

**RDS QUALIFYING COVERED RETIREES AND
INDIVIDUALS RECEIVING COBRA COVERAGE**
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Question

An employer provides retiree drug coverage as well as coverage to actively employed workers and their family members. The employer has applied for the retiree drug subsidy. Can the employer treat individuals receiving COBRA coverage as "qualifying covered retirees?"

Background

In general, a qualifying covered retiree (QCR) is a Part D eligible individual who is enrolled in the sponsor's plan and who is not enrolled in Part D. (See 42 CFR 423.4 and 423.882 for the definitions of "Part D eligible individual" and "qualifying covered retiree"). See also the guidance with frequently asked questions on qualifying covered retirees at: http://www.cms.hhs.gov/EmployerRetireeDrugSubsid/01_Overview.asp

Under the federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), certain former employees, retirees, spouses, former spouses, and dependent children generally have the right to temporary continuation of health coverage when coverage would be lost due to certain specific events. For more information about COBRA, see e.g., frequently asked questions from the US Department of Labor at: http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html.

Answer

For purposes of the retiree drug subsidy, an individual cannot be counted as a QCR if he or she is considered to be receiving coverage by reason of current employment status as determined under the Medicare Secondary Payer (MSP) regulations at 42 CFR §411.104 (even if the MSP rules do not actually apply to the plan sponsor). (See 42 CFR §423.882.) While COBRA coverage is based on the employment status of the employee at the time of the COBRA qualifying event, for purposes of MSP and the retiree drug subsidy, whether an employee, or spouse or dependent of an employee, will be considered to be receiving coverage by reason of current employment status will depend on whether the employee continues to have current employment status **after** the COBRA qualifying event.

Thus, any former employee who chose COBRA coverage can be counted as a QCR if he or she is eligible for Part D and not enrolled in a Part D plan. Any spouse or dependent who is eligible for Part D and not enrolled in a Part D plan, and is receiving COBRA coverage can be counted as a QCR if the coverage is based on the employment of an individual who is no longer in current employment status. If the COBRA coverage derives from an employee who is still in current employment status, a plan sponsor may not count the individual as a QCR. As with all QCRs, whether the COBRA recipient meets the definition of a QCR is subject to audit by CMS.

Examples. The examples below illustrate how the rules set forth above apply in 3 common COBRA situations involving sponsors of employment-based retiree health coverage:

1. Employee (E) dies while actively employed, and spouse (S) elects to continue for 36 months the same prescription drug coverage S (and E) had prior to the death, pursuant to COBRA. S is a Part D eligible individual.

In this situation, E was in current employment status at the time of her death, and S's coverage is based on that employment. However, the MSP rules provide that, because E is no longer in current employment status, the MSP rules do not consider S to be receiving coverage by reason of current employment status. Therefore, Company (C) may treat S as a QCR. To the extent the coverage differs from the coverage under the general retiree plan, the coverage would be treated as a different benefit option for purposes of determining actuarial equivalence.

2. Employee (E) terminates employment. E and spouse (S) elect to continue their same coverage for 18 months pursuant to COBRA. Both E and S are Part D eligible individuals.

In this situation again, regardless of the fact that the basis for the COBRA coverage was E's current employment at the time of the COBRA qualifying event, because E is no longer in current employment status for purposes of the MSP rules, Company (C) may treat E and S as QCRs. To the extent the coverage differs from the coverage under the general retiree plan, the coverage would be treated as a different benefit option for purposes of determining actuarial equivalence.

3. Employee (E) and spouse (S) divorce. E retains coverage due to active employment status. S elects COBRA coverage.

In this situation, because E remains in current employment status, S is considered under MSP rules to be receiving the COBRA coverage "by reason of" E's current employment status. Therefore, Company (C) may not treat S (or E) as a QCR.

Note that for any COBRA recipient that can be counted as a QCR, the plan's actuary must account for the additional premium amount that COBRA recipients pay for prescription drug coverage in the retiree drug subsidy actuarial equivalence "net test." For example, if the COBRA beneficiaries are separated out as an individual benefit option under the sponsor's plan, assuming the option meets the gross test, it must be combined with another option in order to pass the net test because it will likely fail the net test on an individual basis.