

Stakes Are High: Lawsuits Expose Deficient COBRA Notices

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Not many general counsels will tell you that their company's COBRA notice is what keeps them up at night. But recent class action litigation highlights challenges to COBRA notices and issues that can be easily addressed to avoid costly litigation. So if you haven't reviewed your COBRA notice form recently, now may be a good time to do so — or have a talk with your COBRA plan administrator. What was initially believed to be a Florida-specific cottage industry of class action suits attacking allegedly deficient COBRA eligibility notices is now spreading to a multitude of states such as California, Georgia, Illinois, Michigan, Pennsylvania, Tennessee, and Texas. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) ensures that employees who lose health insurance coverage under their company's ERISA plan do not go without insurance before they can find replacement coverage. Employers that sponsor a group health insurance plan must offer employees and qualified beneficiaries continuation of coverage for at least 18 months after a "qualifying event." They must also inform employees and qualified beneficiaries of their right to enroll in continued health insurance coverage within a certain period of time after such an event, such as termination of employment, the death of the covered employee, or divorce. What's the big deal, you wonder? The class actions allege that the employer or the designated COBRA administrator failed to provide COBRA-compliant notices because they are not written in a manner calculated to be understood by the average plan participant, or do not adequately inform the affected employee or beneficiary how to exercise rights to elect COBRA coverage, by failing to:

- Include a coverage election form.
- Include a date certain on which continuation of coverage ends.
- Include an address for payment of premiums.
- Identify the plan administrator.
- Provide all required information in a single notice rather than in multiple notices.

Other suits allege that the COBRA notice improperly contains language suggesting that failure to properly complete the coverage election, or forms that contain incomplete or incorrect information, may subject the plan participant to criminal or civil penalties. Recently, one such putative class action survived a motion to dismiss. In *Lites v. Amazon.com Services LLC*, the district court determined that the plaintiff sufficiently pleaded a COBRA violation and held that the plaintiff “plausibly alleged” that the COBRA notice was not “written in a manner calculated to be understood by the average plan participant given that the penalties included in the [COBRA notice] are not a strictly accurate statement of the law.” Companies, both large and small, have fallen prey to these actions. While many of these cases have settled with classes ranging from 1,700 to over 92,000 class members, a deficient COBRA notice can expose a company to statutory ERISA penalties of \$110 per employee, per day that the COBRA notice is deficient. There’s also an Internal Revenue Code excise tax penalty of \$100 per day for each qualified participant or beneficiary for a COBRA notice violation. These penalties can add up quickly, in addition to attorneys’ fees and costs. The good news is that these claims are largely avoidable. While many companies rely on their COBRA administrator to send compliant COBRA notices, many fail to follow the Department of Labor’s model election notice, which the department introduced to assist employers and plan administrators in complying with the applicable notice requirements. While the use of the model notice is not required, the department views its use as a good faith compliance with COBRA’s notice content requirements. Employers and plan administrators should look to closely follow the department’s model COBRA notices in the future, as these provide guidance as to many of the notice content requirements. However, employers must also be aware that there are additional requirements under the statute that the model notice does not enumerate. Thus, adhering to the COBRA regulations, in addition to closely tracking the model notice, is a good way for employers to protect themselves against these high-stakes class action claims.

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