BCLP. Client Intelligent

BenefitsBCLP

ARE YOUR COBRA NOTICES SUFFICIENT TO AVERT A COSTLY CHALLENGE?

Jun 15, 2021

While the Consolidated Omnibus Budget Reconciliation Act ("COBRA") continuation coverage subsidy requirements imposed by the American Rescue Plan Act of 2021 (previously discussed here and here) are at the forefront of employers' minds, recent litigation trends should motivate plan sponsors to review their standard COBRA election notices to ensure they comply with the general requirements in the regulations promulgated by the Department of Labor ("DOL").

The regulations[1] require COBRA notices be written in a manner calculated to be understood by the average plan participant. Required information includes:

- The name and plan under which continuation coverage is available;
- The name, address, and phone number of the plan administrator;
- Identification of the qualifying event;
- Identification of the qualified beneficiaries (by status or name) who are recognized by the plan as being entitled to elect continuation coverage due to the qualifying event;
- An explanation of the procedures for electing coverage, and the consequences of failing to elect coverage;
- A description of the coverage available;
- The time period for which the coverage is available; and
- The cost of coverage and due dates for payments.

A spate of recent litigation reminds us that failure to include required information in COBRA election notices may expose the plan sponsor and the plan administrator to claims from participants and beneficiaries. Further, if the information included in COBRA election notices is likely to confuse participants and beneficiaries, there may be potential liability for failure to provide a notice written in a manner calculated to be understood by the average plan participant.

In *Green v. FCA US LLC*[2], the plaintiffs alleged that the COBRA election notices sent by the defendants were deficient because they included an "ominous warning" that suggested plaintiffs could be subject to civil and criminal penalties if they submitted incorrect, or even incomplete, information when electing COBRA. According to the plaintiffs, this warning was unnecessary, and it "confused and discouraged them, at least in part" from electing COBRA continuation coverage. The plaintiffs also alleged that the notices failed to identify the name and contact information of the plan administrator.

In an order granting in part and denying in part the defendants' motion to dismiss, the court determined that the failure to include the name and contact information of the plan administrator was a "bare procedural violation, divorced from any concrete harm" to the plaintiffs, as they did not allege an injury-in-fact based on this failure. The court dismissed the claim based on this failure due to lack of standing under Article III.

However, the court denied the defendants' motion to dismiss the claim based on the warning regarding potential civil and criminal penalties for submitting incorrect or incomplete information. The court held that the plaintiffs had plausibly alleged the notice was not written in a manner calculated to be understood by the average plan participant, as the assertion that participants could be subject to penalties for providing *incomplete* information was not a "strictly accurate statement of the law."

Several other recent claims regarding defective COBRA election notices have ended in settlement. By way of example, the court in *Holmes v. WCA Mgmt. Co., L.P.*[3] recently approved a Joint Motion for Preliminary Approval of Class Action Settlement in the amount of $210,000. In *Holmes*, the plaintiffs alleged the defendants provided deficient COBRA notices that (1) failed to provide and explain the continuation coverage termination date; (2) failed to include information regarding how COBRA coverage can be lost before the omitted termination date; (3) failed to identify the plan administrator for the group health plan; and (4) was not written in a manner calculated to be understood by the average plan participant. Currently, there are COBRA election notice cases pending against Amazon[4] and Starbucks[5], among others.

Plan sponsors should take steps to ensure their COBRA notices meet all of the requirements found in the DOL regulations. The DOL has provided model COBRA notices that may be used, and use of such notices, when properly completed, will be considered good faith compliance with COBRA notice requirements. For plan sponsors opting not to use the DOL model notices, comparing the notices that are used against the model notices is advisable. Plan sponsors should also consider some of the common pitfalls that have given rise to recent COBRA notice litigation, taking particular care to:

- Include the group health plan administrator and contact information, as well as important deadlines and the process for electing coverage;

- Review notice language to ensure it is clear and is not likely to mislead or confuse participants;
- Issue the notice within the required timeframe, typically within 14 days of receiving notice of a qualifying event for the COBRA election notice;
- Provide notices in Spanish (or other appropriate language) for employees who primarily speak Spanish (or such other language); and
- Review regulations, guidance, and model notices to ensure all required information is included, or have employee benefits counsel do so.

While plan sponsors are understandably preoccupied with the new the COBRA responsibilities imposed by recent legislation, they should take this as an opportunity to carefully review their standard COBRA notices. Following the simple steps outlined above will go a long way towards accomplishing that vital review and may prevent potentially costly headaches down the line.

[1] 29 CFR 2590.606-4(b)(4).

[2] Case No. 2:20-cv-13079-GCS-DRG (E.D. Mich. 2021).

[3] Case no. 6:20-cv-698-PGB-LRH (M.D. Fla. 2021).

[4] *Kendall v. Amazon Corporate, LLC*, case no. 3:20-cv-02493 (D.S.C. 2020).

[5] *Torres v. Starbucks Coffee Company*, case no. 8:20-cv-01311 (M.D. Fla. 2020).

RELATED PRACTICE AREAS

- Employee Benefits & Executive Compensation

MEET THE TEAM

Randall D. Scherer Jr.

Denver

randy.scherer@bclplaw.com
+1 303 866 0446

Lisa A. Van Fleet

St. Louis

lisa.vanfleet@bclplaw.com
+1 314 259 2326

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.