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# COBRA: AN INCREMENTAL APPROACH TO NATIONAL HEALTH INSURANCE

*Thomas H. Somers\**

While Americans spend more of their income on health care than the people of any other country, their health-measured in the broad terms of life span and death rates-is not outstanding. It ranks somewhere around average among the world's industrial democracies. By one extremely important test, infant mortality, it is far below average. Some of the reasons for this mediocre showing have to do with the ways Americans eat, drink, use drugs, drive and, in general, choose to live. But some have a great deal to do with access to medical care.<sup>1</sup>

## I. LEGISLATING SOCIAL POLICY THROUGH WORKPLACE REGULATION

That the United States needs a system that provides cradle to grave access to basic health care is not a new proposition. An early champion of national health insurance was President Harry S Truman, who wrote:

I have never been able to understand all the fuss some people make about government wanting to do something to improve and protect the health of the people. I usually find that those who are loudest in protesting against medical help by the federal government are those who do not need help. But the fact is that a large portion of our population cannot afford to pay for proper medical and hospital care.<sup>2</sup>

Today, the bridge to health care for nearly forty million Americans denied access is free or, at least affordable, health insurance.<sup>3</sup> There is no dispute that the private sector, the federal government and virtually all states have failed to provide universal health care access.

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\* Associate, Zwerdling, Paul, Leibig, Kahn & Thompson, P.C., Washington, D.C.

1. The Washington Post, August 8, 1988, at A12, col. 1.

2. H.S TRUMAN, YEARS OF TRIAL AND HOPE 17 (1956). Truman proposed a five point national health plan: (1) Prepayment of medical costs through compulsory insurance premiums and the general revenues; (2) Protection against loss of wages from sickness and disability; (3) Expansion of public health, maternal and child health services; (4) Federal aid to medical schools and for research purposes; (5) Stepped-up construction of hospitals, clinics, and medical institutions under local administration. *Id.* at 19-21.

3. The Washington Post, Sept. 21, 1988, at A14, col. 1.

The Consolidated Omnibus Budget Reconciliation Act (COBRA) was signed into law by President Reagan on April 7, 1986.<sup>4</sup> COBRA amends, *inter alia*, the Public Health Service Act (PHSA),<sup>5</sup> the Employee Retirement Income Security Act of 1974 (ERISA),<sup>6</sup> and the Internal Revenue Code (IRC),<sup>7</sup> mandating that employer-provided group medical plans furnish employees, their spouses and their dependent children an option for continuing coverage in certain enumerated circumstances. While Congress and the President, through COBRA, made the minimal policy commitment to provide a health coverage option to those who might otherwise suffer a temporary lapse of health coverage, there is no public commitment to finance this option; the entire scheme is privately funded through the premium payments of those electing the coverage.<sup>8</sup> Moreover, COBRA applies only to those who already have health insurance; it does nothing for those without coverage.

The President and the political bureaucracy have, perhaps to the surprise of some, centralized control and regulation of the employment relationship during the better part of the last decade. Despite widely accepted assumptions that "conservative Republican administrations favor corporate volunteerism, marketplace labor policy, and the exclusion of governmental workplace intervention,"<sup>9</sup> it was during Ronald Reagan's watch that govern-

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4. Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (1986). COBRA is not the first federal effort to regulate employee welfare benefit plans which are, for federal regulatory purposes, distinct from benefit plans which provide for pensions. See 29 U.S.C. § 1002(1)(B) (1982). The kind of benefits which a "welfare plan" might provide include: "medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services." 29 U.S.C. § 1002(1)(A).

By enacting the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982), Congress sought to secure employee welfare benefits through a codification of historical common law fiduciary duties. Prior to ERISA, employee rights in health and welfare plans were protected, if at all, through traditional trust and contract principles. See generally Note, *Employee Benefits Law: Securing Employee Welfare Benefits Through ERISA*, 61 NOTRE DAME L. REV. 551 (1986). Prior to the enactment of ERISA, and currently, Taft-Hartley health and welfare trusts are regulated under the Labor Management Relations Act (LMRA) and, like any other collectively bargained right, are protected under federal labor law. See 29 U.S.C. §§ 185-86 (1982).

5. 42 U.S.C. § 201 (1982).

6. 29 U.S.C. § 1001 (1982).

7. 26 U.S.C. § 1 (1982).

8. The cost of COBRA coverage is borne by those "qualified beneficiaries" who have elected continuing coverage in a timely manner. ERISA §§ 602(3)& 604; IRC §§ 162(k)(2)(C) & 162(k)(4); 42 U.S.C.A. § 300bb-2(3) (1988 West Supp.).

9. Leibig, *The Deprivitization of Employee Benefit and Labor Law: The Surprising Conservative Erosion of Trusts and of the Competitive Labor Model*, 49 LAW & CONTEMP. PROBS. 183 (1986).

ment, through COBRA, engineered an incremental and complex regulatory approach to facilitate affordable access to health care.<sup>10</sup>

Legislating social programs through workplace regulation is a well-accepted pattern in this century and COBRA merely follows in step with the trend.<sup>11</sup> This increasing federal tendency toward centralizing and controlling employment and its benefits, for better or worse, displaces freedom of contract in the workplace.<sup>12</sup> It is now commonplace for Congress to regulate working conditions. Indeed, at the time of this writing, Congress was considering manifold schemes designed to promote social and economic reform through workplace regulation. These proposals include new pension reform, mandated health benefits,<sup>13</sup> catastrophic health insurance, pension

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10. Despite President Reagan's imprimatur, mandated health benefits programs such as COBRA are typically attacked by those on the political right as "socialized medicine pure and simple." See, e.g., *The Washington Post*, Sept. 21, 1988, at A14, col. 5. It is mystifying that the right wing did not level a similar attack on COBRA. Suffice it to say that Harry Truman's response to those who opposed his national health care proposals forty years ago still fits today.

But I had no patience with the reactionary selfish people and politicians who fought year after year every proposal we made to improve the people's health. I have had some bitter disappointments as President, but the one that has troubled me most, in a personal way, has been the failure to defeat the organized opposition to a national compulsory health-insurance program. But this opposition has only delayed and cannot stop the adoption of an indispensable federal health-insurance plan.

TRUMAN, *supra* note 2, at 23.

11. See, e.g., Fair Labor Standards Act (FLSA), 29 U.S.C. § 210 (1982); National Labor Relations Act (NLRA), 29 U.S.C. § 151 (1982); Labor Management Relations Act (LMRA), 29 U.S.C. § 141 (1982); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1982); Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 (1982).

