Case Law Summaries

Overview

This section outlines selected COBRA lawsuits. These lawsuits are a few examples of the litigation that takes place regarding COBRA compliance. Across the nation, several hundred lawsuits have made their way into the federal court system. Countless others are settled out of court each year, with awards ranging into millions of dollars.

The following lawsuits were filed against employers of all sizes, in various industries. No employer is immune from the prospect of COBRA litigation. The lawsuits outlined are incredibly important to employers seeking proper compliance with the COBRA law. Many lawsuits highlight the extreme penalties for compliance failures (e.g., *National Companies v. St. Joseph's Hospital* - **over $1 million;** *Swint v. Protective Life, et al.* - $292,000). The importance of other lawsuits is in their expansion of COBRA requirements where employers must actually amend their COBRA notices and procedures (e.g., *Andre v. Salem Technical Services and Stepan Company*, *Branch v. G. Bernd Company*, *Meadows v. Cagle's, Inc.*). Still other lawsuits help to clarify some of COBRA's difficult administrative issues (e.g., *Kidder v. H & B Marine*).

Who wins in COBRA litigation? Actually, even if the employer wins a COBRA lawsuit, it loses. The average cost to defend a COBRA dispute is $50,000 if the case goes to trial, more if appeals are necessary. A proactive approach to compliance, and understanding the impact of ongoing COBRA litigation, is an employer's best option for proper compliance and avoidance of penalties.

Employers are best served by incorporating changes that result from COBRA case law into their notice language and compliance procedures. This constant monitoring and updating protects employers from finding themselves among the pages of this COBRA case law section.

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ARRA

Dorsey v. Jacobson Homes, PLLC

(United States District Court, District of Columbia, No. 09-1085 (D.C. Cir. 2010))

ARRA affords a Qualified Beneficiary the special right of a DOL expedited review in the event of a subsidy denial. This is not an option. It a required first step before any lawsuit is filed.

In this case, a law firm terminated an employee's employment after a year of disability-related leave. She elected COBRA in late 2008. After ARRA was passed in February 2009, she e-mailed a request, asking for the subsidy. In the e-mail, she stated she spoke with a DOL official, who "confirmed that I was eligible for COBRA benefits."

The employer denied the request. It viewed the termination as voluntary because the employee failed to return to work after her FMLA leave expired. The employer's reply e-mail was direct:

> *"Whether or not you want to acknowledge that you resigned is a matter of semantics. The bottom line is that you left your job, never came back, making it clear that you could not and would not come back."*

Later, a DOL representative called the employer and stated that the COBRA premium should be subsidized. Again, the employer denied the request. Significantly, the Qualified Beneficiary never utilized the DOL expedited review process specifically spelled out in ARRA. That process requires the DOL to render a decision within 15 business days when a Qualified Beneficiary is denied the subsidy and makes a proper application, which is readily available on the DOL website.

Instead, the Qualified Beneficiary sued her former employer. The court dismissed her case because she had no final agency action to appeal. The court held that the expedited review process is required before a Qualified Beneficiary can sue over an ARRA subsidy denial. Summing up, the court concluded, *"It would have been far more speedy to follow the congressional path (i.e., expedited review)."* From start to finish, the lawsuit consumed more than 10 months, considerably longer than the 15 business-day maximum under ARRA.

This case is precedental in several respects. First, the ARRA law does not describe expedited review as a prerequisite for filing a lawsuit. Second, the court's opinion contained a likely typographical error, listing the Qualifying Event date as occurring on September 16, 2007. The subsidy eligibility period starts for Qualifying Events on or after September 1, 2008. Third, per IRS Notice 2009-27, the Qualified Beneficiary had a good argument that she should have been subsidy eligible. She could have argued that the termination was due to an employer policy. Therefore, it fit squarely within the definition of an involuntary termination because it involved "the independent exercise of the unilateral authority of the employer."

ARRA

Hejazi v. U.S. Department of Labor

(United States District Court, Western District of Washington, 2:09-cv-01018-RSL (W.D. Wash. 2010))

The Department of Labor (DOL) was the defendent in the first lawsuit related to a denial of a subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA).

The case involved a union employee who was covered by a multi-employer plan. Continued plan eligibility was based on hours worked during each three-month period. Hejazi worked for one employer for the first five months of 2008. This allowed him to maintain coverage under the plan through October 31, 2008. Later, he worked briefly in September 2008, but not enough hours to change his eligibility end date. Ultimately, his coverage terminated at the end of October.

When ARRA became law in early 2009, Hejazi requested a subsidized premium. The plan denied the request. In accordance with ARRA, Hejazi applied for an expedited review of the subsidy denial by the DOL. The DOL concluded that the loss of coverage occurred outside of the subsidy eligibility period that started on September 1, 2008.

The court came to the same result, but by a slightly different analysis. The loss of coverage date was October 31, 2008, clearly within time frame. But that is not the key date under ARRA. It is the Qualifying Event date. Here, the Qualifying Event of involuntary employment termination was before September 1, 2008, which is a requirement for receiving the subsidy. The brief work during September, resulting in termination, had no effect on the loss of coverage date and was not relevant for ARRA purposes. Thus, the DOL won its motion for summary judgment.

Who must comply

Galati v. D & R Excavating

(United States District Court, District of Arizona, 2006 U.S. Dist. LEXIS 28723 (D.Ariz. 2006))

In this case, both sides agreed that the election notice was never sent and COBRA coverage was never offered. What was the dispute? The point of contention was whether the employer's plan was subject to COBRA at all or whether the small-employer exception (for employers who normally employ fewer than 20 people on a typical business day during the preceding calendar year) applied.

The Court applied the general rule of counting employees: each full-time employee counts as one employee and each part-time employee counts as a fractional employee based on the number of hours worked. D & R Excavating produced timesheets showing fewer than 20 employees in 46 of the 52 pay periods in the prior year, considerably less than the 50 percent threshold required for COBRA application.

The ex-employee countered with two major arguments. First, she claimed there were several “phantom” employees who were paid under the table but produced no evidence as to how much or when they worked. The Court held that this was insufficient to defeat a motion for summary judgment.

Second, she included vacation and holiday time in calculating hours worked. The Court again disagreed, concluding: “[H]er argument flies in the face of the plain text of the regulation.”

As a result, the Court decided that D & R Excavating was entitled to COBRA's small-employer exception and granted its motion for summary judgment.

Who must comply

Giddens v. University Yacht Club

(United States District Court, Northern District of Georgia, Civil No. 2:05-CV-19-WCO (N.D. Ga. 2006))

Twenty is a magic number for COBRA. The general rule of COBRA applicability is that COBRA does not apply if an employer normally employed fewer than 20 employees on a typical business day during the preceding calendar year. This case tested the parameters of this seemingly straightforward rule.

The general manager for University Yacht Club (UYC) reported directly to the president, also known as the "commodore" of this non-profit organization. He and his family were covered by UYC's health plan. He suffered some medical setbacks, including spinal fusion surgery. When his employment terminated in September, he received no medical continuation.

UYC's reasons were simple: the employee was fired for gross misconduct, and even if he wasn't, UYC was subject to the small-employer exception to COBRA. The Court disagreed with the first argument, but agreed with the second argument.

Regarding the gross misconduct allegation, UYC alleged dereliction in financial dealings, use of UYC property for personal reasons and paying for personal items with a company credit card. The employee, on the other hand, said the termination had to do with a personal conflict with the commodore. The Court saw this as a factual dispute; thus, summary judgment was inappropriate on this issue.

The Court's handling of the small-employer exception is instructive to employers who are on the cusp of 20 employees from one year to the next. Despite reviewing the same payroll records, both parties came up with different employee counts. The Court laid down the following rules in resolving the conflicts:

- Averaging 30 hours per week (not 32) was enough for full-time employment status, based on UYC's personnel policy.
- Count only actual hours worked and exclude vacation, holiday and sick time hours.
- Even if an employee works in more than one capacity (in this case, 30 hours in administration, 10 hours in the clubhouse), it was inappropriate to double-count the employee (i.e., 1.3 full-time equivalents).
- UYC's five officers were unpaid and elected, serving on a voluntary basis. Therefore, they were not employees, even though under Georgia law they were considered employees and they received some perks from their position (e.g., special parking, preferred seating at events and free maintenance services). The Court looked to common-law principles of agency instead, focusing on the officers' lack of payment and the absence of employee benefits.

As a result, UYC qualified for the small-employer exception. The Court granted UYC's motion for summary judgment. This case highlights some of the issues for the small-employer exception.

Who must comply

Kidder v. H & B Marine

(United States Court of Appeals for the Fifth Circuit, 932 F. 2d 347 (5th Cir. 1991))

H & B Construction and H & B Marine merged in 1986. Since 1983, the two companies had the same four principals, who each owned 25 percent. The 1986 merger was largely for tax purposes. It is undisputed that between the two companies there were at least 20 employees, the threshold at which an employer must comply with COBRA.

An employee terminated his employment with H & B Construction on February 13, 1987. At the time that he terminated his employment, he and his wife were covered under H & B's group health plan. At that time, he was informed by his supervisor, and by the independent insurance agent who sold the Blue Cross plan to H & B, that he was not eligible for continuation coverage. However, he was offered conversion coverage, which he accepted and paid for.

Kidder filed this lawsuit after facing nearly $24,000 in claims that were not covered by the conversion policy, but would have been covered by the group health plan. Blue Cross was brought into the lawsuit, as it **knew** that H & B Construction had to comply with COBRA but never advised H&B regarding compliance. In a U.S. District Court, the judge ruled that H & B did have to comply with COBRA. Even without the actual merger, the common ownership of H & B Marine and H & B Construction would have been enough to mandate compliance with COBRA. The court found H & B to be 75 percent liable and Blue Cross 25 percent liable for the $23,890.24 in claims.

Blue Cross filed an appeal. The appellate court reversed the district court's ruling and found H & B 100 percent liable. COBRA is a plan administrator law (most employers are the administrators of their plans), not an insurance carrier law. H & B was responsible for proper COBRA compliance, and since it failed to comply, it was required to pay the entire $23,890.24.

Who must comply

Polk v. Dubuis Health System

(United States District Court, Western District of Louisiana, 2007 WL 2890262 (W.D. La. 2007))

Most benefits and insurance professionals familiar with COBRA administration clearly know that church plans are exempt from COBRA's requirements. What is less clear is when this exception actually applies. A recent district court case shed some light.

In that case, the court reviewed what level of religious involvement is required to transform an employer's plan into a church plan. The employer, Dubuis, was a hospital with religious affiliations. When Dubuis terminated the employment of Celestine Polk, a nurse's assistant, the hospital did not offer COBRA because it thought it was exempt from COBRA.

The court disagreed. Under ERISA, the plan sponsor must either be a church (or an association or convention of churches) or share common religious bonds or convictions with a church, an association or convention. The first part did not apply. The employer failed the second part, based on three factors:

- Whether a religious institution has an official role in corporate governance
- Whether the organization receives assistance from a religious institution
- Whether a denominational requirement exists for any employee or customer

Factors in favor of a church plan ruling included the fact that Dubuis is a non-profit organization whose sole corporate member is Christus, another non-profit organization operated by the Congregations of the Sisters of Charity of the Incarnate Word. Three Dubuis board members were members of a religious order.

However, only five of the 10 board members were elected by Christus. No religious order had an official role in governance, and there was no denominational requirement for employment. Therefore, the court held that Dubuis did not operate a church plan and was required to offer COBRA.

Hospitals and other health care organizations with religious affiliations typically assume their plans are exempt from ERISA and COBRA. The correct approach is to seek a private letter ruling from the IRS and an advisory opinion from the DOL to confirm their plans' status as a "church plan." Courts usually give deference to these determinations.

Qualified Beneficiaries

Cuchara v. Gai-Tronics Corp.

