

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

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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.

GROOM INSIGHT. The DOL's Model Election Notice is generally considered a good start in drafting a COBRA election notice (or even a safe harbor in agency inquiries). That said, it has not necessarily proven to be a barrier to lawsuits, because it contemplates supplementation. It states: "To use this model election notice properly, the Plan Administrator must fill in the blanks with the appropriate plan information."

II. Lawsuits' Allegations

All of these COBRA notice cases have been brought by a former employee who terminated employment from the employer, did not elect COBRA coverage, and later incurred medical expenses.

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The complaints allege that the former employees did not elect COBRA coverage because of alleged deficiencies in the COBRA election notices that they received. Because the health plan used the same COBRA election notice for all participants, the plaintiffs say they are bringing the cases as class actions on behalf of all participants in the plan who were sent the same COBRA notice and who did not elect COBRA. The cases seek declaratory relief, penalties, and “appropriate equitable relief” under ERISA, including the maximum statutory penalty of \$110 per day, that a compliant COBRA notice was required but was not provided to class members.

The complaints differ slightly and allege a laundry list of supposed technical violations of the COBRA election notice regulations. However, the one allegation that appears in all of the complaints is that the notice fails to provide the name, address, and telephone number of the plan administrator.

GROOM INSIGHT. The COBRA regulations do not require the COBRA election notice to identify the plan administrator. Rather, they require the COBRA election notice to contain “the name, address, and telephone number of the party responsible under the plan for the administration of continuation coverage benefits.” DOL Reg. 2590.606-4(b)(4)(i) (emphasis added). Similarly, the Model Election Notice does not specifically list the plan administrator, but rather states “You may contact [*enter appropriate contact information, e.g., the Plan Administrator or other party responsible for COBRA administration under the Plan*] to confirm the correct amount of your first payment.”

For most large plans, the party responsible for the administration of COBRA is an outside COBRA administrator, not the plan administrator defined in ERISA § 3(16) or listed in the SPD. So most plans list their COBRA administrator in their election notice – the party responsible for administering COBRA – and not the plan administrator. The complaints state that this is incorrect and confusing enough to participants to cause them not to elect COBRA so that they suffer “informational injury.”

Other allegations include the following:

- The notice does not adequately explain the procedures for electing coverage, and/or does not include a physical election form.
- The notice fails to identify the specific end date for COBRA coverage; it only includes the starting date and the duration of coverage (*e.g.*, 18 or 36 months).
- The notice fails to provide the address to which COBRA payments should be sent (even if an envelope with the address is included).
- The notice fails to explain that a qualified beneficiary’s decision whether to elect COBRA will affect the qualified beneficiary’s future HIPAA rights.

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- The notice is not written in a manner calculated to be understood by the average plan participant (because of the alleged failures described above).
- The notice was not in Spanish, even though there were participants who only spoke Spanish.

GROOM INSIGHT. The COBRA regulations do not require that the COBRA election notice be provided in a foreign language. Although the DOL has posted model COBRA notices on its website in Spanish, this is apparently as a courtesy to employers that wish to voluntarily provide them in Spanish.

III. Outcomes

At least ten of these lawsuits have settled so far, and at least ten are ongoing. Publicly available settlements amounts have ranged up to \$1.25 million. Five cases have involved employers' motions to dismiss, and all five courts have denied the employers' motions to dismiss, allowing the cases to proceed. One court has addressed class certification and agreed to certify the class. As noted above, to date, there have been no substantive decisions on the merits of plaintiffs' claims, either at summary judgment or at trial.

IV. Recent Lawsuits: Failure to Provide Timely Notice

In the past few months, in addition to continuing to bring the deficient notice lawsuits, these law firms are now bringing a new type of claim: failure to provide timely COBRA election notices. These complaints allege that a former employee did not elect COBRA because he or she did not receive a timely COBRA election notice.

The general rule is that the plan administrator must provide a COBRA election notice to any qualified beneficiary within fourteen days after the plan administrator has been notified that the qualifying event has occurred. ERISA § 606(c); Code § 4980B(f)(6). If the employer and the plan administrator are the same, the deadline is forty-four days after a qualifying event that requires notice from the employer to the plan. DOL Reg. § 2590.606-4(b)(2). Of note, these timeframes for providing notices (and electing into COBRA) were recently extended in [guidance issued by the DOL and IRS](#).

The DOL COBRA regulations require that plan administrator send the notice using ERISA's general delivery standards – that is, using a measure reasonably calculated to ensure actual receipt. ERISA general delivery standards also include a safe harbor for electronic delivery. In addition, the preamble to the COBRA regulations state that a notice will be considered “furnished” as of the date of mailing, if mailed by first-class mail, certified mail, or Express Mail; or as of the date of electronic transmission, if transmitted electronically.

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V. Next Steps

Now can be a good time for employers, plan administrators, and COBRA administrators to review their COBRA election notices and their process for sending these notices. In addition, as litigation looms larger over the COBRA notice process, preparation for and awareness of the context in which these claims are brought can be a proactive step as well.

Please reach out to your regular Groom attorney, or any Groom attorney listed here, for assistance. Groom regularly advises employers on COBRA election notices. Groom has also represented employers facing such litigation, including by resolving a recent lawsuit against a large national company before a response in court was even required.

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