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Mandated Health Benefits

The COBRA Guide

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Putting knowledge to work

Paul Hamburger says goodbye

My final COBRA column

Paul M. Hamburger

> *For time is like a fashionable host*
> *That slightly shakes his parting guest by the hand,*
> *And with his arms outstretch'd, as he would fly,*
> *Grasps in the comer: welcome ever smiles,*
> *And farewell goes out sighing.*
>
> – William Shakespeare; *Troilus and Cressida*, Act 3, Scene 3

Yes, you read that title correctly. This is my last column for *Mandated Health Benefits*- The *COBRA Guide*. In fact, it is the last column on continuation coverage issues I will write for any publication, as I will be retiring from legal practice after 40 years of lawyering.

On April 7, 1986, President Ronald Reagan signed the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). At the time, few thought the cute COBRA acronym would survive after the first couple of months of acronym jokes, such as "COBRA Bites," "COBRA's Sting," "De-Fanging COBRA," etc. We still see the funny COBRA references to this day.

Interestingly, COBRA was the one and only "COBRA." Several different budget reconciliation acts were denominated as "OBRAs," and they have all come and gone. But there was one and only one COBRA, and it is still here.

Soon after COBRA's enactment, plan sponsors and administrators sought answers to the seemingly endless questions that arose when there was just a statute, a bit of legislative history, and no administrative or case law guidance. *The COBRA Guide* was intended to fill that void. Here is how it happened.

In October 1986, I published a COBRA Q&A booklet with another publisher that answered many of the fundamental questions plan administrators were asking. It was a successful publication that was updated several times since then.

Separately, in 1987, I received a marketing brochure for a new COBRA publication entitled *Mandated Health Benefits-The COBRA Guide*. The advertisement hailed the book as the only one of its kind in the market. Being a precocious young

lawyer, I sent the marketing piece back to the publisher, along with a copy of my COBRA booklet, and explained that theirs was not the only book out there on COBRA.

My response caught the eye of the associate publisher at Thompson Publishing Group, the original publisher of *The COBRA Guide*. She called me and explained that, although they advertised a book, they still needed to finish the product. They were actually still in search of someone to write their book. I offered up a sample chapter, and she liked it. We agreed on financial terms, and off we went.

Several years later, as part of due diligence related to a sale of Thompson Publishing Group, I was asked for a current copy of my "author contract." No one at the company could find one. I explained that I did not have a contract. I placed my hand on the photocopier and faxed them a one-page copy of my hand—a handshake was, effectively, our contract.

We did tighten things up after that and have had a properly written contract since then. We have had the most wonderful working relationship over the years, and I am grateful for that.

Along the way, *The COBRA Guide* has received great reviews from our readers. At one point in 1992, an employee of the Division of Technical Assistance at the U.S. Department of Labor chimed in with a friendly letter praising our work—"a magnificent job. … Wish our regulations division could do as well!"

In this regard, I remember visiting a client's office years ago, and I asked whether they had my COBRA book. They said they did not. But they did have an excellent two-volume blue looseleaf service of COBRA regulations, which was *The COBRA Guide*. It was a great compliment that my client was so taken with the book that they considered it the binding authoritative guidance—if only.

Writing for publication is difficult. As a lawyer, my "day job" requires careful attention to detail and a lot of legal writing. The challenge of writing for publication, though, is taking that legal writing, "legalese," and turning it into something resembling ordinary English language. I tried my best to do that, recognizing that *The COBRA Guide* is intended for an audience of lawyers and non-lawyers alike, each seeking authoritative answers to their most vexing questions.

Writing for publication is also a great learning experience. As my late father said, "There is no better way to learn than to write." Writing requires me to analyze case law, statutes, regulations, notices, and other commentary. I also must read these materials with a critical eye to understand their meaning and with a mirror to verify whether what I'm reading is a true reflection of reality as measured by client experiences. In my case, I have had the honor of answering COBRA questions and analyzing client COBRA issues for 37 years. That reality has informed much of the commentary on best practices in *The COBRA Guide*.

