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Consolidated Omnibus Budget and Reconciliation Act (COBRA): Over 30 Years Later...COBRA Still Has Fangs

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Many aspects of employee benefit plan administration have become routine. Nevertheless, plan administrators and fiduciaries must remember to periodically review everyday benefit communications—such as **COBRA** notices—to ensure compliance with current law. Not only do plan administrators and fiduciaries have an obligation to comply with the law, but they also have a duty to accurately communicate benefit rights. Some plan administrators and fiduciaries may presume that COBRA notices and other documents are compliant because a reputable source provided them or the documents have not caused any issues for years. However, the threat of class action litigation over misleading and inaccurate plan documents and communications serves as a reminder—it is important to review routine plan documents.

The threat is real and the problem of inaccurate or misleading plan documents is more common than expected. Sometimes the issue is caught through every day benefits administration. Indeed, while processing COBRA requests, some plan administrators have identified and questioned federal and state gaps in major insurance providers' off-the-shelf continuation coverage notices. In response to these inquiries and after discussions with appropriate regulatory agencies, the insurers have quickly revised their continuation coverage notices. Sometimes, however, plaintiffs' counsel are the ones who discover the inaccurate documents. As a result, the courts have witnessed a trend of activity regarding routine COBRA documents and notices.

In January 2017, Marriott International, Inc. joined the ranks of other companies such as The American Bottling Co., BB&T Co., Wal-Mart Stores Inc., and Shipcom Wireless Inc. who all face complaints of alleged failures to comply with COBRA notice requirements. In a proposed class action lawsuit, plaintiffs allege that Marriott violated federal law by not providing employees with adequate notices of their right to continued health insurance coverage. Even though Marriot "partially adhered" to a model notice provided by the Department of Labor, the complaint alleges that crucial parts were left out or modified, hindering qualified beneficiaries' ability to obtain continued coverage. Specifically, the complaint alleges that Marriott's COBRA notices failed to include the contact information of the person responsible for administering the plan or to explain the consequences of not electing or waiving continuation coverage. Similar allegations against SunTrust Banks, Inc. resulted in a 2016 settlement for \$290,000. In December 2016, an Illinois federal court allowed a lawsuit against Capgemini North America Inc. to proceed, even though Capgemini pointed out that the employees did not properly trigger the COBRA notice requirements.

Lessons and observations from the field serve to warn and remind plan administrators and fiduciaries of the risks of failing to periodically revisit and review their COBRA documents and other everyday benefit materials. Proactive and voluntary review of plan documents and benefit communications ensures compliance with the law and other legal obligations and should mitigate against unexpected litigation over documents and communications that were assumed to be compliant.

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