Kilpatrick

MAY 4, 2020

DOL Issues New COBRA Notices - Litigation Trend to Remain Unphased

The Department of Labor ("DOL") posted new model notices on its website which employers may use to satisfy notice obligations under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), along with a short series of FAQs regarding the model notices. The main changes to both the general and the election model notices clarify the interaction between Medicare and COBRA. A newly inserted paragraph does not reflect any changes in the law, but provides more information to employees about when they can enroll in Medicare and under what conditions enrolling in Medicare can terminate COBRA coverage.

In particular, the DOL notes that employees who become eligible for Medicare Part A or B while they are working may enroll immediately, or they may delay enrollment. If an employee does not enroll in Medicare Part A or B when he/she is first eligible, an 8-month special enrollment period exists. The 8-month special enrollment period starts at the earlier of 1) the month after employment ends, or 2) the month after group health plan coverage based on current employment ends.

If an employee terminates employment, elects COBRA coverage, and delays signing up for Medicare for at least eight months after termination, the employee may be subject to a Part B late enrollment penalty and/or a gap in coverage when the employee eventually signs up for Part B Medicare coverage. If an employee elects Medicare coverage while receiving COBRA coverage, the employer's group health plan may terminate the employee's COBRA coverage.

However, if an employee is already enrolled in Medicare Part A or B *before the date* that the employee enrolls in COBRA, then COBRA coverage does not terminate on account of the Medicare enrollment. The DOL also notes that Medicare will generally pay first (i.e., will be the primary payer) and COBRA will pay second when both Medicare and COBRA cover the same health expenses.

Key Takeaway

Even though the DOL updated the COBRA notices, the sample notices have been and continue to remain deficient in many areas. Further, the DOL has made it abundantly clear that use of the notices are not mandatory, but would be considered good faith compliance – except only by the DOL. Because qualified beneficiaries have an independent right to sue under ERISA for COBRA violations, the recent trend in COBRA notice litigation will not be affected. Use of the DOL COBRA notices does not insulate a plan sponsor from becoming a target of COBRA notice litigation.

If a plan sponsor has undergone furloughs, the threat of COBRA notice litigation will only increase due to the larger number of outstanding notices and the larger number of potential plaintiffs. This puts more pressure on plan sponsors to properly review and vet their COBRA notices.