This brings me to my last point: my debt of gratitude.

First, to you, our dear subscribers. Thank you. You have kept this publication going since 1987. Even the best, most insightful commentary goes nowhere without loyal, dedicated readers like you willing to subscribe to this publication and support the effort. I hope you have benefited from the reading as much as I have benefited from the writing.

You have also supported us by commenting on our observations and explanations. When errors creep into the text, our astute readers do not hesitate to comment and question. That is when we learn the real virtue of periodic updates to the text.

In that vein, I thank Thompson Publishing Group, my original publisher, and all its successors, up to and including BLR®. You trusted a 29-year-old lawyer, 4 years out of law school, to develop ideas and content for a comprehensive treatise on what was a brand-new law.

It is impossible to list everyone who was so helpful in supporting me and creating and maintaining this publication over the years. Nevertheless, I especially want to thank Daphne Musselwhite, of blessed memory, who, in 1987, as the associate publisher, responded to my letter and asked me to write the book; John Ortman, associate publisher and senior editor for 16 years and who beat me to retirement by about a year; and, of course, Gwen Cofield.

After *The COBRA Guide* was out for a couple of years, I was privileged to be introduced to Gwen Cofield, the best, most talented, and most helpful editor I've ever worked with. Since 1989, Gwen and I have

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worked together, along with several other guest columnists and periodic contributors, to produce updates, rewrites, answers to subscriber questions, unique one-off products, webinars, and other presentations all about COBRA. I can't thank Gwen enough for all she has done to manage *The COBRA Guide*.

I owe a vast debt of gratitude to the thousands of clients, practitioners, and other commentators who have referred their COBRA questions and issues to me. My writing has been one way to repay that debt—by sharing what I learned from others so that others may benefit therefrom.

I also thank my partners and colleagues over the years, especially those at Proskauer, who have encouraged me in all my writing efforts. Whether through proofreading what I wrote, contributing new thoughts and perspectives, writing guest columns periodically, or commenting on my conclusions, my colleagues have provided tremendous support over the years.

I owe a huge debt of gratitude to my wife and children, who always understood my passion for writing, explaining, and teaching all that I know about COBRA. My writing and speaking work was always on top of a full-time, 24/7 job as a lawyer. How did I do it? As my grandfather used to say, "Time is like a rubber band. It stretches to fit around what you need." I did my best to stretch my time around law and family, and I appreciate my family's acceptance of my extracurricular work.

Finally, my last thank you goes to Jenny Rigterink, who will take the COBRA baton from here and run with it. Jenny is a creative, thoughtful, and careful lawyer. Our subscribers will all benefit greatly from her wisdom and insights for years to come. I am fortunate to be able to move on knowing that *The COBRA Guide* is in good hands.

Thank you all, and farewell.

Paul M. Hamburger *is co-chair of the Employee Benefits, Executive Compensation, and ERISA Litigation Practice Center and head of the Washington, D.C., office of law firm Proskauer Rose LLP. He is also a leader of the Practice Center's health and welfare subgroup and a member of Proskauer's Health Care Reform Task Force. Hamburger has more than 35 years of experience in advising employers and administrators and is the author of numerous articles and publications on COBRA and other employee benefits issues affecting pension and welfare plans. Hamburger is contributing editor of* Mandated Health Benefits—The COBRA Guide *and managing author of* The New Health Care Reform Law: What Employers Need to Know (A Q&A Guide), 5th Edition. ■

Severance agreement terms

Severance agreement not enough to prove COBRA notice compliance

It is not sufficient to tell terminated employees that they have continuation coverage rights under COBRA. The election notice itself must be provided to terminated employees to avoid potential allegations of notice violations.

Although an employer had provided a terminated employee with a severance agreement that said COBRA information was coming, the federal district court allowed the employee's COBRA notice claim to proceed because the agreement did not indicate whether the employee received the notice information. The case is *Davis v. World Ins. Assocs., LLC*, 2023 U.S. Dist. LEXIS 52620 (D.N.J., March 28, 2023).

