



Complying With COBRA in Light of Conflicting Judicial Decisions and Guidance

Paul M. Hamburger

August 1, 2011 — With all the detailed guidelines produced by federal agencies, one could reasonably assume that plan administration generally, and COBRA administration in particular, is a fairly routine exercise. Unfortunately, as many readers can attest, life produces situations that do not fit neatly within the broad rules and regulations dispensed by the U.S. Department of Labor (DOL) and IRS to deal with COBRA coverage. It is not uncommon for different administrators, and more importantly, different courts, to reach opposite conclusions about the meaning of the same statute. Nonetheless, it is often unclear how a plan administrator or third-party administrator (TPA) should reconcile conflicting guidance and maintain consistent plan administration.

Under ERISA, a plan administrator owes a fiduciary duty to the plan's participants and beneficiaries. A plan administrator is also tasked with ensuring that plan benefits are administered on a (relatively) uniform and consistent basis in compliance with legal requirements. For these reasons, among others, plan administrators and TPAs that they hire must know exactly which law or legal rule they are supposed to be following. This leads into the main topic of this column: Is there a fool-proof way to reconcile conflicting mandates, directions and interpretations of the relevant statutes provided by court decisions and agency rulings and other guidance to come up with a clear rule of administration?

The short answer is "no." However, there are ways for administrators (including TPAs) to navigate through conflicting judicial opinions and agency guidance and chart an appropriate, albeit imperfect, course of action. To do this, one must first have a basic understanding of the structure of the federal courts and agencies and their role in interpreting statutes and regulations.

About the Law

The starting point of any legal analysis is always the statute. We start by reading the specific statutory terms — that is the employer/administrator obligation. In COBRA's case, the law amended three federal statutes — the Internal Revenue Code, ERISA and the Public Health Service Act. (Although the three statutes are substantially the same, ERISA and the tax code apply to private employers and the PHSA applies to plans of state and local governments.)

Once one reads the statute, the next step is to see what the regulators think and how they have interpreted the statutory terms. No statute is ever clear enough, and that is why federal agencies issue regulations and other guidance. The problem with COBRA (and several other health care related statutes, including health care reform) is that since it amended three statutes, three different federal agencies (IRS, DOL and the U.S. Department of Health and Human Services) must issue implementing regulations.

To prevent inconsistent regulatory guidance, COBRA's legislative history delegated authority for certain topics to each of the agencies. For example:

1. DOL is responsible for issuing guidance on matters related to notices, election forms and other disclosure issues.
2. IRS is responsible for interpreting the substantive areas of COBRA administration (such as defining qualifying events, qualified beneficiaries, coverage rights and other relevant terms).

- HHS is responsible for regulating plans of state and local governments and, essentially, follows the guidance issued by IRS and DOL.

The legislative history also provides a good resource for the agencies in developing various types of guidance. When the agencies issue their guidance, administrators know what to do — follow it. It is the rare piece of agency guidance that administrators will tend to override with a different interpretation.

In the absence of guidance on a particular topic, however, plan sponsors and administrators are supposed to follow a reasonable good faith interpretation of the statute, regulations and legislative history. For several years after COBRA's enactment, that's all there was. There were not too many significant COBRA cases and administrators developed their systems based on the available statutory and regulatory guidance, as well as good faith interpretations.

Great. Then what? Then came judicial decisions — lots of them. Some were federal court rulings and some were state court rulings. Some were simple and conformed to the statute and regulations, and some deviated significantly. The existence of these conflicting rulings is what causes administrators to wonder whether they need to change their systems every time some court issues a new judicial opinion.

About the Courts

The federal court structure can be thought of as a pyramid. For our purposes we need only focus on three tiers of this structure: the U.S. district courts (the base), the U.S. courts of appeals (the middle) and the U.S. Supreme Court (the top).

U.S. Appeals Court Jurisdiction ^[*]										
First Circuit	Second Circuit	Third Circuit	Fourth Circuit	Fifth Circuit	Sixth Circuit	Seventh Circuit	Eighth Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit
MA	CT	DE	NC	LA	KY	IL	AR	AK	CO	AL
ME	NY	NJ	SC	MS	MI	IN	IA	AZ	KS	FL
NH	VT	PA	VA	TX	OH	WI	MN	CA	OK	GA
PR		USVI	WV		TN		MO	Guam	UT	
RI							ND	HI	WY	
							NE	ID		
							SD	MT		
								NV		
								OR		
								WA		

^[*] Note: There is a DC Circuit as well as a Federal Circuit

District Courts

District courts act as a foundation for this structure; they are the general trial courts for the federal court system. District court jurisdiction, or geographical reach, consists of a clearly defined region of the United States (or its territories).