(United States Court of Appeals for the Third Circuit, 2005 WL 1030466 (3rd Cir. 2005))

When offering a severance package, an employer will often include continuation of health benefits during the severance period. Unfortunately, some employees may want to extend the continuation provisions of COBRA to other employer-provided benefits not subject to COBRA. A recent employer had to take its case to the Court of Appeals level to have an ex-employee's mistaken impression officially corrected.

The ex-employee in this case did not have health coverage on the day before the Qualifying Event of termination of employment and was only covered under the employer's long-term disability (LTD) plan. When he read and signed a release, COBRA was mentioned as a continuation benefit. The ex-employee assumed it applied to his LTD coverage because he did not have health coverage.

The district court and court of appeals agreed that the ex-employee's theory was incorrect. COBRA does not apply to LTD benefits. In addition, the court noted that at several times the employer encouraged him to obtain legal counsel to review the severance package and release. He ignored this suggestion. In the final analysis, the ex-employee thought he was a COBRA Qualified Beneficiary; he simply was not.

While the employer prevailed in this case, the victory came at quite a cost. The litigation lasted for more than 18 months and could have probably been avoided if the employer had eliminated any reference to COBRA for its employees who were not covered under its health plan.

Qualified Beneficiaries

Downes v. J.P. Morgan Chase

(United States District Court, Southern District of New York, Civil No. 03-Civ-8991 (S.D. N.Y. 2006))

The increased use of independent contractors also brings an increased risk of benefits-related lawsuits. An employer recently prevailed in such a dispute through careful plan design, in light of the famous *Vizcaino v. Microsoft* case decided several years ago.

An independent contractor worked for J.P. Morgan Chase. When her assignment ended, she sought COBRA coverage and other ERISA benefits because she claimed she was a common-law employee. Eligibility for J.P. Morgan Chase's plans required not only employee status but also that the individual be on the payroll as a salaried employee.

The Court noted that the individual could not meet the additional requirements and was not eligible for COBRA even if she were determined to be a common-law employee. In granting J.P. Morgan Chase's motion for summary judgment, the Court made the following observation:

> "[N]othing prevents an employer from specifying that its benefit plans apply only to employees that meet particular criteria, including a criterion providing that coverage does not extend to those whose payment is arranged in certain ways."

The case continued on claims under the Equal Pay Act that were unrelated to the COBRA and ERISA issues.

Recall that in the *Vizcaino* case, decided in 1999, numerous Microsoft contractors became eligible for benefits when they were reclassified as common-law employees. Microsoft ultimately settled the case for just under $100 million. In response, many employers revised eligibility requirements so that benefits were available to a more specific class of employees. J.P. Morgan Chase obviously was among them. It is now common to see a W-2 requirement for benefit plan eligibility. Employers should check their plan language and contractor practices to determine if they need to make any changes.

Qualifying Events and Coverage Periods

Chesney v. Valley Stream Union Free School District No. 24

(United States District Court, Eastern District of New York, 2009 WL 936602 (E.D.N.Y. 2009))

A common add-on complaint for employees who sue their former employers is that they never received the required COBRA Election Notice. The common defense for employers – as illustrated in a recent case – is that you do not have to prove receipt.

Here, the “no-receipt” complaint was among many asserted by the former employee. The lawsuit included claims under Title VII, the Americans with Disabilities Act, FMLA, two Amendments to the U.S. Constitution and six state law claims.

Regarding COBRA, the employer successfully argued that it needed only to show that it had sent the notice. The employer’s proof of mailing consisted of an affidavit by the employee who prepared and mailed the notice by first class mail and the fact that the notice had never been returned. Later, the employer sent a second notice with a wrong termination date, which the ex-employee acknowledged receiving. The court said there was “no question” that the employer complied with COBRA. The employee did not claim the notice was mailed to wrong address. Therefore, the employer was entitled to a presumption of proper mailing. The employer’s motion for summary judgment was granted.

A COBRA fundamental is that you do not have to show actual receipt. Instead, you must prove that the notice was sent via a method reasonably calculated to reach the Qualified Beneficiary. You must send the notice to the last known address. So the focus is on the sending, not the receiving. That is why most employers and administrators do not send notices via certified mail (which focuses on receipt). Rather, they use a certificate of mailing that is available at the post office (which focuses on sending).

Qualifying Events and Coverage Periods

Kern v. Blaine Kern Artists & Coventry Health Care

(United States District Court for the Eastern District of Louisiana, Case No. 05-3066 (E.D. La. 2006)

Divorce can be a difficult matter for a husband and wife, especially when both work at the same employer. In addition, divorce has COBRA implications that are not always clear.

After two employees were divorced on January 3, the woman continued to work for their employer, Blaine Kern Artists, for almost six more months before terminating her employment on June 30. When she terminated her employment, she argued that she should have received 36 months of COBRA coverage instead of 18 months, because her qualifying event was the divorce, not the termination of employment.

Two critical facts worked against this argument. First, at all times, her health coverage was based on her status as an employee, not as a spouse of an employee. Second, she did not suffer a loss of coverage until her employment terminated.

Thus, the District Court granted the defendants' motion for summary judgment. It concluded that the triggering event was the employment termination, resulting in only 18 months of COBRA coverage.

Blaine Kern Artists and Coventry Health Care were not completely off the hook. The District Court denied summary judgment on two issues, allowing them to go to trial:

- Whether she received a sufficient notice of COBRA rights.
- Whether Coventry Health Care fully paid all claims submitted during the COBRA coverage period.

Qualifying Events and Coverage Periods

Mlsna v. Unitel

(United States Court of Appeals for the Seventh Circuit, 91 F. 3d. 876 (7th Cir. 1996))

After more than five years of litigation and two appeals, a covered spouse was awarded more than $130,000. The employee and his spouse were covered under Unitel Communications, Inc.'s group health plan when he submitted his letter of resignation to the president of Unitel, on January 23, 1989. Two days later the employee was relieved of his duties, effective immediately. Unitel did not send a COBRA Election Notice. Sometime shortly after the coverage under the Unitel plan ended, the spouse incurred a significant amount of medical bills. She subsequently filed suit, seeking COBRA continuation coverage.

Among the defenses put forth by Unitel was the claim that termination was for gross misconduct. The court dismissed that argument, ruling there was a resignation. The court ruled in the spouse's favor in regard to the claims incurred. The lower court also awarded an ERISA penalty, attorney fees and costs.

In Unitel's appeal, the appellate court made note of the fact that turning in a letter of resignation with notice is not a Qualifying Event. The last day worked would be the date of the Qualifying Event, and the appeals court ruled that the lower court must determine when, and under what circumstances, the employee left Unitel, and whether a Qualifying Event occurred. The appellate court's contention was that, since this was now a case potentially involving involuntary termination instead of voluntary termination, the gross misconduct exception could apply to both.

The district court's second decision concurred that termination was not for gross misconduct and that a Qualifying Event had occurred on the date that he was fired. The court awarded the spouse **$23,916.45** for her uninsured medical bills, **$1,759.98** for costs, and **$59,800.90** for attorney fees. A fee of **$20** per day was also awarded for the period from March 9, 1989, to May 9, 1995, for a total fine of **$45,040** for COBRA notification violation. Unitel challenged the award of fees, maintaining that the district court abused its discretion in awarding the enhanced fees under COBRA and attorneys' fees. The court of appeals found that although the award was significant, the COBRA statute allows fines up to **$100** per day and that a **$20** per day fine was not an abuse of discretion on the part of the district court. The award of over **$130,000** was final.

Qualifying Events and Coverage Periods

Nero v. University Hospitals Management Services Organization

(United States District Court, Northern District of Ohio, 2006 U.S. Dist. LEXIS 76546 (N.D. Ohio 2006))

Terminated for poor performance, the medical assistant in this case sued her employer claiming that she had never received a COBRA election notice.

In this trial addressing COBRA notice penalties, the employer contended that it had sent the notice, offering evidence that it maintained good-faith procedures for sending out COBRA notices through its computer system. The employer also argued that the employee was not entitled to a COBRA notice because she was terminated for gross misconduct. (Before trial, the employer agreed to cover the employee's outstanding medical bills and to give her the opportunity to elect COBRA for an additional 18 months, leaving the employee's claim for $110 per day notice penalties as the only COBRA claim before the court.)

The court disagreed with the employer on both points. Holding that the mere existence of a computerized notice system was not enough to satisfy COBRA's notice requirements, the court noted that the employer did not retain a copy of the alleged notice and that the termination checklist in the employee's file had blanks next to the phrases "COBRA sent" and "send COBRA." Acknowledging that several courts have held that a good-faith attempt to comply with COBRA's notice requirements is sufficient, the court explained that the employer confused a "good faith attempt" to comply with "good faith procedures." The court also noted that the employer was unable to cite a single case holding that the mere existence of a computerized notice procedure was sufficient, especially where there was no evidence that the procedure was actually followed.

As to gross misconduct, the court held that there was no evidence of the required "intentional, wanton, willful, or deliberate" misconduct, although the court did characterize the case as a "close call" because of the potentially serious consequences of the employee's mistakes (for example, failing to complete a referral for a patient who was subsequently diagnosed with terminal cancer). In light of the failed COBRA notice, the court ordered the employer to pay over $7,000 in penalties to the employee (a $15 per day penalty for 468 days).

Once again, we have a case where the employer unsuccessfully tried to argue that merely having a computerized system in place for providing notices should be considered compliance with COBRA. You also need to show actual evidence that a particular notice was sent as well.

Qualifying Events and Coverage Periods

Teamsters v. Marathon Petroleum Company

(United States District Court for Minnesota, 2006 U.S. Dist. LEXIS 61933 (D. Minn. 2006))

When a union goes on strike, all employer actions are under a legal microscope. One employer recently learned that lesson the hard way in the area of continuing health benefits.

Four days after its union employees went on strike, Marathon Petroleum, the employer, sent a letter to striking employees that it would stop paying the employer portion of health plan premiums. Marathon later told employees that failure to pay the full cost of coverage by a certain date would mean termination of coverage. The icing on the cake was this: Marathon did not consider the loss of such coverage a COBRA qualifying event. Instead, it was cancellation of coverage due to "adjusted premiums."

Teamsters, the union representing the striking employees, quickly went to work, seeking a temporary restraining order (TRO) to stop Marathon's actions immediately in Minnesota District Court.

To prevail on the TRO, Teamsters had to show, among other things, a likelihood of success on the merits of the case. The court described this likelihood as "strong." Marathon did have the right to require employee payment of the entire premium. The Summary Plan Description (SPD) gave Marathon this right, and the collective bargaining agreement did not contradict the SPD. However, in so doing, Marathon had to offer COBRA. Clearly, this was a reduction in hours that caused a loss of coverage. The Court did not mention it, but the Final Treasury Regulations clearly state that "a strike or a lockout is a termination or reduction of hours that constitutes a qualifying event if the strike or lockout results in a loss of coverage ..."

Thus, the Court granted Teamsters' TRO motion and restrained Marathon from discontinuing coverage or failing to comply with COBRA. The Court also required Marathon to post $20,000 as security for the TRO.

Note that if Marathon had complied with COBRA, the Court agreed that it could have charged the full premium and if that premium was not paid timely, cancelled coverage. Marathon's COBRA failure, though, resulted in a TRO that broadly prohibited any discontinuation of coverage.

COBRA Extensions

Birkhead v. St. Anne's-Belfield

(United States District Court, Western District of Virginia, 2005 U.S. Dist. LEXIS 18836 (W.D. Vir. 2005))

In this case, a Virginia District Court refused to grant summary judgment to an employer that did not send an election notice because it received notice of the qualifying event from someone other than the covered employee.

After St. Anne's terminated her employment, the ex-employee elected COBRA coverage for her family. When her son ceased to be a dependent after turning age 25, both the insurance carrier (in writing) and the son's father (orally) notified the employer of the event within the required 60-day time frame. St. Anne's refused to send an election notice and extend COBRA coverage to the son. A literal reading of the COBRA statute, specifically 29 USC § 1166(a)(4)(B), seems to base this obligation on circumstances "where the covered employee notifies the administrator under paragraph (3)". St. Anne's argued it did not have to extend coverage because the ex-employee did not personally notify St. Anne's.

