Today's webinar will begin shortly. We are waiting for attendees to log on.

Presented by:

Lorie Maring
Phone: (404) 240-4225
Email: lmaring@fisherphillips.com

Please remember, tax form preparation and employment and benefits law compliance depends on multiple factors – particularly those unique to each employer's circumstances. Numerous laws, regulations, interpretations, administrative rulings, court decisions, and other authorities must be specifically evaluated in applying the topics covered by this webinar. The webinar is intended for general-information purposes only and is not legal advice. It is not a comprehensive or all-inclusive explanation of the topics or concepts covered by the webinar.

Fisher Phillips

What Employers Need to Know About COBRA: Non-Traditional Plans, Medicare, State Laws and Mergers and Acquisitions

UBA United Benefit Advisors
Shared Wisdom. Powerful Results.®

Presented by:
Lorie Maring
Phone: (404) 240-4225
Email: lmaring@fisherphillips.com

Today's Agenda

- COBRA Basics
- State Law COBRA Issues
- Application of COBRA to Non-Traditional Plans
- Calculating COBRA Premiums for HRAs
- COBRA and Medicare Interaction
- COBRA in M&A Transactions
- Questions

What Employers Need to Know About COBRA: Non-Traditional Plans, Medicare, State Laws and Mergers and Acquisitions

Today's Goal

- Enlighten – not confuse
- Identify Issues that my need further attention
- Ensure everyone has a healthy respect for COBRA compliance and importance of outsourcing if not able to manage in house – cost benefit analysis!

- No shooting of the messenger!! *(this is a detailed and dry subject matter)*

Legal Framework

- Consolidated Omnibus Budget Reconciliation Act of 1985
  - Federal Act amending ERISA, the IRC and the PHSA
- ERISA and the IRC apply to group health plans of private sector employers
- PHSA applies to group health plans of state and local governments
- None apply to Insurers directly

Consequences of Failing to Comply

- ERISA $110 per day penalty for failure to provide notices or requested information (gov. employers exempt)
- Excise taxes under Code ($100 per day/$200 per day >1 QB)
  - Self-reporting (IRS Form 8928)
  - Applies to COBRA failures
  - Due by federal income tax return date (no extensions)
- Exposure to negative selection
  - Because COBRA election period is 60 days from *later* of loss of coverage or notice of right to elect
- Exposure to participant lawsuits
- Liability is with the Plan Administrator
  - Excise taxes also possible for carriers, TPAs or COBRA administrators

What Employers Need to Know About COBRA: Non-Traditional Plans, Medicare, State Laws and Mergers and Acquisitions

Overview of COBRA

- A “qualified beneficiary”
- Who participates in a “group health plan”
- And loses coverage
- Due to a “qualifying event”
- May, for a limited time
- Elect continuation of coverage
- At his or her own expense

Qualified Beneficiary

- Two Conditions

1. Must be a covered employee, the spouse of the covered employee or the dependent child of the covered employee
2. Must be covered under the GHP immediately before the qualifying event

- Must elect COBRA when first eligible or lose status as a qualified beneficiary – no future election rights

Qualified Beneficiary

- "Employee" broadly defined and includes:
  - W-2 employees
  - Retirees
  - Independent contractors
  - Self-employed individuals
  - Partners in a partnership

- "Child" includes children born or adopted during COBRA coverage period and as required by a QMCSO

Qualified Beneficiary

- Open Enrollment Rights: Expands individuals who have coverage beyond "qualified beneficiaries"
- Domestic Partners: Not qualified beneficiaries – many plans cover if a tax dependent – coordinate with carrier
- Same-Sex Spouses are qualified beneficiaries under current law – historically an issue
- Other coverage does not negate COBRA rights

Group Health Plan

- Sponsored by an Employer
  - 20 or more employees (complex rules for counting PT EEs)
  - All employees counted (not just those covered under GHP)
  - Based on Controlled Group
  - Some Employers exempt
    - Church Plans meeting ERISA definition
    - Federal Government
- Provides “medical care”

