

Don't Get Bitten by Your COBRA Notices

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In a growing wave of class action lawsuits, plaintiffs are targeting employers who have allegedly failed to provide proper notice of health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”). The wave prompted at least six new lawsuits in 2019 alone, and some have already netted seven-figure settlements. To avoid this litigation trend, employers should take a hard look at their COBRA notices to ensure they comply with governing regulations.

COBRA requires employers who sponsor group health plans to allow plan participants to continue coverage at their own cost when a “qualifying event” occurs that would otherwise terminate coverage. 29 U.S.C. § 1161(a). The most common “qualifying event” is termination of employment, but there are several others, including the death or divorce of a covered employee. Under COBRA, plan administrators must provide an individual with notice of the right to continued COBRA coverage (a) when the individual first joins the plan and (b) when a qualifying event occurs. 29 U.S.C. § 1166(a).

That COBRA notice must explain the right to continue coverage “in a matter calculated to be understood by the average plan participant.” 29 C.F.R. § 2590.606-4(b)(4). Federal regulations specify 14 items that the notice should include—for example, an explanation of how to enroll in COBRA. 29 C.F.R. § 2590.606-4(b)(4)(i)-(xiv). In addition, the Department of Labor (“DOL”) has published a model COBRA notice. Use of the DOL model notice “is not mandatory.” 29 C.F.R. § 2590.606-4(g). But according to DOL official publications, use of the model notice represents “good faith compliance with COBRA’s general notice content requirements.”



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The recent wave of class action lawsuits challenges whether employers' COBRA notices were sufficient. While the precise allegations differ, the plaintiffs generally allege that the notice they received did not include all the information set forth in the regulations or in the DOL's model notice, and that the average plan participant could not understand the notice.

Failure to comply with COBRA's notice requirements can be costly, especially in the context of a class action. COBRA provides a statutory penalty up to \$110 per day per person for failure to provide the required notices. 29 U.S.C. § 1132(c)(1). The penalty adds up quickly. Take, for example, a class of 100 employee who lost their coverage one year ago and received a deficient COBRA notice. The penalty for the employer could be several million dollars, before accounting for an award of legal fees and costs (which COBRA allows).

Thus far, employers have been unsuccessful in defeating these COBRA notice lawsuits at the pleading stage. Some employers have argued that the plaintiff lacked constitutional standing to sue because the alleged defects in the notice—often seemingly innocuous—did not cause any concrete injury. Other employers have argued they were in substantial compliance with the DOL regulations. To date, however, those arguments have not convinced courts to dismiss complaints at the pleading stage. A few of the lawsuits have already settled for seven- and six-figure numbers. The rest are proceeding forward.

There are steps employers can take now to minimize the risk of being swept into this COBRA notice litigation. To begin, employers should check whether their COBRA notices contain the 14 items suggested by the regulations. See 29 C.F.R. § 2590.606-4(b)(4) (i)-(xiv). Employers should also draft their notices in as simple, straightforward language as possible. In addition, employers should seriously consider using the DOL's model notice to gain the protection of "good faith compliance." Even when using the model notice, it may be appropriate to supplement with additional, plan-specific information.

Regardless of whether your COBRA notices could use minor or major changes, now is the time to make those changes. Doing so could save you from a class action complaint.