akerman

Blog Post

Don't Get Bitten - COBRA and Costly Consequences of Non-Compliant Notices

July 7, 2020

COBRA: an acronym that strikes fear (and understandable confusion) into the hearts of many employers. If you have 20 or more employees, you are subject to the often equivocal requirements of the Consolidated Omnibus Budget Reconciliation Act —and the consequences of non-compliance can be poisonous. Given the increase in COBRA-related lawsuits and the Department of Labor's (DOL) recent revisions of its model COBRA coverage notices, this should be on the radar of all employers who may find themselves in the Act's coils.

In order to clarify some aspects of the already mystifying COBRA in the midst of the COVID-19 pandemic, on May 1, 2020, the DOL issued revised model notices and a corresponding FAQ guidance (for the first time since 2014). Most critically, the DOL extended COBRA deadlines until after the announced end of the COVID-19 pandemic. For COBRA election purposes, this means if a qualifying beneficiary received the election notice on or after March 1, 2020, the 60-day initial COBRA election period does not begin until the end of the pandemic and the participant then has another 45 days after that to make the required COBRA premium payments. The deadline to make required monthly premium contributions, for those individuals already receiving COBRA coverage, is also extended until 30 days after the end of the pandemic, and the DOL explicitly stated in its

Related Work

Employee Benefits and ERISA Litigation
Employee Benefits and Executive Compensation
Employment Litigation
Labor and Employment

Related Offices

New York
West Palm Beach

HR Defense Blog

Akerman Perspectives on the Latest Developments in Labor and Employment Law

Visit this Akerman blog

guidance that employers or health insurance carriers cannot terminate COBRA coverage or reject any claims for nonpayment of premium during this period (although coverage may be terminated if an individual fails to make all required premium contributions once the pandemic is over).

By way of background, COBRA is an amendment to the Employee Retirement Income Security Act (ERISA) and applies to employers with at least 20 employees (on more than 50 percent of its typical business days in the previous calendar year) who provide a group health plan to employees. Pursuant to COBRA's requirements, the plan administrator must provide certain notices to plan participants, both upon initial enrollment in the plan and upon a qualifying event if that event results in the loss of health plan coverage or an increase in the premiums being charged to the individual. Qualifying events may include a termination/separation, divorce, or other life events that alter health care coverage status in some way.

Under COBRA, former employees can choose to stay on their employer's health plan temporarily after their employment ends. Upon termination or separation, employees must be provided with a notice that they may elect COBRA coverage to continue if they so choose. Employers should also be mindful of various COBRA deadlines applicable to plan administrators and plan participants. Under joint guidance recently issued by the DOL and Internal Revenue Service (IRS), qualified beneficiaries are entitled to extended periods to elect COBRA coverage, remit premium payments and to notify the plan of certain COBRA qualifying events that may trigger eligibility. The joint guidance also includes an optional extension of the employer deadline for providing COBRA election notices (although it is unlikely that most employers will use this extension).

Recently, we have seen an uptick in class action lawsuits filed against employers who fail to or who

improperly fulfill their COBRA obligations, particularly those surrounding notice provided to separated employees. And as the penalty for failing to provide such a notice can be up to $110 per day, COBRA awards can be extremely costly for employers.

There are many ways an employer's COBRA notices may be deficient. Some potential issues include using confusing verbiage that the average employee may not understand, failing to explain the COBRA enrollment process, failing to describe consequences of delayed enrollment or payment, omitting the mandatory "explanatory information" regarding coverage, and not including the contact information for the administrator of benefits.

The last 10 years have seen numerous cases filed surrounding COBRA notice obligations. In one case for example, the spouse of a former employee of a technology company alleged that the company's COBRA notices failed to identify required information, such as the end date for the health care coverage, where payments should be sent, and identity of the plan administrator. The beneficiary sought to certify a class of the company's health plan participants and requested statutory penalties to each individual per day that the company allegedly failed to comply with the COBRA notice requirements, although the case later settled.

Earlier this year, a large technology supplier was sued in Florida federal court when they did not properly notify their separated employees about their rights under COBRA, namely their ability to continue health care coverage following their separation under the statute. In that lawsuit, the plaintiff alleges that the COBRA notice he and other former employees received were "confusing and incomplete," lacking crucial information that the statute mandates employees are provided with. The complaint accused the company's COBRA notice as "not written in a manner calculated to be understood by the average plan participant." According to the

plaintiff, he lost health insurance and suffered economic injuries as a result of the deficient notice.

From this and other cases, employers can learn valuable lessons. COBRA notices distributed to employees are not the place to get creative—employers should use the model notice form created by the DOL, or at least use the model form for assistance in crafting their own notices. Because recent lawsuits have targeted COBRA notices that do not mirror the model notices, employers should closely review the revised model notices and use them whenever possible.

Employers are encouraged to strictly comply with all of COBRA's notice requirements in order to diminish the risk of liability. If you have any doubts about your obligations as an employer under COBRA, please contact your Akerman attorney and avoid a venomous (and costly) bite!
