LEGAL ALERT

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Plan Administrators Must Satisfy COBRA Notice Obligations

Group health plan administrators are required to notify plan participants and other qualified beneficiaries of their rights to continuation coverage under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA). On August 1, 2006, the federal 8th Circuit Court of Appeals[1] issued an important decision establishing the minimum evidence that a plan administrator must demonstrate in order to fulfill its notice obligations under COBRA.

In *Crotty v. Dakotacare Administrative Services, Inc.,* No. 05-3798 (Eighth Cir. 2006), the plaintiff, Kelly Crotty, alleged that the plan administrator, Dakotacare Administrative Services, failed to give her the required COBRA election notice and that, as a result, she lost her opportunity to elect continuation coverage under the plan. The case turned on whether Dakotacare presented evidence sufficient to show that it complied with COBRA's notice requirements.

COBRA's Notice Requirements Generally

While the *Crotty* case specifically dealt with the COBRA election notice, plan administrators have the duty under COBRA to provide several types of notices to plan participants and qualified beneficiaries:

1. Initial (or General) Notice
2. Election Notice
3. Notice of Unavailability of COBRA coverage
4. Notice of Termination of COBRA coverage

With respect to any of the required notices that plan administrators have the obligation to provide, the *Crotty* decision underscores the critical importance of plan administrators being able to prove that that they have properly provided COBRA notices in order to avoid legal claims that they failed to apprise participants and qualified beneficiaries of their rights.

How to Provide COBRA Notices

Although COBRA does not specify what steps should be taken to notify a plan participant or other qualified beneficiary, courts have held that a "good faith" attempt to comply with a reasonable interpretation of the statute is sufficient. In addition, Department of Labor (DOL) disclosure regulations require that notices be furnished in a manner reasonably calculated to ensure actual receipt.

The majority of courts generally conclude that it is not important whether a plan administrator proves that the qualified beneficiary actually receives the notice, so long as it has sent the notice by means reasonably calculated to reach the recipient, or in a manner such that it can be presumed to have been received.

The DOL COBRA regulations consider a notice "furnished" by a plan administrator to a qualified beneficiary as of the date of mailing, if mailed by first class, certified mail, or Express Mail; or as of the date of the electronic transmission, if transmitted electronically.

Proving that COBRA Notices Were Provided

In the *Crotty* case, the court held that the plan administrator could not show enough evidence that the notice in question was in fact mailed. Although Dakotacare had a computerized system for generating COBRA notices, the only evidence it could demonstrate was an audit report that indicated the computer system generated a notice letter for Ms. Crotty. It did not present any evidence that the letter was mailed to her. The court held this was insufficient because a plan administrator must not only prove that it has a system in place for sending out the required notices, but that the system was reliable and in fact had been followed with respect to the specific individual.

Examples of Proof of Providing Notices

A plan administrator must be able to prove what was provided and to whom it was provided. The *Crotty* decision provides examples of other cases where notice was sufficient:

- A photocopy of the envelope addressed to the recipient

[1] The Eighth Circuit consists of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota

- A report generated by the plan administrator stamped with the date the notice was mailed
- An affidavit by an employee who recalled mailing the notice to the recipient

Plan administrators are advised to produce actual records that support the claim that the notice was provided. Recommended examples of proof include:

- First-class mail with USPS certificate of mailing (this is relatively inexpensive and can be used to establish both the actual mailing and the date)
- First-class mail, documented with business records and individual testimony (this is usually a better option for large plan administrators; consider a declaration or affidavit of mailing for each notice sent)
- Certified mail with no return receipt (this provides proof that the notice was mailed on a particular date)
- Certified mail with return receipt, delivery confirmation, or signature confirmation (the sender will receive confirmation that mail has been received)

Maintaining COBRA Records
Because plan administrators may be required to prove that they provided COBRA notices to qualified beneficiaries years after the fact, it is important that documents of proof be maintained long after the notices to which they relate are provided or mailed.

ERISA's general recordkeeping rules require that plan records be maintained for eight years. While it is not clear whether COBRA notices are subject to this rule, it appears to be a reasonable rule of thumb. Plan administrators should consult with their legal counsel about whether a longer period may be necessary, taking into consideration the states in which they do business.

What Should Plan Administrators Do Now?
Plan administrators now must be able to clearly prove that COBRA notices were in fact provided to the qualified beneficiary in question.

Whatever method of delivery is used, plan administrators should:

- Have a written policy that specifies the procedures it uses to provide the COBRA notices
- Maintain copies of the actual notices sent or provided, or the form used to generate the actual notices at the relevant time
- Maintain evidence of having provided the COBRA notice
- Be able to produce individuals with first-hand knowledge of the plan administrator's practices and procedures to testify that they were followed

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Questions and Answers
The employment law and employee benefits attorneys at Lindquist & Vennum are prepared to answer questions and assist employers in their efforts to comply with this new law. Please contact one of these attorneys if you need assistance:

Jennifer Suich Frank	jfrank@lindquist.com	612-371-2435
Nancy Brostrom Vollertsen	nvollertsen@lindquist.com	612-371-3540
Robert J. Hartman	rhartman@lindquist.com	612-371-3520
Edward J. Wegerson	ewegerson@lindquist.com	612-371-3549
Mark J. Kinney	mkinney@lindquist.com	612-371-2485
Anthony A. Lusvardi	alusvardi@lindquist.com	612-371-3961
Cynthia Y. Lee	clee@lindquist.com	612-371-6200