12. Leibig, *supra* note 9, at 184. This trend, of course, obviates the traditional role of a collective bargaining representative and thus undermines the power of unions and further erodes the principle of freedom of contract. "Freedom of Contract" is an express goal of federal labor policy as embodied in the National Labor Relations Act (NLRA). See 29 U.S.C. § 158(d) (1982); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."). See also Kessler, *Contracts of Adhesion - Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629-30 (1943). More recent examples of federal intrusion into the workplace include the Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 890 (requiring, *inter alia*, sixty days notice to employees in advance of a plant closing) and the Employee Polygraph Protection Act of 1988, Pub. L. No. 347, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 646 (curtailing employer-sponsored use of mechanical lie detector tests).

13. The most comprehensive mandated health coverage measure under consideration at the time of this writing is the Kennedy-Waxman Bill which, if enacted, would amend the Fair Labor Standards Act (FLSA) and the Public Health Service Act (PHSA) and require private and public employers to provide each employee with minimum health benefits. S. 1265, 100th Cong., 2d Sess. (1988). Under Kennedy-Waxman, employers would bear eighty percent of the cost of the benefit premium with employees absorbing the remaining cost. *Id.* at Sec. 314(b).

portability, a long overdue increase in the minimum wage, parental and medical leave.<sup>14</sup>

Of course, there are reasons that the employment relationship holds such allure for federal regulators. We are a nation of employees. Hence, regulating employment is an effective method of tinkering with economic and social reform without the accompanying commitment of substantial public financing.

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most our people have become completely dependent upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.<sup>15</sup>

## II. COBRA: A "MIDDLE OF THE NIGHT" ENACTMENT?

By enacting COBRA without deliberation and in the process amending three distinct statutes, Congress invited a fair amount of regulatory confusion and bureaucratic tension. The Departments of Treasury, Labor and Health and Human Services are charged with issuing regulations to guide private and public employers, plan administrators and employees in the selection of COBRA coverage.<sup>16</sup> Only the Treasury Department has issued temporary regulations at the time of this writing, exposing the statute's inartful drafting and making health plan administration nightmarish.<sup>17</sup> A plan administrator of a major health and welfare trust recently observed,

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Employers of "low income employees" (those making \$4.19 per hour or less in 1988) would be required to finance the entire cost of those employees' benefits. *Id.*

14. See Ray & Brown, *Federal Legislation Update October-December 1988*, 4 THE LABOR LAWYER 331 (1988).

15. F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

16. ERISA 29 U.S.C.A. § 1168 (West Supp. 1988); IRC § 162(k)(6); 42 U.S.C.A. § 300bb-6 (West Supp. 1988). See also H.R. Conf. Rep. No. 453, 99th Cong., 1st Sess. 563 (1985).

17. See 52 Fed. Reg. 22,716 (1987) (to be codified at 26 C.F.R. pt. 1)(proposed June 15, 1987). Plan administrators are given some flexibility until the time when Final Treasury and Labor Department regulations are promulgated. Until that time, employers will be protected from the potentially devastating tax consequences of non-compliance simply by complying with the proposed regulations. *Id.* at 22,716-17. While the Department of Labor has yet to issue regulations defining the myriad notice obligations imposed by COBRA, a model notice has issued to assist employers to notify covered employees and their spouses. Use of the model notice demonstrates good faith compliance with a reasonable interpretation of the notice requirements if the notice is furnished to each covered employee at his or her last known address. If the employee and spouse have the same address, a single mailing, addressed to both

"We spend enormous amounts of money and the fruits [of COBRA] are nearly non-existent."<sup>18</sup>

Absent solid statutory or regulatory guidance or a legislative history that unravels COBRA's complexity, one commentator has asked whether COBRA was rashly considered, a "middle of the night" addition to the budget reconciliation act.<sup>19</sup> Indeed, some might argue that COBRA is symptomatic of Congress' growing inclination to delegate unlimited legislative authority to the other branches of government.<sup>20</sup> The absence of legislative direction, of course, is where federal agencies and, inevitably, the courts are often called upon to divine legislative will.<sup>21</sup> We should expect much of the same in COBRA's future.<sup>22</sup>

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will also be considered good faith compliance. Department of Labor ERISA Technical Release No. 86-2, June 26, 1986. See also Pens. Plan Guide (CCH) ¶ 6999C (June 5, 1987).

18. 15 Pens. Rep. (BNA) 875 (May 30, 1988). John J. Fleming, administrative director of the Bakery, Confectionery and Tobacco Workers and Industry International Health Benefits and Pension Funds, stated that from October 1987 until mid-May 1988 the fund sent out 5,910 letters to participants involved in a COBRA qualifying event. Of the employees who returned an election form, 47 elected coverage and are paying premiums, 23 made one payment and are now delinquent, and 18 elected coverage but never sent in a payment. *Id.*

19. 15 Pens. Rep. (BNA) 1185 (July 25, 1988). There is some evidence, besides the statute itself, which suggests that the enactment of COBRA "was a confused process in which there probably was not sufficient forethought on penalties and details . . ." *Id.*

20. Chief Justice Rehnquist scolded Congress for failing to provide an intelligible principle to guide the Occupational Safety and Health Administration in formulating workplace health standards for permissible levels of benzene. Accurately noting that Congress alone is the appropriate body for many difficult social policy choices, then Justice Rehnquist quoted John Locke:

[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 672-73 (Rehnquist, J., concurring) quoting LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, IN THE TRADITION OF FREEDOM 244 (Mayer ed. 1957).

21. At the time of this writing there is virtually no reported litigation under the mandated health benefits sections of COBRA. See, e.g., *Fort Frye Teachers Association v. Board of Education*, No. C2-87-1326 (E.D. Ohio Nov. 10, 1987) (holding that a teachers strike was a "qualifying event" and ordering the employer to offer continuation coverage). For a discussion of labor stoppages as qualifying events and the implications, if any, this determination may have for labor relations see Grate, *COBRA's Requirements for Group Health Plans: Do They Apply in a Strike?*, 4 LAB. LAW. 35 (1988).

The federal government is not alone in mandating employer sponsored health benefits. Several states have enacted or are considering mandated health coverage legislation raising the question, beyond the scope of this Comment, of whether COBRA and ERISA preempt those state laws. See Howard, *The Terminated Employee's Right To Continue Group Health Insurance*, 17 COLO. LAW. 53, 55-56 (1988); 15 Pens. Rep. (BNA) 697 (Apr. 25, 1988); *Id.* at 880 (May 30, 1988).

22. The associate director of the Employee Benefits and Exempt Organizations Division of the Internal Revenue Service's Office of Chief Counsel, which is responsible for developing a

COBRA is not an example of legislative legerdemain, but it does set forth some coherent rules which, at this juncture, are worthy of scrutiny. Those scattered tea leaves found in COBRA's legislative history provide a useful synopsis of the Act, a fitting point of departure.

