



# COBRA TIPS

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## Can You Be Sued if COBRA Notices Don't Measure Up?

*Yes, but Some Employers Still Don't Get It*

We can't say it often enough: If the contents of your COBRA election notices don't clearly inform qualified beneficiaries of their rights to continuation coverage, you are vulnerable to being sued for not complying with COBRA rules. If you lose, you may be ordered to reimburse medical expenses, pay the winner's legal fees and face statutory penalties under federal law. But even if you ultimately win the case, you lose anyway because defending yourself against lawsuits in federal court is very expensive.

This COBRA Tip references a recent federal appeals court opinion that hinges on the insufficient content of a COBRA election notice. It also addresses the importance of having in place proper COBRA administration procedures that prove compliance, and the need to furnish, upon request, an up-to-date summary of medical plans (summary plan description), which includes required COBRA information.

In the case of *Emilien v. Stull*, the court ordered Stull, the employer and plan administrator, to pay the beneficiary's medical expenses because it failed to provide a "comprehensible" COBRA election form. In addition, Stull was assessed ERISA penalties because it failed to respond to repeated requests for a copy of its summary of medical plan benefits.

### Election Notice Requirements

ERISA requires employers to notify each qualified beneficiary, not just the employee, of the right to elect COBRA continuation coverage when qualifying events occur. This notice must be provided even though the affected employee previously should have received notice of their rights in the required COBRA initial notice (now referred to as the "general notice" by the Department of Labor) and in the SPD.

Currently, federal law does not specify requirements for the contents of the qualifying event notice. (However, the recently proposed COBRA regulations contain a model election notice.) It is generally acknowledged that

election notices must adequately inform beneficiaries of their rights and duties regarding continuation coverage in language that is clearly understood. Yet when plan administrators are sued, courts are called upon to examine the content of particular COBRA election notices and often conclude they are "inadequate."

#### At a minimum, election notices should:

- ✓ Be addressed to all qualified beneficiaries
- ✓ Explain the right to individual election by all qualified beneficiaries
- ✓ Inform beneficiaries of their COBRA rights in easily understood language
- ✓ Include sufficient information so a beneficiary can make an intelligent decision about whether or not to elect coverage
- ✓ Contain information regarding which coverage may be elected
- ✓ State the length of time in which the beneficiary has to make an election of coverage
- ✓ Include the precise amount of the premium to be paid for continuation coverage
- ✓ Advise of the 45-day period in which to make the initial COBRA payment
- ✓ State the duration of coverage
- ✓ Detail the circumstances in which continuation coverage could be cut short
- ✓ Explain the right to convert to individual coverage.

### Inadequate COBRA Notice

In the *Emilien* case, the employer, Stull, claimed to have mailed a letter to the employee, Marie, that notified her of her termination of employment and offered COBRA continuation coverage. The letter, which the beneficiary claimed was never received, supposedly contained Stull's standard form titled "COBRA ELECTION FORM AND NOTICE."

This form used, but did not explain, the phrase "qualifying event." The judge noted: "It is highly unlikely that a layperson would understand the meaning of the term



'qualifying event' without any explanation of that term." He went on to say that the wording of the form was "opaque" and caused confusion even to the employer's human resources administrator.

## Proof of Mailing

Marie's husband, who sued on behalf of her estate, claimed that she never received the employer's letter with notice of COBRA election rights. ERISA provides that beneficiaries have 60 days from the qualifying event or from the date notice is provided (whichever is later) in which to elect COBRA benefits. This generally has been interpreted to mean that election notices are effective on the date they are mailed and no proof of receipt is necessary. But when faced with the charge that the required notice was never provided, courts look to the procedures normally used by the employer to provide notices. In the Emilien case, Stull claimed it sent the letter by certified mail, yet was unable to produce a U.S. Post Office receipt of mailing. Further, Stull's human resources officer could not recall actually mailing the letter, nor could she demonstrate that a regular procedure for mailing was consistently used by the company.

It is important that plan administrators be able to show the date on which a notice was mailed and the method of mailing that was used. This is best done by having in place a consistent practice for providing COBRA notices that indicates notices are always sent in a particular manner. (The appeals court didn't reach a conclusion on the issue of whether Stull actually provided the notice because it had already determined that the notice would have been defective in any case.)

## Request for a Summary Plan Description

ERISA requires that administrators must comply with requests for information regarding benefits by mailing the material requested to the last known address of the requesting party within 30 days after the request was made. If the material is not provided, an administrator may be personally liable to the beneficiary in an amount up to \$100 per day. Moreover, no showing of resulting harm is necessary — merely showing noncompliance with the request is sufficient to assess the ERISA penalty. And, if the failure or refusal to comply was made in bad faith, the maximum amount of the penalty may likely apply.

In the Emilien case, the beneficiary's representative requested a copy of the COBRA election notice once in July and again in August. Stull did not respond to either of those requests. In a letter sent several weeks later, the estate's attorney specifically requested a copy of Stull's summary plan description for employee medical plans and mentioned ERISA's \$100-per-day penalty for non-

compliance. Stull responded to this letter but failed to include a copy of the SPD. The attorney again requested a copy of the SPD but still the employer did not respond. The requested document was not produced until the lawsuit had been filed, and even then it omitted key details. Finally, a complete copy of the document was produced, 13 months after it was initially requested, as part of the employer's court request to have the lawsuit dismissed.

The employer claimed in its defense that it was going through a total reorganization and plant shutdown, which resulted in records being moved and destroyed. The appeals court was sympathetic, recognizing that a company in financial distress might have an excuse for not complying with the request. However, it noted that the statute is not forgiving and concluded that ERISA sanctions were proper. The court left it to the trial court to determine the precise amount of the penalty, but hinted strongly that it should consider bad faith as a factor when doing so.

## Conclusion

The appeals court concluded that the employer was liable for the beneficiary's medical expenses because its COBRA election notice was "legally insufficient." It also ruled that the employer was subject to an ERISA penalty of up to \$100 per day for failure to comply with repeated requests for its summary plan description of medical benefits.

We do not know the exact amounts of the medical expenses and penalties that will ultimately be assessed by the trial court, nor whether the employer will be ordered to pay the beneficiary's attorney's fees. But we can be certain that it would have been far less expensive in the long run had the employer:

- ✓ Utilized a COBRA election notice that clearly and adequately informed the beneficiary of her rights and obligations under the law
- ✓ Had in place a COBRA administration procedure that indicated the notice was properly and timely provided
- ✓ Supplied a summary of the plan's medical benefits promptly after it was requested. ■

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