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Employee Benefit Plan Review

COBRA Noncompliance Can Be Costly

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Now is a good time for employers to review their COBRA procedures or check with their COBRA vendors about documentation processes given a recent case out of the U.S. District Court for the Southern District of Ohio. In *Morehouse v. Steak 'n Shake, Inc.*, the court held that the company violated its obligations under COBRA after failing to provide an employee with a Consolidated Omnibus Budget Reconciliation Act (COBRA) Election Notice. As a consequence of this failure, Steak 'n Shake was liable for the employee's medical costs minus the COBRA premiums she would have paid.

The court also assessed civil penalties against the employer. Under the civil enforcement provisions of the Employee Retirement Income Security Act of 1974 (ERISA), a plan administrator who fails to satisfy COBRA's requirements may be personally liable to the affected participant or beneficiary for up to $110 a day from the date of the failure. Whether the plan administrator will be liable for these statutory penalties is in the court's discretion, and the court is free to order other relief as it deems appropriate.

In *Morehouse*, the court acknowledged that many courts have declined to impose penalties on employers without finding they acted in bad faith. In deciding to impose statutory penalties, the court concluded that Steak 'n Shake had acted in bad faith by failing to provide the employee with a COBRA election form at all. Instead of the full penalty, the court imposed a penalty of $50 a day measured from 45 days after the employee experienced the qualifying event through the date that she acquired new insurance coverage.

Last, the court ordered Steak 'n Shake to pay the employee's attorneys' fees, finding that the company had acted in bad faith for ignoring its obligations under COBRA and that a fee award would likely deter other businesses from engaging in similar misconduct.

What Notices are Required Under COBRA?

Under COBRA, employers with 20 or more full-time employees are required to offer continuation of health coverage for a limited time to employees and their dependents who lose coverage due to a qualifying event. Employers are required to provide a General Notice to an employee or spouse when they first become covered and an Election Notice if coverage will end due to a qualifying event.

The General Notice must be given within 90 days of when coverage under the plan begins. It explains general employee rights and obligations under COBRA. One of those obligations is the employee's or spouse's obligation to notify the plan administrator in a timely manner if a qualifying event occurs, which is within 30 days or 60 days, depending on the type of qualifying event.

The Election Notice is required to be sent once a qualifying event has occurred. The Election Notice must be sent to the employee and any covered spouse and dependent(s) (each a "qualified beneficiary"). A qualified beneficiary has independent election rights, so each of them must be notified. If they all live at the same address, the separate notices can be sent in a single envelope or as a single notice naming all qualified beneficiaries as long as the notice explains that each qualified beneficiary has an independent COBRA election right. The Election Notice provides the qualified beneficiaries with information about their eligibility to elect COBRA following the qualifying event, the length and cost of coverage, and also explains what the qualified beneficiary must do if a second qualifying event occurs during the COBRA coverage period.

Is The Plan Administrator Required to Demonstrate That the Notices Were Sent?

If a qualified beneficiary claims the plan failed to timely provide a COBRA notice, many courts have held that the burden of proof is on the plan administrator to prove the notice was sent. But the plan administrator does not have to prove that the qualified beneficiary actually received the notice - just that the notice was mailed. If the plan administrator can prove that the notice was mailed, the plan administrator will satisfy the Department of Labor's (DOL) standard that the method be "reasonably calculated to ensure actual receipt of the material."

First Class Mail

The DOL rules specifically allow notices to be distributed using first-class mail, and that notices given by first-class mail, certified mail or express mail are considered sent as of the date of the mailing. Second- or third-class mail is also permitted under the regulations. But with second- or third-class mail, return or forwarding postage must be provided and further action must be taken.

Do Not Use Certified Mail

Although certified mail is specifically allowed under the regulations, it may create unnecessary obstacles for the employee and increase risk for the employer. Some local post offices may require the qualified beneficiary go pick up the mailing at the post office if he or she is not home to sign for the letter when it is initially delivered. This puts the burden of receipt on the qualified beneficiary, who may not be able to physically visit the post office or may not understand the significance of picking up the notice. Also, if the certificate comes back to the employer unsigned, the employer has knowledge that the qualified beneficiary did not receive the notice, which raises questions about how the plan administrator should respond. The few courts that have addressed this question have held that the plan administrator satisfied its duty to send the notice and was not required to do more. But under a different set of facts, another court could reach the opposite conclusion.

Proof of Mailing

Plan administrators are required to retain records and proof that notices were mailed to the qualified beneficiary's last-known address. As part of the proof, the plan administrator should be able to produce copies of the actual notices with the names and addresses of the qualified beneficiaries listed along with the date of mailing and the name of the individual who placed the notices in the U.S. mail (not who delivered the mail to a corporate mail room). Preferably, the list of addresses should be signed and dated by the employee who placed the envelopes in the U.S. mail.

Another way to demonstrate proof of mailing is by a certificate of mailing. A certificate of mailing is a receipt for first-class mail that shows the date a letter was presented to the post office for mailing and the addressees. The certificate is relatively inexpensive and can only be purchased at the time of mailing. Although a certificate of mailing is not required, it will serve as proof that the notice was mailed, which will satisfy the plan administrator's obligations under COBRA.

A plan administrator's business records will also serve as evidence that the notice was given. For example, in a U.S. Court of Appeals for the Sixth Circuit case,[1] *Bidwell v. University Medical Center, Inc.*, the Sixth Circuit found that the employer satisfied its obligation to provide notices related to a retirement plan. The employer provided sufficient proof that it gave the participants' correct addresses to its plan vendor for mailing. The employer also presented records maintained by its plan vendor showing that the number of notices mailed matched the number of addresses provided.

Conclusion

If an employer has contracted with a COBRA vendor to provide the notices, the employer should ask the vendor how it would demonstrate proof of mailing if requested by a former participant or by the DOL in an audit. By putting a few processes in place, employers can limit potential liability that could arise from COBRA errors.

Note

1. The case was handled by Frost Brown Todd.

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