



Constance Gilchrest is the research and compliance specialist for Infnisource, Inc., which provides COBRA, flexible benefits and other administrative services to more than 15,000 employers nationwide. She has more than 12 years of experience with COBRA and is certified for Flexible Compensation Instruction (CFCI) through the Employers Council of Flexible Compensation and is CDHC Certified through the National Association of Health Underwriters (NAHU).

COBRA Noncompliance Penalties Are Many and Costly

By Constance L. Gilchrest

COBRA notice failures can have far-reaching effects. They can affect former employees, their family members and most significantly, employers.

The COBRA law specifically outlines proper notice procedures and deadlines to meet in order to remain in proper compliance. Without doubt, the deadline for proper notification of

a qualifying event is the most important. The regulations verify that an employer has 30 days to notify the plan administrator of a qualifying event and administrators have 14 days to mail the notice. The regulations also state that an employer that is the plan administrator can take up to 44 days to generate the notice.

See *Penalties*, p. 9

What Are the Penalties?

Internal Revenue Service Penalty

- \$100-per-day nondeductible excise tax per violation. If more than one qualified beneficiary is in the family, the IRS excise tax is \$200 per day.
- If a violation is not corrected, the noncompliance period ends six months after the last day of the applicable maximum COBRA coverage period — generally 18 or 36 months.
- The noncompliance period will continue to tick even if it is not possible to correct the violation. If an employer cannot make whole those whom it cannot find, the maximum duration for the noncompliance period could run for the full 42 months.
- This penalty may be reduced or waived if an employer has a COBRA program that complies with the four TAMRA criteria: a properly trained staff, written instructions, a program that is designed and updated by competent professionals and outside monitoring.

ERISA Penalty

- Failure to provide the required COBRA notices in a timely fashion can result in a daily assessed penalty of up to \$110 per day, per violation when COBRA is the subject of a lawsuit.
- This penalty can be levied per each qualified beneficiary with no family maximum. Therefore, if there were four qualified beneficiaries in a family that the employer neglected to notify, a judge could fine the employer up to \$440 per day.

Payment of Claims

- The employer would be required to pay the qualified beneficiary's claims. The employer must "make the person whole" by placing the qualified beneficiary in the exact financial condition they would have been in if they had elected the most favorable coverage in light of the expenses incurred.


Damages

- Levied by the judge in a COBRA lawsuit.

Attorney's Fees

- Attorney's fees by the judge in a COBRA lawsuit.

DOL Audit

- The plan could be subject to an audit by the U.S. Department of Labor, which could bring a lawsuit against an employer; and/or the qualified beneficiary can sue an employer for failure to comply with COBRA. 

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QBs Make ‘Tactical’ Error in COBRA Claim

When an employer terminates a group health plan, it terminates its COBRA obligations to all qualified beneficiaries, as a recent case reinforces.

An employer was able to successfully ward off a COBRA notice claim due to legal mistakes by aggrieved qualified beneficiaries who did not specify in their complaint exactly what type of qualifying event occurred. This was enough for a federal district court in Tennessee to dismiss the claim. And in any case, the court pointed out, because the plan ultimately terminated, the employer was not obligated to provide COBRA coverage beyond the plan termination date. The case is *Munsey v. Tactical Armor Products, Inc.*, 2008 WL 4442551 (E.D. Tenn., Sept. 25, 2008).

Facts of the Case

Tactical Armor Products, Inc. had a group health plan insured by Cariten Health Care. Tactical deducted

monies from employee paychecks to pay for their health coverage. However, several plan participants alleged that between May 30, 2006 and Sept. 1, 2006, Tactical continued payroll deductions but did not use those deductions to pay health insurance premiums. Rather, it commingled those funds into its “personal” accounts and converted the funds for personal uses. The health plan was terminated effective June 1, 2006. The plan participants were informed of this termination in an August 2006 letter from Cariten. In addition, at some point (unspecified in the opinion) the facility where they worked was shut down and they presumably lost their jobs.

Alleging that due to Tactical’s action they lost actual funds paid for health coverage, incurred various medical expenses and were not able to get health insurance because of a lapse in coverage, the plan participants sued
See Error, p. 10

Penalties (continued from p. 8)

What should an employer do if someone slipped through the cracks and was never offered COBRA? Action should be taken immediately to avoid penalties from several different entities for failing to comply with COBRA. This means an employer may have to comply with many different sets of rules in order to be protected from all the entities that can levy penalties or charges, which are noted in the sidebar.

COBRA does not have a statute of limitations for violations of COBRA provisions, which means that courts typically look to analogous state-law time frames. This can mean that the hands on the clock continue tick away years after a violation occurred.

Generally, there will not be an adverse legal consequence to the plan if the notice is sent shortly after the proper time frame. However, there are times when the facts are different. It can be up to six months or sometimes two years before this oversight is caught. Now things become more difficult to rectify and one should proceed with caution.

The decision whether to send a (very) late COBRA election notice can make someone feel like they are doing a juggling act. It is a matter of weighing the risks and considering the options. Generally, the employer should send the notice because the failure to do so is an ongoing noncompliance issue:

- *On one hand, the failure to offer COBRA and send the election notice is a violation for which the daily*

penalties continue to mount. The former employee likely has found other coverage through another employer. If he or she really needed the coverage, the employer should have already heard complaints long before.

- *On the other hand, the former employee may have significant claims that were incurred since the qualifying event date.* If the plan is fully insured, the insurer might not accept their continuation coverage, which would entail the employer self-insuring them for the balance of the COBRA period.

An employer with this situation should definitely check with the insurer to see if it will allow COBRA and from what date in order to proceed accordingly. A good faith effort in rectifying this oversight might include paying a few months of COBRA premiums.

To avoid this situation, employers should have an ongoing COBRA compliance program. Regular audits should be done to review COBRA reports against monthly health group billings and payroll records. This would clarify that an employee who is no longer employed or eligible for the group health plan has been properly offered COBRA.

There are a lot of ways for making decisions; some of the most used are the pros versus cons list or risk versus rewards or better late than never. When it comes to COBRA, one can never be too safe; an employer needs to proceed immediately and cautiously. 🏠

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