

COVID AND COBRA NOTICES- FOUR TIPS TO AVOID LIABILITY

Even before the coronavirus outbreak, big-name employers like Amazon found themselves facing proposed class actions claiming they failed to properly notify departing workers of their COBRA rights, and a spike in those cases could be part of the pandemic's fallout.

In March and April respectively, Amazon Corporate LLC and Nestle Waters North America Inc. were sued under the Consolidated Omnibus Budget Reconciliation Act (COBRA)— which allows workers to choose continuation of their health care coverage with their employer after they experience a job loss or other qualifying event. PepsiCo settled a suit over its COBRA notices in April.

The COVID-19 pandemic, with the resulting layoffs and unemployment, has the potential to stoke employment litigation generally, including for COBRA cases. One prominent benefits attorney has predicted we may see an uptick in lawsuits of all kinds by current and former employees due to the pandemic because we are all suffering from the social and economic impacts of the pandemic, and the plaintiffs' bar will have less trouble finding named plaintiffs.

Here, are four tips to help businesses avoid getting sued under COBRA.

1. *Keep It 'Boring'*

COBRA requires employers to inform workers and their spouses of their right to continue coverage under the law through notices that must contain certain information. The U.S. Department of Labor provides a model notice form that companies can use to meet those requirements. Being "boring" by staying as close as possible to the model notices is a good practice for employers that don't outsource their COBRA process to a third-party vendor. No one can ever fault you for using what the DOL has provided.

However, employers might want to change parts of the notice that don't specifically apply to them or may not be as clear as they could be. Tweaking the DOL's model notice — perhaps to make it more user-friendly — hasn't been uncommon in the past, but now those changes should get scrutiny. Companies over the years have modified those notices or inserted information that wasn't part of the DOL's model notice. Ordinarily it wasn't considered a big decision to add to or supplement that notice; now, however it's come up now as an issue to focus upon.

2. *Include Necessary, Not Scary, Info*

Because many workers are unfamiliar with COBRA, it's important that employers include in the notices all the information needed for them to understand how to continue health care coverage. Companies should provide information on who the plan administrator is and who is providing the COBRA extended coverage, along with their contact information.

It is surprising how often those pieces of information are omitted. If the COBRA notice doesn't have that information, how can employee understand how to get that coverage?

However, employers should avoid having unnecessary information in their notices that might frighten workers from applying for the extended benefits. The suits against Amazon and Nestle allege that the companies failed to properly identify the plan administrators and that they wrongly included ominous warnings and irrelevant information about IRS penalties in their notices to spook workers away from continuing their coverage.

Workers should be able to receive all the required information and not be scared to sign up for extended coverage as they transition from one chapter of their life to the next. References to IRS penalties and fines don't belong in the notices. The IRS language is unnecessary and potentially will inhibit workers from seeking coverage to which they have a right, albeit at their own expense.

3. Consider Outsourcing COBRA Obligations

Many companies use third parties like WageWorks Inc. to take care of their COBRA processes. If that's the approach an employer wants to take, the best tip is to negotiate strongly out of the gate to make sure there are strong performance guarantees in their contract. For instance, employers should have an agreement that the employer will tie payments for the vendor's services to certain minimum performance standards thus enabling it to hold the vendor's feet to the fire if and when they do screw up, and so that the employer can find problems as they occur and fix them before a disgruntled employee files a lawsuit.

By all means, Employers should clarify beforehand whether the responsibility for COBRA notice compliance lies with the employing company or other entity or with the outside administrator. It's best to use a "tried and true" vendor that understands the nuances of federal benefits law. COBRA is a highly technical area and the employer wants a vendor with considerable experience in providing COBRA administration and notices.

4. Watch the Legal Landscape — and Your Vendor

Employers not only have to stay on top of regulatory changes, but litigation as well.

While an isolated decision in one district court might not warrant changing a notice, a trend of substantive decisions can't be ignored. And for companies that outsource COBRA work, staying in touch with their vendors and making sure they too are up to speed on the latest from federal agencies and courts is also important. Typically, any kind of communication and coordination of efforts is going to result in a better product than not having that discussion. If there's a change in the law, employers should make sure notices are updated in a timely manner. And businesses should check in with employees, too, to make sure the vendor is behaving appropriately.

COVID-19 has inspired some changes to COBRA, with the IRS and the DOL extending certain deadlines until after the "outbreak period." And at the beginning of May the DOL updated its model notices to include more information about how COBRA and Medicare interact. Employers should keep tabs on vendors to make sure the notices they'll use are up to snuff. Simply contracting with a third party doesn't guarantee that COBRA liability disappears. Just because you've outsourced it, doesn't mean that it's always necessarily the best document.

The adequacy of COBRA notices needs to get heightened attention in today's climate. If a COBRA administrator has sent you a model notice to review, or if you heard from them about changes in the notice, it makes sense to pay attention to it in a way that companies may not always have over the years. These class action lawsuits remind us that even technical issues can have consequences.