The Court disagreed. Paragraph (3) states: "each covered employee or qualified beneficiary is responsible for notifying the administrator." The Court concluded: "In promulgating this regulation, the Department of Labor evidently concluded that the language of § 1166(a)(4)(B) does not preclude various sources from providing notice to an administrator, and not just a covered employee acting personally." Thus, the case could continue, with no apparent reason left for the employer's failure to send the election notice.

The 2004 final COBRA regulations did not apply because the events occurred before their effective date. The issue is now clear. An employer who fails to provide reasonable procedures for qualified beneficiary notifications must accept any written or oral notification that comes to its attention if given to the person who usually handles benefits.

This case underscores the rationale that reasonable notification procedures should be in both the general notice and election notice. If some of your current employees have not received an updated general notice since the 2004 final COBRA regulations went into effect, you should consider a blanket mailing of that notice.

COBRA Extensions

Fallo v. Piccadilly Cafeterias, Inc.

(United States Court of Appeals for the Fifth Circuit, 141 F. 3d 580 (5th Cir. 1998))

An employee terminated his employment with Piccadilly Cafeterias (Piccadilly) in February 1992 and elected COBRA family coverage. The wife became pregnant in January 1993, was diabetic and experienced complications during her pregnancy. Her 18-month continuation coverage period was scheduled to end August 25, 1993. On August 23, 1993, a relative informed Piccadilly, by certified mail, that she was disabled by her pregnancy and that due to her disability, wished to extend her COBRA coverage for an additional 11 months. Piccadilly informed them that it would not extend coverage unless there was a determination of disability from the Social Security Administration (SSA) within 60 days of August 25, 1993. Piccadilly eventually denied the extension of coverage.

The ex-employee sued Piccadilly for violations under ERISA, as amended by COBRA, for not allowing the 11-month disability extension of continuation coverage. While the district court case was pending, the wife finally applied to the SSA for the determination of disability.

The district court ruled in favor of Piccadilly, finding that the spouse needed to initiate the SSA disability proceedings within the initial 18 months of COBRA coverage.

They appealed the district court's decision.

In November 1994, the SSA deemed the wife disabled for the period of time between March 1993 and October 1994.

Piccadilly continued to argue that the determination of disability did not fall within the guidelines listed in the COBRA statute. The ex-employee argued that they relied upon the guidelines that were in the Summary Plan Description (SPD). Piccadilly's vaguely worded SPD described the right to the disability extension as follows: *"the eighteen (18) month period may be extended for an extra eleven months (to twenty-nine [29] months if a person is determined to be disabled for Social Security disability purposes) and the Employer is notified of that determination within sixty (60) days."*

The Court of Appeals reversed the district court's decision finding that the ex-employee had complied with the requirements as they were listed in the SPD.

This case reinforces the importance of specific information in COBRA notices. If the ex-employee had COBRA notices that were accurate and understandable, this litigation may have been avoided by both parties. Reliance on an SPD for COBRA notification may be risky for employers. Although COBRA information is required in an SPD, separate COBRA notices are also required to provide documentation of compliance.

This case also demonstrates how incomplete information can hurt an employer's case. If the SPD had correctly stated that the disability must be incurred within the first 60 days of COBRA coverage and that Qualified Beneficiaries must provide notice of the disability determination within the first 18 months of COBRA, then the employer would have prevailed.

COBRA Coverage

Cox v. Transit Group Transportation

(United States District Court, Southern District of Ohio, 2005 U.S. Dist. LEXIS 21698 (S.D. Ohio 2005))

An employee recently sued his former employer for not providing COBRA coverage even though he never participated in the employer's health plan. This would seem to be an open-and-shut case in the employer's favor. However, it was not so easy.

In this case, an Ohio District Court examined an employer's reimbursement of employee COBRA premium payments for coverage offered by his prior employer. The employee paid each month's premium and then was reimbursed by the employer. When his employment with the new employer terminated, the employee argued that the employer should continue the practice.

The Court held that the reimbursements did not constitute an ERISA plan. The key fact was that the employee – not the employer – paid the premiums. Thus, the employer was not obligated to offer COBRA coverage. The employee did not have health coverage through the employer on the day before the qualifying event.

Such reimbursements are an increasingly common practice, especially for plans with extended waiting periods. However, employers often pay these COBRA premiums directly to the carriers. The direct payment of premiums for health insurance is an indicator that a plan has been established. Thus, employers who do this run the risk of having these arrangements construed to be ERISA plans, subject to COBRA. The better practice – as shown in this case – is to reimburse the employee's premium payments. The best approach, though, is simply to increase the employee's pay proportionately for the duration of the waiting period to avoid any argument that an employer is sponsoring – even indirectly – the employee's health coverage.

While the employer prevailed in this case, it hired two attorneys and endured 23 months of litigation to win the summary judgment.

COBRA Coverage

Ernisse v. L.L. & G. Inc.

(United States District Court, District of Kansas, Civil No. 07-2579-JAR (D. Kan. 2008))

A former employee complained about the failure to receive a COBRA Election Notice, among other things. There was just one problem: he did not participate in the health plan.

His argument was that he did participate in the company's long-term disability (LTD) plan. According to the ex-employee, the LTD plan was subject to COBRA because "disability payments mitigate one of the effects of disease, i.e., the loss of employment."

The court disagreed, awarding summary judgment to the employer, describing the argument as "not plausible on its face." Plans subject to COBRA must provide medical care, "amounts paid . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease."

While this was a relatively easy case, there are two points of instruction. First, employers should examine LTD benefits to see if there are ancillary benefits that are medical care. That part of the plan would be subject to COBRA. Second, employers should be knowledgeable about any state law requirements. Some states have continuation laws that apply to non-health-related insurance.

COBRA Coverage

Noel v. Laclede Gas Co.

(United States District Court, Eastern District of Missouri, Civil No. 4:08CV00817-FRB (E.D. Mo. 2009))

If you are talking about COBRA, you must be talking about employer-sponsored health benefits. That was the basic ruling in a recent case where a former employee tried to argue that the employer's continuation obligation extended to other welfare benefits subject to ERISA.

The individual worked for the employer some 20 years. During that time, he had life insurance through the employer in the amount of $60,000. He died about three months after his termination date while under the mistaken impression that his life insurance was being continued. His spouse sued under a variety of legal theories – including COBRA – that his life insurance should have continued after termination.

The employer won on the COBRA issue because COBRA does not extend to life insurance. However, the court did not dismiss the other counts of the complaint because there were allegations that the employer misrepresented what would happen to the life insurance policy upon termination.

COBRA Notices

Amin v. Flagstone Hospitality Management

(United States District Court, District of Minnesota, 2005 U.S. Dist. LEXIS 29022 (D. Minn. 2005))

Proving that election notices have been mailed is critical to COBRA compliance. A former employee's COBRA claim recently survived summary judgment because his employer omitted a single word from the mailing address.

In this case, a Minnesota District Court denied the employer's summary judgment motion because it could not prove that it sent an election notice to its former employee, who sued on many grounds based on his termination, including whistleblowing, discrimination and retaliation. All claims were dismissed, except the COBRA violation. Here's why.

Flagstone offered two primary pieces of evidence that it had sent the election notice:

- A copy of the election notice that was sent
- A mailing book that confirmed the notice was mailed

Two things were wrong. First, the mailing book did not contain a zip code (although the notice did). Second, and more significantly, neither the notice nor the mailing book contained the "North" indicator for the street. Thus, the ex-employee's claim could go to trial.

This case underscores the importance of maintaining accurate addresses. COBRA law requires that notices must be sent to the last known address. Failure to provide such notice can result in ERISA penalties of up to $110 per day.

COBRA Notices

Cepeda-Hernandez v. First Transit

(United States District Court, District of Puerto Rico, Civil No. 08-1002-JAG/CVR (D. P.R. 2009))

The two main COBRA notices are the General Notice (sent when participation begins) and the Election Notice (sent when a Qualifying Event occurs). In most cases, courts will focus primarily on failures related to the Election Notice. However, as one employer learned, the General Notice is important also.

This case presented an employer whose COBRA administrator was less than meticulous in its COBRA compliance. After an employee voluntarily resigned, he and his family sued his former employer for several COBRA violations, including failure to send both the General Notice and Election Notice.

The employer did not have a good excuse for failing to send the General Notice, arguing that it did not harm the Qualified Beneficiaries and the mistake was not done in bad faith. The employer had a slightly better defense on the Election Notice: it sent the notice to employee's last known address where the entire family resided. It sent other important mailings there as well, including the annual bonus payment that the employee acknowledged receiving. However, there was only one Election Notice in the envelope, which the court saw as significant.

The employer tried to have the case dismissed on summary judgment but did not fare too well. Despite the Single Notice Rule in the DOL Regulations (which allows a single notice to be sent to all Qualified Beneficiaries residing at the same address), the court held that the employer failed to show it had sent the Election Notice to the covered spouse or dependent children. And there was no proof of mailing for the General Notice. The case could proceed, putting the employer at risk for daily civil penalties, uncovered medical expenses (for a family of five), attorneys' fees, and related costs.

We don't see many cases related to failure to provide the General Notice, but penalties apply to those failures like they do for Election Notices. This case is a good reminder that the "no harm, no foul" defense is not an automatic win for an employer. The court took an uncommon view as to what is required to satisfy the Election Notice requirement. Presumably, in this case, the employer's administrator needed to send five notices. The DOL has allowed a single notice to be sent to all Qualified Beneficiaries who reside at the same household. The court made no reference to these widely accepted regulations.

COBRA Notices

Farrell v. AstraZeneca Pharmaceuticals

(United States District Court, District of Delaware, 2005 U.S. Dist. LEXIS 18866 (D. Del. 2005))

Employers and administrators alike often hear this excuse from individuals: "I never received the notice in the mail." An employer won by proving that it did indeed mail the notice. Here's how.

In this case, the Delaware District Court held that the employer's COBRA administrator proved it had sent an Election Notice to a terminated employee. The Court noted that AstraZeneca need not prove receipt but must simply show that it sent the notice to the last known mailing address of the former employee.

The COBRA administrator for AstraZeneca offered the following evidence:

- An affidavit from one of its employees as to the procedure for mailing notices
- A computer printout that showed that the notice was sent to the last known mailing address
- A computer printout that showed a follow-up notice – informing the individual that the election period had expired – was sent to the same address (the employee acknowledged receipt of this second notice)
- A third computer printout that showed the dates both notices were sent
- A report that showed the notice had not been returned from the post office as undeliverable

The Court summed up its decision this way: "[The employer] had no duty to ensure that Farrell received her notice. It was only required to make a good faith effort to notify her of her rights." Thus, the Court granted the employer's motion for summary judgment. This case is instructive on why established administrative procedures are critical to COBRA compliance.

COBRA Notices

Fiveash v. Commerce Lexington

(United States District Court, Eastern District of Kentucky, Civil No. 5:08-CV-28-JMH (E.D. Ky. 2009))

George Bernard Shaw once quipped, “Better never than late” but with COBRA continuation notices that is not the case. One employer, Commerce Lexington, Inc. (Commerce), discovered sending a COBRA Qualifying Event notice, even though it was late, was better than not at all. In the end, it didn’t keep them from paying penalties for the late notice, but there would have been much larger fees against them had they not sent the notice at all.

Commerce terminated an employee on November 28, 2007. She was covered under the medical and dental insurance policies. Commerce failed to mail a COBRA Qualifying Event notice to the employee. She filed suit on January 18, 2008, for failure to provide proper and timely notice of her continuation rights.