This provision would permit certain individuals who might otherwise lose health insurance coverage to continue employment-based health insurance coverage at group rates if they are willing to pay both the normal employer and the employee premium or premium equivalent for such coverage. By creating no additional cost for the federal government or employers, this provision would be of great potential benefit to people who lose group-employment based health insurance, since individual health insurance is typically more costly than group insurance and may be impossible to obtain for people with pre-existing [sic] health problems.<sup>23</sup>

This proposal would require employers to offer the opportunity to purchase group coverage to three categories of people: (1) laid-off workers and their families; (2) divorcees, widows and their children who have lost employment-based health insurance coverage as the result of the death of an employed spouse or divorce; and (3) spouses who have lost group coverage as a result of the covered family member becoming eligible for Medicare while the spouse becomes ineligible.

Laid-off workers and their families could continue group coverage for up to 18 months; widows, divorcees, their minor dependents, and Medicare-ineligible spouses could continue coverage for up to three years.<sup>24</sup>

### III. COBRA'S SCOPE: WHO MUST COMPLY AND WHEN?

COBRA's rules apply to "any group health plan" maintained by an employer.<sup>25</sup> A "group health plan" is any plan maintained by an employer to provide medical care to the employer's employees, former employees and/or

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large body of COBRA regulations, has stated that many COBRA rules will simply have to be created in litigation. For example, "in the mergers and acquisitions arena, the COBRA rules become even more frustrating, particularly in determining whether in the context of a merger or acquisition the new or acquiring entity is liable for providing COBRA rights to the target company's former employees." 15 *Pens. Rep. (BNA)* 885 (May 30, 1988).

23. It is unlawful for the plan to condition the availability of COBRA coverage upon evidence of insurability. 29 U.S.C.A. § 1162(4) (West Supp. 1988); 26 U.S.C.A. § 162(k)(2)(D) (West Supp. 1988); 42 U.S.C.A. § 300bb-2(4) (West Supp. 1988).

24. Senate Committee on Labor and Human Resources, Consolidated Omnibus Budget Reconciliation Act of 1985, S. Rep. No. 146, 99th Cong., 1st Sess. *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 42, 412.

25. 29 U.S.C.A. § 1161(a) (West Supp. 1988); 26 U.S.C.A. § 162(k)(i)(3) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,720 (Q & A 7(a)). Public employee plan participants

their families.<sup>26</sup> A "group health plan" is any medical reimbursement plan, including dental and cafeteria plans whether insured, self-insured, funded or unfunded.<sup>27</sup> A "group health plan" includes individual and group insurance policies, if two or more employees are involved, and employee-pay-all-plans "if coverage under the plan would not be available at the same cost to an employee in the event that he or she were not employed by the employer."<sup>28</sup>

Church plans and small employer plans are exempt from COBRA.<sup>29</sup> A small employer plan is one maintained exclusively by an employer in a calendar year "normally" employing fewer than twenty employees, including owners, partners, directors and independent contractors, if they are eligible for plan coverage.<sup>30</sup> COBRA is applicable to cafeteria plans and other flexible benefit arrangements, including medical reimbursement accounts, but continuation rights apply only to the health benefit options under those plans.<sup>31</sup>

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and beneficiaries may also enjoy a COBRA option. See 42 U.S.C.A. § 300bb-1(a) (West Supp. 1988).

26. *Id.*

27. 52 Fed. Reg., *supra* note 17, at 22,720 (Q & A 7(a)); See also JOINT COMMITTEE ON TAXATION, DESCRIPTION OF REVENUE PROVISIONS OF THE CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985, 99th Cong., 1st Sess., 36 (Apr. 25, 1986).

28. 52 Fed. Reg., *supra* note 17, at 22,720 (Q & A 7(a)). The regulations define "medical care" conterminously with the Internal Revenue Code. See 26 U.S.C.A. § 213(d) (West Supp. 1988). Medical care includes the "diagnosis, cure, mitigation, treatment, or prevention of diseases, and any other undertaking for the purpose of affecting any structure or function of the body" excluding general fitness programs and programs designed merely to enhance well-being. 52 Fed. Reg., *supra* note 17, at 22,720 (Q & A 7). Thus, life insurance and disability income programs need not be offered in COBRA coverage. Neither are spas and exercise programs, accessible for purposes other than for the relief of health or medical programs, regulated by COBRA. *Id.* Expressly included under the proposed regulations are those plans such as drug and alcohol rehabilitation programs "intended to relieve or alleviate a physical condition or health problem" whether chronic or acute. *Id.* at 7(c).

29. 29 U.S.C.A. § 1161(b) (West Supp. 1988); 26 U.S.C.A. § 162(2)(B) & 106(b)(2) (West Supp. 1988).

30. 52 Fed. Reg., *supra* note 17, at 22,723 (Q & A 9(a)). An employer is considered normally employing fewer than twenty employees during a calendar year only if it had fewer than twenty employees on at least fifty percent of its working days. *Id.* (Q & A 9(b)).

31. 52 Fed. Reg., *supra* note 17, at 22,723 (Q & A 14). At the time of this writing virtually all employer sponsored group health plans within the definition of COBRA were subject to the continuation coverage rules. Non-collectively bargained plans were required to comply on the first day of the first plan year beginning on or after July 1, 1986. See COBRA § 10003(b)(1); 52 Fed. Reg., *supra* note 17, at 22,722 (Q & A 11(a)). Collectively bargained plans are required to comply as of the first day of the first plan year beginning on or after the later of (1) January 1, 1987, or (2) the date on which the last of the collective bargaining agreements terminates. See COBRA § 10003(b)(2), Pub. L. No. 99-272, 100 Stat. 222, 99th Cong., 2d Sess. (1986).



## IV. QUALIFYING FOR COBRA COVERAGE

*"Qualified Beneficiaries" and "Qualifying Events"*

A "qualified beneficiary" is one who is entitled to COBRA continuation coverage upon the occurrence of a "qualifying event." A "qualified beneficiary" is any person who, on the day before the "qualifying event," is covered under an employer sponsored group health plan as an employee or an employee's spouse or dependent.<sup>32</sup> The group of qualified beneficiaries is closed on the day before the qualifying event.<sup>33</sup> Accordingly, unless the plan offers family coverage, those joining the family of a qualified beneficiary after that day, such as newborns, adopted children and new spouses, are ineligible for COBRA benefits.<sup>34</sup>

As noted earlier, COBRA coverage rules require offering an employee or qualified beneficiary with a continuation coverage option on the occurrence of a "qualifying event."<sup>35</sup> A qualifying event is, with respect to any covered employee, any of the following events if, under the terms of the plan, the event causes the employee, his or her spouse, or a dependent child of the employee to lose coverage under the plan:

- (1) Termination of employment or reduction in hours for any reason other than for the gross misconduct of the employee,<sup>36</sup>
- (2) Divorce or legal separation,<sup>37</sup>

32. 29 U.S.C.A. § 1167(3) (West Supp. 1988); 26 U.S.C. § 162(k)(7)(B); 42 U.S.C.A. § 300bb-8(3) (West Supp. 1988). COBRA continuation coverage is available to the "employee" covered by the health plan in the event he or she loses coverage due to termination or a reduction in hours. Employer sponsored health plans and trust funds typically provide for an automatic termination of benefits upon separation from service and, at times, when an employee is reduced to part-time status.

