

NEWS BRIEF

Provided by: Evolution of Benefits

Employers See Increasing Numbers of Lawsuits Over Deficient COBRA Notices

Employers are seeing an increase in lawsuits from former employees alleging deficient Consolidated Omnibus Budget Reconciliation Act (COBRA) election notices, with statutory penalties of up to \$110 per person per day. These lawsuits are generally class actions and can result in significant attorneys' fee awards for successful ex-employees. The fact employers are struggling to comply with COBRA notice requirements means employers should brace for increased election notice litigation.

Why Has COBRA Notice Litigation Increased?

Employers' difficulty in complying with election notice requirements plus lucrative class action lawsuits seem to be causing the increase in litigation. Even though COBRA violations tend to be incidental to other employment litigation—meaning most individuals filing claims would not have elected COBRA—they can result in hefty penalties and attorneys' fees awards for successful ex-employees.

The recent barrage of COBRA notice lawsuits claims employers' COBRA election notices are inaccurate, confusing or threatening. Lawsuits have targeted COBRA notices that fail to include:

- The mailing address for payments
- The plan administrator's identity
- An explanation of how to enroll
- The actual election form to elect coverage

The costs of class actions are hefty. Some examples of COBRA notice litigation occurring earlier this year include lawsuits against Home Depot, Fiat Chrysler

and Costco. These companies settled their lawsuits for \$815,000, \$600,000 and \$750,000, respectively.

Why Are Employers Struggling With COBRA Notice Requirements?

In 2020, the U.S. Department of Labor (DOL) revised its model COBRA election notice. While employers can simply use the DOL's model COBRA notice, many do not rely on it because most use third-party vendors to provide notices to their former employees.

These third-party vendors typically provide their own notices that do not strictly adhere to the DOL's model notice. For instance, vendors often omit the plan administrator's name to avoid confusion—as former employees mail COBRA coverage payments to the vendor, not the plan administrator. Additionally, not all information required by the DOL's model notice is known to employers at the time they must provide notice, so vendors omit it. Even though vendors prepare and send most notices, COBRA notice litigation is directed at the employer or plan sponsor, not the vendors.



.....

“The DOL is ‘keeping an eye’ on the need for additional COBRA guidance, but other issues have taken priority.”

- *Elizabeth Schumacher, deputy director of the DOL’s Division of Regulations and Standards*

.....

What this means

While ensuring compliance is always challenging, recent developments—such as the DOL’s revised model notice and the IRS and DOL extending COBRA deadlines and providing additional guidance following the enactment of the American Rescue Plan Act of 2021—have made it harder for employers. Consequently, COBRA notice litigation is likely to continue for the foreseeable future.

While the recent rise in COBRA notice litigation has targeted mainly large employers, all employers should consider reviewing their COBRA notices to ensure compliance, identify potential liabilities and avoid litigation. Even technical violations that do not result in actual harm to former employees—since they rarely elect COBRA—can expose employers to expensive litigation because of statutory penalties and attorneys’ fees.

We will keep you apprised of any notable updates on COBRA notice litigation. Contact Evolution of Benefits for more COBRA compliance resources.