What Employers Need to Know About COBRA

Covered Group Health Plans

- Traditional medical, dental and vision (insured or self-insured)
- HMOs
- On-site clinics (limited exception first aid only)
- Self-insured medical reimbursement (HRAs)
- EAPs (if provide counseling)
- Most Health FSAs
- Discount programs
- Wellness programs

Application of COBRA to Certain Benefit Types: HIPAA-Excepted Benefits

- Frequent source of confusion
  - Plans or insurers may assume that HIPAA-excepted benefits are not subject to COBRA
  - HIPAA/ACA excepted benefit status does not avoid GHP status for COBRA rules
  - Relevant focus for GHP status is whether plan provides medical care

Group Health Plan

Special Considerations

- HSAs
- Long-Term Care Plans
- Voluntary Plans
- Limited Obligation for health FSA
  - Generally not available for HRA
- HRAs

Limited FSA Exception – "Qualified FSA"

- Maximum Benefit Condition
  - Benefits cannot exceed two times salary election or $500, if greater *(allows up to a 1 to 1 matching contribution or $500 employer contribution)*
- Availability Condition
  - Must offer GHP that is not an excepted to benefit to eligible class of FSA participants
- Premium Condition
  - The maximum annual COBRA premium can't be less than maximum annual coverage amount *(in most cases a health FSA annual COBRA premium will be 102% of the annual coverage amount (prorated over remaining months) – this requirement will impact HRAs (especially with carry over amounts and FSAs with large unspent employer contributions)*

"Qualified FSA"

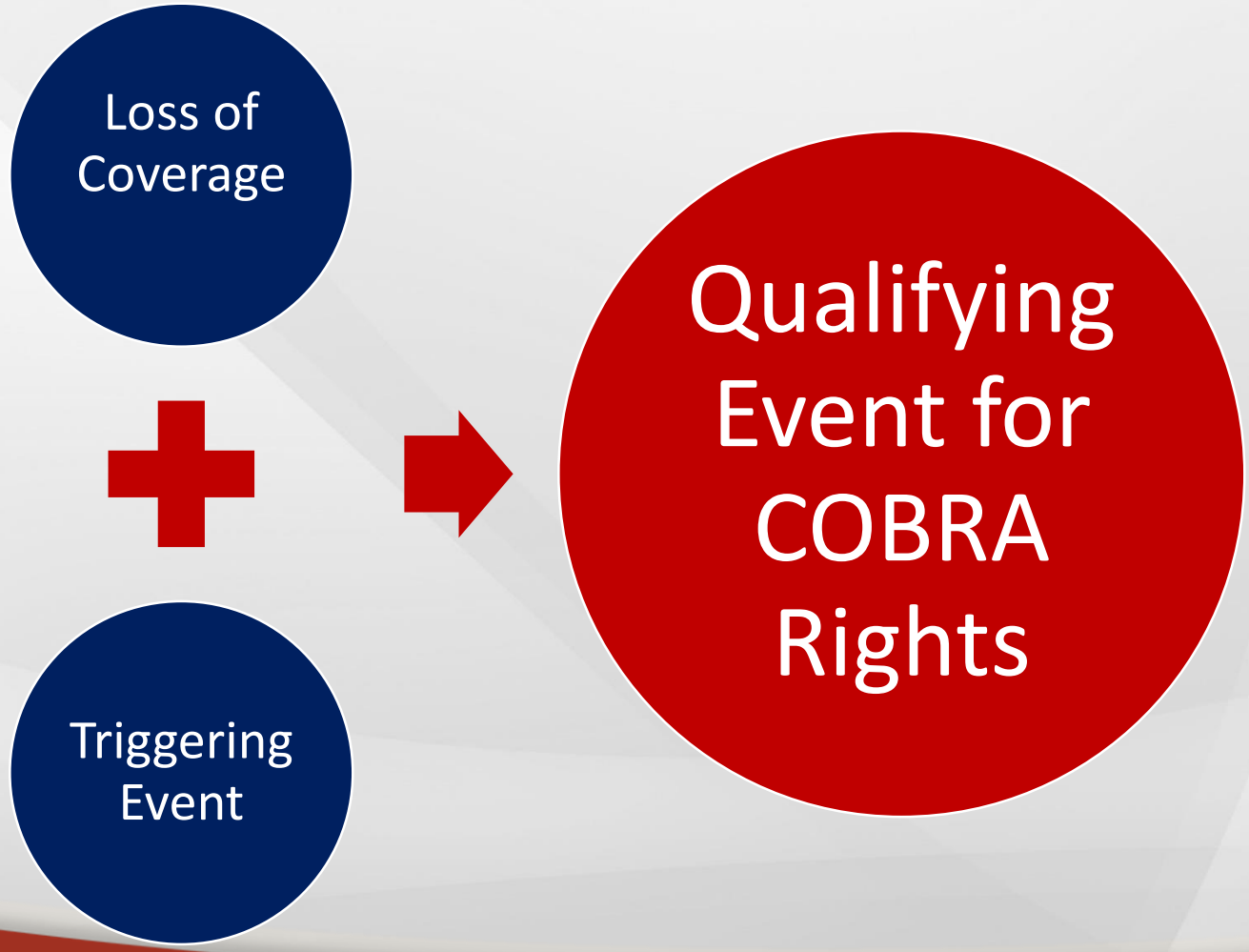
If FSA is <u>underspent</u> - *determined by reviewing:*