An "employee" entitled to elect coverage may include a retiree or a former employee covered on the day before a "qualifying event" by virtue of his or her previous employment. 52 Fed. Reg., *supra* note 17, at 22,724 (Q & A 16). An "employee" may also include sole proprietors, partners, directors, independent contractors if they were covered under the plan because of employment and as long as at least one common-law employee of the employer is also covered under the plan. *Id.*

33. *Id.* (Q & A 17(a)).

34. *Id.* There are occasions when newborns, adopted children and spouses that join the family of a qualified beneficiary become eligible for COBRA coverage. See 52 Fed. Reg., *supra* note 17, at 22,728 (Q & A 30(c) & (Q & A 31)).

35. 29 U.S.C.A. § 1163 (West Supp. 1988); 26 U.S.C.A. § 162(k)(1); 42 U.S.C.A. § 300bb-3 (West Supp. 1988).

36. Thus, retirement, strikes, lockouts, layoff and discharge (except by reason of the employee's own "gross misconduct") are all events qualifying the employee, his spouse or dependent children for the COBRA coverage option. 29 U.S.C.A. § 1163(2) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 18-19).

37. 29 U.S.C.A. § 1163(3) (West Supp. 1988); 26 U.S.C.A. § 162(k)(3)(c) (West Supp. 1988); 42 U.S.C.A. § 300bb3(3) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 18(b)).

- (3) Death of the employee;<sup>38</sup>
- (4) Employee's entitlement to Medicare;<sup>39</sup>
- (5) A dependent losing dependency status under the terms of the plan.<sup>40</sup>

An event that would otherwise create COBRA coverage eligibility will not rise to the level of a qualifying event if it occurs before COBRA's effective date, or while the plan is excepted from Title X of the Act. Thus, the event is non-qualifying on occasions when the individual's plan coverage does not terminate until a time when COBRA does apply.<sup>41</sup>

Multiple qualifying events are instances when the otherwise straightforward rules governing qualification give way. Multiple qualifying events can extend the period of qualification for continuation coverage from eighteen months to thirty-six months.<sup>42</sup>

## V. NOTICE REQUIREMENTS

COBRA's notice requirements impose perhaps the most onerous administrative burden on employers, plan administrators and in some instances, em-

38. 29 U.S.C.A. § 1163(1) (West Supp. 1988); 26 U.S.C.A. § 162(k)(3)(A) (West Supp. 1988); 42 U.S.C.A. § 300bb-3(1); 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 18(b)(1)).

39. 29 U.S.C.A. § 1163(4) (West Supp. 1988); 26 U.S.C.A. § 162(k)(3)(D) (West Supp. 1988); 42 U.S.C.A. § 300bb-3 (4) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 18(a)).

40. 29 U.S.C.A. § 1163(5) (West Supp. 1988); 26 U.S.C.A. § 162(k)(3)(E) (West Supp. 1988); 42 U.S.C. § 300bb-3(5) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 18(a)).

41. 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 20-21). An example of this is if the plan is a small-employer plan at the time of the event as the proposed regulations illustrate: An event that occurs while a group health plan is excepted from COBRA [fails to] . . . provide COBRA election rights to anyone whose coverage ends as a result of such an event. For example, if a group health plan is excepted from COBRA as a small-employer plan during 1988 . . . and an employee terminates employment on December 31, 1988, the termination is not a qualifying event and the plan does not have to permit the employee to elect COBRA continuation coverage. This is the case even if the plan ceases to be a small-employer plan as of January 1, 1989.

*Id.*

42. 52 Fed. Reg., *supra* note 17, at 22,730 (Q & A 40). A multiple qualifying event is one which occurs during a period of COBRA eligibility, extending that period. The Proposed Regulations illustrate a multiple qualifying event.

[I]f an employee covered by a group health plan that is subject to COBRA terminates employment (for reasons other than gross misconduct) on December 31, 1987, the termination is a qualifying event giving rise to a maximum coverage period that extends for 18 months to June 30, 1989. If the employee dies after the employee's spouse and dependent children have elected COBRA continuation coverage and before June 30, 1989, the spouse and the children (except anyone among them whose COBRA coverage had already ended for some other reason) will be able to elect COBRA continuation coverage through December 31, 1990.

*Id.*

employees and qualified beneficiaries. A COBRA notice obligation may arise in four situations and can apply to employers, plan administrators, employees and qualified beneficiaries.<sup>43</sup>

The initial obligation to inform employees and beneficiaries of their continuation coverage rights falls on the plan administrator. When COBRA first applies to a group health plan and thereafter when an individual is originally covered by the plan, the plan administrator must notify each covered employee as well as each covered employee's spouse, in writing, of his or her COBRA rights.<sup>44</sup> Additionally, the legislative history strongly suggests that the Summary Plan Description (SPD) include an outline of COBRA rights.<sup>45</sup>

Notice of an employee's death, termination, reduction of hours or Medicare eligibility must be made by the employer to the plan administrator no later than thirty days following the day of that event if any of those events causes a loss of coverage under the plan.<sup>46</sup> Each covered employee or qualified beneficiary is responsible for notifying the plan administrator of the occurrence of any divorce, legal separation or of a dependent child losing dependency status under the plan within sixty days of the qualifying event.<sup>47</sup> In turn, the plan administrator must give written notice of the right to COBRA coverage to each employee and each qualified beneficiary within fourteen days of receiving notification of the qualifying event.<sup>48</sup>

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43. 29 U.S.C.A. § 1166 (West Supp. 1988); 26 U.S.C.A. § 162(k)(6) (West Supp. 1988); 42 U.S.C.A. § 300bb-6 (West Supp. 1988); *see also* H.R. Conf. Rep. No. 453, 99th Cong., 1st Sess. 563, 567 (1985).

44. 29 U.S.C.A. § 1166(1) (West Supp. 1988); 26 U.S.C.A. § 162(k)(6)(A); 42 U.S.C.A. § 300bb-6(1) (West Supp. 1988). For those plans already in existence at the time of COBRA's effective date, this preliminary notice must be given at the time that the rules first apply to the plan. COBRA §§ 10002(e) & 10003(c).

