Fla. Class Actions Show Why Correct COBRA Notices Matter

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In Florida's federal courts, there has been an epidemic of class actions alleging that employers failed to provide technically proper notice of the right to continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act. A dozen such lawsuits have been filed (each by the same law firm) with mirror image allegations.[1]

These cases illustrate why it is necessary to sweat the details in issuing COBRA notices.

COBRA requires sponsors of group health plans to permit a plan participant to elect to continue coverage at the participant's own cost if an event occurs that will cause a loss of coverage under the plan, known as a qualifying event. Plan administrators must provide a COBRA notice when such individuals first commence participation, known as the initial notice, and when a qualifying event occurs, or the election notice.

Termination of employment that causes a loss of plan coverage is the most common qualifying event. Others include reduction of hours, divorce, death of the covered employee, or a child ceasing to be a dependent under the plan terms when such events result in a loss of plan coverage.

COBRA requires notice of the right to continue plan coverage "in a matter calculated to be understood by the average plan participant." That notice must identify the plan administrator's contact information, explain the process to elect to continue coverage, state when COBRA coverage payments are due, and provide the address where payments should be sent.[2]

What do these putative class complaints allege? Each asserts that the COBRA election notice did not comply with one or more of the notice requirements, i.e., that the notice "partially adhered to" portions of the nonmandatory model notice in the COBRA regulations but that "critical parts are omitted or altered in violation" of the regulations. Yet, that model notice in the regulations is "not mandatory" but merely suggestive.[3]

Spot-checking, those allegations appear in these dozen cases as follows:

Allegation	Number of Complaints
Notice failed to provide notice of continuation coverage "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)	7 of 12 complaints
Notice failed to provide the plan administrator's name, address, and telephone number and/or the COBRA administrator in violation of 29 C.F.R. § 2590.606-4(b)(4)(i)	8 of 12 complaints
Notice failed to include one or more pieces of required explanatory information about the coverage, how to elect it, the start and termination dates, and payment requirements in violation of 29 C.F.R. § 2590.606-4(b)(4)	11 of 12 complaints
Notice never sent to or received by individual	1 of 12 complaints

Plan sponsor employers are not insulated from these suits even if there is a separate third-party COBRA administrator. These lawsuits were each filed against the employer sponsoring the health plans. Further, eight of the dozen complaints filed allege that the notice received did not sufficiently identify the plan administrator and/or its contact information.

These class action claims may be unsustainable on alternate grounds.

First, there is a standing hurdle. These complaints parallel the Fair Credit Reporting Act claims rejected by the U.S. Supreme Court in Spokeo Inc. v. Robins.[4] Not every imperfection in notice gives rise to actual injury. Rather, where the alleged notice defect does not cause an actual lapse in insurance coverage, there is no standing.

Second, these complaints assert variances between the model notice and the notices actually received. However, a variance is not a defect per se because the "[use] of the model notice is not mandatory." And, even if the model notice is used, administrators are expected to add or supplement relevant information from it or delete information that is not applicable.[5]

Finally, the purpose of these COBRA notice regulations is to "help participants and beneficiaries understand how to exercise their COBRA rights."[6] A notice that provides sufficient information for an individual to understand how to elect COBRA coverage and the process for doing so, as well as what the consequences are of failing to elect COBRA coverage, satisfies the essential purpose of those regulations. Simply stated, substantial compliance is a complete defense.[7]

Class actions, even built on unsustainable claims, still impose costs and risks. There are prophylactic measures that plan sponsors can and should pursue to avoid those costs and risks. This should include reviewing the actual COBRA notices that are being delivered to plan participants. Salvation is indeed in checking those details.

COBRA vendors often use software that automates the notice process and may be lacking in the details that are required to be included in COBRA notices. Plan sponsors outsourcing COBRA administration should request the applicable documents in order to ensure that they contain the details specified in the regulations.

