

EBIA Weekly Archives

Is Retroactive Termination of Health Coverage Due to Failure to Notify the Plan of a Divorce Considered a Rescission Under Health Care Reform?

From the July 01, 2015 EBIA Weekly

QUESTION: We recently learned that an employee failed to inform us of her divorce from her husband six months ago. Our health plan does not cover a divorced spouse except through COBRA, and we would like to retroactively cancel the former husband's coverage back to the date of the divorce. Is this retroactive termination of coverage considered a rescission under health care reform, requiring our plan to provide advance written notice of the termination?

ANSWER: No. Because the divorced spouse did not elect COBRA and pay the COBRA premium, canceling coverage retroactively in this instance would not constitute a rescission under health care reform. You may cancel the coverage retroactively to the extent permitted under COBRA's rules.

As background, health care reform prohibits rescissions—defined as the cancellation or discontinuation of coverage with retroactive effect—except in cases of fraud or intentional misrepresentation of a material fact as prohibited by the terms of the plan. Even when there is fraud or misrepresentation, plans must give at least 30 days' advance written notice of a rescission. The agencies (DOL, IRS, and HHS) have clarified that making retroactive changes due to nonpayment of premiums (including for failure to timely notify the plan of a divorce, and elect and pay for COBRA for the former spouse) is not a rescission. This means that health care reform would not prohibit your plan from retroactively terminating coverage, nor would it require 30 days' advance notice of the termination.

Before making any retroactive termination of coverage, however, you should review all pertinent documents, past practices, and the facts of the case to consider the relative strength of the arguments for terminating the coverage under COBRA's rules. For example, you should confirm your plan's adoption and disclosure of reasonable procedures by which employees/qualified beneficiaries are required to notify the plan administrator of a qualifying event such as a divorce. If the plan has not established reasonable notice procedures, COBRA may require an offer of coverage to the former spouse. And, if your plan is insured (or self-insured with stop-loss insurance), any decisions should be made in consultation with the insurer (or stop-loss carrier).

For more information, see EBIA's **COBRA** manual at Sections XVII.C ("Notices Provided by the Covered Employee/Qualified Beneficiary to the Plan Administrator"), XVII.D ("Reasonable Notice Procedures"), XXVI.D ("Prohibition Against Rescission"), and XXVIII ("Special Issues: Insurance and Stop-Loss Coverage"). See also EBIA's **Health Care Reform** manual at Section X.D ("Prohibition on Rescissions"). You may also be interested in our recorded web seminar, "**COBRA Compliance Challenges: Identifying, Correcting, and Preventing the Big Problems.**"

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