After the suit was filed, Commerce realized its oversight and sent a Qualifying Event notice. That notice had an incorrect termination date and a revised notice was sent which opened a new election period. The former employee tried to elect, however did so beyond the time frames and COBRA coverage was denied.

The former employee sought statutory penalties, attorney fees and costs related to her employer’s failure to provide her COBRA notice timely. She also claimed that Commerce breached its fiduciary duties under ERISA and retaliated against her in violation of ERISA when they failed to notify her of continuation coverage rights under COBRA.

The court determined that the employee did receive adequate notice (even though late) and therefore was not entitled to judgment as matter of law on her claims of lack of notice, breach of fiduciary duties under ERISA and retaliation in violation of ERISA. The court did determine that she was entitled to a ruling on her claim that Commerce’s notice to her was untimely.

Courts weigh various factors, including prejudice, injury and bad faith, when determining whether to assess a statutory penalty and the amount. Commerce argued they did not act in bad faith. The court determined that the award of statutory penalty was appropriate because there was no doubt that the notice was sent untimely. The notice was mailed approximately two weeks after the suit was filed and two months after the employee was terminated.

Commerce claimed that “fee awards are likely to have the greatest deterrent where deliberate misconduct is in the offing.” The court saw it differently, stating an award of attorney fees encourages employers and plan administrators to alter their behavior and deter other employers from providing a late COBRA continuation notice.

Since COBRA requirements are part of ERISA, failing to comply with COBRA can subject an employer to an ERISA penalty of up to $110 per day, per violation. In the end, the penalty for this employer stopped after the “first good faith attempt” to comply with COBRA’s election notice requirement. The court awarded statutory penalties for a total amount of $2,200 for the untimely notice. The motion for reasonable attorney fees and costs was granted in the amount of $10,366.49 and costs in the amount of $350.

This employer did the correct thing by sending the notice, even if late. However, it did not keep them from being penalized for their lack of compliance. Without exception, proper notification at the time of the Qualifying Event is the most important function of compliance. Employers are required to notify all Qualified Beneficiaries of their COBRA rights within 44 days of the date they learn of the event.

There are several penalties for failing to comply with COBRA. These penalties are levied by different entities. COBRA penalties can be imposed by the IRS, the DOL can bring a lawsuit against an employer and/or a Qualified Beneficiary can sue an employer for failure to comply with COBRA. Since COBRA penalties are very severe, an employer must make sure its COBRA compliance program is designed in accordance with all of COBRA rules and must update the program as legislative changes and litigation require.

COBRA Notices

Hamilton v. Mecca

(United States District Court for the Southern District of Georgia, Savannah Division, 930 F. Supp. 1540 (S.D. Ga. 1996))

In April 1993, a new employee of Mecca, Inc. completed the insurance application, which included a question about whether he had been treated in the last five years for any of a number of medical conditions, including heart disorder. The individual answered "No" and signed the application, which included a disclaimer stating the information provided was true to the best of the applicant's knowledge and that providing false information or a lack of information could retroactively render the insurance coverage void, holding the company and insurance carrier harmless for any medical bills. He did not reveal that he had been treated in 1990 for hypertension, ethanol abuse and supraventricular tachyarrhythmias, specifically atrial flutter. Family coverage began on July 7, 1993.

In April 1994, the employee was hospitalized and diagnosed with congestive heart failure. His doctor indicated that he was completely and permanently disabled. Unable to return to his work, his employment was terminated, effective April 18, 1994. Two days later, the wife asked why the prescription card had been turned down by a local pharmacy. She was referred to a representative of Provident Life, who explained that group coverage had been terminated, but an individual conversion policy was available. They took the conversion policy at a monthly cost of $275.31. They were unable to maintain the policy beyond July 31, 1994. They were never notified of their rights under COBRA.

The ex-employee medical expenses prior to his death totaled $78,859.09. Prior to the lawsuit, some providers had reduced or written off the bills, and others were covered by the conversion policy. At the time the court examined the bills, the outstanding total was $19,059.32. The widow brought this action, alleging violations of COBRA and ERISA, seeking payment of unpaid claims. She **also sought $11,100 in statutory penalties** under ERISA for Mecca's failure to provide Summary Plan Booklet in a timely manner.

The court determined that **Mecca was liable in the amount of $24,059.32** (the amount of unpaid medical claims plus $5,000 in ERISA penalties). The court adopted the position that given the option COBRA would have been elected.

Mecca attempted to deny responsibility for these claims by asserting that misrepresention of facts on the insurance application, the company was not liable for his claims. The court stated that risk of these claims had been Provident's, which decided to settle out of court. The court also stated that the phrase, "to the best of my knowledge," shifted focus from truth and falsity to whether or not the employee believed his statements to be true.

Mecca also claimed that its lack of knowledge about COBRA should free the company of any related penalties. It was shown that in May 1993, Mecca did in fact send a COBRA notice to another employee. In the testimony, Mecca referred frequently to the advice given to the company by its agent and Provident employees. Mecca claimed that no COBRA notice was sent because the company was never instructed by its agent or Provident to do so. This argument was futile.

COBRA Notices

Holford v. Exhibit Design Consultants

(United States District Court, Western District of Michigan, 218 F. Supp. 2d 901 (W.D. Mich. 2002))

When Exhibit Design Consultants (EDC) terminated the employment of one employee, the employer did not send her a COBRA Election Notice. EDC's defense was that the employee handbook, which she had previously received, contained sufficient information on COBRA to apprise her of her COBRA rights. EDC further argued that its failure to provide an Election Notice was an honest error, based on a misinterpretation of the existing statute.

The Court disagreed. It not only held that EDC was wrong but also that EDC had acted in bad faith in failing to provide her an Election Notice. The Court summed up its view of EDC's defense as *"either blatant disregard for the law or extreme recklessness not appropriate to a modern business nor the realities of modern commercial life."*

As a result of not receiving the Election Notice, the ex-employee suffered some harm because she had to forego certain medical treatments that she needed.

Thus, the Court had little trouble in issuing a daily fine of $55 for 502 days, a total of $27,610 in fines payable to the ex-employee. EDC was also ordered to pay attorney fees in the amount of $23,730.

COBRA Notices

Joiner v. Dreisenga & Associates

(United States District Court, Western District of Michigan, No. 1:04-CV-437 (W.D. Mich. 2005))

Special deals sometimes happen when employees retire from a company. An employer discovered that its failure to follow COBRA regulations can have expensive results.

In this case, the District Court for Western Michigan ruled that an employer satisfied its COBRA notice duties by providing a retiree oral notice of his health benefit continuation rights. That was the good news for the employer. The bad news was that the employer must now go to trial and prove when that coverage was supposed to end because there was a dispute on that point.

A retiree from Dreisenga & Associates accepted a consultant arrangement whereby his former employer would continue his health coverage. He never received a written COBRA election notice. A discussion with the president of Dreisenga was held to be sufficient because it allowed him to "make an informed decision." Thus, the employer was not penalized for failing to provide an election notice.

However, it was unclear as to how long this coverage would continue. The retiree continued to enjoy coverage for more than five years after he retired and beyond the age of 65. Dreisenga finally terminated coverage when he completed a form that stated he had prostate cancer. At that time, Dreisenga said coverage was supposed to have ended at age 65; the retiree said it was supposed to be indefinite, as long as he paid his premiums.

In the final analysis, the Court granted Dreisenga's motion for summary judgment on the issue of proper notification, and denied its motion on the issue of when the coverage was supposed to terminate and whether it had been terminated because of a pre-existing condition (i.e., the prostate cancer).

A proper COBRA election notice would have listed the events under which coverage is terminated. One reason is entitlement to Medicare, which typically occurs when one turns 65 and enrolls in Medicare. While the record was unclear as to whether Medicare enrollment occurred when he turned 65 (most people do), if he had done so and if Dreisenga had provided a written election notice, Dreisenga would have been well within its right to terminate coverage earlier.

COBRA Notices

Lane v. Compass Group USA

(United States District Court, District of Connecicut, 2005 U.S. Dist. LEXIS 25119 (D. Conn. 2005))

Determining when employment terminates after a leave of absence can be challenging. For one Connecticut employer, it will probably prove costly as well.

In this case, a Connecticut District Court refused to grant summary judgment to an employer that communicated two separate termination dates to a former employee, who never elected COBRA coverage. As a result, the case proceeded to trial with the prospects for victory looking dismal for the employer, Compass Group.

How did this happen? After the employee suffered a workers' compensation injury in March, she took time off until early May. She last worked on May 22. In early August, Compass Group sent a COBRA election notice with a May 22 qualifying event date. This meant that Compass Group was late in sending the election notice. Compass Group later argued that the real termination date was August 3, thus making the election notice timely. According to Compass Group, the May 22 notation was due to "carelessness having no legal repercussions."

The Court disagreed. The Court noted that the insurance carrier, CIGNA, had later requested reimbursement for claims it had paid after May 22. The ex-employee did not elect coverage because she was under the impression she was still employed, having never been notified otherwise until she received the election notice.

The bottom line is this: Compass Group's confusion over the termination date – in communications to both CIGNA and the employee – could result in ERISA daily penalties, attorney fees and payment of all related medical claims for an employee who worked less than nine months and earned $8 per hour.

Employers sometimes overlook COBRA compliance in managing leaves of absence. While it is not apparent in this case, a leave of absence can sometimes trigger a qualifying event (reduction of hours) if it causes a loss of coverage per the terms of the group health plan. It is imperative that employers communicate timely and accurately when a qualifying event occurs.

COBRA Notices

Linden v. Harding Tube v. ADP COBRA Services, Inc.

(United States District Court, Eastern District of Michigan, 2005 U.S. Dist. LEXIS 21574 (E.D. Mich. 2005))

An employer and its COBRA administrator recently received an expensive reminder that notice time frames are inflexible.

In this case, a Michigan District Court awarded almost $63,000 to a participant to cover claims that were unpaid due to an untimely election notice.

Harding Tube terminated one employee's employment on June 15, 2001. In late July, he was admitted to a hospital for about two months. In late August, Harding Tube became aware of its oversight and instructed ADP, its COBRA administrator, to send the Election Notice. ADP did not send the Election Notice until November 7, 2001.

Huron Valley Hospital, the hospital that treated the ex-employee, authorized MedAssist to coordinate the COBRA election and handle COBRA payments. MedAssist sent ADP payment for three months of coverage, but there was some dispute as to whether ADP ever forwarded the premium payment to Harding Tube. Thus, no insurance coverage existed for those months to cover claims that totaled $62,923.45.

The Court ruled that the personal representative of the estate of the now deceased individual was entitled to reimbursement for the claims. The court decided that neither Harding Tube nor ADP was entitled to judgement against each other. Harding Tube was ordered to pay $62,923.45 in claims.

COBRA regulations require election notices to be sent within 44 days. The outcome could have been worse. The court could have assessed a $110 daily penalty for the failure to send a timely notice. For employers, this case underscores the importance of monitoring the outsourced COBRA relationship and ensuring that each party is fulfilling its contracted duties.

COBRA Notices

Lloyd v. Harrington Benefit Services

(United States District Court, Northern District of Mississippi, Civil No.1:05CV28-JAD (N.D. Miss. 2006))

An increasingly common practice for employers with benefit plan waiting periods is to help pay for the COBRA coverage of their new hires. This practice does not always guarantee continuous coverage, as one employee recently learned.

The individual resigned from Westlake Chemical in May to go to work for Cubicon. Harrington Benefit Services (HBS) administered Westlake's plan, including COBRA. Cubicon had a 60-day waiting period but agreed to pay for the family's COBRA coverage during that time. The new employee submitted the COBRA paperwork to his Cubicon supervisor and assumed he would take care of all the details.

He assumed wrong.

Cubicon never sent the election form to HBS, and HBS later sent the family a notice in August, stating that no COBRA coverage had been elected. The family denied receiving the letter, and when they submitted claims during that time frame, HBS continued to pay for them, even after the employee elected Cubicon coverage. All told, the incorrectly paid claims totaled almost $15,000.

