C. Small Employer Exception

An event is not a qualifying event unless it occurs while a group health plan is subject to COBRA. **20** In turn, a plan is not subject to COBRA for any calendar year if all employers maintaining the plan employed fewer than 20 employees on a typical business day during the preceding calendar year. **21**

Under these rules, events that would otherwise be COBRA qualifying events will not give rise to any COBRA rights or obligations if they occur in a year when the small employer exception applies. But there is a corollary-if a qualified beneficiary experiences a qualifying event **22** during a year in which a plan is subject to COBRA (i.e., because the exception does not apply), then the qualified beneficiary will remain entitled to continuation coverage for the remainder of the COBRA maximum coverage period, even if the plan becomes entitled to the exception for a subsequent year. Application of the small employer exception is discussed in more detail in the following paragraphs.

Caution: When in Doubt, Consult With Counsel. Because the rules are so complex, we recommend getting professional advice when deciding whether COBRA's small employer exception applies. Application of the small employer exception to complicated ownership structures or business reorganizations is particularly difficult to sort out, but even in apparently mundane situations, it can be tricky deciding whether and how to count employees.

If an employer mistakenly relies on the small employer exception (e.g., if employees of a related employer are not counted in determining whether there were fewer than 20 employees during the preceding calendar year), the consequences can be severe. Noncompliance with COBRA's notice and election requirements can result in lawsuits and statutory penalties.* And employers and plans may find themselves with unexpected obligations to provide COBRA coverage to former employees and other qualified beneficiaries. Employers with insured plans (or self-insured plans with stop-loss coverage) may face uninsured COBRA liability if the insurer has not agreed to provide COBRA coverage (because COBRA was believed to be inapplicable).†

* For a discussion of potential liabilities for failure to comply with COBRA, see Section XXV.

† For a discussion of issues facing employers with insured plans, see Section XXVIII.

1. Small Employer Exception Generally

A group health plan is not subject to COBRA for any calendar year "if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year." **23** The slightly different Code formulation of the rule exempts from excise taxes any COBRA failures with respect to any qualifying event that occurs during a "calendar year immediately following a calendar year during which all employers maintaining [a group health] plan normally employed fewer than 20 employees on a typical business day." **24**

Caution: State Continuation Coverage Requirements May Apply. A small employer plan that is insured may have continuation coverage obligations under applicable state law,* although exempt from COBRA.

* State continuation coverage laws are discussed further in Section XXVII.

Note that one court rejected an employee's argument that the language "all employers maintaining such plan employed fewer than 20 employees" meant that so long as any other employer that maintained the same type of health plan employed over 20 people during the year, then the plan was subject to COBRA. When an employer maintains an insured group health plan solely for its employees, whether that plan satisfies the small employer exception is determined by counting only that employer's employees, not the employees of other employers that maintain separate insured group health plans through the same insurance company. **25**

Mistakes Happen. Failing to offer COBRA due to a belief that the employer is not subject to COBRA is a common compliance mistake.* For more information on COBRA compliance mistakes and how to correct them, see Section XXIV.

* *See, e.g.*, *Virciglio v. Work Train Staffing LLC*, 2016 WL 7487725 (11th Cir. 2016).

2. Counting Employees Generally

a. Count Employees, Not Just Plan Participants

COBRA's small employer exception focuses on the number of employees working for all employers maintaining the plan, not just on the number of employees covered by the group health plan. **26** This means that the plan must count all employees, including both full-time and part-time employees.

b. Count Only Common-Law Employees

Under the IRS COBRA regulations, only common-law employees are counted as "employees" for

purposes of the small employer exception. **27** Groups not counted as employees include self-employed individuals, independent contractors, and members of a corporate employer's board of directors, unless of course these individuals are also common-law employees of the employer or of any member of the employer's controlled group. **28**

Common-law employee status is not determined on the basis of a worker's title or job description but instead depends on several factors enumerated by the IRS and the courts. **29** Consequently, a worker who is thought to be an independent contractor or a self-employed individual might in fact be a common-law employee if enough factors are present indicating an employment relationship with an organization (such as that organization's right to direct and control the manner in which the individual performs services). **30**

One group of workers that might be overlooked in this connection are workers providing services through a leasing arrangement. Frequently, these workers are actually common-law employees of the organization for which they are performing services (the recipient) even though they may be getting paychecks (and benefits) from the leasing organization (sometimes called a professional employer organization or PEO). **31** Workers providing services through a leasing arrangement **32** who qualify as common-law employees of the recipient should be counted by the recipient in determining whether COBRA's small employer exception applies. **33**

We are not aware of any reported COBRA case dealing with the question of whether shareholders in a professional corporation are to be counted as employees for purposes of COBRA's small employer exception. The courts have dealt with a similar issue under the ADA, **34** the ADEA, **35** and Title VII of the Civil Rights Act of 1964. **36** The Supreme Court has decided a case **37** under the ADA involving shareholders in a professional corporation and enunciated six factors that must be examined in determining whether such individuals are common-law employees (the factors come from EEOC guidelines on the employee status of partners, officers, directors, and major shareholders):

- whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- whether and to what extent the organization supervises the individual's work;
- whether the individual reports to someone higher in the organization;
- whether and to what extent the individual is able to influence the organization;
- whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- whether the individual shares in the profits, losses, and liabilities of the organization.

The Court also cautioned that the existence of an employment agreement or a person's title-such as partner, director, or vice president-is not determinative of a person's status. This decision specifically dealt with whether shareholders in a professional corporation were employees for purposes of the ADA, but the opinion suggests that the same tests would apply in determining the applicability of other federal nondiscrimination statutes; these tests may also have relevance in the context of COBRA's small employer exception.

While some courts have taken a different approach for purposes of determining the applicability of Title VII, concluding that shareholders in a professional corporation should not be counted as employees, **38** these decisions have been brought into question by the Supreme Court's decision in the *Clackamas* **39** case.

