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When an employee loses coverage under a group health plan as a result of a termination or a reduction in hours for reasons other than gross misconduct, or as a result of some other "qualifying event," the employee and/or the employee's qualified beneficiaries may be entitled to continuation coverage pursuant to the US Consolidated Omnibus Budget Reconciliation Act of 1985. Under the Employee Retirement Income Security Act of 1974, if there is a qualifying event that triggers COBRA coverage, most employer-sponsored group health plans are required to send out election notices to the affected employees and/or qualified beneficiaries offering temporary continuation of their group health coverage (i.e., COBRA continuation coverage).

Although COBRA has been around for decades, recently there has been a proliferation of class action lawsuits (mostly filed in Florida) targeting companies based on alleged technical deficiencies in their COBRA election notices. These lawsuits have largely been spearheaded by a single plaintiff's law firm. In light of the current economic climate, the recent wave of layoffs and furloughs, and the potential availability of statutory penalties, attorneys' fees, and other damages under ERISA for technical violations of the COBRA notice requirements, the number of COBRA class action lawsuits is certain to grow in the coming weeks and months.

Targeted COBRA Notice Deficiencies. In the past year alone, at least 18 class action lawsuits targeting COBRA notices have been filed against a number of large companies in their capacities as plan administrators for group health plans. In general, the complaints in these cases assert that the companies' COBRA election notices failed to include all of the information required by the COBRA notice regulations. In addition, the complaints emphasize that the challenged COBRA election notices deviate from the US Department of Labor's (DOL) model election notice.

Based on our review of these lawsuits, the complaints primarily allege the following deficiencies in the COBRA election notices:

- The notice was not "written in a manner calculated to be understood by the average plan participant" in violation of 29 C.F.R. § 2590.606-4(b)(4).
- The notice fails to provide the name, address, and telephone number of the party responsible for administering the continuation of coverage benefits in violation of 29 C.F.R. § 2590.606-4(b)(4)(i).
- The notice fails to explain how to enroll in COBRA coverage, includes conflicting information about deadlines for enrolling, and/or does not include a physical election form in violation of 29 C.F.R. § 2590.606-4(b)(4)(v).
- The notice does not provide all of the required "explanatory information" about coverage, including that a qualified beneficiary's decision on COBRA election will affect the future rights of qualified beneficiaries to portability of group health coverage, guaranteed access to individual health coverage, and special enrollment in violation of 29 C.F.R. § 2590.606-4(b)(4)(vi).
- The notice does not explain the continuation coverage termination date in violation of 29 C.F.R. § 2590.606-4(b)(4)(viii).
- The notice fails to describe the consequences of delayed or non-payment and/or does not provide the address to which payments should be sent in violation of 29 C.F.R. § 2590.606-4(b)(4)(xii).

In addition, some lawsuits have alleged that, even if COBRA election notices include all of the required information, they are nonetheless unlawful because the information was provided in multiple notices (rather than a single notice) or the notice included additional language referencing potential criminal and civil penalties for making false statements on the COBRA election form. While each complaint has certain unique characteristics, the ultimate premise behind these lawsuits is the plaintiffs' argument that, to cut costs, companies are deliberately choosing to disregard the DOL's model COBRA notice in order to "confuse" or "scare" their employees into not obtaining COBRA continuation coverage.

See, e.g., Pinazo v. Citigroup, Inc., No. 20-cv-21866 (S.D. Fla.); *Grant v. JPMorgan Chase & Co.*, No. 19-CV-1808 (M.D. Fla.); *Dau Pham v. Greif, Inc.*, No. 20-CV-1988 (N.D. Ill.); *York v. Nestle Waters North America, Inc.*, No. 20-CV-973 (M.D. Fla.); *Strickland et al. v. United Healthcare Servs.*, No. 19-CV-1933 (M.D. Fla.); *Conklin v. Coca-Cola Beverages Florida, LLC*, No. 19-cv-2137 (M.D. Fla.); *Rigney et al. v. Target Corp.*, No. 19-CV-1432 (M.D. Fla.); *Riddle et al. v. PepsiCo., Inc.*, No. 19-CV-3634 (S.D.N.Y.); *Ousley v. Amazon Corporate, LLC*, No. 20-CV-701 (M.D. Fla.); *York v. Nestle Waters North America, Inc.*, No. 20-CV-973 (M.D. Fla.); *Bryant v. Wal-Mart, Inc.*, No. 16-cv-24818 (S.D. Fla.); *Hicks v. Lockheed Martin Corporation*, No. 19-CV-261 (M.D. Fla.); *Robles v. Lowe's Home Centers LLC*, No. 19-cv-02713 (M.D. Fla.).

Common Defenses to COBRA Notice Challenges. Though the majority of the lawsuits filed in the last year are only in the early stages, many of the defendants in those cases are asserting similar arguments in asking courts to dismiss the lawsuits at the outset. While the efficacy of these arguments remains to be seen, some plaintiffs have obtained early success in fending off these arguments at the motion to dismiss stage.

- **Lack of Standing:** Defendants argue that the named plaintiffs' claims fail because the complaint does not adequately allege a concrete injury-in-fact sufficient to confer standing. This is because the alleged deficiencies in the COBRA election notice are merely an "informational" or "technical" injury that does not establish an injury-in-fact that is traceable to the plan sponsor or plan administrator. The defendants further argue that the plaintiffs fail to allege any causal connection between the alleged deficiencies in the notice and their failure to elect COBRA continuation coverage.

