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EBIA Weekly Archives

New Benefits Coordinator's Failure to Provide COBRA Election Notice Leads to Stiff Penalties for Employer

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[*Evans v. Books-A-Million*, 2012 WL 5379351 (N.D. Ala. 2012)]

Available at http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-2_07-cv-02172/pdf/USCOURTS-alnd-2_07-cv-02172-1.pdf

The terminated employee in this case sued her former employer for, among other things, not providing her a COBRA election notice for its group dental plan. The employer did not dispute that the employee was entitled to a COBRA notice but contended that its failure was an “innocent mistake.” Members of the employer’s benefits staff described a complicated process involving three different reports that had to be cross-referenced in order to identify terminated employees who were entitled to receive a COBRA notice. The staff members, including a new benefits coordinator who had only been at the job a few weeks, were unable to prove that a notice had been provided and offered conflicting reports as to how they had responded when the employee called to request an election notice.

The court determined that there were too many “contradictions and evasions and disingenuous answers” to conclude that the employer’s failure to mail the notice was inadvertent. In particular, the court noted that the employer had failed to provide a notice despite being given multiple opportunities to do so—first when the employee was terminated, again when she called and requested a notice, and finally when she filed her lawsuit. As a result, the court concluded that the employer intentionally withheld the notice and calculated penalties accordingly. The court imposed penalties from the 45th day after the employee’s termination through the end of the 18-month coverage period that the employee could have elected under COBRA. Based on the employer’s bad faith and “intentional withholding of the COBRA notice,” the court set the penalty at \$75 per day, for a total of \$37,950 plus over \$45,000 in attorneys’ fees and costs. The court noted that the employer, as a large, national company, would be able to satisfy the fee award and that the statutory penalty alone might not be a sufficient deterrent against further misconduct.

EBIA Comment: This case serves as a stark reminder to employers and administrators to make sure they have COBRA notice procedures in place—and to make sure they are followed. The court’s opinion also provides an enlightening discussion of the factors that may be considered when determining the penalty amount for a COBRA notice failure. While the COBRA statute sets a maximum penalty amount of \$110 per day, the actual amount of the daily penalty—and the number of days for which the penalty is assessed—is left to the court’s discretion. The court also has discretion regarding the amount of attorneys’ fees awarded, and, as illustrated by this case, may use the attorneys’ fees as a further penalty or deterrent. For more information, see EBIA’s **COBRA** manual at Sections XVIII.J (“Sending the Election Notice and Proving It Was Sent”) and XXV.C (“Statutory Penalties for Failure to Provide Certain COBRA Notices”).

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