Plans should review COBRA election notices to ensure that the content requirements of the regulations are satisfied. The following is a list of some of the items specifically required under the regulations:

- Identifying information about the applicable group health plan and contact information of the party responsible for the administration of COBRA benefits.

- A description of the qualifying event and of the qualified beneficiaries who are entitled to elect COBRA coverage, including the date on which coverage under the plan will terminate unless such coverage is elected.

- A statement regarding the rights of each qualified beneficiary with respect to the qualifying event and a description of who may elect COBRA coverage on behalf of other qualified beneficiaries.

- An explanation of the plan's procedures for electing COBRA coverage, including any timing requirements and deadlines, as well as an explanation of the consequences of waiving COBRA coverage.

- A description of the COBRA coverage that may be elected under the plan, the date such coverage may commence, an explanation of the maximum coverage period, as well as information regarding how coverage may be impacted by a second qualifying event.

- A detailed description of the cost of coverage and due dates for payments.

Plan administrators are also responsible for complying with detailed timing requirements both for the initial COBRA notice and the COBRA election notice when a qualifying event occurs. Thus, plans should review not only the election notice but also the initial COBRA notice; the notice of unavailability of COBRA coverage; the notice of termination of COBRA coverage; the qualifying event notices; and any late premium payment reminder letters.

Today is the day to start checking on COBRA compliance. Tomorrow, there may be a lawsuit.

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[1] Five cases have settled: Hicks v. Lockheed Martin Corp., Case No. 8:19-cv-00261 (M.D. Fl.), ECF 34 (establishing common fund of $1,250,000); Valdivieso v. Cushman & Wakefield Inc., Case No. 8:17-cv-00118 (M.D. Fl.), ECF. 92 (establishing a common fund of $390,000); Vazquez v. Marriott Int'l, Inc., Case No. 8:17-cv-00116 (M.D. Fl.), ECF 117 (approving settlement of undisclosed amount); Sefchick v. Branch Banking & Trust Co., Case No. 8:16-cv-03303 (M.D. Fl.), ECF 13 (same); Delaughter v. ESA Mgmt., LLC, Case No. 8:16-cv-03302 (M.D. Fl.), ECF 58 (same).

Five others are stayed pending mediation, arbitration, or an undecided motion to dismiss, or have a pending motion to compel arbitration or to stay before the court. Conklin v. Coca-Cola Beverages Fl., LLC, Case No. 8:19-cv-02137 (M.D. Fl.); Strickland v. United Healthcare Servs., Case No. 8:19-cv-01933 (M.D. Fl.); Grant v. JPMorgan Chase & Co., Case No. 8:19-cv-01808 (M.D. Fl.); Rigney v. Target Corp., Case No. 8:19-cv-01432 (M.D. Fl.); Riddle v. PepsiCo, Inc., Case No. 7:19-cv-03634 (S.D.N.Y.).

One was dismissed with prejudice when the plaintiff named an improper defendant. Tadal v. Pavestone, LLC, Case No. 8:19-cv-00053 (M.D. Fl.). One other is still pending, having survived a motion to dismiss. Bryant v. Wal-Mart Stores, Inc. Case No. 1:16-cv-24818 (S.D. Fl.).

[2] 29 C.F.R. § 2590.606-4 (listing the notice requirements).

[3] Id. § 2590.606-4(g), App'x.

[4] 136 S. Ct. 1540 (2016).

[5] 29 C.F.R. § 2590.606-4(g).

[6] 69 Fed. Reg. 30084, 30092 (May 26, 2004).

[7] Federal courts have adopted the substantial compliance doctrine in other contexts relating to provisions of ERISA — the Employee Retirement Income Security Act of 1974 — such as the regulatory requirements for notices that insurers must give claimants when denying benefit claims and informing them of the right to appeal that decision. See Lacy v. Fulbright & Jaworski , 405 F.3d 254, 256-57 & n.5 (5th Cir. 2005) (listing cases from seven federal courts of appeals).