- **Substantial Compliance:** As the DOL explains in its final rules implementing the COBRA notice requirements, the notice requirements are intended to assist participants and beneficiaries in understanding how to exercise their COBRA rights and elect coverage. Faced with technical arguments about the content of their COBRA election notices, defendants have invoked the substantial compliance doctrine to argue that their notices are drafted to be understandable to the average participant and therefore substantially comply with the COBRA notice requirements. The defendants argue that a mere technical violation of the COBRA notice requirements is insufficient to state a valid legal claim under ERISA.

- **DOL Model Notice Is Not Mandatory:** As noted above, the plaintiffs in these lawsuits spend a lot of time focusing on variations between the employer's COBRA election notice and the DOL's model notice. The COBRA notice regulations, however, make clear that the "[u]se of the model notice is not mandatory" and that administrators "must appropriately add relevant information where indicated in the model notice, select among alternative language and supplement the model notice to reflect applicable plan provisions." *See*, 29 C.F.R. § 2590.606-4(g)). Because each employer and plan is different, the DOL's model notice is not intended to anticipate every possible scenario or relevant element of the notice. Accordingly, defendants argue that any evaluation of an employer's COBRA election notice should be based on the COBRA notice regulations—and not the DOL's model notice.

- **Class Certification:** In an effort to increase their prospective damages and assert more leverage over employers, recent COBRA election notice lawsuits have been filed as putative class actions seeking attorneys' fees, statutory penalties, and other damages on a class-wide basis. However, in an attempt to avoid a standing challenge and draw more sympathy from the court, the named plaintiffs often allege that they were actually injured because the deficiencies with their employer's COBRA election notice caused them not to obtain continuation coverage. While such allegations are intended to help the named plaintiff survive a motion to dismiss, to certify a class, he or she must satisfy the commonality requirements of Federal Rule of Civil Procedure 23. This becomes much more difficult when a plaintiff must rely on individualized proof to establish that each putative class member suffered a similar injury-in-fact.

Additional Risks for Employers to Consider. It is not uncommon for employers to engage a third-party administrator to handle COBRA administration and compliance, including the election process. However, even if an employer uses a third-party COBRA administrator, it could still be subject to statutory penalties of up to $110 per day as the plan administrator if the COBRA election process is not handled properly or there are deficiencies with the COBRA election notices. In addition, courts have discretion to grant other relief, such as awarding medical expenses incurred by a qualified beneficiary, actual COBRA coverage, and attorneys' fees and costs. Subject to certain limitations and exceptions, the Internal Revenue Service can also impose an excise tax of $100 per person (a maximum of $200 per family) per day for a non-compliant COBRA election notice. While such penalties may be insubstantial when dealing with a single participant or beneficiary, they can

grow exponentially if a deficient COBRA notice or process involves multiple, or potentially dozens or hundreds, of participants and beneficiaries.

Employers should also keep in mind that challenges to their COBRA election notices – even if meritless – can result in significant litigation costs. As noted above, some district courts have denied motions to dismiss and permitted discovery when presented with mostly conclusory allegations about faulty COBRA notices. Even if an employer is confident that it will ultimately prevail on summary judgment, it may have to incur substantial litigation costs to achieve that result. Consequently, a number of large companies have chosen to settle rather than litigate to summary judgment. As Lockheed Martin stated in its filed settlement agreement, it agreed to pay $1.25 million "solely to purchase peace and in recognition of the substantial expense and burden of continued litigation."

Other Recent Developments. On May 1, 2020, DOL revised its model COBRA notice forms and issued a corresponding set of Frequently Asked Questions (FAQs) to help employers better understand and comply with COBRA's notice requirements. The revised model notice and FAQs address COBRA's interaction with Medicare and explain, among other things, that there may be advantages if a participant enrolls in Medicare before, or instead of, electing COBRA. Because the plaintiffs' bar has focused on differences between an employer's COBRA election notice and the DOL's model notice, employers should closely review the DOL's revised model notice.

Tips for Employers to Mitigate Their Risk. Faced with the prospect of potentially significant monetary penalties and costly litigation, employers can take a number of actions to mitigate their risk of being targeted with a COBRA class action lawsuit. In consultation with their benefits counsel, those actions include:

- Periodically reviewing their COBRA election notices to ensure they are sufficiently detailed to comply with the COBRA notice requirements and inform participants how to continue their health care coverage.
- Comparing their COBRA election notces to the DOL's model notice and evaluating, to the extent there are any material differences, the reasons for those differences.
- Evaluating the propriety and necessity of including any information in the COBRA election notices beyond what is required by the COBRA notice requirements.
- Timely notifying the group health plan of any qualifying events to ensure all eligible group health plan participants are also timely apprised of their COBRA rights.
- Providing timely notice of COBRA eligibility, enrollment forms, duration of coverage, and terms of payment after a qualifying event has occurred.
- Considering whether to supply appropriate notices to participants if COBRA premiums are not received.
- Providing timely notices when COBRA coverage ends before the expected duration and responding to individuals seeking coverage who are not eligible for COBRA.
- For employers that use third-party COBRA administrators, periodically reviewing their service agreements and ensuring the vendor has agreed to adequately indemnify the employer for any acts of negligence or contractual breaches with respect to COBRA compliance. Such employers should also periodically check in with their third-party administrators to ensure they are aware of recent legal developments.

Takeaways for Employers. In light of the current economic environment, these are certainly trying times for many employers and reviewing the content of their COBRA election notices may not be a high priority. However, given the recent wave of COBRA class action lawsuits, the growing number of layoffs nationwide, the DOL's updates to its model COBRA notices, and the willingness of some courts to allow such lawsuits to proceed to discovery, employers should take appropriate steps to evaluate their COBRA compliance, whether or not they use a third-party COBRA administrator.

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