Legal Update Article

COBRA Notice Litigation: Cases Are Mushrooming and Settlements Are Too

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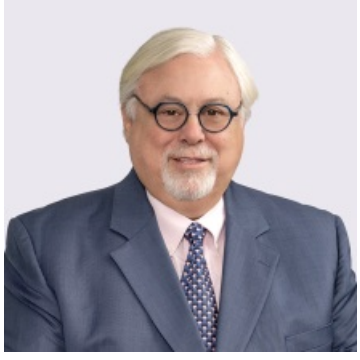

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(He/Him)

Imagine something as simple as a COBRA notice that complies with law, but is not identical to the Department of Labor's (DOL) model notice, leading to six- or seven-figure class action litigation settlements?

Companies in Florida and, more recently, in New York have seen a flurry of cases over Consolidated Omnibus Budget Reconciliation Act (COBRA) notices. (More than 10 household-name entities have been sued so far.) In these cases, a COBRA notice is provided (typically, by a third-party vendor) to covered persons experiencing a qualifying event, but the litigation is filed against the employer or plan sponsor. While the COBRA notices are not identical to the model notice (or "safe harbor") the DOL has promulgated and omit certain confusing and cumbersome language from the model notice, they still comply with COBRA.

The cases allege the COBRA notice (usually also designed by a third-party) were missing details required by the model notice, such as the name and contact information of the plan administrator. Frequently, the identity of the plan administrator is omitted because the COBRA payments must be mailed to the third-party vendor. While these items are specified in the DOL model notice, these often are unknown or overlooked at the time the notice is given and, therefore, omitted.

In a recent case in the Southern District of New York, the plaintiff claimed the COBRA notice (sent by a third-party vendor) was deficient because: (i) multiple COBRA letters, rather than just one, were sent; (ii) the notices did not identify the plan administrator or the COBRA claims administrator; (iii) the notices did not provide details on how to enroll in COBRA or did not enclose a physical enrollment form; and (iv) only a second letter (typically sent after the participant indicates he or she elects COBRA coverage) provided the address to which payment should be sent. The district court denied a motion to dismiss, ruling that, at the pleading stage, since the COBRA notice was not identical to the DOL model notice, the plaintiff stated a claim that could proceed to discovery.

Based upon such alleged deficiencies, these cases seek statutory penalties and other damages on a class-wide basis. COBRA, which amended and supplemented ERISA, included an avenue under ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1), for qualified beneficiaries to receive up to $110 per day per person for a plan administrator's failure to provide the required initial COBRA notice or the COBRA election notice. Further, the court has the discretion to award legal fees to the plaintiff's counsel under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). However, what the plaintiff's counsel want is a common fund settlement, so they can collect a percentage of that amount as a legal fee and expense award.

The $110-per-person-per-day statutory penalties are sought on behalf of a class in these

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cases. Under the law, the typical ERISA statute of limitations is six years. ERISA § 413(1), 29 U.S.C. § 1113(1). The statute of limitations in Florida for COBRA notice violations is four years. Imagine a large employer that has sent out thousands of COBRA notices over a six-year period and is sued for deficient notices. This employer may face the prospect of a penalty of approximately $40,000 per year, per participant. A class of 10,000 participants over the six-year period for this employer could mean astronomical damages. While no such recovery has occurred, and no case has succeeded on the merits yet, this helps explain the settlements reached to date.

Mitigate the Risk

There are steps employers can take to mitigate the risk of being the next target for this type litigation. Simply using the DOL's model notices often is not enough if they are incomplete or not provided timely. Employers should ensure they understand what is required, including knowing what notices are needed and when; examine their notices and administrative practices; and know the compliance soft spots to proactively protect themselves against a claim. This will frequently involve protracted discussions with the third-party vendors who handle COBRA notification for employers. Employers also should examine their service contracts with COBRA third-party administrators so that indemnity obligations are clear.

The Jackson Lewis Employee Benefits and ERISA Complex Litigation Practices are available to advise and counsel clients on the compliance issues and the litigation issues resulting from the renewed emphasis on COBRA notices.