

May 12, 2020

COVID-19 and Reimagining the Workplace: Daily Briefing Recap

COBRA Notice Class Action Litigation Claims

Please note that the following is a recap of our Daily Briefing from May 12, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.'s [COVID-19 resource page](#) for updates on workplace impacts and [sign up here](#) to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

COBRA and COVID-19

- The widespread layoffs and terminations implemented in response to COVID-19 are qualifying events under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Given the recent explosion in potentially costly COBRA notice class action litigation, employers must ensure that their COBRA notices are compliant with regulations and the DOL model notice.

What is COBRA?

- COBRA allows eligible employees and their dependents to temporarily continue group health benefits following certain qualifying events, including:
 - Termination
 - Layoff
 - Loss of hours such that an employee is no longer eligible for benefits.

Qualifying Event Notice Requirements

- COBRA has very specific and detailed requirements for notices that must be sent following qualifying events:
 - To help employers meet these requirements, the Department of Labor has provided a model notice or “safe harbor” notice.

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- Arguably, if an employer follows the model notice word-for-word, they have presumably met their notice obligations.
- However, some employers have tailored the model notice to make it more user-friendly and/or to eliminate language that does not apply to them.
- The current COBRA notice class action lawsuits come from these deviations from the model notice.

Changes Due to COVID-19

- Please note that the DOL has temporarily extended the period during which eligible employees can elect COBRA coverage and the deadline to begin making COBRA premium payments.
- Employers should consult the updated model notices provided by the DOL in connection with these extensions.

COBRA Notice Class Actions

- The number of COBRA notice class action claims has significantly increased in the last four to six months.
- Claims allege that COBRA notices are “deficient” because they are not identical to the model notice and therefore do not provide all the information required by DOL regulations.
- Damages requested typically include the following:
 - Equitable relief under ERISA Section 502(a)(3).
 - Statutory penalties of up to \$110 per participant per day under ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1).
 - Plaintiff’s counsel fees under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1).
- No suits have been decided on the merits; there have been numerous motions to dismiss, all of which have been denied.
- Even though many employers use third-party COBRA administrators, under ERISA the plan administrator is still responsible for the content of the notice.

Defenses

- Specific merits: There is no case law stating that a COBRA notice must be identical to the DOL model notice to be compliant with the statute and DOL regulations
- Standing: If a covered person never had any intention to select COBRA coverage, arguably there is no harm from an alleged deficient notice.
- Class: Did the average participant really not understand the notice?
- Statutory penalties: There are two defenses, as plaintiffs must show that:
 - The plan administrator acted in bad faith.
 - There was some sort of prejudice to the plaintiff.

Mitigating Exposure

In order to mitigate their risk, employers should:

- Understand COBRA regulations and the DOL model notice.
- Stay current with regulatory changes.
- Keep in touch with their COBRA notice vendors.
- Review notices themselves to make sure they are compliant.

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with [Jackson Lewis' latest available information and resources](#).

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.