In March of the next year, Westlake rehired the individual and when he re-enrolled, HBS discovered its payment error. HBS successfully recovered about $10,000 of the claims from medical providers. This resulted in those providers seeking reimbursement from the family which prompted them to sue HBS.

The employee made two basic arguments:

- HBS' confirmation of coverage constituted a material misrepresentation of the facts; as a result, HBS had no right to seek reimbursement when it later detected the error.
- HBS effectively waived its right to deny coverage when it paid for the medical claims.

The Court disagreed with both arguments. A plan has the right to correct its coverage mistakes to the extent possible.

This case emphasizes the importance of being vigilant about terminations of coverage. While the employer's plan prevailed against the employees, there would have been no lawsuit if coverage had been terminated promptly and appropriately. This case also underscores the rule that COBRA elections are ultimately the sole responsibility of each qualified beneficiary.

COBRA Notices

Meadows v. Cagle's, Inc.

(United States Court of Appeals for the Eleventh Circuit, 954 F. 2d. 686 (11th Cir. 1992))

In the autumn of 1988, an employee of Cagle's suffered a series of strokes that left her completely disabled. Her employment was finally terminated on August 1, 1989.

Three days later, Cagle's sent a COBRA notice. After reviewing the notice, her husband called the plan administrator for more information and was informed that disabled employees were entitled to free coverage for 12 months following a termination of employment. Thereafter, she could begin COBRA coverage. The husband did not elect COBRA coverage at that time. He indicated that his understanding was that the lifetime cap on medical expenses applied to his wife's illness without having to elect COBRA for her.

On July 23, 1990, just seven days before the expiration of the 12-month extended coverage period, the husband was appointed legal guardian for his wife and subsequently tried to elect COBRA for her. The plan rejected the election as being late because it was made more than 60 days after receipt of the notice. He sued Cagle's, seeking COBRA coverage for his wife.

He argued that the plan administrator had advised him that the plan's lifetime maximum benefit applied to his wife without the need for a COBRA election. The court rejected this argument, stating that the plan document was clear on this point, and oral statements could not override it.

The court next focused on the fact that he misunderstood his options. It noted that he never received a copy of the SPD. **The court quoted a section of ERISA, which clearly points out that the SPD, and any modifications or changes, must be provided to each participant and each beneficiary receiving benefits under the plan**. Since Cagle's did not provide any of this, the court ruled that the COBRA notice requirements were not met, and the election period never began. The court ruled that the very late COBRA election must be honored.

COBRA Notices

Phillips v. Riverside, Inc.

(United States District Court for the Eastern District of Arkansas, Eastern Division, 796 F. Supp. 403 (E.D. Ark. 1992))

Riverside, Inc. provided a three-month severance package that included salary and health insurance benefits when it fired its president on October 6, 1989. Thirteen months later, he had a heart attack and incurred approximately $38,000 in medical expenses. He did not have insurance. Four months later, he attempted to elect COBRA through Riverside and its parent company, Apartment House Builders (AHB). His election was denied, and a lawsuit commenced over the failure to provide an Election Notice.

Testimony revealed that Riverside *"made no notations and kept no files, records, copies, or any other information showing that COBRA letters were sent out."* The court ruled that without documentation of a notice having been mailed, the court would have to rely on the individual's claim that he did not receive the notice. The court ruled that any personal COBRA knowledge and awareness did not relieve Riverside from its duty to provide notice.

The judge then looked at the SPD and found the portion on COBRA to be *"confusing at best."* Next, looking at the actual COBRA notice that would have been sent, the court ruled that he *"would still prevail ... After careful examination of the 'COBRA letter' used by AHB ... the Court finds that it would not adequately have informed Mr. Phillips of his rights."* The judge wrote, "*This letter, assuming it was received, did not contain adequate information about the coverage Mr. Phillips was entitled to receive, and therefore he could not have made an informed and intelligent decision whether to elect continuation of coverage."*

The court ordered Riverside and AHB to pay $38,597.08 in claims, minus applicable deductibles and premium fees. It also assessed an ERISA penalty against Riverside in the amount of $3,210 and ordered Riverside to pay attorney fees.

COBRA Notices

Shephard v. O'Quinn

(United States District Court, Eastern District of Tennessee, 2006 U.S. Dist. LEXIS 24252 (E.D. Tenn. 2006))

Incompetent or fraudulent, take your pick. That is how a District Court recently described an employer's conduct in failing to offer COBRA coverage.

Four days before scheduled knee surgery, an employee learned that his employer – O'Quinn Enterprises – terminated his employment. The owner described the termination as a temporary layoff and said that insurance coverage would be paid for one additional month and for the first two months of COBRA thereafter.

These assurances did not ring true. First, O'Quinn Enterprises was not forwarding premium payments to the insurance carrier, resulting in a lapse of coverage. Second, the ex-employee never received a COBRA election notice.

The resulting unpaid medical bills had the predictable result: collection activities, stress, frustration and a worsening credit score. The resulting opinion from the Court also had a predictable result: a slam-dunk victory against the employer.

The Court awarded $90,860 in statutory penalties at the $110 per day maximum for not providing an election notice. Attorney fees were another $16,909, and medical claims totaled $12,200. Interestingly, rates of $225 per hour for attorney time and $95 per hour for paralegal time were deemed to be reasonable by the Court.

The Court stated that it wanted the result in this case to "act as a deterrent and caution to other employers who may purport to provide a group health insurance benefit to their employees."

This case is a good reminder about the importance of COBRA compliance and how outsourcing COBRA administration can eliminate these burdens. Former employees have several remedies at their disposal to right any COBRA wrongs by employers.

COBRA Notices

Sluka v. Landau Uniforms

(United States District Court, Western District of New Jersey, 2005 U.S. Dist. LEXIS 17227 (D. N.J. 2005))

An employer recently learned a costly lesson about the importance of providing timely election notices.

In this case, a New Jersey District Court assessed a $20 per day penalty and attorney's fees against an employer that neglected to send an election notice to a terminated employee until almost 14 months after the qualifying event. The employer, Landau Uniforms, put forth this defense: there was no evidence of malice or bad faith in its failure to provide the notice. It was simply a case of "honest error."

It took Landau 415 days to send an Election Notice. The Court considered the fact that the omission did appear to be an honest error and acknowledged that Landau was now offering health coverage retroactive to the loss of coverage date, apparently at its own cost. Proof of injury is not required in assessing a penalty.

Nevertheless, the Court used its discretion in assessing the daily penalty, totaling $8,300, and award of attorney fees, likely more than the penalty. It could have been worse: the maximum penalty is $110 per day.

The lesson is frustratingly simple: no matter what the reason, no matter what an employer does to make things right, many courts will still assess penalties for failure to provide timely COBRA notices.

COBRA Notices

Torres-Negron v. Ramallo Bros.

(United States District Court, Puerto Rico, 203 F. Supp. 2d 120 (D.P.R. 2002))

The Human Resources Director for Ramallo Brothers was there for only eight months but will no doubt be long remembered. Her employer had a group health plan that was subject to COBRA. On several occasions during her tenure, she tried to explain to her employer that it was obligated to notify all former employees of their COBRA rights. Her explanations fell on deaf ears.

When she was terminated, Ramallo Brothers did the expected by failing to provide her with the required COBRA election notice. Shortly after she filed a COBRA lawsuit about 10 months later, Ramallo Brothers sent an Election Notice on June 25, 1999. The employer tried to argue that, based on her knowledge of COBRA, that she did not need a COBRA notice.

The Court held that a former employee’s knowledge of COBRA is irrelevant. The Court assessed a daily penalty of $45 each for the ex-employee and her minor son, a total of $24,390, in addition to an award of attorney fees and costs.

COBRA Notices

Tufano v. Riegel Transportation

(United States District Court, Eastern District of New York, Civil No. CV 03-0977 (JO) (E.D. NY 2006))

Here is yet another case in which a former employee did not elect COBRA coverage, suffered a serious medical setback, and later claimed to never receive a COBRA election notice. The key issue was whether the employer could prove it sent the notice. Like many other employers who handle their own COBRA administration, Riegel Transportation (RTI) failed to do so.

When his employment terminated in June, the individual claimed no one made him aware of his COBRA rights by mail or otherwise. He needed gall bladder surgery in December and received a pre-authorization letter from RTI's group health plan carrier, GHI. The letter contained the standard disclaimer: "This authorization is NOT a guarantee of coverage." Nevertheless, relying on the letter, he underwent surgery, and GHI at first paid claims, then later canceled coverage retroactively to October 1. GHI offered COBRA coverage in January, but he failed to elect it. Neither GHI nor RTI could recall sending a COBRA General Notice during employment, which COBRA requires.

RTI was responsible for sending COBRA Election Notices. Its mailing process was as follows:

- Inputting personalized information in a form letter
- Printing two copies: one for mailing signed on company letterhead, the other unsigned on plain paper for a COBRA file
- Putting the mailed copy in an envelope, then in a U.S. mailbox

RTI had the unsigned file copy of the COBRA notice for the individual. The RTI employee responsible for mailing the notice could not recall sending it. Also, another former employee testified that he never received a COBRA notice, apparently due to a change of address of which he never notified RTI.

The court held that RTI did not prove it had sent the notice. There was no direct evidence it was sent, and RTI lacked any written procedures. The unsigned copy was insufficient proof.

He was awarded the value of his medical claims: $10,232.90. The parties had stipulated at the start of the trial that this was the extent of damages. The outcome could have been much worse. Because of the damages stipulation, the court did not impose a daily penalty on RTI for the failure to provide the election notice and the general notice.

This case should remind employers who administer COBRA of the importance of having written COBRA notice mailing procedures and following them precisely. For irrefutable evidence that a notice was sent, they should consider adopting a proof of mail system because as this case demonstrates, memories can fail and procedures are not always followed.

COBRA Notices

Turner v. Adidas Promotional Retail Operations, Inc.

(United States District Court, Northern District of Illinois, Civil No. 07-C-2511 (N.D. Ill. 2009))

An employee continually took time off after a workplace injury. Ultimately, his employer terminated his employment when he did not return to work, and his doctor did not provide any type of note documenting his need to extend the leave. He sued under FMLA, for interference with his rights, and COBRA, for failure to provide an Election Notice.

The Court dismissed all counts. On the FMLA claim, the court held that he knew of the need to provide documentation and did not provide it. While the employer did not provide any specific records, it appeared on the record that the ex-employee had clearly exceeded 12 weeks of leave anyway. On the COBRA claim, the court said that the employer demonstrated a good faith effort by sending the notice to the ex-employee's last known address. Admittedly, he said that he did not regularly check his mail or live at the mailing address on record.

This is yet another case where the employer merely showed it had mailed the notice based on "the most recent information available to the plan." Even so, the employer could have avoided a lawsuit by confirming the mailing address upon termination of employment.

COBRA Notices

Washicheck v. The Ultimate

(United States District Court, Western District of Wisconsin, 2005 U.S. Dist. LEXIS 27311 (W.D. Wisc. 2005))

A premium payment defect in an employer's election notice prevented the employer from terminating COBRA coverage for untimely payment.

In this case, a Wisconsin District Court held that when a COBRA participant tried to submit a premium payment more than six weeks after the due date, the employer was not necessarily able to terminate coverage. The reason was simple: a poorly drafted COBRA election notice.

When one employee resigned, she elected COBRA and continued a practice of submitting premium payments after the end of the typical 30-day grace period. For example, she submitted her July payment on August 13. The Ultimate, her former employer, accepted such payments and continued coverage until she underwent surgery in early September. On October 14, when she tried to make her September payment, that payment was rejected, and coverage was terminated retroactive to August 31. By then, there was more than $22,000 in claims.

