COBRA Class Actions Are Now a Real Threat

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October 23, 2013 — Since COBRA’s enactment in 1985, approximately 10 court decisions have addressed plaintiffs’ attempts to have classes certified in lawsuits involved claims of COBRA violations. However, it is only in three more recent class action cases where courts have certified classes and permitted the lawsuits to proceed as class actions. Thus, the question is raised on why courts now appear to be more willing to approve class action litigation in COBRA matters.

Background

Claims involving COBRA violations, whether they are claims for COBRA coverage or claims for notice violations, generally are heard exclusively in federal court. This is because these COBRA rules are part of ERISA, and ERISA generally preempts state laws that relate to employer-sponsored benefit plans. ERISA also provides exclusive federal court jurisdiction for many COBRA claims, particularly claims involving notice violations.

Once a case is in federal court, the rules that govern lawsuits brought in federal court have a standard for when a lawsuit can be tried as a class action. First, the named plaintiffs attempting to bring the lawsuit on behalf of a class of unnamed plaintiffs must prove that the following four requirements are satisfied:

1. the class is so numerous that it is impractical to hear all of the claims in one lawsuit (numerosity);
2. there are questions of law or fact that are common to the class (commonality);
3. the claims or defenses of the named plaintiffs are typical of the claims or defenses of the class (typicality); and
4. the named plaintiffs (including their counsel) will fairly and adequately protect class interests (adequacy).

Second, the plaintiffs then must prove that their lawsuit falls into one of three categories of lawsuits for which class action adjudication is permitted under the federal rules.

In the Past, Class Actions Generally Were Rejected

In the earliest COBRA class action cases, the courts tended to deny class certification on the commonality and typicality prongs of the first part of the class action test. For example:

1. In *Kane v. United Independent Union Welfare Fund*, the court failed to certify a class action involving claims alleging that the health plan failed to notify participants and qualified
beneficiaries of their COBRA rights because plan representatives gave the required notices orally, the content of which necessarily varied from person to person.

2. In another of the earlier cases, Williams v. Borden, Inc., the potential class consisted of 11,500 divorced spouses and children over the plan’s limiting age who claimed that they did not receive COBRA election notices. The court denied class certification because it would have had to determine whether each of these 11,500 class members provided notice to Borden of their qualifying events within the required time period.

3. In Brown-Pfifer v. St. Vincent Health, Inc., the court held that the attempted class action failed the typicality requirement because the defendant used multiple vendors with varying procedures and class counsel failed to show satisfaction of the adequacy requirement.

A Shift Seen in Recent Cases

By contrast, more recent COBRA class action cases have shown that courts seem more willing to certify COBRA class actions. The first case in which a COBRA class action was certified was Pierce v. Visteon Corp., in 2006. This case is ongoing, and last June the court awarded $1.85 million in COBRA notice penalties to the plaintiffs, plus a yet-unspecified amount of attorney’s fees. In determining the penalty it imposed, the court did not address that it necessarily had to evaluate the date of each plaintiff’s qualifying event and if and when each plaintiff received a COBRA election notice. Instead, the court focused on the fact that many of the plaintiffs had asked Visteon for COBRA information after they were terminated and held that Visteon was grossly negligent or willfully ignorant of its COBRA notice obligations, causing harm to the plaintiffs.

In August of this year, the court in Slipchenko v. Brunel Energy, Inc. certified a class action with claims that the employer violated COBRA’s initial and election notice requirements. Brunel hired employees but then placed its employees with its clients for short-term projects, and the court found that the company did not provide COBRA notices as required by law. Regarding the election notice claims, the court also did not discuss the fact that adjudicating these claims would require reviewing the different dates on which class members experienced qualifying events. Instead, the court held that the damages issues were certifiable because they depended on Brunel’s conduct and intent toward the entire class, and individualized considerations of prejudice or bad faith did not predominate over the class issues.

Also in 2013, an employer and plan administrator agreed to settle, for $1.3 million, a lawsuit by its former employees claiming that the company failed to provide COBRA election and premium subsidy information in violation of COBRA and the American Recovery and Reinvestment Act of 2009. In Hornsby v. Macon County Greyhound Park, Inc., the court stated only that the various requirements for class certification were met but declined to analyze why. Based on the class certification decision in this case, it seems that the employer permanently laid off all of the class members in January 2010 – February 2010. It thus appears that the facts involved with each qualified beneficiary’s election notice violation claim stemmed from the same mass layoff.

Why the Shift?

It is difficult to discern from these later cases why courts seemingly are less concerned with adjudicating class claims of COBRA notice violations than the courts in earlier COBRA cases. Of course, it is entirely possible that the courts are not less concerned now but simply that the claims for which class certification is now being sought fit the federal class certification standard better than the earlier claims. For example, in the three earlier cases summarized above, the plaintiffs’ claims did not center on one standard COBRA procedure of or one employment action by the defendants. In the
three more recent cases, the defendants’ standard COBRA procedures (or lack of standard procedures) and/or employment actions were central to the plaintiffs’ claims.

Another possible influence on the later courts’ willingness to review qualifying event dates and dates on which notices were provided for each class member in assessing penalties is that, for larger employers at least, COBRA recordkeeping has become almost universally automated and handled by outside COBRA administrators. This development makes it potentially easier to prove that a single action (the same administrative flaw) caused class-wide harm and allows plaintiffs to easily present all the relevant data to the courts.

A final observation is that the cases in which a class was certified seemed to involve defendants that allegedly ignored their COBRA obligations. This degree of noncompliance was not as clearly alleged in the cases where classes were not certified. Courts may be willing to overcome procedural issues when facts could demonstrate that administrators failed to adhere to COBRA compliance to the detriment of qualified beneficiaries.

Given this new reality and potential litigation risk involving COBRA administration, it is imperative for employers and plan administrators to review COBRA administrative procedures and do what they can to ensure that all procedures comply with COBRA’s requirements.

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