneficiaries, then the employer must make open enrollment rights available to all individual qualified beneficiaries. This means that if four members of a family elect COBRA coverage and are considered qualified beneficiaries, each family member can select different plan options during open enrollment (as if each qualified beneficiary were an individual employee). This applies when employers offer one or more plans to select from and offer similarly situated non-COBRA beneficiaries the ability to switch among plans at open enrollment. 	<p>This section provides examples of the situations in which an employee experiences a qualifying event and did not cover his/her family on his coverage. He/she can elect COBRA on an individual basis, however, during open enrollment can add coverage for any eligible dependent as stipulated by the plan open enrollment rules. Please note that if an employee who is under COBRA continuation adds coverage for a family member during open enrollment, the family member is not granted qualified beneficiary status by COBRA.</p>
<p>Question 5: Aside from open enrollment periods, can a qualified beneficiary who has elected COBRA choose to cover individuals (such as newborn children, adopted children, or new spouses) who join the qualified beneficiary's family on or after the date of the qualifying event?</p>	<p>Yes, COBRA continuants are entitled to the special enrollment rights under the same conditions as non-COBRA employees. If the addition of a new family member on the plan results in an increased COBRA premium, the plan can require the COBRA participant to pay the increased premium amount.</p>	<p>The 1987 Proposed Regulations do not have a question in this exact format. The key differences are a result of clarifications made by HIPAA that extend special enrollment periods to a qualified beneficiary's family members in the event of a qualified family status change. For example, if a COBRA beneficiary gets married and requests coverage for the new spouse in a timely manner, then the plan must cover the spouse under the qualified beneficiary's COBRA coverage. The new spouse does not have qualified beneficiary status and the spouse's coverage would end on the date the qualified beneficiary's coverage ends.</p> <p>The only exception to this rule is that newborn children and newly adopted children added to COBRA coverage within 30 days of birth or adoption are granted qualified beneficiary status.</p>
<p>SECTION 54.4980B-6 – ELECTING COBRA CONTINUATION COVERAGE</p>		
<p>Question 1: What is the election period and how long does it last?</p>	<p>A group health plan is required to extend coverage, provided a qualified beneficiary makes a timely election. The election period must begin no later than the date the qualified beneficiary would lose coverage due to a qualifying event. The election period ends 60 days after the later of the following:</p> <ul style="list-style-type: none"> ● The date a qualified beneficiary would lose coverage under the plan 	<p>There is no material difference between the 1987 Proposed Regulations and 1999 Final Regulations.</p> <p>This section provides an example of a situation in which an employer continues coverage on an employee for 6 months after the qualifying event. In this case, the election period can begin no later than the expiration of the six-month continued coverage period.</p>

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<p>Question 1: What is the election period and how long does it last? <i>(Continued from page 4.)</i></p>	<ul style="list-style-type: none"> ● The date notice is provided to the qualified beneficiary of his/her right to elect COBRA coverage <p>An election is considered made the date it is sent to the plan administrator.</p>	
<p>Question 2: Is a covered employee or a qualified beneficiary responsible for informing the plan administrator of the occurrence of a qualifying event?</p>	<p>The employer or plan administrator must determine when a qualifying event has occurred. However, the employee or qualified beneficiary is responsible for notifying the employer of a dependent who is no longer eligible under the terms of the contract and/or of the divorce or legal separation of the covered employee. The group health plan is not required to extend COBRA continuation coverage to a qualified beneficiary if the plan administrator is not provided notice within 60 days of the later:</p> <ul style="list-style-type: none"> ● The date of the qualifying event ● The date the qualified beneficiary would lose coverage on account of the qualifying event. 	<p>There is no material difference between the 1987 Proposed Regulations and the 1999 Final Regulations.</p>
<p>Question 3: During the election period and before the qualified beneficiary has made an election, must coverage be provided?</p>	<p>If an election is made for COBRA continuation, coverage must be provided retroactive to the date coverage is lost. During the election period, the following procedures must be followed for verifying the COBRA rights of qualified beneficiaries during the election period but before an election has been made:</p> <ul style="list-style-type: none"> ● In the case of a traditional plan arrangement, if the plan is able to provide retroactive reinstatement, the plan can terminate the coverage and reinstate the coverage once an election is made. If a health care provider contacts a plan administrator during the COBRA election period inquiring about a qualified beneficiary's coverage status, the plan must provide complete information regarding the COBRA election status. The plan must notify the provider that coverage is not in effect but will be retroactively reinstated if a COBRA election and payment is made. ● If the case of a health plan that provides services such as a walk-in clinic or an HMO 	<p>The key difference in 1999 Final Regulations is the requirement that the plan administrator provide very specific details to a provider who calls to verify coverage status on a qualified beneficiary in the election period. If a provider calls to verify benefits, the plan administrator must provide information that the qualified beneficiary is in the election period. In addition, the administrator must indicate that coverage will be reinstated back to the loss of coverage date if COBRA is elected and premium is paid.</p>