Are Members of an LLC or LLP Common-Law Employees for Purposes of the Small Employer Exception? A small law partnership had 10 partners and 15 employees in the preceding calendar year. Its group health plan is therefore excepted from COBRA under the small employer exception for the current year (the partners do not count toward the 20-employee threshold). What if the partnership is converted either to a limited liability company or a limited liability partnership? Under applicable state law, the owners who were formerly partners now have limited liability, such that they don't individually bear the full risks of proprietors. Although unclear, the former partners arguably have become common-law employees (due to the conversion), who have to be counted toward the 20-employee threshold of the small employer exception.*

* *Cf. Siko v. Kassab, Archbold & O'Brien, L.L.P.*, 1998 WL 307247 (E.D. Pa. 1998) (denying a limited liability partnership's motion for summary judgment dismissing Family and Medical Leave Act claims on the grounds that the firm had too few employees for the Act to apply, finding "insufficient evidence at this time to support Defendant's contention that Defendant's law firm partners are not employees for purposes of FMLA"). The Supreme Court's decision in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, U.S. 1169, 123 S. Ct. 1012 (2003), previously discussed, indicates that whether an individual shares in the profits, losses, and liabilities of an organization is only one of six factors to be considered in reaching a conclusion as to his or her employment status. As previously discussed, this decision specifically dealt with whether shareholders in a professional corporation were employees for purposes of the ADA but may also have relevance in the context of COBRA's small employer exception. Another factor that might arguably be relevant with regard to an LLC or LLP is whether that entity is treated as a partnership or a corporation for federal income tax purposes.

3. Fractional Rule for Counting Part-Time Employees

The IRS COBRA regulations create a special rule for counting part-time employees for purposes of the small employer exception. Under the regulations, a part-time employee counts as a fraction of an employee. **45** The fraction is equal to the number of hours that the part-time employee works divided by the number of hours that an employee must work in order to be considered a full-time employee. The number of hours that must be worked for an employee to be considered full-time is determined in a manner consistent with the employer's general employment practices (but cannot be more than eight hours a day or 40 hours a week). An employer may count employees for each typical business day or may count employees for a pay period and attribute the total number of employees for that pay period to each typical business day that falls within the pay period. **46** An employer also may count part-time

employees on an aggregate basis (rather than on an individual basis) by totaling the hours worked by part-time employees and dividing that sum by the number of hours required for one worker to be considered working full-time. **47** The employer must use the same method for all employees and for the entire year for which the small employer plan determination is made. **48**

a. Application of Fractional Rule

Two courts have methodically applied the fractional rule. In *Giddens v. University Yacht Club Inc.*, **49** the court held that part-time employees' vacation, holiday, and sick-leave hours are not counted. The court reasoned that the IRS COBRA regulations "focus on an 'actual' count of employees and their hours worked," and, therefore, the only hours that may be counted for purposes of the fractional rule "are those which employees actually worked." The court also ruled that an individual who worked for an employer in more than one capacity could only be counted once. **50** Finally, the court refused to count certain "casual laborers" for any purpose because no documentation supported whether they worked on certain days or how many hours they worked.

Is Fractional Rule Valid Exercise of IRS Authority? We have certain reservations about whether the fractional rule is a valid exercise of IRS authority to promulgate regulations. For example, the rule doesn't square with the approach to part-time employees taken under other federal statutes with similar small employer exceptions, including, for example, Title VII of the Civil Rights Act, which (like COBRA) refers only to the number of employees and does not specifically address part-time employees. Title VII's exception has been interpreted by the U.S. Supreme Court to require application of the "payroll method,"[*] which (unlike the fractional rule) counts a part-time employee as a full employee, not a fractional employee, and counts a part-time employee even on days that he or she does not work. The only court to consider this issue, however, has rejected the payroll method and approved the fractional rule, in part based on subtle differences between COBRA and Title VII.[†] Nevertheless, it is difficult to convince a court that an otherwise properly issued regulation is invalid-the courts give great deference to the interpretation of a statute by the agencies charged with enforcing the statute.[‡] Therefore, we expect that smaller employers will rely on the fractional rule when counting part-time employees.

[*] *Walters v. Metro. Educ. Enters.*, 519 U.S. 202 (1997) (did not involve validity of regulations).

[†] *Galati v. D & R Excavating, Inc.*, 2006 WL 1273917 (D. Ariz. 2006).

[‡] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

In *Galati v. D & R Excavating, Inc.*, **51** the court summarized the fractional rule as applied by an employer that used weekly pay periods, with a full-time employee working 40 hours per week:

> [The] part-time employees will count as X/40 of an employee, where X is the number of hours the part-time employee worked during that week. If the sum of part-time employees

> and full-time employees is less than 20 for a given week, then [the employer] is credited with one week of employing less than 20 employees.

The court also ruled that neither holiday pay nor vacation pay could be incorporated into the calculation of the "number of hours worked by that employee" under the fractional rule. The court suggested, however, that "in weeks where multiple employees are given 8 hours of holiday pay, the measure of full-time employment for that week [could be] fewer hours (i.e. a 32-hour workweek for that pay period would be 'full-time')."

It should be noted that the fractional rule creates additional administrative burdens when compared with the payroll method. A plan sponsor following the fractional rule will have to track the actual hours worked by part-time employees and determine for each part-time employee what fraction of a full-time employee he or she is for each day or payroll period. Administrators should insist on accurate records of hours worked by part-time employees in order to be able to demonstrate that a plan satisfies the small employer exception. Moreover, these records must be retained so that they can be produced in the event of a lawsuit.

Use of Fractional Rule Should Be Communicated to Employees and Covered Spouses. Employers that decide to follow the fractional rule and determine that they are no longer obliged to provide COBRA coverage will want to make sure that they communicate to all employees (and their covered spouses who should have received initial COBRA notices) the employer's position that COBRA no longer applies. In addition, employers following the rule should revise all handbooks, summary plan descriptions (SPDs), and other documents and communications to remove any language that purports to grant COBRA rights.*

* The DOL explains the fractional rule in a booklet addressed to employees (DOL Booklet "An Employee's Guide to Health Benefits Under COBRA" (as visited June 27, 2017)). *See also* COBRA Continuation Health Coverage FAQs, Q4 (as visited June 27, 2017).

b. Fractional Rule When Employees Are Not Paid by the Hour and Do Not Keep Time Records

In *Marrs-Gonzalez v. Oasis Lending, Inc.*, **52** the majority of the employer's employees were paid on a commission-only basis, and the employer kept no records of the hours these employees actually worked. The employer created a formula solely for purposes of applying the fractional rule to estimate the hours an employee worked as a function of commissions he or she earned. The court rejected the employer's ad hoc formula, ruling that the employer must either provide documentation of the hours an employee actually worked or establish the hours worked by some other reliable means of proof. Employers of non-hourly employees may want to keep hourly records to satisfy the fractional rule, or rely

on hourly equivalency formulas that are recognized for other purposes (for example, hourly equivalencies for truck drivers to satisfy State prevailing wage law).