Terminating COBRA coverage for non-payment or late payment of premiums is a common practice. This should have been a slam-dunk victory for the employer. However, the Election Notice contained the following verbiage: "All subsequent premium payments must be received by the end of the coverage month." The court held that this language could be construed to set the payment due date at the end of the month, not the first of the month, with a 30-day grace period following thereafter. As a result, Ultimate was not entitled to summary judgment, and the case could proceed to trial.

This case should prompt employers who use their own notices to review the payment terms in their election notices. Check to see if you are inadvertently creating a longer grace period than is required by law. Another lesson from this case is the importance of following your COBRA procedures consistently. Making even one exception can create a legally binding precedent.

Election Periods and Time Frames

Branch v. G. Bernd Company

(United States District Court for the Middle District of Georgia, Macon Division, 955 F. 2nd 1574 (11th Cir. 1992))

One employee worked for G. Bernd Company and terminated his employment on less than friendly terms. A G. Bernd Company employee attempted unsuccessfully to advise him of his COBRA rights over the telephone. He was scheduled to come into the G. Bernd Company office to complete paperwork on COBRA. When he came in, the employee was unavailable, and someone else handled the paperwork. The ex-employee signed a waiver of COBRA coverage for dependents, when no dependents were covered under the plan.

Ten days later, he was shot several times and admitted to the Medical Center of Central Georgia. He incurred approximately $98,000 in claims and then died as a result of his injuries. When no family could be located, the hospital administrator was appointed as administrator of the estate and attempted to elect COBRA coverage on behalf of the estate. The G. Bernd Company denied the request because it was made outside the 60-day election period.

The court found in favor of the hospital, stating that the employer never properly described the election period. The court found no reference to the 60-day election period in either the COBRA notice or the company's SPD. Since the election period was never listed, the court ruled that a COBRA election would be valid if made before the end of the 18-month continuation period.

The court went on to note, even if a 60-day election **had** been specified in the notice, the "**election period would have been suspended from the time Bell became incapacitated until Branch was appointed administrator of the estate."** Due to a provision in the G. Bernd Company insurance contract, the carrier was ordered to pay the $98,000.

Election Periods and Time Frames

Lifecare Hospitals v. Health Plus of Louisiana v. Custom-Bilt Cabinet & Supply

(United States Court of Appeals for the Fifth Circuit, 2005 U.S. App. LEXIS 14640 (5th Cir. 2005))

In April 2000, Custom-Bilt, the employer, and Health Plus entered into an agreement whereby Custom-Bilt established a group health plan for which Health Plus was the carrier. On July 16, 2001, a Custom-Bilt employee became seriously ill and was hospitalized due to Guillain-Barre Syndrome, a life-threatening disorder in which the body's immune system attacks part of the peripheral nervous system. At one point he was put on a breathing machine. He stayed at Lifecare Hospital from July 31, 2001, to December 12, 2001.

In the meantime, Custom-Bilt decided to terminate employment. On July 24, 2001, a Custom-Bilt employee gave his wife a COBRA election form. On August 13, 2001, Custom-Bilt officially terminated employment and notified Health Plus, which terminated coverage as of August 31, 2001.

In November 2001, Lifecare contacted Custom-Bilt about health coverage, and on December 17, 2001, the ex-employee mailed his completed election form to Health Plus in addition to his retroactive premiums. Health Plus denied all claims after August 31, 2001. **Over $250,000 in claims were at stake.**

Neither Custom-Bilt's SPD nor the election form indicated that the election period was 60 days long. The COBRA statute defines an election period as "*at least* 60 days' duration." The Court held that election was timely and that Health Plus was liable for the medical bills. Health Plus had argued it was entitled to indemnification from Custom-Bilt – which would have required Custom-Bilt to pay the medical bills – but the Court disagreed.

This case underscores the significance of proper notices and SPDs in administering COBRA. While the employer did not pay the large medical claim this time, it incurred considerable legal expenses at the trial and appellate levels to avoid liability. And when its insurance comes up for renewal, it can likely expect a considerable rate increase.

COBRA Ending Events

Chaganti v. Sun Microsystems & Ceridian

(Ninth Circuit Court of Appeals, 2006 WL 3431753 (9^{th} Cir. 2006)

All three parties involved in this case – the employee, employer and COBRA administrator – learned that when it comes to COBRA administration, the proverbial saying is true: “Time waits for no one.”

When the employee was terminated by Sun Microsystems in November 2001, Sun provided Ceridian with the wrong address for sending the COBRA election notice. Thus, he never received the notice. In fact, it was not until May 2002 that he heard that Ceridian was administering COBRA for Sun. After contacting Ceridian and receiving an election notice, he elected and paid for his COBRA coverage through June 2002.

However, coverage for July 2002 was problematic. The Qualified Beneficiary did not mail the check for July until August 3 – which was past the end of the 30-day grace period for premium payments. Ceridian had sent a total of three reminders that his July payment was due on July 31: invoices sent in June and July and special notice sent on July 23. On August 7, Ceridian sent a termination notice.

The Qualified Beneficiary offered three reasons why coverage should not have been terminated. First, he claimed that Ceridian should not have applied his initial payment retroactively to his qualifying event date but prospectively from his election date. Second, he argued he should have had more time to make his retroactive payments because of the delay in receiving the election notice. Third and finally, he argued that he never received a proof of insurance card; thus, coverage termination was inappropriate.

On the delay in receiving the COBRA Election Notice, the District Court awarded him $2,292 (or $12 per day for the 191 days of delay). It could have been worse. In its discretion, the District Court could have awarded up to $110 per day ($21,010).

On the delay in receiving the July premium payment, the District Court granted summary judgment to Ceridian. The three excuses were contradicted by existing COBRA law and regulations. The 30-day premium payment grace period stands on its own and is not conditioned on other factors.

COBRA Ending Events

Geissal v. Moore Medical Corp.

US Supreme Court 118 S. Ct. 1869 (1998)

An employee of Moore Medical Corporation (Moore) was covered under Moore's group health plan and his wife's plan through her employer, Trans World Airlines (TWA). Upon termination, he was notified of his COBRA rights. He elected COBRA and began paying premiums. After Moore had collected premiums for six months, the company informed him that it had made a mistake. Moore said that he was not eligible for COBRA because of his other coverage through the TWA plan. A lawsuit was the result.

In district court, the judge found for Moore. The judge held that an employee with coverage under another group health plan as of the COBRA election date is ineligible for COBRA coverage.

The court also indicated that there was not a *"significant gap"* between the coverages offered by Moore and TWA. A *"significant gap"* means that the Qualified Beneficiary would have been left with major out-of-pocket medical expenses without having had both the COBRA coverage and the coverage under another group health plan. Prior to the district court's decision, the ex-employee died, and his wife continued the litigation. She appealed the lower court's ruling, and the Eighth Circuit Court of Appeals affirmed the decision of the district court. She then appealed to the Supreme Court of the United States.

The Supreme Court agreed to hear the case, *"to resolve a conflict among the Circuits on whether an employer may deny COBRA continuation coverage under its health plan to an otherwise eligible beneficiary covered under another group health plan at the time he elects coverage under COBRA."*

The *"first becomes"* language was the primary area of consideration for the court. The nine justices reached a unanimous decision in favor of Geissal. The court decided that coverage already in existence at the time someone elects COBRA does not cause that person to lose eligibility for coverage under COBRA. Justice Souter, writing the opinion for the high court, stated, *"So far as this case is concerned, what is crucial is that (the statute) does not speak in terms of 'coverage' that might exist or continue; it speaks in terms of an event, the event of 'becom(ing) covered.' This event is significant only if it 'first' occurs at a time 'after the date of election."*

The other item that many hoped would also be resolved in the decision was the parallel issue of Medicare entitlement prior to the date of election. The court stated this: *"…the same comparison would have to be made when the beneficiary was covered under Medicare, which is treated like a separate group plan for present purposes."*

Thus, the existence of other group medical or Medicare coverage prior to COBRA election does not justify an employer's refusal to offer COBRA coverage.

COBRA Premiums

Andre v. Salem Technical Services and Stepan Company

(United States District Court for the Northern District of Illinois, Eastern Division, 797 F. Supp 1416 (N.D. III 1992)

When an employee went to work for Salem Technical Services, he was informed in writing that:

1. His coverage under the group health plan would be effective on 02/02/91 (exactly one month from his hire date).

2. If he wished to participate in the insurance program, he needed to fill out information on a Prudential Insurance Request, and an insurance package would be forwarded to him.

3. He would be automatically eligible for the plan. If he did not wish to participate, he would have to reject coverage by completing a rejection of coverage form.

On January 14, 1991, he elected COBRA through his former employer, Stepan Company, and paid for coverage through January 31. He did not pay for February's coverage. From February 17 to 24, he took week-long bereavement leave to attend his mother's funeral. On February 26, he suffered a heart attack and spent the next six days in the hospital. At the time of his hospitalization, he believed he was covered under Salem's plan.

On March 4, 1991, he learned that because he had not completed a form that had been mailed to him by Prudential, he never became covered under Salem's plan. That same day, he contacted Stepan Company to see if it was possible to reinstate COBRA coverage. Stepan company indicated it would look into the matter and get back to him. On March 12, not having heard from them, he sent a check for the premium to Stepan Company. On March 22, Stepan Company returned the check and refused to re-enroll him in the plan.

In regard to the lawsuit against Stepan Company, the judge ruled that the inquiry on March 4 was timely enough to allow reinstatement of COBRA coverage. The court found that it was reasonable to assume he would have tendered a check on March 4, had Stepan Company informed him that he could have done so. The question for the court then became whether payment on March 4 would have been timely enough to allow reinstatement of COBRA. The grace period for coverage normally would have ended on Saturday, March 2 (30 days from the beginning of the coverage period and, in this case, the date due). Invoking Rule 6(a) of the Federal Rules of Civil Procedure (regarding when an affected period ends on a Saturday, Sunday or legal holiday, and the necessity to carry over that period to the next day, which is not one of the aforementioned days), the Court ruled that payment on Monday, March 4 would have been timely and ordered Stepan Company to reinstate the coverage.

COBRA Premiums

Draper v. Baker Hughes, Inc.

(United States District Court for the Eastern District of California, 892 F. Supp. 1287 (ED. Cal. 1995))

Knowing that his employment with Baker Hughes, Inc. (BHI) would be terminating soon, one proactive employee attempted to elect COBRA in December 1991. He submitted a check for $250.42, the amount of one month's premium. BHI declined payment and informed him that he would have to wait until a Qualifying Event took place before he could elect and pay for COBRA coverage. Annual confirmation statements created by BHI and sent to employees showed the amount of BHI's monthly contribution ($188.51). He was contributing $57 a month toward his and his family's coverage and believed that the total contributions to his health insurance amounted to $241.51. Since COBRA allows the employer to charge 102 percent of the applicable rate, he calculated the COBRA premium amount to be $250.42. Termination occurred on February 8, 1992. On February 24, 1992, BHI's third party COBRA administrator, Johnson & Higgins/KVI, notified him of his COBRA rights and informed him that the cost for family medical and dental coverage was $786.96. In May 1992, when he could no longer afford the family rate, he cut back to single coverage and paid $416.63 a month.

At the time, BHI employed over 11,000 people and negotiated a rate for a fully insured group health plan for all employees with Provident Life & Accident Insurance Company (Provident) annually. The case hinged on the fact that the rate was figured for BHI **as a whole** without regard to the risk experiences of its individual divisions. BHI, not each separate division, paid Provident a monthly premium. In one of the low experience divisions, a Qualified Beneficiary was charged a COBRA rate of only $96.33. In the ex-employee's division, identical coverage cost $317.58.

One of the significant findings of the court dealt with its decision that BHI, not Baker Hughes Corporate, was the "employer." In pertinent parts, the court quoted from the Internal Revenue Code, *"...all employees of all corporations, which are members of a controlled group of corporations...shall be treated as employed by a single employer'....A 'controlled group of corporations' includes a parent-subsidiary, that is, 'one or more chains of corporations connected through stock ownership with a common parent.'"* Furthermore, the court found BHI to be the "plan sponsor" and "plan administrator."