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<p>Question 3: During the election period and before the qualified beneficiary has made an election must coverage be provided?</p> <p><i>(Continued from page 5.)</i></p>	<p>plan, the plan can require the qualified beneficiary to:</p> <ul style="list-style-type: none"> ● Elect and pay for COBRA coverage prior to receipt of services; ● Pay the reasonable and customary fee for services but the plan must reimburse the qualified beneficiary within 30 days after a COBRA election; or, ● The plan can provide continued coverage and treat the use of the facility as a constructive election. In such a case, the plan can require the qualified beneficiary to pay the applicable charge for coverage provided the plan informs the qualified beneficiary prior to receipt of services that use of the facility will be considered a constructive election. 	
<p>Question 4: Is a waiver before the end of the election period effective to end a qualified beneficiary's election rights?</p>	<p>If, during the election period, a qualified beneficiary waives COBRA continuation coverage, the waiver can be revoked at any time before the end of the election period. However, if a qualified beneficiary waives COBRA rights and revokes the waiver before the end of the election period, coverage does not have to be provided retroactively to the loss of coverage date. Coverage has to be provided to the date the revocation was made.</p>	<p>There is no material difference between the 1987 Proposed Regulations and the 1999 Final Regulations.</p>
<p>Question 5: Can an employer or an employee organization withhold money or other benefits owed to a qualified beneficiary until the qualified beneficiary either waives COBRA continuation coverage, elects and pays for COBRA, or the election period expires?</p>	<p>No, an employer or an employee organization must not withhold anything to which a qualified beneficiary is otherwise entitled (by operation of the law or other agreement) in order to compel payment for COBRA or coerce a qualified beneficiary to give up COBRA rights. Such a withholding constitutes a failure to comply with COBRA. Furthermore, any purported waiver obtained by means of withholding is considered invalid.</p>	<p>There is no material difference between the 1987 Proposed Regulations and the 1999 Final Regulations.</p>

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<p>Question 6: Can each qualified beneficiary make an independent election under COBRA?</p>	<p>Yes, each qualified beneficiary (including a child born to or placed for adoption with a covered employee during a period of COBRA continuation) must be offered the opportunity to make an independent election to receive COBRA coverage. In addition, if a group health plan offers an open enrollment period in which similarly situated non-COBRA active employees are allowed the opportunity to switch among medical plan options, then each qualified beneficiary also has independent open enrollment election rights. If an employee or the spouse sends an election that does not specify an individual election, then it is assumed the election is made on behalf of all qualified beneficiaries. An election for a minor child can be made by the child's parent or legal guardian. In addition, if the qualified beneficiary is deceased or incapacitated, a legal representative or the spouse can make an election on behalf of the qualified beneficiary.</p>	<p>This question is similar in intent between the 1987 Proposed Regulations and the 1999 Final Regulations. However, the 1987 Proposed Regulations addressed each qualified beneficiary's right to an independent election in regard to core and core+non-core benefit plans. The core coverage discussion has been eliminated.</p> <p>The 1999 Final Regulations also include the stipulations that apply to independent election rights during open enrollment periods, provided the employer offers open enrollment to similarly situated non-COBRA active employees.</p>
<p>SECTION 54.4980B-7 DURATION OF COBRA COVERAGE</p>		
<p>Question 1: How long must COBRA continuation be made available to a qualified beneficiary?</p>	<p>COBRA continuation coverage must begin the date of the qualifying event (with the exception of a revoked waiver), and end not before the earliest date as follows:</p> <ul style="list-style-type: none"> ● The maximum required period based upon the qualifying event (18 months for termination or reduction in work hours, 36 months for loss of dependent status or death of covered employee). The maximum coverage period can be extended from 18 months to 29 months if a qualified beneficiary is totally disabled. ● The first day for which a timely payment is not made to the plan with respect to the qualified beneficiary (see question 5 in Section 49.4980B-8). ● The date the employer or employee organization ceases to provide any group health plan coverage to any employee. 	<p>The 1999 Final Regulations are similar in content to the 1987 Proposed Regulations, however, there is a key clarification in regard to the termination of COBRA coverage on the basis of coverage under another group health plan or Medicare. The 1999 Final Regulations include the provisions decided under <u>Geissal v. Moore Medical Corporation</u>. The Final Regulations clearly state that COBRA coverage can only terminate if the new group coverage or Medicare is effective after the date of the COBRA coverage election.</p>

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<p>Question 1: How long must COBRA continuation be made available to a qualified beneficiary?</p> <p><i>(Continued from page 7.)</i></p>	<ul style="list-style-type: none"> ● The date after the date of COBRA election that a qualified beneficiary becomes covered under another group health plan (see question #2 of this section). ● The date after the date of COBRA election that a qualified beneficiary becomes covered under Medicare (see question #3 of this section). ● If a group health plan would terminate coverage for cause on an active employee (such as for submission of a fraudulent claim), then coverage can be terminated on a COBRA beneficiary on the same terms. ● Finally, if an individual is covered under COBRA solely because of his/her relationship to a qualified beneficiary, then coverage for the individual terminates when coverage on the qualified beneficiary terminates. 	

Our technical bulletins are written and produced by the McGraw Wentworth staff and are intended to inform our clients and friends on general information relating to employee benefit plans. They are not intended to provide either legal or tax advice. Consult your legal counsel or tax advisor in matters that directly affect your benefit plans.

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