Employers That Decide Not to Follow the Fractional Rule Should Consult With Insurers. Some employers may wish to ignore the fractional rule and count part-time employees as full-time employees (because, for example, they want to avoid the risk of a lawsuit or the administrative difficulty of accounting for part-time employees in the detail required by the regulations). These employers should first consult with any insurers involved (the insurer of an insured plan or the stop-loss carrier for a self-insured plan) to make sure that the insurer agrees to provide COBRA coverage although the employer would not be subject to COBRA if the fractional rule were applied.

4. Employees of Related Employers (and Successors)

For purposes of determining whether an employer has 20 or more employees, all employees of all related employers under common control must be counted. **53** (However, see the special rules for multiple employer welfare arrangements (MEWAs), discussed in Section V.)

Specifically, under the IRS COBRA regulations, a "small-employer plan is a group health plan maintained by an employer (within the meaning of Q/A-2 of this section) that normally employed fewer than 20 employees (within the meaning of paragraph (c) of this Q/A-5) during the preceding calendar year." **54** Q/A-2, in turn, provides that an "employer" is any "person for whom services are performed" and "any other person that is a member of a group described in [Code §] 414(b), (c), (m), or (o)," which includes the person for whom services are performed. These cross-referenced subsections of Code §414 include all members of-

- a controlled group of corporations (Code §414(b));
- a group of trades or businesses under common control (Code §414(c));
- an affiliated service group (Code §414(m)); and
- certain other arrangements described in regulations (Code §414(o)). **55**

Related employers whose employees must be counted for purposes of the small employer exception include foreign employers, if the requisite relationship exists. **56**

In addition, the term "employer" includes "successors" of those entities described above (the person for whom services are performed and related entities described in Code §414(b), (c), (m), or (o)). **57** A successor employer is defined as an entity that "results from a consolidation, merger, or similar restructuring of the employer." **58** A successor employer can also be a "mere continuation" of the employer. **59** And a purchaser of substantial assets in an asset sale can be a successor employer if it continues the business operations of the seller related to the purchased assets. **60**

An explanation of the complicated Code §414 rules is beyond the scope of this manual. However, the

following examples illustrate how the definition of "employer" contained in the IRS regulations can affect the availability of the small employer exception.

Example 1: Employees of Related Entities Must Be Combined. During both the current and preceding calendar years, ABC Corporation owned 100% of the stock of its subsidiary, XYZ Corporation. ABC employed 15 employees on a typical business day during the preceding calendar year, while XYZ employed ten employees on a typical business day during the preceding calendar year. Any group health plan sponsored by either ABC or XYZ is subject to COBRA during the current year because ABC and XYZ are members of the same controlled group of corporations within the meaning of Code §414(b), and their combined workforce of employees exceeded 20 in the preceding year.

In Example 1, the corporations whose employees are counted together for purposes of the small employer exception retain the same corporate structures in the current and preceding calendar years. The application of the small employer exception is more complex when entities engage in a business reorganization, merger, or acquisition. The IRS has provided guidance in Rev. Rul. 2003-70 **61** with respect to some of these transactions, as illustrated in the following examples.

Example 2: Employees of Merging Entities Must Be Combined. During 2016, Able Corp. has 15 employees, and Zebra Corp., an unrelated corporation, has 14 employees. Neither Able nor Zebra is related to any other business entity. During 2017, Zebra has a group health plan, and Able does not. Able merges with Zebra on September 3, 2017, with Zebra as the surviving corporation.

Before September 3, 2017, Zebra's group health plan is not subject to COBRA because it falls under the small employer exception. But for qualifying events occurring on or after September 3, 2017, Zebra's plan is subject to COBRA because, for purposes of the small employer exception, the "employer" on and after September 3, 2017, is the post-merger Zebra, whose employees in the preceding calendar year were the employees of both Able and pre-merger Zebra. The IRS has ruled in Rev. Rul. 2003-70* that the employees of both corporations during 2016 should be counted for purposes of determining whether the small employer exception applies, even though the companies were not related to one another during 2016 or during the period January 1, 2017, through September 2, 2017.

Under Rev. Rul. 2003-70, the same result will occur any time there is a stock sale as defined in the IRS COBRA regulations (i.e., a "transfer of stock in a corporation that causes a corporation to become a different employer or a member of a different employer")† if a small employer not subject to COBRA becomes part of a group of related employers that together employed more than 20 employees during the preceding calendar year. Consequently, a stock sale as well as a merger or other reorganization could cause a small employer to lose the protection of the small employer exception, effective on the date of the transaction.

* Rev. Rul. 2003-70, 2003-27 I.R.B. 3.

† Treas. Reg. §54.4980B-9, Q/A-1(b).

Example 3: What Employees Count After Asset Sale? During 2016, Can- Do Corp. had 15 employees, and Positive Corp., an unrelated corporation, had 22 employees. Neither Can- Do nor Positive is related to any other business entity. During 2016, both Can- Do and Positive sponsored group health plans for their employees. Can- Do acquires substantially all of the assets of Positive on September 3, 2017, and hires all of Positive's employees. Before September 3, 2017, Can- Do Corp.'s group health plan is not subject to COBRA because Can- Do falls under the small employer exception, and Positive Corp.'s plan is subject to COBRA because Positive had 22 employees during the previous calendar year.

Under Rev. Rul. 2003-70,* Can- Do's group health plan would continue to be excepted from COBRA during the remainder of 2017 (even though the combined number of employees of Can- Do and Positive during the preceding calendar year exceeded 20). Can- Do would continue to be excepted from COBRA until the January 1 following a year in which Can- Do normally employed at least 20 employees (applying the usual rules for determining whether a plan is a small employer plan). The IRS ruling indicates that the asset acquisition would not cause Can- Do to become a related corporation of Positive, and therefore their employees during 2016 need not be counted together.

