

## COBRA Compliance Failures Cost Employers Millions

COBRA has been around for decades, but the stakes for non-compliance with its notice requirements may be higher than ever. Courts have been increasingly willing to allow COBRA lawsuits to proceed on a class action basis — thus raising employers' potential financial exposure. Recently, following class certification, parties to a COBRA lawsuit reached a \$1 million settlement. This agreement followed two other COBRA class actions, one where the employer settled for \$375,000 and \$625,000 in attorneys' fees and another where the court ordered \$1.85 million in penalties and \$341,000 in attorneys' fees. In light of these developments, employers should carefully review their COBRA procedures — and/or those of their TPAs — to identify and correct errors.

### Background

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), employers with at least 20 employees in the prior calendar year must offer continuation coverage under their group health plan following certain work or life events (“qualifying events”) that result in a loss of coverage. Qualifying events include termination of employment, reduction in hours, the employee's death, divorce or legal separation, and aging out of dependent child status. COBRA coverage generally must be offered for up to 18 or 36 months following the qualifying event.



COBRA imposes several notice requirements, the most important of which are the “initial COBRA notice” and the “election notice.” The initial COBRA notice, which must be provided within 90 days of the date coverage under the plan begins, informs participants of their COBRA rights and obligations. The COBRA election notice advises individuals entitled to COBRA coverage, known as “qualifying beneficiaries,” about their rights and obligations following a qualifying event, and must be provided no more than 14 days after the plan receives notice of the qualifying event (44 days when the employer is also the plan administrator and the qualifying event is termination, reduction in hours or the employee's death). For more information on these notices, and the DOL's recent updates to model COBRA notices, please see our [June 3, 2014 For Your Information](#).

COBRA compliance failures can trigger a number of different adverse consequences depending on the compliance failure involved, including:

- Internal Revenue Code excise taxes of \$100/day (\$200/day if the failure affects more than one qualifying beneficiary for the same qualifying event)
- ERISA statutory penalties of up to \$110 per day
- Lawsuits to recover COBRA coverage under ERISA or the Public Health Service Act, where the court can award attorneys' fees and interest to the prevailing party
- Other court-ordered relief, such as liability for medical bills

## Trends in Costly COBRA Class Actions

Historically, courts have been hesitant to certify COBRA claims for treatment on a class action basis because proving a COBRA notice violation can involve individual, fact-specific issues. Plaintiffs have successfully established class certification in recent years, however, in lawsuits concerning systematic failures to comply with COBRA notice requirements. We examine these developments below.

### **Slipchenko, et al. v. Brunel et al.**

Brunel Energy, Inc. (Brunel) is a Houston-based company that places technical specialists with clients in the oil and gas industry that need staffing for short-term projects. To do so, Brunel enters into a short-term employment contract with a specialist, and, when the client project is finished, terminates the specialist's employment. If Brunel hires the specialist to work on another project for the same or a different Brunel client, the specialist and Brunel enter into a new employment contract.

In 2011, a former Brunel employee who participated in the Brunel Group Health Plan (Plan) brought a class action lawsuit alleging COBRA violations; other former employees later joined the lawsuit as named plaintiffs. This group claimed, on behalf of themselves and similarly situated individuals, that Brunel failed to provide an initial notice when they first became plan participants or an election notice when it terminated their employment.

In 2013, the court [certified the class action](#). Damages would fit within the class action framework, the court determined, because they depend on Brunel's conduct and intent toward all class members — and not particular individuals. In the same opinion, the court also ruled in favor of two named plaintiffs' initial notice claims and one named plaintiff's election notice claim.

Following this decision, the parties entered settlement negotiations that resulted in Brunel agreeing to pay \$375,000 to the class members along with \$625,000 in attorneys' fees to resolve the dispute.

**Comment.** Because proceeding as a class action significantly increases an employer's potential liability, class action certification typically plays a key role in an employer's willingness to COBRA settle claims — as well as the amount the employer is willing to pay to put an end to the litigation.

### **Hornsby v. Macon County Greyhound Park, Inc.**

A group of employees who were part of a mass layoff by Macon County Greyhound Park, a racetrack, filed a COBRA class action in 2010. The claims concerned a two-month period in which the third-party administrator (TPA)

failed to send COBRA election notices to qualified beneficiaries. Following a grant of class certification, in 2013 the parties agreed to a \$1.3 million settlement, with \$250,000 to class members and \$950,000 for administrative costs and legal fees.

### **Pierce v. Visteon Corp.**

In 2006, terminated employees of Visteon, an automotive supplier, brought class action claims alleging that the company failed to ensure that its COBRA TPA provided timely election notices. The court certified the class, and ultimately found in favor of the employees — rebuffing Visteon's attempts to pin the notice errors on the TPA. In 2013, the court awarded ERISA statutory penalties in the amount of \$1.85 million, along with \$314,000 in attorneys' fees and costs.

**Comment.** Outsourcing COBRA administration to a TPA does not relieve the plan administrator of liability for COBRA-related errors. The plan administrator must monitor the TPA's systems and performance to ensure COBRA compliance.

So why the increase in COBRA class certifications? Increased automatization of COBRA administrative procedures, often through a TPA, is one likely key factor. With automatized processes in place, one administrative action — or omission — can harm a group of similarly situated participants in a predictable and consistent manner. Common facts that need not be adjudicated on an individual basis can render a COBRA claim suitable class action treatment.

### **In Closing**

Employers should take note of the high dollar values involved where courts have recently certified COBRA class actions claims. In the COBRA world, a single administrative error can easily and quickly result in mounting, and costly, violations. Conducting an audit of COBRA procedures can help an employer identify and correct administrative problems — either internal errors or those of its TPA.

### **Individual Lawsuits Can Also Pose Threat**

While smaller in scale, non-class action COBRA litigation can also prove costly to employers. In a 2014 decision in *Evans v. Books-A-Million*, for example, the Eleventh Circuit Court of Appeals upheld a \$75-per-day statutory penalty against the bookseller in connection with the failure to provide a terminated employee with a notice of her continued right to dental coverage. The penalty amounted to \$37,950, as Books-A-Million had failed to provide the notice for a total of 506 days. The court also tacked on attorneys' fees and costs in the amount of \$45,103.

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