

Publications

Employers Get Bit: Flurry of Class Action Lawsuits Allege Deficiencies in COBRA Election Notices

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Recently, plaintiffs' firms have filed a flurry of class action lawsuits against employers, alleging violations of COBRA's election notice requirements and seeking statutory and other penalties. These plaintiffs' firms – led by two firms in Florida – have filed over twenty lawsuits against employer plan sponsors, usually in the Southern or Middle District of Florida. Although the lawsuits are being filed primarily in Florida, they are typically filed against companies doing business nationally.

The central claims in these lawsuits focus on alleged deficiencies in an employer health plan's COBRA election notice, even where the notice is based on the Department of Labor's ("DOL") Model Election Notice. The plaintiffs generally assert technical defects in the election notices, at times based on aggressive or even novel interpretations of the law. Nonetheless, the lawsuits have forced employers to either settle or defend their notices in litigation.

At least ten of the lawsuits have settled quickly, in some cases for large amounts, which likely has given incentive for the firms to continue filing complaints. In addition, because most employer health plans use some form of DOL's Model Election Notice, these firms can re-process a complaint very easily to apply to the next employer in line.

Only a handful of health plans have pursued a litigation approach, with most of these lawsuits still early in the litigation process. At least five courts have denied employers' motions to dismiss, although these opinions generally point out that at this stage, they are not evaluating the content of the COBRA notice, but accepting the plaintiffs' allegations as factually correct. No courts have made substantive rulings on the merits of plaintiffs' claims, either at summary judgment or at trial, at this time.

Below we provide more detail on the allegations. There are a number of steps employers and plans can take at this time. First, plans can benefit from continuing to monitor this litigation. Second, a periodic review of COBRA election notices can be helpful. Third, employers should be alert as to inquiries from plaintiffs' lawyers that can provide "early warning" of this potential litigation.

I. Background: COBRA Election Notice Requirement

COBRA requires that most employers allow employees and their families the opportunity to continue health care coverage under the employer's plan when a "qualifying event" occurs, including termination of employment. ERISA §§ 601-608; Code § 4980B. COBRA coverage is not automatic; covered employees and their covered family members (known as "qualified beneficiaries") must affirmatively elect COBRA. A plan administrator must notify qualified beneficiaries of the beneficiary's right to elect COBRA coverage by providing an election notice. ERISA § 606(a)(4); Code § 4980B(f)(6)(D).

While the substantive COBRA rules are in the Internal Revenue Code, it is the DOL that has enforcement authority over the content of the notices. DOL's COBRA notice regulations provide that the election notice must be "written in a manner calculated to be understood by the average plan participant" and include a list of fourteen items. DOL Reg. § 2590.606-4(b). The DOL has issued a Model Election Notice. The DOL's COBRA regulations explain that use of the Model Election Notice is "not mandatory," but use of the Model Election Notice "appropriately modified and supplemented" will be "deemed" to satisfy the regulation's content requirements. DOL Reg. § 2590.606-4(g). In 2014, the DOL issued an updated Model Election Notice that added information about coverage options through the Health Insurance Marketplace. On May 1, 2020, the DOL issued another updated Model Election Notice that addresses COBRA's interaction with Medicare.