Consequently, if Can- Do continues to employ 20 or more employees after the asset acquisition, it will become subject to COBRA on January 1, 2019 (i.e., the first day of the calendar year following the year in which Can- Do employs 20 or more employees on at least 50% of its typical business days during that year). Alternatively, if the acquisition had occurred on May 1, 2017, then Can- Do would become subject to COBRA on January 1, 2018 (because it employed 20 or more employees on at least 50% of its typical business days during 2017, from May 1 to December 31).

* Rev. Rul. 2003-70, 2003-27 I.R.B. 3.

Even though the Can- Do Corp. plan in Example 3 would not immediately become subject to COBRA at the time of the asset purchase, according to Rev. Rul. 2003-70, in certain circumstances the Can- Do Corp. plan would still have to provide COBRA coverage to certain individuals in accordance with the IRS COBRA regulations applicable to mergers and acquisitions. **62** These regulations, which are discussed in detail in Section XII, require a "successor employer" **63** in an asset sale to provide COBRA coverage to any "M&A qualified beneficiaries" **64** associated with the acquired assets.

If, in Example 3, Positive Corp. terminates all of its group health plans because of the asset sale to Can-Do Corp., and if Can-Do continues Positive's business "without interruption or substantial change," Can-Do will be a "successor employer" under the IRS COBRA regulations. If Positive's group health plan was providing COBRA coverage to any qualified beneficiaries before the asset sale, or if an employee of Positive was terminated in connection with the asset sale (instead of being hired by Can-Do) and became entitled to elect COBRA as a result, these individuals would be "M&A qualified beneficiaries" under the IRS COBRA regulations. According to Rev. Rul. 2003-70, Can-Do would be obligated to provide COBRA coverage to any M&A qualified beneficiaries as a successor employer, even during the

period when it is still excepted from COBRA as a small employer. **65**

Example 4: What Employees Count When Small Subsidiary Is Spun Off? Parent Co., which had 500 employees in 2016, owns 100% of the stock of a subsidiary, XYZ Company, which had 12 employees in 2016. Parent and XYZ are not related to any other business entity. On July 1, 2017, Parent sells all of the stock in XYZ to Zach, an individual who has never run a business or had employees. After the sale, XYZ continues to have 12 employees and is related to no other employer within the meaning of Code §414. Simultaneously with the stock sale, XYZ establishes a group health plan (on July 1, 2017). On September 1, 2017, Quentin, an employee of XYZ, terminates his employment. Must he be offered COBRA?

Rev. Rul. 2003-70 does not provide direct guidance on when the plan established on July 1, 2017, by XYZ may start to take advantage of the small employer exception. It may be argued that the exception should apply immediately because XYZ itself, as the only employer ever maintaining this plan, had fewer than 20 employees in 2016 (the calendar year preceding the year in which the qualifying event occurred). Rev. Rul. 2003-70 arguably supports this result. In the ruling, as it relates to a stock sale, the IRS states that the employees of the employer, as it is constituted after the stock sale, must be counted. In this case, the employer as constituted after the stock sale consists only of XYZ.

But this runs counter to the general rule that the applicability of the small employer exception is based on the number of employees employed by the employer in the calendar year preceding the year in which the qualifying event occurs. And in counting employees, the employees of all employers related to the employer maintaining the plan must be counted. One could argue that XYZ is the employer maintaining the plan in question and, in 2016 (the calendar year preceding the year in which the qualifying event occurred), it had more than 20 employees when the employees of the related parent corporation in that year were counted.

We acknowledge that this is a gray area. An employer that faces this kind of question should consult with benefits counsel before deciding whether the small employer exception applies.

5. Employees Outside the United States

When counting employees, one should count not only employees in the United States, but also employees outside the United States. **66** For example, an employer with 500 employees in Europe and ten employees in the United States does not satisfy the small employer exception and is subject to COBRA. **67** The Second Circuit reached a similar conclusion with respect to the Age Discrimination in Employment Act (ADEA), which applies to an employer "who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." **68** The court held that foreign employees employed outside the United States are counted for purposes of the ADEA's 20-employee requirement. **69** And the Ninth Circuit concluded that non-U.S. citizens should be counted toward the employee minimum under Title VII of the Civil Rights Act of 1964, **70** which

applies to employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. **71**

6. What Records Show Employee Counts on Typical Business Day?

An employer is considered to have normally employed fewer than 20 employees during a particular calendar year if it had fewer than 20 employees on at least 50% of its typical business days during that year. **72** One court has held that when the Schedule B filed with a plan's Form 5500 showed that the employer employed 32 employees during 1990, the employer's group health plan was subject to COBRA in 1991. **73** In another case, an employee's affidavit that summarily accounted for additional employees was insufficient to overcome the employer's motion for judgment without trial based on timesheets and other payroll records that showed that it had fewer than 20 employees in virtually every pay period in the year in question. **74** Other records that might evidence the number of employees include such things as personnel records, federal and state employment tax returns, and reporting forms for state workers' compensation insurance. **75**

7. Applying Exception When Employee Numbers Fluctuate From Year to Year

Once it is determined what employees to count, applying the exception will be relatively straightforward for most plans whose employee numbers stay consistently above or below the threshold. Difficulties can occur, however, if employee numbers fluctuate from year to year around the threshold.

a. Crossing Over the 20-Employee Threshold

If a single employer plan ceases to be a small employer plan because of an increase in its workforce during the current calendar year, then the plan becomes subject to COBRA as of the following January 1. **76** This can have some interesting consequences for a new business, as illustrated by the following example.

Example 1: New Company With 20 or More Employees. Little Candy Co., which is not related to any other business entity, opens for business on January 1, 2017, with five full-time employees. Its talking chocolate hearts take off on Valentine's Day, and by March, Little Candy Co. has 25 full-time employees. The edible sparklers are a big hit for the Fourth of July. By August, Little Candy Co. has 100 full-time employees and starts a group health plan for all employees. Unfortunately, the pumpkin-flavored eyeballs are a dud at Halloween, and in November 2017, the company lays off ten employees who lose health coverage on their last day of employment. Are those ten employees entitled to an opportunity to elect COBRA?

The answer is no. The company had no employees in the preceding calendar year (and is not related to any other employer whose employees would have to be counted). Little Candy Co. is therefore a small employer throughout 2017, its first year of operation.* But if Little Candy Co. lays off another 71 employees on January 1, 2018, those 71 employees will be entitled to an opportunity to elect COBRA because Little Candy Co. had 20 or more employees for more than 50% of its typical business days during the preceding calendar year (2017).† This is the case for all employee terminations occurring during 2018, even if Little Candy Co. stays below 20 employees throughout its second year of operation.

