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The Road to Hell Is Paved with Good Intentions: COBRA Compliance in the Wake of COVID-19 Downsizing

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Several large employers have recently been hit with a new wave of lawsuits challenging their compliance with the notice requirements of the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA—which is an amendment to the Employee Retirement Income Security Act of 1974 (ERISA)—requires an employer to send "notice" to an employee regarding their health coverage upon termination. This continuation of coverage "election" notice is designed to provide a former employee with sufficient information to make an informed decision about whether to elect such continued health coverage. This type of COBRA notice litigation is showing no signs of slowing down. The hasty and rampant downsizing due to the COVID-19 crisis has only provided more potential plaintiffs (terminated employees) and defendants (downsizing employers). As many employers and plan administrators may find themselves sending hundreds, if not

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thousands, of COBRA election notices in the coming months, this article explores the requirements for COBRA notice compliance, summarizes recent litigation trends on this issue, and provides practical tips to mitigate against such litigation risks.

Former employees have filed class actions in Florida and New York against household name companies, challenging both the timing and the content of these election notices as insufficient and noncompliant.[1] Though none of these cases have been adjudicated on the merits, many have settled for significant amounts. And that is just a small fraction of the potential exposure. ERISA imposes a statutory penalty of $110—per participant, per day—from the date of the notice failure for noncompliance.[2] To put that in perspective: an employer who terminates just 100 employees as part of a reduction-in-force and fails to send a technically "compliant" COBRA notice for 30 days could face a minimum statutory penalty of $300,000. And that number balloons exponentially as the number of terminated employees increases, along with the continued passage of time.

COBRA NOTICE REQUIREMENTS

COBRA applies to any employer that employed at least 20 employees during the prior calendar year and that provides a group health plan, such as a medical, dental, or vision plan, to its employees.[3] COBRA requires the plan administrator of a group health plan to provide certain notices to plan participants, both upon initial enrollment in the plan and upon a "qualifying event." Specifically, an employer must provide notice of the right to COBRA continuation coverage, which is a temporary extension of coverage under the employer's health plan. The right to elect continuation coverage allows individuals to maintain group health coverage under adverse circumstances and to bridge gaps in health coverage that otherwise could limit their access to health care.[4]

COBRA defines a "qualifying event" as one that would cause the covered employee, or the spouse or a dependent child of the covered employee, to lose coverage under the health plan. A loss in coverage occurs when an affected employee ceases to be covered under the same terms and conditions as were in effect immediately before the qualifying event. A reduction in hours or termination of employment is just two types of "qualifying events" that may result in a loss of coverage.[5]

A plan administrator must send a COBRA continuation of coverage notice no later than 14 days after receipt of the notice of a qualifying

event.[6] The notice may be sent by mail, personal delivery, or through the use of electronic media, provided it meets certain requirements.[7] The notice must be "written in a manner calculated to be understood by the average plan participant" and must contain specific information detailed in the regulation, including, *inter alia*:

- The name of the plan under which continuation is available and the name, address, and telephone number of the party responsible under the plan for the administration of continuation coverage benefits;

- Identification of the qualifying event;

- Identification, by status or name, of the qualified beneficiaries who are recognized by the plan as being entitled to elect continuation coverage with respect to the qualifying event, and the date on which coverage under the plan will terminate (or has terminated) unless continuation coverage is elected;

- A statement that each individual who is a qualified beneficiary with respect to the qualifying event has an independent right to elect continuation coverage, that a covered employee or a qualified beneficiary who is the spouse of the covered employee (or was the spouse of the covered employee on the day before the qualifying event occurred) may elect continuation coverage on behalf of all other qualified beneficiaries with respect to the qualifying event, and that a parent or legal guardian may elect continuation coverage on behalf of a minor child;

- An explanation of the plan's procedures for electing continuation coverage, including an explanation of the time period during which the election must be made and the date by which the election must be made;