- *annual elected limit*
- *total reimbursable claims submitted*
- *maximum COBRA premium)*

- Then, COBRA must be offered, but only through end of plan year.

If FSA is <u>overspent</u> based on above criteria, no COBRA is required to be offered.

Understanding Qualifying Events



Loss of Coverage

- Ceasing to be covered under same terms and conditions
- Not limited to termination of coverage
- Applies to any change in coverage that
  - Increases premiums
  - Reduces benefits
  - Otherwise changes terms and conditions of coverage

Triggering Events

- Termination of employment *(other than for gross misconduct)*
- Reduction in hours
- Death of employee
- Divorce of legal separation from employee
- Ceasing to be a dependent child under plan terms
- Employee becoming entitled to Medicare
- Employer bankruptcy for retiree plans only

Continuation Coverage Offered

- Must be identical to coverage provided similarly situated beneficiaries under plan of QB at QE *(even if of no value to QB)*
- QB may change plan coverage (benefit options or packages) and dependent coverage at open enrollment
- HIPAA special enrollment rights apply to COBRA coverage
- Changes to coverage for active employees are applicable to COBRA QBs

Length of COBRA

18 Months

Termination of employment or reduction in hours

36 Months

Divorce, legal separation, child's loss of dependent status, death of employee, employee's entitlement to Medicare

Extensions of COBRA Coverage

- Multiple Qualifying Events following 18 month COBRA
  - Employee dies
  - Divorce/legal separation
  - Child ceases to be a dependent
  - Medicare entitlement
- Must have been an event qualifying for COBRA if it occurred first
- May require QB to notify PA within 60 days

Extensions of COBRA Coverage

- Disability Extension for 29 Months from Trigger
  - Trigger is termination of employment or reduction in hours
  - SSA determination that disability exists within first 60 days of COBRA coverage
  - Multiple Qualifying Event rules apply and could extend to 36 months
  - The QB must notify PA before end of 18 month COBRA period
  - Extension applies to all QBs (disabled or non-disabled) who are entitled to COBRA as a result of termination of employment or reduction in hours
- Medicare Extension (discussed later)
- Employer Bankruptcy – For retiree plans - extends coverage beyond typical COBRA limits