* *See* Treas. Reg. §54.4980B-2, Q/A-5(a).

† *See* Treas. Reg. §54.4980B-2, Q/A-5(b).

By definition, under the IRS COBRA regulations, there is no qualifying event unless a listed "triggering event" (termination of employment, death of employee, divorce, etc.) occurs while a plan is subject to COBRA. **77** When a triggering event occurs while a plan is excepted from COBRA, the plan has no obligation to offer COBRA coverage, regardless of when coverage is lost as a result of the triggering event. However, if a qualifying event occurs after the plan ceases to be excepted from COBRA, the plan must offer COBRA coverage. For this purpose, the qualifying event occurs when the triggering event occurs, regardless of when coverage is lost. **78**

Example 2: Event Occurs While Plan Is Not Subject to COBRA. Evergreen Company's group health plan is excepted from COBRA as a small employer plan during the year 2017. Carter terminates employment with Evergreen on December 31, 2017, but a loss of coverage under the plan for him and his wife, Martha, will not occur until March 31, 2018. Assume that the plan ceases to be a small employer plan on January 1, 2018.

For purposes of the small employer exception, the relevant event for both Carter and Martha was the triggering event of termination of employment that occurred on December 31, 2017. Because the plan was not subject to COBRA in 2017, there was no qualifying event for either of them and they have no COBRA rights under the plan.*

* Treas. Reg. §54.4980B-4, Q/A-1(d).

Example 2 (cont'd): Later Event Occurs After Plan Becomes Subject to COBRA. Assume the same facts as above. On January 15, 2018, Carter and Martha divorce, while they are still covered under the plan due to the deferred loss of coverage in connection with Carter's termination of employment. The divorce is a triggering event that occurs while the plan is subject to COBRA. Whether or not Martha is entitled to COBRA coverage depends on whether she will lose coverage as a result of the divorce (rather than Carter's termination of employment). If she does lose coverage before March 31 as a result of the divorce, the "divorce will constitute a qualifying event during 2018 and so entitle [her] to elect COBRA continuation coverage."*

* Treas. Reg. §54.4980B-4, Q/A-1(d). The discussion of the above example in the regulation does not analyze the loss of coverage issue. However, as discussed in Section VII, a triggering event like divorce is not a qualifying event unless it causes a loss of coverage.

b. Going Under the 20-Employee Threshold

A qualified beneficiary otherwise entitled to continuation coverage will continue to qualify for such coverage even if, after the COBRA qualifying event occurs, the group health plan becomes entitled to rely on the small employer exception because of a drop in workforce. **79**

Example: COBRA Obligation Continues for Existing Qualified Beneficiaries. Burren, Inc. is subject to COBRA in the year 2016 because it had more than 20 employees during 2015. Sally, the spouse of a Burren employee, is covered under Burren's group health plan. During 2016, Sally divorces the employee, loses coverage under the plan and timely elects COBRA coverage. Even though, due to a decrease in the workforce, the Burren plan becomes eligible for the small employer exception in 2017, 2018, and 2019, it must continue to provide COBRA coverage to Sally (subject to the applicable rules governing duration of the COBRA maximum coverage period)* for up to 36 months following the divorce.

* The COBRA maximum coverage period is discussed in detail in Section VIII.

c. Small Employer Plan Becoming Maintained by COBRA-Size Employer

The 1987 IRS proposed regulations provided that the small employer exception applied if all employers maintaining the plan employed fewer than 20 employees on a typical business day in the preceding calendar year. If a plan ceased to be a small employer plan because of the addition during a calendar year of an employer that had 20 or more employees in the preceding year, the plan immediately became subject to COBRA. **80** However, the final regulations do not address this issue.

d. Discontinuing New Offers of COBRA After Small Employer Exception Applies

If the employer's average workforce falls below 20 employees for a calendar year, the employer may wish to take advantage of the small employer exception for qualifying events that occur in the following calendar year. **81** If so, the employer or plan administrator should notify active employees that there is no COBRA coverage for qualifying events in the relevant calendar year. The SPD and plan document should be revised to reflect that COBRA does not apply. Without such a notice, coupled with necessary revisions to the SPD and plan document, employees and their family members may attempt to argue that they were entitled to COBRA based upon the initial COBRA notice or, in the case of private-sector

employers, the description of COBRA in the SPD. An employer whose workforce hovers around the 20-employee threshold might consider adding special language to its initial COBRA notice and other communications with employees.

Caution for Insured Plans (or Plan With Stop-Loss Coverage). An employer that maintains an insured plan should be aware that the insurance company may take the position that it provides coverage for qualified beneficiaries only when COBRA requires the coverage, thus leaving the employer whose workforce falls below 20 employees exposed to the risk that it will have to self-insure the benefits of those individuals who are allowed to elect COBRA coverage. Of course, in any state with a mini-COBRA law that has no small employer exception, the insurer will be required to provide state continuation coverage in any event.

8. Small Employer Exception for Multiemployer Plans

In the case of a multiemployer plan, a small employer plan is a group health plan under which each of the employers contributing to the plan for a calendar year normally employed fewer than 20 employees during the preceding calendar year. **82** Different rules apply to small multiemployer plans that cross the 20-employee threshold, depending on how the crossover occurs. **83**

9. Small Employer Exception for MEWAs

The application of the small employer exception to MEWAs is included in the detailed discussion of MEWAs in Section V.