After her employment termination on July 30, 2021, Evelyn Davis sued World Insurance Associates, LLC (WIA), alleging that WIA failed to provide notice of her COBRA election rights and failed to timely process her request for continued healthcare coverage.

Davis entered into a severance agreement when her employment terminated that stated Davis would receive a COBRA election notice within 14 days with information on COBRA coverage and alternative options. WIA contended that because the agreement notified Davis of her COBRA eligibility, her claim should be dismissed.

However, the court reasoned that while Davis received initial notice of her COBRA rights through the severance agreement, nothing in that agreement indicated whether she received the additional COBRA election information or if WIA processed her request for COBRA coverage on a timely basis. Accordingly, the court ruled that Davis stated a valid claim for violation of her COBRA notice rights and denied WIA's motion to dismiss.

Implications

The *Davis* case illustrates the pitfalls posed by relying on statements in separation agreements to provide qualified beneficiaries with notice of their COBRA election rights. This scenario frequently arises in connection with severance agreements (or even employment agreements with severance provisions) for

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individual employees. Those negotiating the terms of the severance do not always make sure the technical COBRA notices are provided and assume the technical health plan rules will be followed automatically. That is not always the case, and therefore, it is important to make sure that individualized severance arrangements are coordinated with overall health plan compliance.

On a separate issue, it is noteworthy that most recent COBRA notice lawsuits have focused on alleged deficiencies regarding the *content* of the required COBRA notices. By contrast, the *Davis* case emphasizes the importance of maintaining adequate COBRA notification procedures to ensure the COBRA notice is provided to the qualified beneficiary. (See ¶1310 of *the Guide*.) ■

Attorneys' fee awards

Judge approves fee award equal to 45% of COBRA settlement

Case settlements concerning technical violations of COBRA notice provisions continue to pile up. Those actions can result in significant settlement amounts and attorneys' fees awarded against employers, with the calculation of the fee award subject to various factors.

In a recent COBRA notice class action, the federal district court approved the parties' proposed $137,750 settlement, resulting in a net payout of $1,305 per class member. The court awarded $61,987.50 in attorneys' fees, based on calculations by the magistrate judge. The case is *Roll v. Enhanced Recovery Co., LLC*, 2023 U.S. Dist. LEXIS 45172 (M.D. Fla., January 5, 2023).

Facts of the case

Heather Roll, David Ronan, and Colleen Ronan filed a putative class action, alleging that their former employer, Enhanced Recovery Company, LLC (ERC), failed to provide them with adequate notice of their COBRA rights upon their employment termination.

The parties' settlement agreement provided that: ERC will pay $137,750; class members will each receive $1,305; and class counsel could file for an attorneys' fees award of up to $65,000 and up to $2,500 in litigation costs.

A federal district court granted the joint motion for preliminary approval but remanded the case to the magistrate judge to calculate attorneys' fees.

The magistrate judge concluded that persuasive case law compelled using the common fund method, under which fees are not assessed against the unsuccessful litigant but rather are taken from the fund or damage recovery. Here, the settlement sum and attorneys' fees were negotiated together, meaning the attorneys' fees should be deducted from the total amount ERC was required to pay.

The magistrate judge noted that under the common fund approach, the $67,500 fee award would represent approximately 49% of the settlement fund. However, the retainer agreement limited attorneys' fees to 45% of any recovery received through settlement or trial.

The magistrate judge's recommendations were submitted to the district court, which subsequently adopted them.

Implications

This case provides a useful explanation of the different approaches that may be used to calculate the attorneys' fees award in class actions filed about allegedly deficient COBRA notices. (See ¶1520 of the *Guide*.) The best advice to defend against these claims, which may result in hefty attorneys' fees awards, continues to be to ensure the COBRA notices being used conform to the models provided by the U.S. Department of Labor, as modified for the plan at issue. (See ¶1314 of the *Guide*.) ■

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