Early Termination of COBRA Coverage

- The required premium isn't paid (taking into account grace periods under the plan
- QB becomes entitled to Medicare
- QB becomes covered by another GHP
- Employer ceases to maintain any GHP (controlled group basis)
- Under disability extension, the QB ceases to be disabled
- For cause (e.g. filing a false benefit claim or falsifying dependent eligibility)

What Employers Need to Know About COBRA

Electing COBRA Coverage (Notice Requirements)

Two categories of notices:

- *Notices From the Plan Administrator*
- *Notices To the Plan Administrator*

Overview of Notice Requirements

Category 1: Notices From the Plan Administrator

- General Notice
- Election Notice
- Notice of Unavailability of COBRA Coverage
- Notice of Termination of COBRA Coverage

Overview of Notice Requirements

General Notice

- **Furnished When** – Not later than 90 days from the date on which the employee or spouse first becomes covered under the plan (or, if later, the date on which the plan first becomes subject to COBRA)
- **Furnished How** – By first-class mail, addressed to the employee (and spouse if spouse is covered under the plan)
  - If applicable, address envelope to "Mr. and Mrs. Employee Name"
  - May also be hand delivered, although if you do so you should get a dated confirmation of receipt
  - May also be provided as part of a plan's SPD, although not recommended
  - In all cases, plan administrator must ensure that employee (and spouse) have been timely furnished a copy

Overview of Notice Requirements

Election Notice

- **Purpose** – To inform the employee, spouse and/or dependent of his or her COBRA coverage rights and *enable* each to elect COBRA coverage
- **Furnished to Whom** – To all individuals who are qualified beneficiaries as a result of a qualifying event
  - If any spouse and/or dependent resides at an address different from the employee (for example, because of a divorce, legal separation or loss of dependent status), you must send one notice to the employee and another to the spouse and/or dependent at his or her separate address

Overview of Notice Requirements

Election Notice

- **Furnished When** – Not later than 14 days after *receipt of notice* of a qualifying event
- **Furnished How** – By first-class mail, addressed to the employee (and other qualified beneficiaries, if applicable)
  - If applicable, address envelope to "Mr. and Mrs. Employee Name" or "Mr. Employee Name and Family," unless spouse and/or dependents reside at a different address
  - May also be hand delivered, although if you do so you should get a dated confirmation of receipt

Overview of Notice Requirements

Election Notice

- **General Recommendations and Considerations**
  - Retain a copy of any Election Notices sent in each employee's file
  - Maintain a record of the mailing date, name and address of each individual to whom an Election Notice has been sent, as well as the person who sent it
  - Important to have a prescribed method/routine for complying with the notice requirements, and that the method/routine is followed in all instances

Overview of Notice Requirements

Notice of Unavailability of COBRA Coverage

- **Purpose** – After *notice* of a qualifying event, to inform an individual that he or she is *not* entitled to COBRA coverage
- **Furnished to Whom** – To the individual from which (or respect to which) the notice of a qualifying event was received

Overview of Notice Requirements

Notice of Unavailability of COBRA Coverage

- **Furnished When** – Not later than 14 days after *receipt of notice* of a qualifying event
- **Furnished How** – By first-class mail
  - May also be hand delivered, although if you do so you should get a dated confirmation of receipt
  - May also be furnished by certified mail, return receipt request, although not necessary

Overview of Notice Requirements

Notice of Unavailability of COBRA Coverage

- **General Recommendations and Considerations**
  - Retain a copy of any Unavailability Notices sent in each employee's file
  - Maintain a record of the mailing date, name and address of each individual to whom an Unavailability Notice has been sent, as well as the person who sent it
  - Important to have a prescribed method/routine for complying with the notice requirements, and that the method/routine is followed in all instances

