

E*Alert

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**FEDERAL COURT IN WISCONSIN HOLDS THAT LATE NOTICE DOES NOT
EXTEND COBRA CONTINUATION PERIOD**

By: Alan M. Levy, Esq.

The rules seem clear on paper: when an employee loses health insurance coverage due to termination or reduction in hours, the employer has 30 days to notify the plan administrator of the qualifying event, the administrator then has 14 days to provide the employee with a notice that he/she can elect to purchase continued coverage, and that continuation normally ends after no more than 18 months. What if the employee never gets the election notice?

In *Koopman v. Forest County Potawatomi Member Benefit Plan*, 2005 WL 538601 (E.D. Wis. 2/15/06), the participant was told he would be terminated February 11, 2004, and he would get the COBRA election notice by separate mailing. Despite several inquiries from the ex-employee, the plan continued his coverage at the employer's expense and did not deliver the election notice until December 7, 2004. The participant expected to purchase his own insurance for 18 months thereafter, retaining coverage until May 31, 2006. Instead, in January 2006, the plan notified him that his right to COBRA continuation would end February 10, 2006 – six months after the cutoff date based on the discharge notice, but five months before the 18 months following the delivery of the election notice.

Although the decision focused on whether the employee could obtain an injunction for continued coverage until May 2006, its lessons about notice are important. The Court said:

- (1) COBRA coverage is for 18 months after the occurrence of the qualifying event, not the receipt of the election notice.

- (2) While the employer can voluntarily extend that period at its own expense, COBRA does not require that it do so solely because of a tardy election notice.
- (3) A lapse in coverage may cause application of a subsequent plan's pre-existing condition rules, or allow insufficient time to find new insurance. That may create a liability for which the court can, in its discretion, assess up to \$110.00 for every day over 30 that a notice is late, in addition to any damages for a coverage gap.

Useful ground rules can be derived here. An employer is best served by making sure **all** notices (employer to plan, plan to departing employee, coverage-electing employee to plan) are delivered promptly and clearly. An employer who wishes to pay for part of the 18-month COBRA continuation period (e.g., as part of a severance package) should still make sure the election form is provided to the employee within the 44-day notice period. While, under this decision, the employee is not entitled to extended coverage based on tardy delivery of the election notice, that person may have claims pursuant to the \$110.00 per day rule and/or for the loss caused by a coverage lapse due to tardy notice.

COBRA prescribes a variety of adverse consequences if not administered correctly. While daily notice penalties and continuing premium costs may become significant, they pale in comparison to possible hospital and medical bills for the ex-employee and his/her dependents who cannot acquire replacement insurance because they did not receive COBRA notices at the correct times.

If you have any questions about the issues raised by this e-alert, please feel free to contact Alan Levy at (414) 273-3910 or by e-mail at alevy@lindner-marsack.com

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