45. H.R. Conf. Rep. No. 453, 99th Cong., 1st Sess. 566 (1985). The Summary Plan Description (SPD) is an ERISA-required written description of a benefit plan which must be provided to participants and beneficiaries. The SPD must be in an easily understandable form, include a statement of eligibility, coverage, employee rights and set forth the appeal procedure which must be established to settle disputes arising under the plan. 29 U.S.C. § 1022 (1982).

46. 29 U.S.C.A. § 1166(2) (West Supp. 1988); 26 U.S.C.A. § 162(k)(6)(B) (West Supp. 1988); 42 U.S.C.A. § 300bb-6(2) (West Supp. 1988).

47. 29 U.S.C.A. § 1166(3) (West Supp. 1988); 26 U.S.C.A. § 162(k)(6)(C) (West Supp. 1988); 42 U.S.C.A. § 300bb-6(3) (West Supp. 1988). Failure of the employee or qualified beneficiary to provide notice of these qualifying events to the plan administrator within the sixty day time period is cause for denying COBRA coverage. 52 Fed. Reg., *supra* note 17, at 22,729 (Q & A 33).

48. 29 U.S.C.A. § 1166 (West Supp. 1988); 26 U.S.C.A. § 162(k)(6)(D); 42 U.S.C.A. § 300bb-6(4) (West Supp. 1988). For purposes of COBRA notice requirements, any notice properly given to the spouse of the employee is considered to be effective notice to any dependent children that reside with that spouse. Interestingly enough, notice to the employee is *not* considered constructive notice to dependent children residing with that employee. 29

The Act provides sanctions for failures to give the required notice to employees and other qualified beneficiaries. A plan administrator who fails to meet the notice requirements may be personally liable to the participant or beneficiary for amounts up to \$100 a day from the date of the failure or refusal.<sup>49</sup> These money penalties are limited to private sector administrators. Recalcitrant state or local government employers are subject to equitable sanctions.<sup>50</sup>

## VI. ELECTING COBRA COVERAGE

Each qualified beneficiary who would otherwise lose plan coverage because of a qualifying event must be given the opportunity to elect to continue coverage.<sup>51</sup> An election by a covered employee or that employee's spouse to continue coverage is deemed an election on behalf of any other qualified beneficiary who would otherwise lose coverage as a consequence of the qualifying event. Therefore, an employee or spouse's election tolls the election period, protecting the option of continuing coverage for all eligibles.<sup>52</sup> While a qualified beneficiary who is a parent may elect continuing coverage on behalf on his or her entire family, if eligible, each qualified beneficiary retains the independent right to elect COBRA coverage in the event the employee and/or the spouse rejects the coverage.<sup>53</sup>

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U.S.C.A. § 1166(4)(B) (West Supp. 1988); 26 U.S.C.A. § 162(k)(6)(D)(ii) (West Supp. 1988); 42 U.S.C.A. § 300bb-6(4) (West Supp. 1988).

49. 29 U.S.C.A. § 1132(c) (West Supp. 1988). Under ERISA, attorneys fees and costs may be available to participants, beneficiaries and fiduciaries as litigants seeking to enforce COBRA rights. 29 U.S.C. § 1132(g)(1) (1982); *see also* *Iron Workers v. Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Eaves v. Penn.*, 585 F.2d 453 (10th Cir. 1978); *Frery v. Shorr Paper Products, Inc.*, 494 F. Supp. 565 (N.D. Ill. 1980).

50. 42 U.S.C.A. § 300bb-7 (West Supp. 1988).

51. 29 U.S.C.A. § 1161(a) (West Supp. 1988); 26 U.S.C.A. § 162(k)(1); 42 U.S.C.A. § 300bb-1(a) (West Supp. 1988). 52 Fed. Reg., *supra* note 17, at 22,726 (Q & A 22).

52. 29 U.S.C.A. § 1165(2) (West Supp. 1988); 26 U.S.C.A. § 162(k)(5)(B) (West Supp. 1988); 42 U.S.C.A. § 300bb-5(2) (West Supp. 1988).

53. 52 Fed. Reg., *supra* note 17, at 22,729 (Q & A 37). This independent election right also includes the entitlement to elect between "core" and whole-package coverage. *Id.* One commentator has noted:

failure by the employee or spouse to make an election does not preclude an election by another qualified beneficiary under the strict terms of the statutory language. This requirement could result in 'split coverage' in many instances (e.g. where a divorced spouse and children elect continuation coverage and the employee elects a different coverage). It is not clear, however, that Congress intended such a result or intended to give qualified beneficiaries any rights not previously possessed by the covered employee. The regulations might reasonably provide, therefore, that covered dependents residing with the employee should follow the election/non-election of the covered employee, on the theory that, in non-divorce situations, all that may be elected or rejected is the package of coverage rights previously in effect.

Morgan, *Continuation of Health Care Coverage*, 31 TAX NOTES 1247, 1250-51 (1986). It ap-

The election period may begin at any time, but must run at least sixty days from the date the qualified beneficiary would otherwise lose plan coverage in the absence of a COBRA election.<sup>54</sup> The sixty day election period begins to run from the later of the day coverage is terminated or sixty days following receipt of the required notice outlining the right of election.<sup>55</sup> An election made at the end of the sixty day period may be applied retroactively to the date when the qualified beneficiary lost coverage under the plan. The ability of the qualified beneficiary to apply his decision retroactively will, of course, allow some qualified beneficiaries to engage in "negative selection;" adopting a wait and see approach, electing the coverage at the end of the period only if he or she incurred a covered medical expense that exceeded the applicable premium.<sup>56</sup> A failure to make an election within the confines of the sixty day election period, however, is an absolute bar to any COBRA entitlement.<sup>57</sup>

A qualified beneficiary may waive his or her election rights.<sup>58</sup> A waiver of COBRA rights given during the sixty day election period is subject to revocation during that period, but, such a change of heart is not without consequence. A qualified beneficiary who waives continuing coverage and then revokes the waiver need not be provided with retroactive coverage.<sup>59</sup> Such an indecisive qualified beneficiary is entitled to coverage only from the date of revocation.<sup>60</sup>

## VII. DURATION OF COBRA COVERAGE

COBRA coverage must be available for a minimum of eighteen months in

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pears that the proposed regulations fail to address the issue of "split coverage" that Morgan aptly describes is a likely occurrence when divorce is the antecedent to COBRA coverage and dependent children are involved.

54. 29 U.S.C.A. § 1165(1) (West Supp. 1988); 26 U.S.C.A. § 162(k)(5)(A)(ii); 42 U.S.C.A. § 300bb-5(1) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,728 (Q & A 32).