While all this had been addressed in other courts, the ruling on "applicable premium" was new ground. The court noted that the applicable premium is defined as the cost to the plan, not the cost to the employer. The court ruled that in this case the cost to the plan was, in fact, the cost of insuring **all** of BHI's employees, **not the cost of insuring a subset of BHI employees**, such as Baker Hughes Corporate. BHI argued that since it offered COBRA Qualified Beneficiaries of other divisions lower rates when their division was being rebilled at a lower rate, it should be able to pass along the increased cost when applicable, as in Draper's case.

The court found that though BHI had a legitimate business interest in rebilling its divisions based on each division's claim experiences, it was not permissible to break the premiums out that way for purposes of COBRA. The court ruled that the ex-employee had calculated his COBRA premium correctly and should have been charged only $250.42 for his and his family's COBRA coverage. Accordingly, the court awarded him the difference times 18 months ($9,657.72), plus interest, legal fees and costs.

COBRA Premiums

Lincoln General Hospital v. Blue Cross/Blue Shield of Nebraska

(United States Court of Appeals for the Eighth Circuit 963 F. 2d. 1136 (8th Cir. 1992))

On February 1, 1988, an employee was injured in a serious automobile accident and was admitted to Lincoln General Hospital (LGH). She developed a blood clot in her leg and eventually lapsed into a coma. On February 3 her ex-husband notified Lincoln Public Schools that they had divorced on December 9, 1987. He elected COBRA on her behalf and paid one month's premium for her. Blue Cross of Nebraska opened a COBRA continuation file on her. On February 4 a legal guardian was appointed. On February 15 Blue Cross mailed an invoice for February and March premiums. Also on February 15 LGH called Blue Cross to verify insurance coverage. They were informed that she was covered.

A $93,930 interim bill was sent to Blue Cross on March 8. On March 10 Blue Cross approved a two week rehabilitation period at Madonna Nursing Home. Also on March 10 the employee was discharged from LGH.

On April 7, 1988, LGH submitted a final bill to Blue Cross for $111,217.58. Blue Cross denied payment on the grounds that coverage had been terminated retroactively to January 31, 1988, due to nonpayment of the premium. The bills submitted by Madonna Nursing Home were paid by Blue Cross, however.

The employee was not in a position to pay the huge bill, and assigned all her rights to LGH. In its subsequent lawsuit, Lincoln General Hospital claimed that Blue Cross:

1. Failed to provide continuation coverage

2. Breached its fiduciary duty

3. Waived its right to apply the first premium retroactively

The judge disagreed with all three claims. While conceding that the retroactive premium issue was cloudy, the judge held that the invoice for February and March premiums gave ample notice that the first premium had been applied retroactively.

An additional claim by LGH was that Blue Cross arbitrarily and capriciously denied the claims submitted by LGH, yet paid subsequent claims from Madonna Nursing Home. A Blue Cross letter to the Nebraska State Department of Insurance indicates, "Bills submitted by Madonna were paid through an error in our office."

The judge granted summary judgment to Blue Cross.

In the appeal, incapacitation was one of the issues raised. LGH's contention was that since she was in a coma, her grace period for the timely payment of premium should have been extended. The court held that, since a legal guardian was appointed, the affected period of time did not have to be tolled. The court pointed out that it was the legal guardian's responsibility to receive mail and act upon it if necessary, including medical insurance for a person who was in the hospital, in a coma.

COBRA Premiums

Manthos v. Jefferson Parish Library Dept.

(United States District Court, Eastern District of Louisiana, Civil No. No. 07-1302 (E.D. La. 2008))

COBRA is a deadline-driven law. One exception to applicable deadlines that courts have carved out over the years is when qualified beneficiaries have a period of mental or physical incapacity. An employer recently learned that truth the hard way.

In this case, a former employee sued the employer under both COBRA and the Americans with Disabilities Act. The ex-employee elected COBRA and made payment for the first month of coverage. During the payment grace period, he was assaulted, suffering a head injury that caused drowsiness and confusion, and missed the payment deadline. The employer told the qualified beneficiary that coverage was terminated for non-payment. Even though it had extended the payment deadline in other situations, the employer refused to do so in this case despite receiving a doctor's note stating that the qualified beneficiary was incapacitated during that time.

The court made quick work of the employer's motion for summary judgment on COBRA. While the mental impairment perhaps was not as severe as in other incapacity cases, it was enough to raise a fact issue on this point. The employer's motion was denied.

The employer did not help itself any in communicating with its former employee. At one point, it ignored his letter on the COBRA issue. A response letter stated that "federal law and Parish policy prohibited the Parish from reinstating COBRA benefits once the payment deadline had passed," even though the benefits administer had indicated otherwise and case law clearly supports a deadline extension for incapacity.

Granting extensions based on incapacity can be challenging. The extension is not unlimited and only tolls the deadline for the period of incapacity. It is important that a qualified beneficiary present clear evidence of incapacity. Mere illness will typically not suffice.

COBRA Premiums

Sirkin v. Phillips Colleges, Inc.

(United States District Court for the District of New Jersey, 779 F Supp. 751 (D. N. J. 1991))

On July 22, 1990, an employee quit from Katherine Gibbs School, a subsidiary of Phillips Colleges, Inc. Fox-Everett, a co-defendant in the case, sent her a COBRA notice on August 10. She elected COBRA on August 22 and paid $299.43, which entitled her to coverage through August 15. On September 14 Fox-Everett notified her that she had until October 4 to pay the next required premium to bring her balance up to date. That never happened.

On October 4, 1990, Phillips terminated coverage, retroactive to August 16. On October 9 she was admitted to the Bergen Pines Hospital, where she remained for several months. On November 2, 1990, a friend inquired about her COBRA coverage and requested that it be reinstated back to August 16.

On January 16, 1991, the ex-employee was declared mentally incompetent, (suffering from cerebral atrophy and memory impairment) and the friend was appointed her legal guardian.

On March 7, 1991, the friend tendered a check to Phillips in the amount of $1,952.02 to bring the COBRA coverage up to date. Phillips refused to accept the payment, and a lawsuit commenced.

The court stated, ***"... where an insured misses a premium deadline under COBRA due to the insured's incapacity to know of or meet her obligation, the deadline for that premium payment is tolled for a reasonable time until the insured or her legally appointed guardian is able to cure the deficiency."***

Therefore, the judge ordered Phillips to accept the premium payment for Sirkin and reinstate her COBRA coverage.

COBRA Premiums

Shade v. Panhandle Motor Service Corp.

(United States Court of Appeals for the Fourth Circuit, 1996 U.S. App. LEXIS 16703 (4th Cir. 1996))

An employee of Panhandle Motor Service Corporation (Panhandle) was enrolled under his wife's employee group health plan through "BCBE" and also in Panhandle's group plan through Mountain State Blue Cross & Blue Shield (Blue Cross). In the fall of 1990, he was diagnosed with a seriously malfunctioning liver and became a candidate for a transplant. In December 1990 he received a liver transplant and began extended recovery. During this time, Panhandle put him on medical leave. According to the plan specifics, he did not lose coverage due to the medical leave status. Therefore, COBRA was not offered.

On March 1, 1991, Panhandle terminated its group health plan with Blue Cross and began a self-insured plan. Panhandle also entered into an agreement with Phoenix Mutual Insurance Company (Phoenix) to provide "stop-loss" coverage for Panhandle. When Panhandle transferred its employees from Blue Cross to Phoenix, it neglected to transfer the recovering employee who was unaware that he no longer had coverage through Panhandle. On March 14, 1991 he and his wife divorced. Due to the fact that he was covered as a spouse under his wife's group plan with BCBE, his ex-wife alerted her employer of the Qualifying Event (divorce). He was notified of his option to continue coverage through BCBE. However, under the impression that he had coverage through Panhandle, he did not elect to continue coverage through BCBE.

He returned to work (part-time) on April 11, 1991. On June 17, 1991, he terminated his employment due to illness. Based upon the requirements of COBRA, Panhandle then notified him of his right to continuation coverage under the Phoenix plan. However, when he tried to elect, his request was denied by Phoenix due to the fact that Panhandle had never placed him on the Phoenix plan. He was now faced with large medical bills that he thought would be covered and with the knowledge that he still had no coverage for any future claims. Therefore, he brought forth action against Panhandle for failure to uphold its fiduciary responsibility to make him aware of the new plan and to transfer him to that plan.

The district court's decision (in favor of the ex-employee) was based upon the fact that Panhandle breached its fiduciary responsibilities by failing to (under ERISA) alert him of the change in plan to enroll him in the new plan (Phoenix). The court stated that Panhandle was liable *"to make good to such plan any losses to the plan resulting from each such breach ... and shall be subject to such other equitable or remedial relief as the court may deem appropriate,"* (29 U.S.C. @ 1109(a) (1988)).

The district court therefore ordered Panhandle to reimburse all medical claims incurred between March 1991 and April 1993. (In April 1993 Medicare entitlement began.) The court subtracted the amount that would have been paid in premiums to Panhandle during that time and ordered Panhandle to reimburse $122,808.17 in medical claims and $27,712 in attorney fees. Due to the fact that Phoenix was involved in defending its procedures, the court ordered Panhandle to reimburse Phoenix for its attorney fees as well. Panhandle appealed but, in turn, the United States Court of Appeals upheld the decision.

Managing COBRA

Starr v. Metro Systems

(United States District Court, District of Minnesota, 2005 U.S. Dist. LEXIS 20443 (D. Minn. 2005))

Following rules can be a challenge in any walk of life and at any age. One employer and its employee who was in charge of COBRA learned that failing to follow its own COBRA rules is costly.

In this case, a Minnesota District Court held that Metro, the employer, failed to prove timely mailing of an Election Notice. Thus, Metro was liable for the former employee's medical claims minus the premiums he would have paid, totaling $113,468.86.

Metro terminated one person's employment on February 24, 2000. A Metro employee, was in charge of sending COBRA notices. Her standard procedure entailed six steps. Unfortunately for Metro, she deleted the Election shortly after creating it, and she had no proof that she ever mailed the notice. The deleted notice also had the wrong zip code. After the ex-employee notified Metro in late August that he had not received any COBRA information, Metro sent on September 5, 2000, what it considered to be a "duplicate" copy of the notice, even though it did not have a copy of the original notice. Because more than six months had passed, the election period on the "duplicate" notice had already ended.

As a result, COBRA coverage was never elected. He did sue to recover the cost of the claims he incurred in the first eight months of what would have been his COBRA coverage. He had a daughter who incurred significant medical expenses during that time.

The Court concluded that Metro never gave the opportunity to elect COBRA because the election period in the "duplicate" notice had expired by September. The Metro employee in charge of COBRA was an individual defendant and was also found liable for the judgment because she was listed as the Plan Administrator. Another approach is to identify the employer as Plan Administrator and grant a person (by job title) or committee authority to act on its behalf.

Thus, the employer and employee were jointly liable to pay claims, totaling more than $113,000.

This case emphasizes the need to follow clear notice mailing procedures. The cost easily could have been higher: the Court declined to issue a $110 daily penalty for the failure to send a notice.

Managing COBRA

Underwood v. Fluor Daniel, Inc.