10. Applying Small Employer Exception to State Government Plans

COBRA applies to a group health plan maintained by a state that receives funds under the PHSA or "by any political subdivision of such a State, or by any agency or instrumentality or such a State or political subdivision." **84** One published COBRA case addresses the application of the small employer exception to political subdivisions of a state. In that opinion, the court held that a town in Indiana that had fewer than 20 employees was not subject to the COBRA provisions of the PHSA. **85**

The ADEA, which contains a similarly worded exemption for employers with fewer than 20 employees, also applies to state agencies and instrumentalities. A court has addressed whether the employees of an agency or instrumentality must be aggregated with the employees of the state when applying the ADEA exception. The employer was a private, nonprofit corporation with five employees. It was established at the request of the state, received funding from the state, leased office space from the state, used

services of state university faculty, and had centers on state university campuses. The state's education department provided for the employer's postage, supplies, and copying expenses. Distinguishing between state agencies and state instrumentalities, the court indicated that the employees of a state agency *would* have to be aggregated with the employees of any affiliated state subdivision for purposes of the 20-employee rule. However, the court determined that the corporation was not a state *agency* because the state did not control the hiring, firing, or working conditions of its employees. Moreover, the court ultimately held that, even if the corporation were a state *instrumentality*, its employees should not be aggregated with state employees because the state did not exercise sufficient control to place any terminated corporation employees in state jobs outside the corporation. **86**

11. Practice of Offering COBRA

A plan that qualifies for the small employer exception may nevertheless be liable under COBRA if it has a practice of offering COBRA coverage notwithstanding the exception. If such a plan tries to stop offering COBRA coverage, it may be precluded from altering its practice, at least for individuals who have already experienced a qualifying event. **87**

At least one court has ruled that a small employer that offered COBRA to one employee may be estopped from claiming that it is not subject to COBRA. The Sixth Circuit ruled that COBRA's 20-employee threshold requirement was simply an element of the employee's COBRA claim rather than a jurisdictional requirement and held that estoppel can apply to COBRA's 20-employee threshold requirement but only if all the elements of estoppel are present. Considering those elements, the court ultimately found that the employee could not prove certain required elements. For example, the employee had to prove that the employer used conduct or language that amounted to a representation of material fact, but because the employee only overheard co-workers talking about the other employee who had received COBRA coverage, she could not show that the employer had represented to her that she would receive COBRA benefits. **88**

20 Treas. Reg. §54.4980B-4, Q/A-1(d).

21 ERISA §601(b); PHSA §2201(b)(1). *See* Code §4980B(d)(1). The following cases illustrate the importance of demonstrating that the 20-employee threshold has been met: *Feamster v. Mountain State Blue Cross & Blue Shield*, 2012 WL 6720915 (4th Cir. 2012) (potential controlled group relationship that may have caused employer to exceed small employer threshold did not exist on a typical business day during the preceding calendar year); *Just v. Accu-Turn, Inc.*, 2013 WL 3423274 (E.D. Wis.), *reh'g denied*, 2013 WL 6145814 (E.D. Wis. 2013) (case dismissed and rehearing denied because employee failed to prove that employer had 20 or more employees); *Franco-Santos v. Goldstar Transp., Inc.*, 2011 WL 570280 (D.P.R. 2011); *Bitter v. Orthotic & Prosthetic Specialists, Inc.*, 2005 WL 2037458 (E.D. La. 2005) (COBRA did not apply to the employer's health plan because the

employer had fewer than 20 employees); *McGoldrick v. DataTrak Int'l, Inc.*, 42 F. Supp. 2d 893 (D. Minn. 1999) (Magistrate's Recommendation) (even if the employees of two employers were counted, there were fewer than 20 employees, and COBRA therefore did not apply to one employer's group health plan); *DeVoll v. Burdick Painting, Inc.*, 1993 WL 144715 (N.D. Cal. 1993), *aff'd*, 18 EBC 2106 (9th Cir. 1994) (qualified beneficiary produced no evidence to counter employer's statement that it "employed fewer than 20 employees on a typical business day during 1990, the calendar year preceding [the qualified beneficiary's] reduction of hours"); *Fauntleroy v. Rainbow Marketers*, 888 So. 2d 1045 (La. App. 3d Cir. 2004) (affirming trial court's dismissal of COBRA claim because employee had failed to present evidence of number of employees of employer in preceding calendar year); *Hubbard v. The Shores Group, Inc.*, 855 S.W. 2d 924 (Ark. Sup. Ct. 1993) (affirming dismissal of complaint for failure to allege that employer "had twenty or more employees 'on a typical business day during the preceding calendar year'"); *Alisz v. Benefit Trust Life Ins. Co.*, 874 F. Supp. 224 (N.D. Ind. 1994) (dismissing count for failure to allege number of employees employed by employer); *Silver v. I. Goldberg & Partners, Inc.*, 1994 WL 760739 (S.D.N.Y. 1994) (denying employer's motion for summary judgment for dismissal because employer failed to show it had fewer than 20 employees in relevant calendar year).

22 For purposes of this rule, the relevant event is the triggering event regardless of when the loss of coverage occurs. *See* Treas. Reg. §54.4980B-4, Q/A-1(d) (when employment terminates in calendar year in which group health plan is not subject to COBRA but affected employee is given three months of employer-provided coverage into the next calendar year in which the plan is subject to COBRA, the qualifying event for purposes of the small employer rule occurs in the first year even though the loss of coverage occurs in the second-the employee is, therefore, not entitled to COBRA).

23 ERISA §601(b); PHSA §2201(b)(1).

24 Code §4980B(d)(1). As discussed in detail in subsection C.2, an employer is considered to have normally employed fewer than 20 employees during a particular calendar year if it had fewer than 20 employees on at least 50% of its typical business days during that year. Treas. Reg. §54.4980B-2, Q/A-5(b). For a discussion of the allocation of regulatory authority among the IRS, DOL, and HHS, see Section III.

25 *Cox v. Town of Rome City*, 764 N.E. 2d 242 (Ind. App. 2002).

26 *Jiminez v. Mueblerias Delgado, Inc.*, 196 F. Supp. 2d 125 (D.P.R. 2002).

27 Treas. Reg. §54.4980B-2, Q/A-5(c). Note also that under ERISA, "employee" means common-law employee. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 14 EBC 2625 (1992). Similarly, under the Code, the term "employee" is defined using common-law principles. Rev. Rul. 87-41, 1987-1 CB

296 (which provides 20 factors as guides for determining whether an individual qualifies as a common-law "employee" for tax purposes). For certain specific purposes, but not including COBRA, the Code applies an expanded definition of employee to include "a full-time life insurance salesman." Code §7701(a)(20).

28 Treas. Reg. §54.4980B-2, Q/A-5(c). *See Jiminez v. Mueblerias Delgado, Inc.*, 196 F. Supp. 2d 125 (D.P.R. 2002) (family members of the shareholders of a corporation who worked in the business must be counted as employees just as any other member of the workforce would be; the ERISA §3(6) definition of employee, "any individual employed by an employer," as interpreted by the United States Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 14 EBC 2625 (1992), does not allow for consideration of "a parental or familial relationship when determining whether an individual is an employee pursuant to ERISA"). *See also Galati v. D&R Excavating, Inc.*, 2006 WL 1273917 (D. Ariz. 2006) (court refused to count "under the table" employees in calculation of small employer exception).