Overview of Notice Requirements

Notice of Termination of COBRA Coverage

- **Purpose** – To inform an individual that his or her COBRA coverage has ended or will end before the applicable maximum period (18, 29 or 36 months)
- **Furnished to Whom** – To each individual whose COBRA coverage has ended or will end before the applicable maximum period (18, 29 or 36 months)

Overview of Notice Requirements

Notice of Termination of COBRA Coverage

- **Furnished When** – As soon as reasonably practicable after the plan administrator learns that the individual is or will be no longer eligible for COBRA coverage
- **Furnished How** – By first-class mail
  - May also be hand delivered, although if you do so you should get a dated confirmation of receipt
  - May also be furnished by certified mail, return receipt request, although not necessary

Overview of Notice Requirements

Notice of Termination of COBRA Coverage

- **General Recommendations and Considerations**
  - Retain a copy of any Unavailability Notices sent in each employee's file
  - Maintain a record of the mailing date, name and address of each individual to whom an Unavailability Notice has been sent, as well as the person who sent it
  - Important to have a prescribed method/routine for complying with the notice requirements, and that the method/routine is followed in all instances

Overview of Notice Requirements

Category 2: Notices To the Plan Administrator

- Covered Employee or Qualified Beneficiary Qualifying Event Notice
- Employer Qualifying Event Notice

Overview of Notice Requirements

Covered Employee or Qualified Beneficiary Qualifying Event Notice

- **Purpose** – To inform the plan administrator of the following qualifying events:
  - Divorce or legal separation
  - Termination of dependent status
  - Notice of a second qualifying event during COBRA coverage
  - SSA determination of being disabled at any time during the first 60 days of COBRA coverage
  - SSA determination of no longer being disabled

Overview of Notice Requirements

Covered Employee or Qualified Beneficiary Qualifying Event Notice

- **Furnished When** – Pursuant to plan's reasonable procedures, subject to following minimum deadlines:
  - 60 days after latest of qualifying event, loss of coverage or notice of plan's procedures, for divorce/legal separation, termination of dependent status or second qualifying event
  - 60 days after latest of SSA determination, qualifying event, loss of coverage or notice of plan's procedures, for SSA disability determination
  - 30 days after later of SSA determination or qualifying event, for SSA determination of no longer being disabled

Overview of Notice Requirements

Covered Employee or Qualified Beneficiary Qualifying Event Notice

- **General Recommendations and Considerations**
  - —Implement reasonable plan procedures to avoid insufficiency of verbal or other informal notices
  - —Require use of a specific written notice form, which must be easily available and furnished free of charge

Overview of Notice Requirements

Employer Qualifying Event Notice

- **Purpose** – To inform the plan administrator of the following qualifying events:
  —Covered employee's death
  —Termination of employment
  —Reduction in hours
  —Medicare entitlement
  —Employer's bankruptcy (under certain circumstances)
- **Furnished When** – Not later than 30 days after the later of qualifying event or loss of coverage

Overview of Notice Requirements

Employer Qualifying Event Notice

- **General Recommendations and Considerations**
  - In many cases the employer is also the plan administrator
  - If employer is also the plan administrator, with respect to qualifying events to be notified by employer, the Election Notice may be provided not later than 44 days after the later of qualifying event or loss of coverage
    - Combines 30 days of notice plus 14 day deadline to send Election Notice
    - Nonetheless, best practice is to adhere to 14 day deadline for *all* Election Notices

Election of Coverage

- 60 days from the later of
  - The date GHP coverage is lost
  - The date the Plan Administrator provides the election notice, if later
- Each QB has an independent right to elect coverage

COBRA Premium

- May not be more than 102% of "applicable premium"
  - 150% for disability extension
- Applicable Premium
  - Cost to plan
  - Insured Plans – monthly premium to carrier
    - Generally must use same premium tiers for plan coverage
  - Self-Insured – (1) reasonable actuarial estimates of future costs or (2) based on past-costs adjusted for changes in cost-of-living index

