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Employers Cautioned as Suits Over COBRA Coverage Notices Add Up

By Sara Hansard

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- Details can deter former workers from keeping health coverage
 - Greater clarity from DOL needed on notices, attorneys say
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A rising threat of litigation is prompting benefits attorneys to caution employers to pay closer attention to the details of notices they provide about how former workers can continue their health coverage.

Lawsuits against companies such as Amazon, General Motors, and Target allege deficiencies in Consolidated Omnibus Budget Reconciliation Act (COBRA) notices that could deter individuals from signing up. COBRA allows former employees to keep their health insurance for limited periods, but few do because they must pay the full cost.

The costs of the litigation can add up. Many of the approximately 50 cases filed over the past four years have been settled. Earlier this year, Home Depot settled a case for \$815,000, Fiat Chrysler settled for \$600,000, and Costco agreed to pay \$750,000. And, there's a trend toward defendants asking courts to rule rather than settling the cases, employment lawyers say.

The lawsuits are "picking up with more frequency," Ed Meehan, principal of Groom Law Group, said in an interview. Groom Law Group specializes in employee benefits regulated under the Employee Retirement Income Security Act, which governs large health plans that pay their own claims.

More plaintiffs' law firms are getting involved, targeting larger companies, Meehan said. That could result in significant damages since fines can be \$110 per employee per day, he said.

"Employers really ought to be taking a close look at their COBRA notices and trying to identify the vulnerabilities," Roberta Casper Watson, a partner in the Tampa, Fla., office of the Wagner Law Group, said in an interview. It "is kind of a dangerous time to be anything less than pristine with your COBRA notices."

Allegations in Litigation

Most of the cases are based on the allegation that the COBRA notices don't contain required information, that they are too complicated for people to understand, or that they are designed to scare people from filing for COBRA by warning against filing false information, Meehan said.

In 2020, the Department of Labor took the unusual step of filing an amicus brief in a suit against Southwest Airlines Co., saying the argument used by many plaintiffs' law firms in the cases is wrong. Plaintiffs' firms have argued that COBRA notices incorrectly fail to include contact information for health plan administrators. But the DOL said their regulations allow for COBRA notices to include contact information for those responsible for administering COBRA benefits.

A class action complaint against Amazon filed in the U.S. District Court for the Southern District of Florida in February alleged the e-commerce behemoth "has flagrantly and repeatedly violated ERISA by failing to provide participants and beneficiaries in the Plan with adequate notice of their right to continue their health insurance coverage."

The complaint alleges the Amazon COBRA notice "creates an artificial fear of criminal prosecution or civil liability," by containing "an ominous warning suggesting the submission of 'incomplete' information when electing COBRA may result in criminal or civil penalties." The complaint also faulted the company for not using DOL's model COBRA notice and for failing to identify the plan administrator.

Groom Law Group, which is defending Amazon in the lawsuit, filed a motion to dismiss the case April 13.

Regulations don't prohibit plans from including more information about participants' rights and obligations, the motion said. Moreover, neither COBRA nor its implementing regulations "require that a COBRA notice identify the 'plan administrator,'" it said. COBRA notices are required to provide contact information for "the party responsible under the plan for the administration of continuation coverage," it said.

Marc Edelman, an attorney with Orlando, Fla.-based Morgan & Morgan who is the lead lawyer representing the plaintiff in the Amazon case, said in an interview that bringing the cases is necessary because "the importance of health insurance can not be overstated. The uninsured face a litany of personal and financial risks."

"Employers should be held accountable for following federal law," Edelman said. "I respectfully disagree that the statements and verbiage in certain COBRA notices is accurate."

Edelman said he hasn't observed an increase in cases. "I don't think it's particularly widespread," he said.

New Model Notice Unlikely Soon

COBRA notice cases could become more common unless the rules regarding what information must be included in the notices are clarified, attorneys say.

At a conference held by the Employers Council on Flexible Compensation in March, Jody Dietel, senior vice president, advocacy and government affairs for health savings account trustee HealthEquity, asked Department of Labor officials if the agency might issue a new model notice “and help us get rid of this litigation?”

Elizabeth Schumacher, deputy director of DOL’s division of regulations and standards, replied that the agency is “keeping an eye” on the need for additional COBRA guidance, but implementing the No Surprises Act and work on mental health parity compliance are higher priorities.

“There may be some valid critiques of some of the COBRA notices,” Watson, of the Wagner Law Group, said. But many of the cases—such as those faulting notices for not identifying plan administrators—“are just spurious,” she said.

“It appears to me that most of the cases are being brought incidental to employment litigation,” in which a former employee has a dispute about their termination, Watson said. “These are mostly or all people who never would have elected COBRA,” she said.

Although many of the cases have resulted in settlements between employers and plaintiffs, a case against Wal-Mart Stores Inc., in which Watson was an expert witness for the company, was dismissed in 2020 after a master’s report to the court found the plaintiffs didn’t have legal standing, Watson said.

The lead plaintiff in the case was retroactively covered as a dependent of her domestic partner, and the \$13,750.68 annual cost of COBRA continuation coverage “would have been well in excess of the annual cost her domestic partner paid for health coverage,” the report said.

Two other plaintiffs in the case “never had any intention of electing COBRA,” Watson said.

If a COBRA beneficiary has trouble making a COBRA election, most employers will help them make sure they know what to do, so there’s no need for a lawsuit, she said.

—*With assistance from Jacklyn Wille*

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