29 *See, e.g.*, Rev. Rul. 87-41, 1987-1 C.B. 296; *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 14 EBC 2625 (1992). *See also Admin. Comm. of the Time Warner, Inc. Benefit Plans v. Biscardi*, 25 EBC 2325 (S.D.N.Y. 2000); *Giddens v. Univ. Yacht Club Inc.*, 37 EBC 1837 (N.D. Ga. 2006) (unpaid part-time officers of a nonprofit corporation who were elected to their positions were determined not to be common-law employees for purposes of the small employer exception).

30 *See, e.g.*, *Mulligan v. Girl Scouts Wagon Wheel Council*, 986 F.2d 1428 (10th Cir. 1993) (Parties agreed that the employer had 18 employees. The dispute arose over whether two individuals who provided janitorial services for the employer for ten hours a week were employees or independent contractors. The parties agreed that if the janitors were employees, the employer would have 20 employees and would be required to provide COBRA benefits to terminated employees. However, the court held that the janitors were independent contractors, not employees. Thus, the employer was a small employer (only 18 employees) and did not have to provide COBRA.).

31 PEOs and the COBRA issues raised by employee leasing are discussed in more detail in subsection E.

32 We mean all workers providing services under some type of employee leasing arrangement, whether or not described in Code §414(n). Code §414(n) provides that a leased employee who satisfies certain criteria must be treated as an employee of the recipient for purposes of COBRA (and other benefit requirements). These criteria are (a) the individual is not an employee of the recipient; (b) the individual's services are provided pursuant to an agreement between the recipient and the leasing organization; (c) the individual has provided services for the recipient on a substantially full-time basis for at least one year; and (d) these services are performed under the primary direction or control of the

recipient. Code §414(n)(2). ERISA §607(4) provides that this treatment of certain leased employees under Code §414(n) applies under the COBRA provisions of ERISA as well.

33 The IRS COBRA regulations state that only common-law employees should be counted for purposes of determining whether COBRA's small employer exception applies. Treas. Reg. §54.4980B-2, Q/A-5(c). But Code §414(n) states that leased employees (as defined in that section-the criteria are discussed above) shall be treated as employees for purposes of COBRA (and other benefit requirements). ERISA §607(4) provides that this treatment of certain leased employees under Code §414(n) applies under the COBRA provisions of ERISA as well. Thus, it is unclear whether some employees who are not common-law employees (but are treated as employees under Code §414(n)) would have to be counted for purposes of the small employer exception. *Cf. Burrey v. Pacific Gas and Electric Co.*, 159 F.3d 388 22 EBC 1887 (9th Cir. 1998) (holding that the only individuals who fit within the definition of "leased employee" under Code §414(n) are those who are *not* common-law employees of the recipient organization and who meet the criteria set forth in that section).

34 The ADA applies to employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §12111(5)(A).

35 The ADEA applies to employers with 20 or more employees. 29 U.S.C. §630(b).

36 Title VII applies to employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. 42 U.S.C. §2000e(b).

37 *Clackamas Gastroenterology Assocs., P.C. v. Wells*, U.S. 1169, 123 S. Ct. 1012 (2003). *See also Hyland v. New Haven Radiology Assoc., P.C.*, 794 F.2d 793 (2d Cir. 1986) (physician-shareholders of professional services corporation who actively participated in management and operation of business and had employment agreements with the corporation were counted as employees for purposes of determining that ADEA applied to corporation; cases construing definitional provisions of one anti-discrimination statute (referring to the Fair Labor Standards Act of 1938, 29 U.S.C. §§203(a), (d), (e)(1); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e(a), (b), (f); and the ADEA) are persuasive authority when interpreting the others).

38 *Drescher v. Shatkin*, 280 F.3d 201 (2d Cir. 2002) (court concluded that employees eligible to sue under Title VII were the ones to be counted in determining if Title VII's 15-employee threshold had been met; president/sole director/sole shareholder of a professional corporation did not count as an employee under this approach and the corporation was not subject to Title VII); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (court applied an "economic realities" test, concluding that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation" and need not be counted as an employee in

determining the applicability of Title VII).

39 *Clackamas Gastroenterology Assocs., P.C. v. Wells*, U.S. 1169, 123 S. Ct. 1012 (2003).

45 Treas. Reg. §54.4980B-2, Q/A-5(e). *See* DOL Booklet "An Employer's Guide to Group Health Continuation Coverage Under COBRA" (as visited June 27, 2017), and COBRA Continuation Health Coverage FAQs, Q4 (as visited June 27, 2017). *Cf. Jiminez v. Mueblerias Delgado, Inc.*, 196 F. Supp. 2d 125 (D.P.R. 2002), in which the court interpreted the IRS 1987 proposed regulations to mean that each part-time employee must be counted as one employee in applying COBRA's small employer exception.

46 Treas. Reg. §54.4980B-2, Q/A-5(e).

47 Preamble to 2001 Final IRS COBRA Regulations, 66 Fed. Reg. 1843, 1844 (Jan. 10, 2001).

48 Treas. Reg. §54.4980B-2, Q/A-5(e).

49 *Giddens v. Univ. Yacht Club Inc.*, 37 EBC 1837 (N.D. Ga. 2006).

50 "An employee who typically worked over thirty hours in administration was considered a full-time employee, but if the employee worked another ten hours in the clubhouse, plaintiffs have also contributed the additional clubhouse hours toward the employee's part-time status. The court finds that this is not in keeping with the regulations as one person cannot count as more than one employee." *Giddens v. Univ. Yacht Club Inc.*, 37 EBC 1837 (N.D. Ga. 2006).

51 *Galati v. D & R Excavating, Inc.*, 2006 WL 1273917 (D. Ariz. 2006).