(State court structures also tend to follow this three-step pyramid structure; however, because most COBRA cases are brought in federal court, we will focus on the federal system.)

If a COBRA controversy reaches the courtroom, the local federal district court will likely be its first stopping point. Due to litigation strategies and multiple possible claims in any given case, it is possible that state courts might hear (and they have heard) COBRA cases. However, most cases start in federal court because COBRA is a federal statute.

Appeals Courts

Above the district courts sit the U.S. courts of appeals; these courts cover the law throughout the country and its territories through 13 distinct circuits (see chart for further details). A decision in a given circuit is the applicable law in all states that are covered by that circuit. Moreover, other circuit courts will typically give considerable weight to the ruling of a sister circuit.

A matter usually reaches this tier on direct appeal. Often, as a practical matter, appellate courts act as a final arbiter in deciding issues of interpretation of statutes because it is very hard to have a case reach the U.S. Supreme Court (top of the pyramid).

Should two circuits reach conflicting conclusions, a matter might be brought to the Supreme Court. This is a rare occurrence in general because the Court does not take very many cases under consideration. Issues relating to COBRA are no exception. In fact, the only COBRA case to reach the Supreme Court is *Geissel v. Moore Medical Corp.* (see ¶1900, Case No. 324). Nevertheless, if the Supreme Court intervenes, its interpretation should serve as final, binding guidance on how to interpret any law until and unless that law is then later amended by Congress.

What to Do About Different Decisions?

With that as background, the next question is: What does an administrator do if one district court decides a COBRA case one way and another court decides it another way? (Note that some decisions are marked "not for publication." These decisions, while instructive, are not binding on other courts or in other situations as a legal matter. For this discussion, we will assume the court decisions in the example are not so marked.)

At the federal district court level and certainly at the state trial court level, court decisions are not necessarily the "be all and end all" of a COBRA analysis. Remember, the standard to which employers must adhere is a good-faith interpretation of the statute and legislative history. So if an administrator follows that interpretation, with applicable guidance issued by the federal agencies, the fact that a district court decided the issue in a different way does not compel a change in approach.

Example 1. A district court decides that when an employer is the plan administrator for COBRA purposes, the plan administrator must provide COBRA notices to qualified beneficiaries within 14 days following a termination of employment. We know that the COBRA statute says that the employer in this instance has 30 days to notify the plan administrator, which has another 14 days to notify the qualified beneficiary. We also know that DOL, in interpreting the statute, has indicated that the period in these cases for notifying a qualified beneficiary is 44 days.

Notwithstanding all that, a judge decided that the period should be collapsed to 14 days. What should an administrator (other than the one involved in the case) do?

Again, using the approach of following a good-faith reasonable interpretation of the statute and legislative history, as reflected in applicable federal agency guidance, an administrator should be able to continue administering plans based on the 44-day standard. In this case, the court just got it wrong. Perhaps the lawyers did not prepare the case properly. Or perhaps the judge just didn't agree. Nevertheless, it is well-established by most courts and the federal agencies that the longer period applies.

The only remaining issue at this level depends on whether the administrator is operating in the same exact geographic district where this court resides. If that is the case, and the administrator knows that the particular district court is inclined to always decide the issue in litigation the "wrong" way, the administrator should

consider whether it is worth modifying or continuing the practice and assuming the risk of a future case and, perhaps future appeals.

Example 2. Our hypothetical district court case is appealed to the appellate level. If the appeals court reverses and says the standard is 44 days, all is well with the world and the administrator's continued administration was vindicated. But what if the appellate court affirms the bad decision from the lower court?

That outcome is much more troubling. The federal appellate court rulings are binding on courts within the relevant circuit and tend to carry more weight than district court decisions. So when those decisions are issued, it is time to talk to an expert advisor to consider the options and risks with deviating from an appellate level decision.

What About State Courts?