- An explanation of the consequences of failing to elect or waiving continuation coverage, including an explanation that a qualified beneficiary's decision whether to elect continuation coverage will affect the future rights of qualified beneficiaries to portability of group health coverage, guaranteed access to individual health coverage, and special enrollment under Part 7 of Title I of ERISA, with a reference to where a qualified beneficiary may obtain additional information about such rights; and a description of the plan's procedures

for revoking a waiver of the right to continuation coverage before the date by which the election must be made;

- A description of the continuation coverage that will be made available under the plan, if elected, including the date on which such coverage will commence, either by providing a description of the coverage or by reference to the plan's summary plan description;

- An explanation of the maximum period for which continuation coverage will be available under the plan, if elected; an explanation of the continuation coverage termination date; and an explanation of any events that might cause continuation coverage to be terminated earlier than the end of the maximum period;

- A description of the circumstances (if any) under which the maximum period of continuation coverage may be extended due either to the occurrence of a second qualifying event or a determination by the Social Security Administration, under Title II or XVI of the Social Security Act (SSA),[8] that the qualified beneficiary is disabled, and the length of any such extension;

- In the case of a notice that offers continuation coverage with a maximum duration of less than 36 months, a description of the plan's requirements regarding the responsibility of qualified beneficiaries to provide notice of a second qualifying event and notice of a disability determination under the SSA, along with a description of the plan's procedures for providing such notices, including the times within which such notices must be provided and the consequences of failing to provide such notices. The notice shall also explain the responsibility of qualified beneficiaries to provide notice that a disabled qualified beneficiary has subsequently been determined to no longer be disabled;

- A description of the amount, if any, that each qualified beneficiary will be required to pay for continuation coverage;

- A description of the due dates for payments, the qualified beneficiaries' right to pay on a monthly basis, the grace periods for payment, the address to which payments should be sent, and the consequences of delayed payment and nonpayment;

- An explanation of the importance of keeping the administrator informed of the current addresses of all participants or beneficiaries under the plan who are or may become qualified beneficiaries; and

- A statement that the notice does not fully describe continuation coverage or other rights under the plan, and that more complete information regarding such rights is available in the plan's summary plan description or from the plan administrator.[9]

To assist employers with compliance, the U.S. Department of Labor (DOL) has issued a model COBRA notice, which is available on its Web site.[10] The regulation acknowledges that the DOL's model notice must—necessarily—be modified to "appropriately add relevant information," "select among alternative languages" and supplemented "to reflect applicable plan provisions."[11] Furthermore, items of information that are not applicable to a particular plan may be deleted.[12] Use of the model notice, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements.[13]

Significantly, the applicable regulation explicitly states that that use of the DOL's model notice is "not mandatory."[14] In that regard, many employers find the language of the DOL's model notice to be too lengthy and confusing for their particular workforce. Instead, they have adopted a COBRA notice that does not mirror the DOL's model notice exactly, but nevertheless contains all of the requisite language set forth in the regulation.

RECENT TRENDS IN COBRA NOTICE LITIGATION

In recent years, there has been an upward trend in lawsuits claiming that employers and plan administrators of health plans violated ERISA by failing to provide participants and beneficiaries with adequate notice of their right to continue health coverage upon a qualifying event (like termination) as required by COBRA. These lawsuits claim that, rather than including all the requisite information required by law to be written in a manner to be understood by the average plan participant, the notice only includes part of the legally required information or does not provide the information in a clear manner but, instead, in "piece-meal" fashion. These lawsuits frequently track the plain language of the regulation, claiming, *inter alia,* that the notice:

- Fails to include the name of the plan under which continuation is available;

- Fails to provide the name, address, and telephone number of the plan administrator or the entity responsible for administering the plan;
- Fails to identify the qualifying event;
- Fails to identify the qualified beneficiary by status or name;
- Fails to identify the date on which coverage will end if COBRA is not elected;
- Fails to adequately explain the procedures for electing coverage under COBRA;
- Erroneously directs participants to a general phone number rather than provide explicit instructions on how to enroll;
- Fails to contain the address where payments are to be sent;
- Fails to identify the date on which coverage will end if COBRA is not elected;
- Fails to include an explanation of the consequences of failing to elect or waive COBRA;
- Fails to identify the date that COBRA coverage will end (if elected); or
- Fails to include a description of the amount that it will be required to pay for such coverage.

