

# Lawsuits for Defective COBRA Notices Can Be Big Time Headaches

by Dennis J. Merley - Tuesday, May 05, 2020



As the COVID-19 pandemic is displacing millions of workers from their jobs, COBRA notices informing those workers about insurance continuation rights are being mailed out at a record pace. Though their contents might seem straightforward and unremarkable, COBRA notices are now being viewed as a new basis for substantial and costly litigation.

We all know that the [Consolidated Omnibus Budget Reconciliation Act \(COBRA\)](#) permits employees to extend their coverage under their employer's group health insurance program in the event of loss of employment or other "break in service" (e.g. loss of eligibility due to reduced hours, certain leaves of absence, etc.).

## The Problem

What we did not know until recently was that class action lawsuits are now cropping up due to COBRA notices omitting critical information, influencing terminated workers not to extend coverage and/or misstating the recipients' rights such that they lose coverage that they might otherwise have been able to retain.

For example:

- Walmart has been sued for omitting important information in their COBRA notices;
- Nestlé is alleged to have sent warnings of penalties that recipients might be assessed so as to steer former employees away from continued coverage;

– PepsiCo is accused of sending notices that imply that seeking coverage in the federal marketplace might be more advantageous than continuing coverage under COBRA.

The cost of inadequate or noncompliant COBRA notices can be substantial. The Department of Labor (DOL) can impose civil penalties up to \$110 per day per person. Meanwhile, the Internal Revenue Service (IRS) also could assess an excise tax of \$100 a day per beneficiary and \$200 a day per family until they get a correct notice. Since these cases are brought on a class basis, these penalties add up quickly. Consider that if just 50 employees are issued inadequate notices that are not corrected for 30 days, the DOL penalty might be \$165,000 while the IRS could tack on another \$150,00 (or more).

Perhaps most worrisome is the possibility that former workers could claim that the COBRA notice influenced them not to extend coverage. Then, when they incur huge medical costs due to sickness or injury, they could look to recover those costs from their former employers.

## **What to do**

The best way to ward off possible liability for inadequate COBRA notices is, not surprisingly, to get them right. Review your notice carefully to be sure that it is correct, comprehensive and unbiased regarding continued coverage. Consult with knowledgeable legal counsel to learn of any possible changes in the regulatory requirements. While the DOL has [template notices](#) available, you must still be sure to tailor them to your specific organization in certain key spots.

And don't just rely on third party administrator (TPA) and assume that all is well – it is the employer's obligation to advise COBRA beneficiaries of their rights so you will be liable for any errors the TPA might have made.

## **Bottom Line**

Do not go through all of the meticulous planning necessary for effective and legal workforce restructuring and then get caught for having a defective COBRA notice. If you have not looked at yours recently, now is the time to do so.