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How to Ride the Wave of COBRA Notice Litigation without Wiping Out

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As employers have noticed, there is a growing wave of COBRA notice class action lawsuits filed against large employers with at least six cases being filed in 2019 alone.

In each of the cases, the plaintiffs allege that the COBRA election notice given by the employer to qualified beneficiaries following qualifying events was deficient. While the specific allegations vary, generally the complaints allege that (1) the employer failed to use the model COBRA election notice provided by the Department of Labor, (2) the notice used did not include all of the information described in the Department of Labor's COBRA notice regulations, and (3) the notice was not drafted in a manner that was calculated to be understood by the average plan participant.

COBRA requires the administrator of a group health plan to notify qualified beneficiaries of their right to continue coverage under the plan upon receipt of notice of a qualifying event. The Department of Labor has provided a model election notice which employers can use to prepare their own election notice. The Department of Labor states that use of the model notices (appropriately completed) would be viewed by the Department as good faith compliance with COBRA's notice content requirements. However, the Department of Labor is very clear that use of the Department's model COBRA notices is not mandatory. Instead, the model notice is provided as a way to facilitate compliance with the Department of Labor's regulations which specify the information that must be included in a COBRA election notice.

The types of issues raised in the class actions can make disposing of these cases very difficult and costly before summary judgment or even trial. As a result, employers may be motivated to settle even if there are no deficiencies with respect to the COBRA notice.

Given this growing trend, this would be a good time for employers to undertake a careful review of their COBRA election notices. As part of that review, employers should be mindful of the following –

1. If you use the DOL Model Election Notice, you must review and supplement the model notice.

The DOL model election notice does not address a number of items that should be addressed in order to provide full disclosure of a qualified beneficiary's COBRA rights. For example, it does not include a discussion of the special rule for health FSAs or a full discussion of electing COBRA continuation coverage, especially on behalf of other qualified beneficiaries. As a result, using the Department of Labor's current model notice as the sole method of communicating COBRA election rights to qualified beneficiaries puts employers at risk of being wiped out by the wave of COBRA notice

litigation. Instead, employers should craft a COBRA election notice which is based on the model notice but supplemented to address other issues which are important for a qualified beneficiary to have a complete understanding of his or her COBRA election rights.

2. The COBRA Election Notice should be easy to read.

The DOL model notice goes to great lengths to make certain the notice can be understood by the average plan participant. When employers draft their COBRA election notices, employers should make certain the notice is written as clearly as possible. This includes, for example, using short sentences with the active voice, and avoiding the use of double negatives and technical terminology.

3. The COBRA Election Notice must satisfy the DOL Regulations.

When drafting the COBRA election notice, employers must not only use the DOL model notice as a guide but also make certain that the election notice satisfies the requirements of 29 C.F.R. § 2590.606(4)(b)(4). This includes prominently displaying the contact information for someone that the qualified beneficiary can call with questions regarding the election notice or procedures.

4. Review all vender COBRA notices that are sent to participants.

Practically every employer, regardless of size, uses an outside vendor for COBRA services. Previously, many employers thought that COBRA notices were low risk as long as the notices were sent within the appropriate time periods. However, with six class actions and counting this year alone, that is no longer the situation. COBRA election notices and all other required COBRA communications should be reviewed by employers and appropriate legal counsel with the above items in mind.