Although the notice need only be "written in a manner calculated to be understood by the average plan participant," plaintiff-participants claim they were unable to understand their rights and felt confused or misled. They have also claimed that multiple notices—or notices in multiple parts—violate the rules. In one of the most recent complaints filed, the plaintiff-participants claimed the notice included "ominous warnings" designed to "scare individuals away from electing COBRA coverage."[15]

Plaintiffs in these suits claim to have suffered a variety of "economic" injuries as a result of such "deficient" notices, including, *inter alia*:

- Inability to make an informed decision about health coverage;
- Loss of health coverage;

- Unpaid medical bills;
- Failure to seek medical treatment because they were uninsured; and
- Loss of the ability to direct health-care–related decisions.

As a result of such deficient notices, plaintiff-participants seek appropriate equitable relief pursuant to ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3), in particular, an order enjoining the plan administrator from continuing to send defective notices, and to send corrective ones. More significantly, though, plaintiff-participants seek to recover statutory penalties of up to $110 per day for each participant who received a deficient COBRA notice, and, of course, attorneys fees and costs pursuant to 29 U.S.C. Section 1132(g)(1).

It is not surprising why these COBRA notices have become a target for the plaintiffs' bar. Although the regulation explicitly states that compliance with the DOL's model notice is "not mandatory," courts have been reluctant to dismiss cases outright at the pleadings stage, where the notice does not match the DOL model notice exactly. Courts have found that noncompliance with the DOL model notice is sufficient enough to allow the case to proceed to discovery. Thus, any COBRA notice that does not comply perfectly with the letter of the DOL model notice is a potential target for a lawsuit.

Of course, there are several potential defenses. As with any regulatory-based claim, defendants may succeed in asserting, and proving, a "substantial compliance" defense as it relates to the specific COBRA notice requirements. Moreover, defendants may also successfully challenge the named plaintiff's lack of injury, damages, or standing, as well as his or her adequacy or typicality as a class representative.

That said, it is similarly not surprising why several defendants have chosen to settle. Litigation is expensive, burdensome, and distracting—and the potential exposure for statuary penalties and attorney fees could be significant. To illustrate, in *Hicks v. Lockheed Martin Corp.*, the plaintiff challenged the adequacy of COBRA notices sent to 54,000 individuals. Though the defendant denied and continued to deny any liability, the defendant nevertheless settled for $1,250,000—a third of which could end up being awarded to plaintiffs' counsel.[16] Likewise, in *Valdivieso v. Cushman & Wakefield Inc.*, the plaintiff challenged the adequacy of COBRA notices sent to approximately 2,300 individuals, and the defendant settled for $390,000 along with prospective relief.[17] Others have settled for various undisclosed terms and amounts.

PRACTICAL CONSIDERATIONS IN THE WAKE OF COVID-19 DOWNSIZING

In March and April 2020 alone, employers across the country were forced to lay off or furlough much of their workforce due to a downturn in business. As of April 16, 2020, the COVID-19 pandemic drove 22 million people to file new claims for unemployment insurance in just four weeks.[18] With each wave of additional furloughs and downsizing, employers are presented with a new group of employees suffering terminations or reductions in hours of employment with potential claims against the company related to their employment, benefits, and/or termination. COBRA compliance is no exception. In addition to challenging the content of the notices as described above, employers can expect challenges to the timing of the notices, particularly if there is any question or confusion over when the employee received notice of his/her termination, that is, if it was preceded by a furlough period or if the employee was terminated and then re-hired.

On April 30, 2020, the DOL issued guidance extending the deadline for employers to send COBRA notices and for employees to elect coverage.[19] Nevertheless, employers and plans sponsors should consider taking the following steps now, to avoid a potentially costly lawsuit down the road:

- **Review your COBRA notice.** Now is the time to dust off the company's COBRA election notice, or ask to review the COBRA notice sent by a third-party administrator. It may also be prudent to seek a fresh review by outside legal counsel.