(United States Court of Appeals for the Fourth Circuit, 1997 U.S. App. LEXIS 1410 (4th Cir. 1997))

A former employee and spouse appealed a district court decision after it ruled that Fluor Daniel, Inc. was not liable for over $400,000 in medical claims for the spouse. At the time of his termination from Fluor Daniel, Inc., the employee was handed a COBRA notice. He took the notice home, never showing it to his wife, and put it in his safe because he was scheduled to begin a new job within the COBRA 60-day election period. The insurance offered by the new employer would not cover any medical expenses related to his wife's pre-existing intestinal condition, so they decided to elect COBRA for her only. She contacted Fluor Daniel's benefits department and was told by an unnamed employee to remit $679.36. This amount was exactly twice the monthly rate for joint coverage (as listed on the notice handed to Raymond upon his termination). She mailed a check for the quoted amount, dated August 10, 1992, to Fluor Daniel. On the check's memorandum line, she wrote, "July and Aug. 1992." They did not remit any premium payments extending them past the August 31, 1992, expiration of coverage, although she continued to require medical assistance for her condition. Her situation worsened, requiring her to enter the hospital on January 2, 1993. After the hospital told him there was a problem certifying his wife's admission, he contacted Fluor Daniel, who informed him that their insurance had been canceled as of August 31, 1992, for non-payment of premiums. Fluor, however, did not acknowledge the attempts to retroactively pay premiums, and it refused to pay the approximately $400,000 in medical expenses stemming from hospitalization and surgery.

The appellate court affirmed the reasoning of the district court that, although she was not properly notified of her COBRA rights, from the evidence provided by her actions, the information contained within a written notice sent to her would not have increased her knowledge of COBRA. The COBRA coverage lapsed solely because she and/or her husband neglected to pay the required insurance premiums, holding Fluor harmless for any actions it took when cancelling the coverage. Thus, Fluor was not responsible for the medical claims. Hoewever, the appellate court went one step further and explained the fact that she knew her rights related to COBRA were purely "happenstance," and that did not absolve Fluor from its obligation to notify her of them.

The appellate court criticized Fluor for improper notification procedures of a Qualified Beneficiary and a poorly written election form. Seeing that there clearly were not existing circumstances in this case to excuse the administrator's failure to notify, the appellate court imposed the maximum penalty of $100 per day. *"Fluor Corporation and its several subsidiaries employ a multitude of people. Fluor's failure to comply with COBRA's notice to beneficiaries provision from the amendments' enactment in 1986 until at least 1993, has potentially caused substantial harm. In addition, because the purpose is not to compensate participants for injuries, but to punish for non-compliance with ERISA, the amount of the penalty must be sufficient to deter the administrator from future misconduct."* According to COBRA, Fluor Daniel was required to have informed its plan administrator of the termination within 30 days of the occurrence. Fluor Corporation then had 14 days in which to provide notice of her rights. Since termination was on June 29, 1992, Fluor's failure to comply with the applicable notice provision rendered it in violation of the law as of August 13, 1992. By using the statutory penalty in this case, the penalty was assessed at $100 a day for 365 days, equaling $36,500.

COBRA Penalties

Enenstein v. Eagle Insurance Agency

(United States District Court, Northern District of Illinois, 2006 U.S. Dist. LEXIS 37235 (N.D. Ill. 2006))

Failing to offer COBRA coverage. Falsely notifying the insurance carrier about COBRA eligibility. Reneging on a promise to a state insurance division after its investigation. Normally, it is three strikes and you're out, but an employer recently tried to escape liability for these alleged actions because of one of COBRA's gray areas: the statute of limitations.

The initial result – prompted by a motion to dismiss – was a strikeout of the employer.

When one individual's employment at Eagle Insurance Agency terminated, he waited to receive his COBRA election notice. And waited, and waited. Eagle and its plan administrator allegedly failed to send an Election Notice and told the carrier he was not eligible for COBRA. After he complained to the Illinois Division of Insurance, Eagle and the plan administrator reversed their stance but did not provide coverage retroactive to the loss of coverage date.

In the lawsuit, Eagle's primary argument was that he filed the action too late. COBRA does not have a statute of limitations, defined as the maximum time period for filing a lawsuit. As a result, courts apply the most analogous statute of limitations from the state where the lawsuit is filed. The Illinois insurance statute of limitations period is two years. This lawsuit was filed 2 years and 17 days after employment terminated.

The Court ruled that the statute of limitations period did not start until the individual *discovered* that he had been injured by the defendants' actions. Because his discovery occurred well after his employment ended, the lawsuit was timely filed.

This case is instructive on many levels. First, employers' COBRA notice failures from long ago may still come back to haunt them if the individual does not discover the omission until much later. Second, no segment of industry is immune from COBRA failures, even insurance agencies, which usually have a solid working knowledge of COBRA. Third, naming individuals as plan administrators often results in personal liability. It is better to assign that role to the employer. Prudent employers may want to review their summary plan descriptions (SPDs) and amend them accordingly.

COBRA Penalties

National Companies Health Plan v. St. Joseph's Hospital

(United States Court of Appeals for the Eleventh Circuit, 929 F 2d. 1558 (11th Cir. 1991))

At the time of one indivdual's termination of employment from National, he and his family were covered under National's group health plan. They were also covered under the plan at St. Joseph's Hospital, where the wife was employed. Claims were coordinated between the two plans.

The wife was pregnant at the time of the husband's employment termination. With a complicated birth expected, the husband sought to maintain coverage under both health plans. When National offered COBRA, they elected and began paying premiums. When the wife gave birth to premature twins, **several hundred thousand dollars in claims resulted.** National attempted to cancel the COBRA coverage based on other coverage with St. Joseph's Hospital. They filed suit, claiming they relied on National's assurance to them that they would be allowed to continue coverage under COBRA.

Not only did the court order National to provide COBRA coverage, it ordered the company to provide COBRA for 36 months. Though the statute would have only required 18 months, the COBRA notice that was provided listed the maximum coverage period as 36 months. The court stated they relied upon this incorrect wording, as well as National's representation to them that it (National) would provide the coverage. Using principles of equitable estoppel, the court found that they relied upon National's assurance to their detriment and thus were entitled to the coverage.

Of additional importance was the court's citing of **outdated information in National's COBRA notice.** The COBRA statute had been amended, prior to the Qualifying Event, regarding when COBRA coverage may be terminated prior to the end of the maximum coverage period. National's notice did not contain the new wording. The court stated the importance of immediately updating all notice and plan information upon a change in the COBRA law. Further, the court stated that the employer was **required to know all ERISA requirements** and *"to determine employee's rights to continuation coverage and notify them of these rights."*

In all, the award amounted to nearly **$1 million. Approximately $200,000 of the award was for damages, and another $60,000 for the attorney fees.** When citing the reason for awarding damages and attorney fees, the court stated that plan sponsors (usually employers) need to be aware there is more to lose in these lawsuits than the cost of claims.

COBRA Penalties

Olick v. Kearney

(United States Bankruptcy Court, Eastern District of Pennsylvania, No. 07-10880ELF (Bankr. E.D. Pa. 2009))

This was an employment-related case where a variety of violations were alleged: age discrimination, benefit discrimination, and wrongful termination. The former employee also sued a variety of defendents, including his employer (the Knights of Columbus), the insurance carrier (Aetna), his former supervisor and a co-worker. Because the employer declared bankruptcy after the lawsuit commenced, the case was tried in bankruptcy court. He settled with Aetna and the co-worker was dropped from the case before the court's opinion was issued.

For the COBRA dispute, the issue focused on when his employment terminated. This dictated when health plan coverage should have ended. The employer said the ex-employee resigned as of the date on the COBRA election notice that it sent. This date was some four months in the past. The former employee claimed he was never officially terminated and should have had medical claims paid.

The court sided with employee, concluding that the election notice intentionally misstated, by about four months, the actual termination date. The court took a dim view of this intentional action. It assessed more than $13,000 in penalties at the statutory maximum of $110 per day because the wrong date was not a clerical error but a "considered choice." There was no good faith and the employee was prejudiced even though the insurance carrier ultimately settled all of the unpaid medical claims by paying them in full.

It should be remembered that both the Qualifying Event date and the Qualifying Event reason are essential elements of the election notice.

COBRA Penalties

Sonnichsen v. Aries Marine Corp.

(United States District Court, Western District of Louisiana, 6:09-cv-00578-TLM-MEM (W.D. La. 2010))

Leaves of absence are often difficult to manage, and errors are easy to make. This can be an expensive lesson, as this case showed.

An offshore oil rig cook took some time off for back surgery. Afterwards, the employee obtained a doctor certification, stating he could not return to work for 12 weeks. There was a factual dispute as to whether the employer ever knew about the certification. About two months after the surgery, the employer sent the now ex-employee a COBRA election notice, telling him for the first time that his employment had been terminated as of his last day at work. Because COBRA was too expensive, he declined COBRA coverage.

The medical bills were expensive also.

The ex-employee sued under COBRA for the late notice and more than $30,000 in unpaid bills. The District Court did not award penalties for the late notice because the individual was not prejudiced by the delay. After all, he declined COBRA and did not contact the employer about health coverage during his absence. The court then examined the unpaid medical claims. It reviewed the over-arching purpose of COBRA - to keep employees fully informed after a loss of coverage caused by a qualifying event. Thus, the court awarded the individual the amount of his medical claims minus the applicable COBRA premiums he would have paid if he had COBRA coverage. In addition, the court awarded an unspecified amount of attorney's fees to the individual.

Several things stand out in this case. First, the employer did a poor job of clarifying job status during the leave of absence and what that status meant for health coverage. Presumably, the employee was eligible for FMLA, but there was no mention of it in the opinion. If FMLA did apply, the COBRA Qualifying Event and loss of coverage were premature, and these actions violated FMLA as well as COBRA.

Second, the termination occurred after September 1, 2008, so the employer should have sent a notice related to the ARRA subsidy. The employer did claim that the termination was voluntary, but ARRA notices were required to be sent for all Qualifying Events on or after that date, and the individual should have had a second election right if the termination was involuntary. The IRS has stated that when an employer initiates the action to terminate, the termination will be viewed as involuntary. If the employer had refused to provide the subsidy, that action would have been subject to the right of expedited review by the DOL.

COBRA Penalties

Swint v. Protective Life

(United States District Court for the Southern District of Alabama, 779 F. Supp. 532 (S. D. Ala. 1991))

On September 18, 1987, 45 days after his 19th birthday, a young man was catastrophically injured in an automobile accident. His stepfather was covering him under his group health policy through his employer, Ward International Trucks. Ward's plan, through Protective Life Insurance Company, agreed to cover an unmarried child between the ages of 19 and 24 years if the child attended school full-time or depended on the employee for more than one-half of their support.

On September 21 Swint reported to work and informed his employer of his stepson's condition. Representatives of Ward discussed both his condition and his school status with the stepfather on several occasions. During one such occasion, the employer asked if he was "still in school." He told the employer that the young man had not graduated the previous June with his high school class and was enrolled in a course to earn his diploma. The employer determined that he was a "full-time" student, and Ward's agent/broker advised Ward not to send a COBRA notice. Ward was informed that coverage was extended under the terms of the plan.

In early January, after the claims began to rise toward the $80,000 mark, a routine review began. A claims review examiner requested written verification of student status. It was then that Protective Life learned of the independent study correspondence class in which the stepson was enrolled. Protective Life sometime thereafter determined that he was not eligible for coverage and sent the stepfather a letter demanding a refund of the over $80,000 in claims already paid. A carrier representative later testified that the letter made no mention of the availability of COBRA because **the election period** had expired.

A lawsuit followed, claiming that both Ward and Protective Life breached their fiduciary duties by not investigating Ivie's eligibility for coverage after being informed of the accident. **NOTE:** ERISA's lengthy discussion of fiduciary duties includes mention of the obligation of plan administrators **to make the plan beneficiaries' welfare their primary responsibility.**

The stepfather also argued that the employer and carrier further breached their fiduciary duties by not notifying the family of Ivie's right to continuation coverage under COBRA. The plaintiffs asserted that Protective Life did not make an adequate inquiry into Ivie's eligibility and therefore could not deny coverage.

On November 8, 1991, the court ordered Protective Life to pay over $80,000 in claims. On February 27, 1992, by separate order, the judge awarded over $192,000 in damages to be paid jointly by the employer (Ward) and carrier (Protective Life). Interest and attorney fees were also awarded.