55. 29 U.S.C.A. § 1165(1)(C) (West Supp. 1988); 26 U.S.C.A. § 162(k)(5)(A)(iii) (West Supp. 1988); 42 U.S.C.A. § 300bb-5 (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,728 (Q & A 32). An election is deemed to be made on the date that it is sent to the employer or plan administrator. *Id.*

56. 52 Fed. Reg., *supra* note 17, at 22,729 (Q & A 34). Plans are not required to reimburse qualified beneficiaries for compensable medical services rendered during an election period before an election is made, but, if an election is made in a timely manner, the plan must make retroactive reimbursement to the qualified beneficiary. *Id.*; *See also* Morgan, *supra* note 53, at 1250 (1986).

57. 52 Fed. Reg., *supra* note 17, at 22,728 (Q & A 32).

58. *Id.* at 22,729 (Q & A 35).

59. *Id.* Waivers and revocations of waivers are considered made on the date that they are sent to the employer or plan administrator, as applicable.

60. *Id.*

instances where the qualifying event is termination<sup>61</sup> or a reduction of hours or thirty-six months when the qualifying event is the death of the covered employee, divorce or legal separation of the covered employee from the covered employee's spouse, the covered employee's entitlement to Medicare benefits or a dependent child losing dependency status under the terms of the plan.<sup>62</sup> The eighteen and thirty-six month periods of qualification begin to run from the date of the qualifying event, even if coverage does not terminate until some later date.<sup>63</sup>

There is only one instance where the original eighteen or thirty-six month period of coverage can be expanded during the entitlement period. If, after a termination of employment there is a second qualifying event such as the divorce of the covered employee from his or her spouse, the affected qualified beneficiary may opt to extend COBRA coverage to thirty-six months.<sup>64</sup>

There are several circumstances where a qualified beneficiary may lose COBRA continuation coverage prior to end of the period of entitlement. These instances are:

- (1) The qualified beneficiary fails to make a timely premium payment;
- (2) The sponsoring employer terminates all of its group health plans;
- (3) The qualified beneficiary becomes covered under another employer sponsored group health plan as an employee, dependent or otherwise or;
- (4) The qualified beneficiary becomes entitled to medicare benefits.<sup>65</sup>

In the event the qualified beneficiary exhausts the relevant maximum coverage period, the group health plan must, during the 180 day period that ends on that expiration date, provide the qualified beneficiary with an option

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61. As noted earlier, termination for "gross misconduct" disqualifies an employee, his or her covered spouse or dependents from receiving COBRA coverage. *See, e.g.*, 29 U.S.C.A. § 1163(2) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,725 (Q & A 18). The lack of any Labor Department regulations leaves this amorphous standard for disqualification undefined. That the Congress chose such a tolerant standard for COBRA coverage in a termination context clearly protects the COBRA rights of those employees discharged for a cause that falls short of outrageous conduct.

62. 29 U.S.C.A. § 1163 (West Supp. 1988); 26 U.S.C.A. § 162(k)(1) (West Supp. 1988); 42 U.S.C.A. § 300bb-3 (West sup. 1988); 52 Fed. Reg., *supra* note 17, at 22,730 (Q & A 38-43).

63. 52 Fed. Reg., *supra* note 17, at 22,730 (Q & A 41). For example, if the plan provides extended coverage for those who would otherwise lose coverage as the result of the death of a covered employee, that period of extended coverage may be credited against the thirty-six month period of entitlement that COBRA otherwise provides. The Plan may, as an alternative during the election period, offer qualified beneficiaries a choice between COBRA coverage and some other type of continuation coverage, such as retiree coverage or state-law continuation coverage. *Id.*

64. *Id.* (Q & A 40); *see also supra* note 42 and accompanying text.

65. 29 U.S.C.A. § 1162(2) (West Supp. 1988); 26 U.S.C.A. § 162(k)(B)(ii) (West Supp. 1988); 42 U.S.C.A. § 300bb-2(2) (West Supp. 1988).

of enrolling under a conversion health plan if such a right is offered to similarly situated active employees under the plan.<sup>66</sup> If such a conversion option is not generally available, the qualified beneficiary's right to opt for coverage under the plan expires at the end of the COBRA period.<sup>67</sup>

### VIII. THE TYPE OF CONTINUING HEALTH BENEFIT COBRA MANDATES

As a general rule, a qualified beneficiary must have the right to purchase the same kind of coverage he or she enjoyed immediately prior to the qualifying event.<sup>68</sup> Moreover, if health benefit offerings for similarly situated active employees are modified, these changes must also be made available to COBRA beneficiaries.<sup>69</sup> Employers or plan administrators should be cautious of the COBRA consequences visited on employers changing or eliminating plans for similarly situated active employees. Any such change or elimination in coverage entitles COBRA enrollees to the option of enrolling in *any* other health plan maintained by the employer.<sup>70</sup> These health benefits must be offered at the same time and in the same manner as those enjoyed by active employees.<sup>71</sup>

Of course, the Treasury Department was not satisfied by the relative simplicity of the statutory language governing the type of benefit that must be offered under COBRA. Consequently, the proposed regulations invent a distinction between "core" and "non-core" coverage.<sup>72</sup>

A qualified beneficiary who, immediately before the qualifying event, is covered by a plan that provides both core coverage and non-core coverage must be able to elect to receive either (1) the coverage that he or she had immediately before the qualifying event (including the core coverage and any non-core coverage), or

66. *Id.*; 52 Fed. Reg., *supra* note 17, at 22,731 (Q & A 43).

67. *Id.*

68. 29 U.S.C.A. § 1162(2) (West Supp. 1988); 26 U.S.C.A. § 162(k)(2)(A) (West Supp. 1988); 42 U.S.C.A. § 300bb-2(1) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,726 (Q & A 23).

69. 29 U.S.C.A. § 1162(2) (West Supp. 1988); 26 U.S.C.A. § 162(k)(2)(A) (West Supp. 1988); 42 U.S.C.A. § 300bb-2(1) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,726 (Q & A 23).

70. 52 Fed. Reg., *supra* note 17, at 22,726 (Q & A 23); S. Rep. No. 146, 99th Cong., 1st Sess., 365 (1985).

71. S. Rep. No. 146, 99th Cong., 1st Sess. 365 (1985).

72. There does not appear to be an iota of support for this distinction in the statute or COBRA's legislative history. Therefore, it is perplexing that the Treasury Department took it upon itself to legislate such a distinction. Accordingly, it will be no surprise if and when a court strikes this agency-made distinction. *See, e.g.,* Natural Resources Defense Council, Inc. v. Herrington, 768 F.2d 1355, 1383 (D.C. Cir. 1985).