COBRA Premium

- Self-funded
  - Should take into account stop-loss premiums
  - Past cost may not be used if significant changes in coverage or # of covered employees
  - Past cost generally same as cost for similarly-situated beneficiary for the same period during preceding determination period and adjusted for inflation for the 12-month period ending on the last day of the 6th month of the preceding determination period *(may not use past cost if inflation measured by the implicit price deflator is lower than the actual medical trend)*

COBRA Premium

- For FSAs: maximum charge is 102% of the sum of the employee's annual salary reduction election and non-elective employer contributions (do not include carry over).
- For HRAs – more challenging
  - Actuarial method required for first year (and likely subsequent years)
    - Reasonable estimate of the cost of providing HRA coverage for similarly situated beneficiaries.
    - IRS Safe Harbor: applicable premium is same for QBs with different total reimbursement amounts available (blended rates, but not clear how determine – some ERs base on % utilization (e.g. if 80% of funds are used on average in HRAs in first year and $1,000 available, annual COBRA premium could be $816 (102%))
    - IRS working on additional guidance – Cadillac tax valuation may provide clarity
  - Past cost method generally unavailable if HRA allows carry overs

COBRA and Medicare

- Medicare entitlement vs. eligibility
  - Entitlement to Medicare generally means individual is both eligible and enrolled
  - Eligibility for Medicare, in contrast, means individual could enroll in Medicare
- Medicare entitlement is automatic for some
  - Example: Individual already receiving Social Security benefits when attains age 65 is automatically eligible, enrolled, and thus entitled.
- Some individuals are eligible but must file an enrollment application to be entitled to Medicare
  - Example: Individual age 65 who is eligible to receive Social Security benefits but who has not applied for them must apply to enroll

COBRA and Medicare

- COBRA generally is not triggered by Medicare entitlement – MSP Requirements!
  - Covered employee's entitlement to Medicare is a listed triggering event for spouse and children (but not for employee) but is rarely actually a QE—because Medicare entitlement generally does not cause a loss of coverage for active employees
    - Check plan document and SPD
    - MSP rules prohibit loss of active employee GHP coverage due to Medicare entitlement
  - MSP rules not prohibit loss of GHP coverage upon Medicare entitlement for retirees (QE for retiree's spouse and children)

COBRA and Medicare

- Medicare entitlement after COBRA election
  - COBRA coverage can be terminated early if QB (including the covered employee) first becomes entitled to Medicare after electing COBRA
  - Does not affect COBRA rights of other QBs (e.g., spouse, child) who are not entitled to Medicare

COBRA and Medicare

- Medicare entitlement <u>before</u> COBRA election
  - QB (including the covered employee) who is entitled to Medicare before electing COBRA still has right to elect COBRA coverage *(e.g. Medicare entitled 15 days after termination of employment)*
  - Employer's GHP may not withdraw COBRA offer because QB becomes entitled to Medicare before date of election

COBRA and Medicare

- Special Medicare extending rule
  - Applies if covered employee's QE (Term of employment or reduction in hours) occurs within 18 months after employee becomes entitled to Medicare
  - COBRA maximum coverage period for spouse and children (but not employee) is extended to 36 months from the date the employee became entitled to Medicare

COBRA and Medicare

COB and Timing Issues

- COBRA does not preserve Medicare Special Enrollment rights resulting in higher premiums for Part A and Part B and potential gaps in coverage if only elect COBRA upon retirement
- Retiring employees electing both may not appreciate coordination of benefits between Medicare and COBRA –
  - COBRA pays after Medicare and often assumes in plan that Employee elected Part B, though some retiring employees decline Part B to take COBRA leaving gaps in coverage
- Should recommend employees nearing 65 discuss Medicare options with a broker or CMS

