



Juli Hanshaw has more than nine years of experience with COBRA and works directly for the President of Infinisource, Inc., which provides COBRA, flexible benefit and other administrative services to more than 14,000 employers nationwide.

With COBRA Compliance, The Proof Is in the Pudding

By Juli Hanshaw

An old adage says, “The proof is in the pudding.” For some employers, however, the pudding may be sweet but the lack of proof is what spoils the dessert.

Proper COBRA administration requires employers to notify qualified beneficiaries of their rights to continuation coverage after experiencing a qualifying event, for example, termination of employment for reasons other than gross misconduct, or a reduction in hours. Notifications should be provided in writing and the suggested method is via first-class mail to the last known address. The law clearly states that it is the plan administrator/ employer’s responsibility to prove that the notice was sent to the qualified beneficiary.

The more important question is this: How do you prove a notice was sent? Four employers recently reviewed this same question before a judge in the courtroom. While proof of actual “receipt” of the notice is not required, proving that the notice was “mailed” is not as easy as it might seem.

A judge ordered one employer to pay \$113,468.86 for its failure to prove a COBRA notice was mailed, in the case of *Gary Starr v. Metro Systems, Inc. and Deborah Masanz*. The court found that Metro failed to maintain records sufficiently to establish that a notice was sent to Starr on a timely basis (see story on p. 2 for subsequent developments).

Starr asked for a COBRA election notice. Metro was unable to find the original and therefore, provided Starr with another notice with the original mailed date. This notice did not provide Starr with proper time to elect as required under COBRA: 60 days to elect from the notice date or loss of coverage date, whichever is later. Having failed to provide a notice on a timely basis is what brought this employer into the courtroom.

In the case of *Marybeth Farrell v. Astra-Zeneca Pharmaceuticals LP*, Farrell claimed that she never received her COBRA notice

after a termination of employment. Astra-Zeneca notified a third-party administrator, which in turn generated and mailed the notice to Farrell’s last known address. The court found that this was adequate under COBRA’s notice requirements, which state there must be a “good faith” attempt to notify qualified beneficiaries of their COBRA rights, but impose nothing on the employer to ensure that the notice is received.

The recipe for success is to be able to prove that a qualifying event notice was sent on a timely basis.

Furthermore, the administrator was able to supply evidence of the notice being mailed, including two computer printouts and an affidavit of the procedures followed in mailing the COBRA notice. In addition, the court was provided a description of how the computer tracking system produces a COBRA notice and notes on the date that was sent. Astra-Zeneca was also able to produce a printout showing the date the notice was sent and that it was never return from the post office as undeliverable. Given that the administrator had followed procedures and was able to prove the notice was sent, AstraZeneca’s motion for summary judgment was granted, thus removing this claim from the lawsuit.

A third employer was not so fortunate. It did not have written procedures in place, but tried to prove the notice was sent with evidence of past termination practices each time a COBRA notice was required. The case of *Robert Tufano v. Riegel Transportation, Inc.*, also produced testimony from other former employees that they were not properly notified. Riegel was not able to prove that the qualifying event notice was sent. The court found the employer, Riegel, responsible for

See *COBRA Compliance*, p. 7

Novel Argument to Circumvent Limitations Period Fails

Before considering any COBRA litigation, it is important for both plaintiffs and defendants to consider the relevant statute of limitations. In particular, any time an action is brought more than two years after a qualifying event, careful consideration should be given on whether the action has been brought in a timely manner. If not, the case might be dismissed.

To circumvent the application of a two-year statute of limitations period for a COBRA notice claim under

COBRA Compliance (continued from page 6)

medical bills of more than \$10,000 due to the lack of written procedures and documentation of when the notice was sent.

In *Ayman A. Amin, v. Flagstone Hospitality Management, LLC*, the employer failed to prove its notice mailing; therefore, its motion for summary judgment was denied. Flagstone was able to prove that a COBRA notice was mailed and addressed to the qualified beneficiary (Amin), but the documentation indicated a missing zip code and street designator of “North.” This employer had a policy to send COBRA notices via certified mail but did not follow the policy in this instance.

Flagstone argued that if the address was incorrect then the notice would have been returned. The court disagreed and believed that if it was delivered to an incorrect address, there was a chance that the person who received it threw it away. Therefore, the court will review this case further on the COBRA claims.

Even though this case indicated standard procedures were in place to send a COBRA notice, nothing indicated the notice was actually mailed. This was yet another case proving that evidence of adequate standard office procedures should be in place for generating and mailing a COBRA notice. In addition, there should be evidence that the procedures are followed to establish the administrator’s good faith compliance with COBRA’s notice requirements.

The proof may be in the pudding, but the recipe for success is to be able to prove that a qualifying event notice was sent on a timely basis. The best ingredient is to send these important notifications via the U.S. Postal Service, using first-class mail with a certificate of mailing. This method shows that an actual notice was sent on a certain date to a certain individual(s). In addition, make sure that written procedures are in place describing precisely what methods are used to provide COBRA notices and that those methods are being consistently followed. The sweetest reward is staying out of the courtroom. 🏠

Indiana law, a qualified beneficiary used a novel argument. He stated that because he was damaged on each day of an employer’s notice failure, that failure fell under a “continuing violation” doctrine under which a plaintiff can reach back to the beginning of a violation—even if it lies outside the limitations period—when it would be unreasonable to require or even permit him to sue separately over every incident of a defendant’s unlawful conduct. A federal district court in Indiana was unimpressed, noting that applying such a doctrine could allow an aggrieved qualified beneficiary to accumulate per-day notice penalties for many years without any applicable limit. Accordingly, the court deemed the notice claim time-barred by applying a rule under which when an alleged wrong is a failure to take action in a timely way, such as giving notice, a claim for violating the duty to take that action accrues when the deadline for taking the action (such as the COBRA election period) expires. The case is *Piercefield v. International Truck and Engine Corp.*, 2006 WL 2263985 (S.D. Ind., Aug. 7, 2006).

Facts of the Case

James Piercefield was terminated from employment with International Truck and Engine Corp. on Sept. 16, 2003. (COBRA provides that a termination or reduction in hours of employment is a qualifying event that entitles qualified beneficiaries to up to 18 months of COBRA coverage. See ¶1122 of the *Guide*.) Piercefield alleged that International Truck did not provide him a COBRA election notice. (Under COBRA, an employer has 30 days from the qualifying event date to notify the plan administrator, who then must provide a COBRA election notice within 14 days. A plan administrator that violates COBRA’s notice requirements may, in a court’s discretion, be liable for up to \$110 a day from the notice failure date. See ¶1312, ¶1314 and ¶1520.)

He then sued International Truck for COBRA notice violations on Dec. 16, 2005, two years and three months after his termination. International Truck sought a dismissal, arguing that his claim was time-barred.

The court noted that COBRA does not establish a statute-of-limitations period for COBRA notice violations. Therefore, courts have applied the most analogous limitations period under state law, such as for unfair insurance settlement practices. (See ¶1900, *Treanor v. Metropolitan Transportation Auth.*, Case No. 591.) However, Indiana does not have such a statute; therefore, the parties agreed that the most analogous law was Indiana’s two year statute-of-limitations period for actions involving

See Novel Argument, p. 8