(2) the core coverage only.<sup>73</sup>

“Non-core coverage” is coverage for vision and dental benefits.<sup>74</sup> “Core coverage” is all of the other kinds of health coverage the qualified beneficiary was receiving under the plan before the qualifying event.<sup>75</sup> Qualified beneficiaries may choose either core-only or non-core coverage, but if non-core coverage is no more than five percent of the total cost of the coverage, the plan need not provide the alternative of core coverage alone.<sup>76</sup>

## IX. PAYING FOR COBRA COVERAGE

### A. Paying the Premium

The availability of continuation coverage is contingent on the qualified beneficiary making a timely premium payment.<sup>77</sup> While the premium must be fixed for a twelve month period known as a “determination period,” a beneficiary must be allowed to pay for the coverage in either monthly, quarterly or semiannual installments.<sup>78</sup>

The qualified beneficiary must make his or her first payment within forty-five days of his or her COBRA election.<sup>79</sup> A premium payment is otherwise timely for a period of COBRA coverage if it is made within thirty days after the first day of the period.<sup>80</sup> If covered employees or qualified beneficiaries are permitted to make a later payment under the terms of the plan, so too must COBRA eligibles.<sup>81</sup>

### B. Calculating the Cost

There should be no doubt that COBRA is not a publicly financed health insurance scheme. As designed, COBRA requires those who elect COBRA coverage to finance that benefit through premiums. Few appear to dispute the notion that in drafting the cost provisions of COBRA, Congress failed to apply much in the way of skilled legislative draftsmanship.<sup>82</sup>

This absence of precise statutory guidance, when coupled with the absence

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73. 52 Fed. Reg., *supra* note 17, at 22,726 (Q & A 24).

74. *Id.*

75. *Id.*

76. *Id.*

77. 29 U.S.C.A. § 1162(3) (West Supp. 1988); 26 U.S.C.A. § 162(k)(2)(C) (West Supp. 1988); 42 U.S.C.A. § 300bb-2(3) (West Supp. 1988); 52 Fed. Reg., *supra* note 17, at 22,731 (Q & A 44).

78. 52 Fed. Reg., *supra* note 17, at 22,731 (Q & A 46).

79. *Id.* (Q & A 48).

80. *Id.* (Q & A 48(b)).

81. *Id.*

82. *See, e.g.,* Morgan, *supra* note 53.



of long-promised cost Treasury Regulations can create an administrative nightmare for conscientious plan administrators who seek to fund COBRA coverage in accordance with the law.<sup>83</sup>

In providing COBRA coverage, the plan may not charge more than 102 percent of the "applicable premium."<sup>84</sup> The "applicable premium" is the cost to the plan for providing that kind of coverage under the plan during the same time period to similarly situated beneficiaries.<sup>85</sup> That the premium a plan may charge is subject to a ceiling of two percent above cost does not, it appears, preclude the plan from charging a smaller sum for COBRA coverage.

The cost of the COBRA premium charged to any qualified beneficiary must be determined by the plan *in advance* of the period of coverage. The plan must make this cost determination for an entire twelve month "determination period" based on the cost to the plan for identical coverage of similarly situated beneficiaries who are not eligible for COBRA coverage.<sup>86</sup> The statute directs that cost considerations necessary for determining the appropriate COBRA premium be made without regard to whether the employer or the employee ordinarily absorbs the cost of coverage under the plan.<sup>87</sup> Indeed, the legislative history indicates that qualified beneficiaries may be charged for the entire cost of COBRA coverage even in the event the employer subsidizes that cost for similarly situated covered employees who have not experienced a qualifying event.<sup>88</sup> "The amount to be charged for the continuation coverage thus must be based on the ultimate *net* cost to the

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83. Michael Thrasher, associate director of the Employee Benefits and Exempt Organizations Division of the Internal Revenue Service's Office of Chief Counsel, has indicated that the agency is working on the cost provisions of regulations explaining COBRA continuation rules and is encountering difficulty in defining, like many others, what is 102 percent of the "applicable premium" that an employer may charge for that coverage. 15 Pens. Rep. (BNA) 885 (May 30, 1988). Efforts at drafting those regulations will not be completed in 1988. *Id.*

84. 29 U.S.C.A. § 1162(3)(A) (West Supp. 1988); 26 U.S.C.A. § 162(k)(2)(C) (West Supp. 1988); 42 U.S.C.A. § 300bb-2(3) (West Supp. 1988).

85. 29 U.S.C.A. § 1164(1) (West Supp. 1988); 26 U.S.C.A. § 162(k)(4)(A) (West Supp. 1988); 42 U.S.C.A. § 300bb-4(1) (West Supp. 1988).

86. 29 U.S.C.A. § 1164(3) (West Supp. 1988); 26 U.S.C. § 162(k)(4)(C) (West Supp. 1988); 42 U.S.C.A. § 300bb-4(3) (West Supp. 1988). The statute's language suggests that the plan could vary the amount of the monthly premium charged within the twelve month determination period as long as the sum of such premium payments did not exceed the limit for that determination period. Morgan, *supra* note 53, at 1254 (1986). The Proposed Regulations appear to follow that interpretation. See 52 Fed. Reg., *supra* note 17, at 22,731 (Q & A 45).

87. 29 U.S.C.A. § 1164(1) (West Supp. 1988); 26 U.S.C.A. § 162(k)(4)(A) (West Supp. 1988); 42 U.S.C.A. § 300bb-4(1) (West Supp. 1988); S. Rep. No. 146, 99th Cong., 1st Sess. 365 (1985). Ordinarily, under a Taft-Hartley Health and Welfare Plan, the employer absorbs the entire cost of the plan by making contributions to the plan in accordance with a formula set out in the plan, fixed not actuarially but, through collective bargaining.

88. *Id.*

employer (i.e. the premium cost less any dividends or any experience rebates).”<sup>89</sup> Some have argued that tying the COBRA premium to the cost incurred by the employer is nonsensical, especially for many small-employer plans.

The rule makes no sense within the context of a small employer who has a straight forward insured health plan. In some years, the cost to the plan would be astronomical if only one employee incurs large expenses for a serious illness. In other years, the cost to the plan would be *de minimis* if covered employees stayed healthy during the year. In such a case, a more workable rule would define the “applicable premium” as the premium charged by the insurance company. It is hoped that regulations will adopt such an approach. Dividends or experience rebates (if any) could be paid to the electing qualified beneficiary on the same basis as paid to the employer under the plan.<sup>90</sup>

Self-insured plans are subject to special rules for determining the “applicable premium” and recovering the cost the plan incurs to provide COBRA coverage.<sup>91</sup> A self-insured plan may not charge an amount exceeding 102 percent of a “reasonable estimate” of the cost of providing coverage during such a period for similarly situated beneficiaries.<sup>92</sup> While the statute mandates an actuarial assessment of cost, future Treasury Regulations will enumerate those factors which, when considered, will make the estimate of cost “reasonable.”<sup>93</sup>

COBRA provides self-insured plans with an alternative scheme for calculating cost that is apparently designed to minimize the expense a smaller plan might incur to hire an actuary and assess the cost of providing health coverage on a prospective basis.<sup>94</sup> This method allows the employer or plan administrator to tie the COBRA premium to the cost incurred by the plan to provide similar coverage during the preceding determination period, adjusted for inflation.<sup>95</sup> This alternative method is unavailable for any plan that experiences a significant change either in the coverage under or the employees covered by the plan between the determination period and any pre-

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89. Morgan, *supra* note 53, at 1255.