52 *Marrs-Gonzalez v. Oasis Lending, Inc.*, 2009 WL 2488300 (S.D. Fla. 2009)

53 Code §414(t) (extending Code §414 controlled group rules to Code §4980B, the Code's COBRA provisions); Treas. Reg. §54.4980B-2, Q/A-5(a) (cross-referencing Treas. Reg. §54.4980B-2, Q/A-2 on related employers). The parallel provision in ERISA is its definition of "employer." ERISA §607(4). The Fifth Circuit in *Kidder v. H & B Marine, Inc.*, 932 F.2d 347, 14 EBC 1379 (5th Cir. 1991), rejected an employer's argument that the Omnibus Budget Reconciliation Act of 1989 deleted reference in ERISA's COBRA provisions to the controlled group rules, noting that ERISA §607(4) continued to apply the Code's controlled group rules to the definition of "employer," which also controlled for COBRA purposes. *See also Franco-Santos v. Goldstar Transport, Inc.*, 2011 WL 570280 (D.P.R. 2011); *Granger v. AAMCO Automatic Transmission, Inc. t/a Collex Collision Experts, Inc.*, 1992 WL

233861 (D.N.J. 1992).

54 Treas. Reg. §54.4980B-2, Q/A-5(a).

55 *See* Code §414(t)(2) (listing Code §4980B as an applicable section).

56 *See* Treas. Reg. §54.4980B-2, Q/A-5(a), Example (ii). An employer whose plans are not subject to ERISA's COBRA provisions because they are maintained outside the United States primarily for the benefit of nonresident aliens could still be a related employer whose employees must be counted for purposes of the small employer exception. See Section XXXIII for a discussion of the ERISA exclusion for certain foreign plans.

57 Treas. Reg. §54.4980B-2, Q/A-2(a).

58 Treas. Reg. §54.4980B-2, Q/A-2(b).

59 Treas. Reg. §54.4980B-2, Q/A-2(b).

60 Treas. Reg. §§54.4980B-2, Q/A-2(a) and 54.4980B-9, Q/A-8(c). This rule and the COBRA liability of such a successor employer in an asset sale is discussed in detail in Section XII.

61 Rev. Rul. 2003-70, 2003-27 I.R.B. 3.

62 Treas. Reg. §54.4980B-9.

63 An acquiring company is a successor employer under the regulations only if the seller ceases to provide any group health plan to any employee "in connection with the sale," and the buyer "continues the business operations associated with the assets purchased…without interruption or substantial change." Treas. Reg. §54.4980B-9, Q/A-8(c)(1).

64 M&A qualified beneficiaries consist of two possible groups in an asset sale: (a) qualified beneficiaries already receiving COBRA coverage before the sale under a plan of the seller as a consequence of employment associated with the assets that are sold; and (b) qualified beneficiaries who experience their qualifying events in connection with the sale. Treas. Reg. §54.4980B-9, Q/A-4(a).

65 Rev. Rul. 2003-70 clearly states this conclusion:

> If, however, under the rules of [the IRS COBRA regulations applicable to mergers and acquisitions, the acquiring corporation] is a successor employer to the seller of the assets, then the group health plan of [the acquiring corporation] will have the obligation to make COBRA continuation coverage available to any M&A qualified beneficiaries of the seller in accordance with the rules of [the IRS COBRA regulations applicable to mergers and acquisitions], even though [the acquiring corporation] is otherwise excepted from COBRA.

Rev. Rul. 2003-70, 2003-27 I.R.B. 3.

66 Treas. Reg. §54.4980B-2, Q/A-5(a)(ii).

67 The employees at foreign locations, however, generally are not entitled to elect COBRA coverage. *See* Code §4980B(g)(1)(C) (nonresident alien employees without U.S. source income and their spouses and dependent children are not qualified beneficiaries).

68 29 U.S.C. §630(b).

69 *Morelli v. Cedel*, 141 F.3d 39, 21 EBC 2921 (2d Cir. 1998).

70 *Kang v. U. Lim Am., Inc.*, 296 F.3d 810 (9th Cir. 2002).

71 42 U.S.C. §2000e(b).

72 Treas. Reg. §54.4980B-2, Q/A-5(b).

73 *Powell v. Wilmington Plumbing Supply Co., Inc.*, 921 F. Supp. 1264 (D. Del. 1996), *aff'd*, 176 F.3d 472 (3d Cir. 1999).

74 *Galati v. D & R Excavating, Inc.*, 2006 WL 1273917 (D. Ariz. 2006). *Cf. Marrs-Gonzalez v. Oasis Lending, Inc.*, 2009 WL 2488300 (S.D. Fla. 2009).

75 *See* Audit Techniques and Tax Law to Examine COBRA Cases (as visited June 27, 2017).

76 *See* Treas. Reg. §54.4980B-2, Q/A-5(a).

77 Treas. Reg. §54.4980B-4, Q/A-1(d).

78 *See* Treas. Reg. §54.4980B-4, Q/A-1(d) (when employment terminates in calendar year in which group health plan is not subject to COBRA but affected employee is given three months of employer-provided coverage into the next calendar year in which the plan is subject to COBRA, the qualifying event for purposes of the small employer rule occurs in the first year even though the loss of coverage occurs in the second-the employee is, therefore, not entitled to COBRA).

79 Code §4980B(d)(1); Treas. Reg. §54.4980B-2, Q/A-5(g).

80 Treas. Reg. §1.162-26, Q/A-9(d) (1987). This would remain the rule for multiemployer plans. Treas. Reg. §54.4980B-2, Q/A-5(f).

81 Treas. Reg. §54.4980B-2, Q/A-5(g), Example 3.

82 Treas. Reg. §54.4980B-2, Q/A-5(a).

83 Treas. Reg. §54.4980B-2, Q/A-5(f).

84 PHSA §2201(a).

85 *Cox v. Town of Rome City*, 764 N.E. 2d 242 (Ind. App. 2002).

86 *Palmer v. Ark.*, 154 F.3d 892 (8th Cir. 1998).

87 *See Gaymon v. Leyden*, 597 So. 2d 1358 (Ala. Civ. App. 1991) (ex-wife was awarded money judgment for unpaid medical expenses against ex-husband, who was president of employer (which had fewer than 20 employees), for his failure to follow divorce decree's directive that he "comply with all Federal Rules and regulations regarding [the wife's] right to medical coverage").

88 *Thomas v. Miller*, 2007 WL 1827293 (6th Cir. 2007). *See also Hanysh v. Buckeye Extrusion Dies, Inc.*, 2012 WL 3852569 (N.D. Ohio 2012) (employer that was unaware of small employer status may be estopped from terminating coverage after it is informed of small employer exception). For more information on estoppel, see Section XXV.