



COBRA Considerations in Corporate Transactions

A Lexis Practice Advisor® Practice Note by
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This practice note provides an overview of who has the obligation to make Consolidated Budget Reconciliation Act of 1985 (COBRA) coverage available to affected qualified beneficiaries in the context of an employer's stock or asset sale. (Treasury Regulation section 54.4980B-9.)

Many of the terms used in this practice note are defined in [COBRA Compliance and Enforcement](#). The specific areas covered by this practice note are the following:

- What Is a "Stock Sale" for These Purposes?
- What Is an "Asset Sale" for These Purposes?
- What Are the General COBRA Responsibilities in Stock or Asset Sales?
- Can the Parties Allocate COBRA Responsibilities in the Purchase Agreement?
- What Is the Effect of the Seller Terminating Its Group Health Plan upon or After the Sale?

WHAT IS A "STOCK SALE" FOR THESE PURPOSES?

For purposes of these COBRA requirements, a "stock sale" is the transfer of stock in a corporation that causes the corporation to become a different employer or member of a different employer (the term "employer" includes all members of a controlled group of companies, [as defined under Internal Revenue Code section 414]). A stock sale for these purposes also includes a transaction involving interests in a non-corporate entity (such as membership interests in an LLC). The following terms are often used to describe the parties involved in a stock sale:

- "Selling group" is the controlled group of companies, or the group of trades or businesses under common control, of which an employer ceases to be a member as a result of the stock sale.
- "Acquired organization" is the company that ceases to be a member of the selling group as a result of the stock sale.
- "Buying group" is the controlled group of companies, or the group of trades or businesses under common control, of which the acquired organization becomes a member as a result of the stock sale.

WHAT IS AN “ASSET SALE” FOR THESE PURPOSES?

For purposes of these COBRA requirements, an “asset sale” is the transfer of substantial assets, such as a plan or division, or substantially all the assets of a trade or business. The following terms are often used to describe the parties involved in an asset sale:

- “Selling group” is the controlled group of companies, or the group of trades or businesses under common control, that includes the company or other trade or business that is selling the assets.
- “Buying group” is the controlled group of companies, or the group of trades or businesses under common control, that includes the company or other trade or business that is buying the assets.

WHAT ARE THE GENERAL COBRA RESPONSIBILITIES IN STOCK OR ASSET SALES?

In a stock or asset sale, so long as the selling group maintains a group health plan after the sale, the plan has the obligation to make COBRA continuation coverage available to the seller’s qualified beneficiaries with respect to that sale (commonly referred to as M&A qualified beneficiaries). A group health plan for the buying group does not, as a result of a stock sale or an asset sale, have an obligation to make COBRA continuation coverage available to those qualified beneficiaries of the selling group who are not M&A qualified beneficiaries with respect to that sale.

Who Is Considered an M&A Qualified Beneficiary in a Stock Sale?

In the case of a stock sale, an individual is a M&A qualified beneficiary if the individual’s qualifying event (QE) occurred prior to or in connection with the stock sale, and who is a covered employee (or a covered spouse or dependent child of such an employee) whose last employment prior to the QE was with the acquired organization.

A covered employee who continues to be employed by the acquired organization after the sale does not experience a termination of employment as a result of the stock sale. Therefore, the sale is not a QE for the covered employee, or the covered employee’s spouse or dependent children, regardless of whether group health plan coverage is provided after the sale, and neither the covered employee, nor the covered employee’s spouse or dependent children, becomes a qualified beneficiary as a result of the stock sale.

Who Is Considered an M&A Qualified Beneficiary in an Asset Sale?

In the case of an asset sale, an individual is an M&A qualified beneficiary if the individual’s QE occurred prior to or in connection with the asset sale, and who is a covered employee (or a covered spouse or dependent child of such an employee) whose last employment prior to the QE event was associated with the assets being sold.

In the case of an asset sale, the sale is a QE for a covered employee whose employment immediately before the sale was associated with the purchased assets, and for the employee’s spouse or dependent children who are covered under a group health plan for the selling group immediately before the sale. An asset sale will not be treated as a QE where (1) the buying group is a “successor employer” (see below) and the covered employee is employed by the buying group immediately after the sale, or (2) the covered employee (or the spouse or any dependent child of the covered employee) does not lose coverage under a group health plan of the selling group after the sale.

Unless exception (1) or (2) in the preceding paragraph applies, a covered employee will experience a termination of employment with the selling group as a result of the asset sale, regardless of whether the employee is employed by the buying group or whether the employee’s employment is associated with the purchased assets after the sale. Following such termination, the covered employee and the employee’s spouse and dependent

children who lose coverage under the selling group's plan are M&A qualified beneficiaries, and must be offered COBRA coverage under the selling group's group health plan (but, see below for certain exceptions to this general rule).

CAN THE PARTIES ALLOCATE COBRA RESPONSIBILITIES IN THE PURCHASE AGREEMENT?

In a stock or asset sale, the buyer and seller are permitted to allocate COBRA responsibility to make COBRA continuation coverage available to M&A qualified beneficiaries. However, if the party assigned this responsibility under the terms of the purchase agreement fails to perform, the party that has the obligation under the default statutory provisions to make the COBRA coverage available to M&A qualified beneficiaries continues to have that obligation.

WHAT IS THE EFFECT OF THE SELLER TERMINATING ITS GROUP HEALTH PLAN UPON OR AFTER THE SALE?

In the case of a stock sale, if the selling group ceases to provide any group health plan to any employee in connection with the sale, a group health plan maintained by the buying group has the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries. A buyer's group health plan has the obligation beginning on the later of the following two dates, and continuing as long as the buying group continues to maintain a group health plan (within the maximum duration limits for COBRA continuation coverage):

- The date the selling group ceases to provide any group health plan to any employee
- The date of the stock sale

In the case of an asset sale, if the selling group ceases to provide any group health plan to any employee in connection with the sale, and if the buying group continues the business operations associated with the assets purchased from the selling group without interruption or substantial change, then the buying group is considered a successor employer to the selling group in connection with that asset sale.

A buying group does not fail to be a successor employer in the case of an asset sale merely because the asset sale takes place in connection with a bankruptcy proceeding. If the buying group is a successor employer, its group health plan has the obligation to make COBRA continuation coverage available to M&A qualified beneficiaries. The plan has this obligation beginning on the later of the following two dates and continuing as long as the buying group continues to maintain a group health plan (within the maximum duration limits for COBRA continuation coverage):

- The date the selling group ceases to provide any group health plan to any employee
- The date of the asset sale

In both the stock sale and asset sale contexts, the determination of whether the selling group's cessation of providing any group health plan to any employee is in connection with the sale is based on all of the relevant facts and circumstances.

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Gabriel Marinaro serves as special counsel in the Employee Benefits and Executive Compensation group. His practice focuses on all aspects of employee benefits and executive compensation. He regularly counsels publicly traded and privately held companies, tax-exempt organizations, and governmental entities on a variety of employee benefits and executive compensation matters. Gabe regularly advises both employers and executives on a wide range of executive compensation matters, including drafting employment agreements, equity compensation arrangements, severance agreements and bonus plans. Gabe provides guidance on nonqualified deferred compensation plans both for for-profit companies and tax-exempt clients. Gabe regularly drafts nonqualified deferred compensation arrangements, including supplemental executive retirement plans, and change in control agreements. Additionally, Gabe advises employers and executives on issues under Code Sections 409A, 457(f), 457A, 162(m), 280G and 83 regarding compensation arrangements for executives.

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