State courts can be a little trickier. Often, state courts may not have the same level of understanding of the interplay between federal law and agency interpretations. On the other hand, many state courts are very adept at these issues. In the end, the same type of analysis will apply. Did the court apply a good-faith interpretation of the statute and legislative history? If it did, the decision should be followed. If it did not, then consideration needs to be given (with advice from counsel) on the extent to which the decision needs to be followed. Also, consultation with local counsel can prove very helpful. Often, local counsel will have great insight into the weight given to state court opinions on federal law matters within the jurisdiction.

Lessons From Wrong Decisions

Here is a final word on this topic before addressing another issue. Sometimes, administrators can learn what to do even from wrongly decided cases. For example, a court might find that a notice was not provided by the plan administrator because the qualified beneficiary claimed non-receipt and there was not enough proof in the record of how the notice was provided. Technically, when it comes to COBRA notice issues, a qualified beneficiary claiming non-receipt is not relevant. The issue is whether the administrator can prove that the notice was properly sent to the qualified beneficiary's last known address. Yet, a case that seems to be wrongly focused on the qualified beneficiary's non-receipt can still serve as a useful reminder of how to properly administer COBRA and avoid the litigation as much as possible in the first place.

The bottom line is unless the U.S. Supreme Court has issued a ruling on a COBRA issue (which only happened once), court decisions are generally instructive and informative. Some opinions are more persuasive than others, but they are not all necessarily binding on all plan sponsors. Instead, court decisions should be viewed in the context of a good-faith interpretation of the statute and legislative history and used as a guide (with advice of counsel) to proper plan administration.

TPAs and Brokers Providing Legal Advice

Plan sponsors and administrators often rely on the services of TPAs to help ensure that they are operating their plans based on a good-faith interpretation of the statute and legislative history. When questions or problems arise in administration, the temptation is to ask the TPA what to do. In turn, TPAs are in business to serve and satisfy their clients.

Therefore, when a client calls, the TPA's role is to assist and answer the questions.

But what if the client asks the TPA a question that really requires a legal opinion or legal interpretation? A similar problem arises when brokers are faced with client questions. These non-legal entities need to be very careful when answering legal questions.

Aside from the issue of whether the TPA or broker is engaged in the unauthorized practice of law, legal advisors bring a different approach and discipline to answering legal questions. For example, sometimes a TPA may tell a client what the "rule" is based on how the TPA administers things. In other words, for very

good and sound reasons, TPAs establish practices that are easy to administer and facilitate consistent and uniform administration among a wide variety of employers and group health plans. That is fine as far as it goes. However, regarding any given administrative issue, there might be other ways that the law can be satisfied but that deviate from the TPA's administration. Sometimes clients need to know that as well.

Only an independent advisor can be completely relied upon to provide the client with the full range of legally permissible solutions to a given problem. This is not meant as any criticism of TPAs or their ability to offer good and appropriate advice on the law. Rather, it is simply a statement of the inevitable reality of the inherent conflict between explaining multiple ways to administer COBRA at the same time, as the TPA only administers one of those ways on a regular basis.

Also, particularly when COBRA errors occur, clients need to be sensitive to attorney-client privilege issues. TPAs and brokers are not lawyers and their conversations with clients are not privileged. Therefore, TPAs and brokers should be sensitive to discussing tricky compliance errors and corrections with clients without having the client consult an attorney.

Finally, lawyers, especially experienced benefits lawyers, can often bring a broader range of experience to the table. TPAs will know how and why they administer things the way they do. However, experienced counsel will know the practices of several different recordkeepers and be able to provide a well-rounded analysis to the client's situation.

In many if not most cases, TPAs and brokers can provide very helpful, accurate and timely information. However, when it comes to analyzing tricky legal questions and deciding on how to correct COBRA administrative errors, it is highly recommended that proper legal advice be sought as well.

Paul M. Hamburger, Esq., is a partner in the Washington, D.C., office of the law firm Proskauer Rose LLP. He is a member of Thompson's Health Plan Advisory Board, and is author and contributing editor of the COBRA Guide, the Pension Plan Fix-It Handbook and the Guide to Assigning and Loaning Benefit Plan Money, all published by Thompson Publishing Group.

For more information on Thompson's HR Compliance Expert | Employee Benefits Solutions, click [here](#). A free [14-day trial](#) to our digital research library also is available to interested parties.

© 2013 Thompson Information Services