COBRA in Mergers & Acquisitions

- Unless parties contract liability - COBRA assigns obligations in connection with M&A transactions–
  - If Seller maintains a GHP after the sale, Seller must provide COBRA to "M&A QBs" with respect to the sale
  - If Seller ceases to maintain any GHP after the sale, the Buyer must provide COBRA to M&A QB if–
    - Buyer maintains a GHP, and

      In an asset sale, Buyer is a successor employer (complicated legal analysis)

      "**Seller" and "Buyer"** include members of their controlled groups
- If parties assign liability other than as required by regs – be sure to obtain approval of insurer or stop-loss insurer

COBRA in Mergers & Acquisitions

Definition of "M&A QB"

Stock/Equity Sale

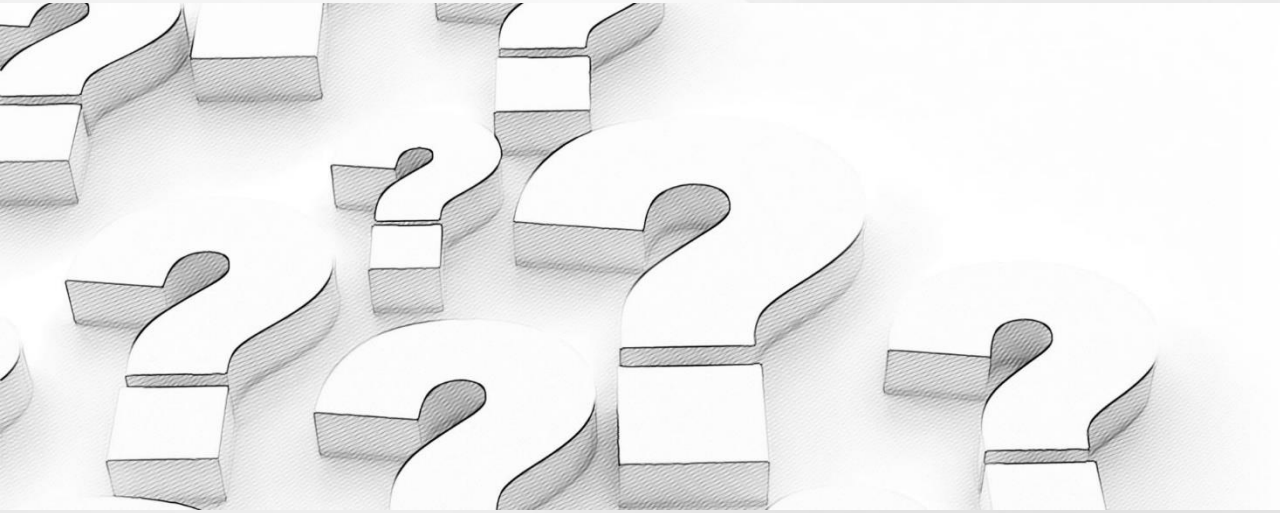
- Those on COBRA before the sale; and
- Those who terminate / lose coverage in connection with the sale

- Asset Sale
  - Those on COBRA before the sale;
  - Those who terminate / lose coverage in connection with sale; and
  - Those who continue with new employer but lose prior coverage in connection with sale

State Mini-COBRA Law Issues

- Insured Plans
  - Can regulate COBRA for insurance policies
  - Self-insured plans exempt (stop-loss generaly not a GHP)
- Small Employer – Mini COBRA
  - 2 to 19
- Large Employers
  - Supplemental COBRA – often different terms, QBs, and notice requirements
- Conversion Policies – notice requirements
- State/municipal governments
  - Some states have continuation of coverage requirements for early retirees until age 65/apply to self-insured also – no ERISA preemption

Final Questions
ubamember@fisherphillips.com



HRCI –
SHRM –

Presented by:
Lorie Maring
Phone: (404) 240-4225
Email: lmaring@fisherphillips.com

Thank You

Presented by:
Lorie Maring
Phone: (404) 240-4225
Email: lmaring@fisherphillips.com