- **Carefully consider using the DOL model notice.** To minimize risk, it may be prudent to consider using the model COBRA election notice published by the DOL, which courts have affirmatively found to be good-faith compliant with COBRA's notice requirements. The model notice is not without its flaws though and, as noted above, modifications are needed. For example, the COBRA notices indicate that family members covered during an 18-month COBRA period can qualify for a potential 18-month extension if there is a second qualifying event, such as a divorce or a child ceasing to be an eligible dependent, during the original 18-month period. While this is true with respect to qualified beneficiary family members—*i.e.*, a spouse or child covered immediately preceding the original qualifying event—family members enrolled after COBRA begins are not entitled to such rights. Yet, the model COBRA notice makes no distinction.

- **Ensure proper procedures are in place.** Now is also the time to take a look at the procedures for determining when a qualifying event occurs, and disseminating notices.

NOTES

1. *See, e.g., Riddle v. PepsiCo, Inc.,* Case No. 7:19-cv-03634 (S.D.N.Y.); *Valdivieso v. Cushman & Wakefield Inc.,* Case No. 8:17-cv-00118 (M.D. Fla.); *Hicks v. Lockheed Martin Corp.,* Case No. 8:19-cv-00261 (M.D. Fla.); *Vazquez v. Marriott Int'l, Inc.,* Case No. 8:17-cv-00116 (M.D. Fla.); *Sefchick v. Branch Banking & Trust Co.,* Case No. 8:16-cv-03303 (M.D. Fla.); *Delaughter v. ESA Mgmt., LLC,* Case No. 8:16-cv-03302 (M.D. Fla.); *Conklin v. Coca-Cola Beverages Fla., LLC,* Case No. 8:19-cv-02137 (M.D. Fla.); *Strickland v. United Healthcare Servs.,* Case No. 8:19-cv-01933 (M.D. Fla.); *Grant v. JPMorgan Chase & Co.,* Case No. 8:19-cv-01808 (M.D. Fla.); *Rigney v. Target Corp.,* Case No. 8:19-cv-01432 (M.D. Fla.); *Tadal v. Pavestone, LLC,* Case No. 8:19-cv-00053 (M.D. Fla.); *Bryant v. Wal-Mart Stores, Inc.,* Case No. 1:16-cv-24818 (S.D. Fla.); *Smith v. Home Depot USA, Inc*. Case No. 8:20-cv-00850 (M.D. Fla.).

2. 29 U.S.C. § 1132(c)(1); 29 C.F.R. § 2575.502c-1. Some courts have held that the penalty applies only to the covered employee (*i.e.*, the participant) while others have held that it applies to each qualified beneficiary (*e.g.*, spouse and child).

3. Smaller employers that are not subject to federal COBRA may be subject to state COBRA requirements, which are not discussed here.

4. 29 C.F.R. § 2590 *et seq.*

5. 26 C.F.R. § 54.4980B-4.

6. 29 C.F.R. § 2590.606-4(b)(1). In case of a termination of employment/reduction in hours of employment, the employer has 30 days to notify the plan administrator of the event. When the employer and plan administrator are the same (which is typically the case), notice must be provided 44 days after the termination of employment/reduction in hours of employment.

7. 29 C.F.R. § 2590.606-4(f); 29 C.F.R. § 2520.104b-1.

8. 42 U.S.C. § 401 *et seq.* or § 1381 *et seq.*

9. 29 C.F.R. § 2590.606-4(b)(4).

10. 29 C.F.R. § 2590.606-4(g).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See York v. Nestle Waters North America, Inc.,* Case No. 8:20-CV-00973 (M.D. Fla.).

16. *Hicks v. Lockheed Martin Corp., supra* n.1, ECF No. 34.

17. *Valdivieso v. Cushman & Wakefield Inc., supra* n.1, ECF No. 92.

18. "Sizing up the Coronavirus' Hit to the Job Market," Gwynn Guilford, *The Wall Street Journal,* Apr. 16, 2020, *available at https://www.wsj.com*.

19. *See* "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak" (85 Fed. Reg. 26351, May 4, 2020).