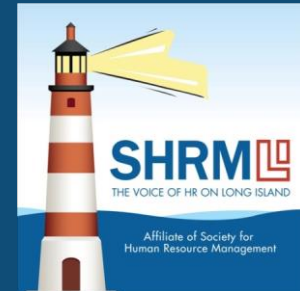


**Last Fridays “Lunch and Learn”
Webinar:
Taking The Bite Out Of COBRA
March 27, 2020**

Keith A. Dropkin

Jackson Lewis P.C. | White Plains

Keith.Dropkin@jacksonlewis.com | 914-872-6873



Introductory Statement

THE MATERIALS CONTAINED IN THIS PRESENTATION WERE PREPARED BY THE LAW FIRM OF JACKSON LEWIS P.C. FOR THE PARTICIPANTS' OWN REFERENCE IN CONNECTION WITH EDUCATION SEMINARS PRESENTED BY JACKSON LEWIS P.C. ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE.

Increase In COBRA Class Action Lawsuits

- ◆ Companies in Florida and New York have seen an increase in class action lawsuits involving COBRA notices.
- ◆ The cases generally allege that the COBRA notice were missing details included in the DOL's model COBRA notice, such as the name and contact information of the plan administrator.
- ◆ These cases seek statutory penalties and other damages on a class-wide basis.
 - ERISA \$110 per day per person penalty for failure to provide the required initial COBRA notice or the COBRA election notice.
 - The court has the discretion to award legal fees to the plaintiff's counsel.
- ◆ All the current layoffs will provide a rich target for plaintiff's attorneys.

Other Potential Costs For Failing to Comply

In addition to the litigation costs and ERISA penalty, other possible costs include:

- ◆ self-insuring the medical claims of former employees and their covered dependents who did not elect COBRA coverage due to a faulty notice;
- ◆ an excise tax penalty of \$100 per day (\$200 per day if multiple family members are at issue)

Mitigating the Risk

- ◆ Have all COBRA forms reviewed for compliance
 - Using the DOL's model notices often is not enough if the sent forms are incomplete or delinquent.
- ◆ Understand how COBRA works, and the most common mistakes.
- ◆ If using a third-party administrator for COBRA notices, discuss with them their procedure.
- ◆ Examine the service contracts with COBRA third-party administrators so that indemnity obligations are clear.

Compliance Issues

Furloughs

- ◆ A reduction of hours (which includes a furlough) that results in loss of coverage is a COBRA qualifying event, and COBRA must be offered.
- ◆ There seems to be some confusion that if a furloughed employee must be treated as a full-time employee for purposes of ACA reporting (due to the employer using a “look back” period for variable hour employees), the employee must remain on the health plan pursuant to the ACA.
 - That is not correct – the ACA does not mandate coverage for any employee.
 - The plan document controls who is covered under the Plan. If an employer adopted the ACA look-back language for eligibility purposes, then some furloughed employees may remain eligible.

Compliance Issues

Furloughs

- ◆ An employer may offer extended coverage to furloughed employees instead of COBRA if:
 - The plan is amended to provide for such coverage, and
 - Discussing the issue with the insurer (or stop loss carrier if plan is self-insured), and obtain written confirmation and approval of the change to eligibility requirements.
- ◆ The employer may subsidize the COBRA premiums to furloughed employees. Employers with self-insured plans should be wary of IRS non-discrimination rules if only offering subsidy to certain employees.

Compliance Issues

Not Realizing You Are Subject To COBRA

COBRA generally applies to employers who employs 20 or more employees on more than 50 percent of the employer's working days during the preceding calendar year.

Compliance Issues

Failing to Offer COBRA for FSA

- ◆ Medical, Dental, Vision, FSA, MERP, HRA plans are all subject to COBRA. Also, employee assistance plans or wellness programs that provide medical care and on-site health care;
- ◆ FSA: If the payroll deductions exceed the claims paid (i.e., the employee has put more in than what was paid out), COBRA must be offered through the end of the plan year.
- ◆ Any grace period that applies to the plan year must apply to COBRA participants.

Compliance Issues

Determination of COBRA Coverage Period

- ◆ The COBRA coverage period generally begins from the date of the triggering event.
- ◆ However, a plan is permitted to measure the maximum coverage period from the date that plan coverage is lost (which typically will come later than the triggering event).
- ◆ Some employers continue coverage for terminated employees to the end of the month, and measures COBRA period from that point. This creates problems if not consistent with plan documents.

Compliance Issues

Election Notice to Spouse

- ◆ Administrators should mail an election notice to the employee and spouse at their last-known mailing address.
 - More conservative approach is to send separate notices in separate envelopes.
- ◆ Hand-delivering the election notice to a terminating employee is not adequate notice to the spouse.

Compliance Issues

Failing to Document Delivery of Election Notice

- ◆ In dispute, plan administrator has the burden of proving it sent the COBRA election notice, not that the qualified beneficiary received the election notice.
- ◆ If the plan administrator mails the election notice, it needs to prove (1) that it had a written procedure for preparing and sending election notices and that the procedure was followed; (2) that the notice was sent; (3) when the notice was sent; (4) the contents of the notice; and (5) the address to which the notice was sent.

Thank You

jackson|lewis[®]

With more than 900 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

jacksonlewis.com