90. *Id.*

91. 29 U.S.C.A. § 1164(2) (West Supp. 1988); 26 U.S.C.A. § 162(k)(4)(B) (West Supp. 1988); 42 U.S.C.A. § 300bb-4(2) (West Supp. 1988).

92. 29 U.S.C.A. § 1164 (2)(A) (West Supp. 1988); 26 U.S.C.A. § 162(k)(4)(B) (West Supp. 1988); 42 U.S.C.A. § 300bb-4(2) (West Supp. 1988).

93. *Id.*

94. 29 U.S.C.A. § 1164(2)(B) (West Supp. 1988); 26 U.S.C.A. § 162(k)(3)(B)(ii) (West Supp. 1988); 42 U.S.C.A. § 300bb-4(2)(B) (West Supp. 1988).

95. *Id.*

ceding determination period.<sup>96</sup>

The requirement that the premium determination be made in advance of the period of coverage creates substantial risks for the plan. Typically, in a large group health plan, the benefit provider will not know the premium for a plan year until after that year.<sup>97</sup> The premium is tied to the number of employees covered each month under the plan and this information, frequently, cannot be compiled, communicated and analyzed until months after the plan year ends.<sup>98</sup>

One commentator implies that the difficulties rampant in discerning cost, within the confines of an inartfully drafted statute and the absence of guiding regulations, make the necessity of amending COBRA's continuing health care provisions self-evident.<sup>99</sup> The suggested remedy is to allow charges for providing continuation contingent on the "cost to the plan for the coverage of similarly situated individuals during the last period for which there are complete cost data."<sup>100</sup> This is a sensible approach. It makes the determination of cost fair and verifiable for both the recipient of the extended benefit and the plan administrator whose primary responsibility under ERISA, it must be remembered, is to deliver health insurance to employees and their dependents.<sup>101</sup>

The cost rules uniquely applicable to self-insured plans also pose practical

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96. 29 U.S.C.A. § 164(2)(C) (West Supp. 1988); 26 U.S.C.A. § 162(k)(4)(B)(ii) (West Supp. 1988); 42 U.S.C.A. § 300bb-(2)(C) (West Supp. 1988). As noted earlier, the "determination period" is any period of twelve months for which a premium is fixed. The premium must be fixed before the beginning of that period. 29 U.S.C.A. § 1164(3) (West Supp. 1988); 26 U.S.C.A. § 162(k)(4)(C) (West Supp. 1988); 42 U.S.C. § 300bb-4(3) (West Supp. 1988). It appears that the determination period will, in most instances, be the plan year, but the statutory language does not require coterminous periods. The statute does not make it clear whether an employer or plan administrator may change a determination period in a subsequent year. As one commentator has noted:

Neither the statute nor the legislative history indicates whether this is an annual election, a one-time permanent election, or an election that can only be changed with government approval. Employers making this election should be prepared for the possibility that they will have to treat it as a permanent one.

Morgan, *supra* note 53 at 1254.

The Proposed Regulations issued by the Treasury Department require that the determination period not change from year to year. This is a common sense approach since it eliminates the possibility that each qualified beneficiary might have distinct determination periods tied to each individual anniversary date of entitlement to COBRA coverage. 52 Fed. Reg., *supra* note 17, at 22,731 (Q & A 45).

97. Morgan, *supra* note 53 at 1255.

98. *Id.*

99. *Id.* at 1258.

100. *Id.* at 1255.

101. See, e.g., 29 U.S.C. § 1104 (1982); Note, *Employment Benefits Law*, *supra* note 4, at 565-568.

problems for plan administrators. A plan that follows the "reasonable estimate" rule without the benefit of long-awaited regulations, chooses a path fraught with risk. For example, if government estimates for inflation are set at five percent, but medical costs follow current patterns and soar at a rate far greater than other consumer items, the self-insured plan might be faced with absorbing a significant portion of the cost of providing COBRA coverage. On the other hand, should the plan estimate inflation at higher levels than are experienced, the plan sponsor may face substantial tax sanctions.<sup>102</sup>

#### X. FAILURE TO COMPLY: SANCTIONS

The Technical and Miscellaneous Revenue Act of 1988, enacted in late 1988, amended COBRA and imposed sanctions on employees and other fiduciaries in instances where plans failed to provide continuing health care coverage.<sup>103</sup> An excise tax equal to one hundred dollars a day up to two hundred dollars a day per family may be imposed on employers and other fiduciaries who fail to comply with COBRA.<sup>104</sup> The size of the penalty ultimately depends on the number of beneficiaries deprived of coverage, the number of occasions during a tax year when there are violations, whether the employer knew of the failure and whether the failure is remedied.<sup>105</sup>

#### XI. CONCLUSION

COBRA opens the door to health care access for few of the forty or so million Americans who lack basic health insurance. Indeed, there is some evidence that those who are entitled to COBRA are not electing it in great numbers.<sup>106</sup> Despite the shortcomings of COBRA, in particular its limited scope, creating health care access as a mandated employment benefit is as sound an approach to the needs of those who lack coverage as it was in Harry Truman's day.

Health care access is more than a legal, medical or political question. It is morally imperative. "Just remuneration" alone is an insufficient foundation for the kind of moral employment relationship that is central to attaining a just and enlightened society.<sup>107</sup>

Man's life is built up every day from work, from work it derives its

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102. Technical and Miscellaneous Revenue Act of 1988, Pub L. No. 100-647, — Stat. — (1988) (codified at IRC § 4980B).

103. *Id.*

104. *Id.*

105. *Id.*

106. 15 Pens. Rep. (BNA) 875 (1986).

107. See generally POPE JOHN PAUL II, *On Human Work*, ENCYCLICAL LABOREM EXERCENS, (Sept. 14, 1984).

specific dignity . . .<sup>108</sup>

A moral employment relationship provides for the health of workers and their families.<sup>109</sup>

Besides wages, various social benefits intended to ensure the life and health of workers and their families play a part. . . . The expenses involved in health care, especially in the case of accidents at work, demand that medical assistance should be easily available for workers and that as far as possible it should be cheap or even free of charge.<sup>110</sup>

It is appropriate that the well-spring of human dignity, work itself, should begin to bridge the divide that separates so many from basic health care.<sup>111</sup> COBRA may not assure universal health care access, but it should be applauded as a step, albeit a hesitant step, in the right direction.

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108. *Id.* at 3.

109. *Id.* at 45.

110. *Id.* at 45.

111. *Id.* at 3.