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# Avoiding Unexpected Liability for Former Employees' Medical Expenses

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Adherence to the COBRA health care continuation rules is not always high on an employer's list of priorities. Compliance is often "outsourced," and even when handled "in-house," it rarely consumes much attention. A recent case, Hager v. DBG Partners, Inc., illustrates that inattention can be costly for employers. This post explains why.

## What Went Wrong?

While the facts of the case are admittedly unusual, the outcome is still instructive for employers. Plaintiff, David Hager, was terminated from his position as chief executive officer of DBG Partners, Inc ("DBG"). DBG notified Hager of his termination by written notice mailed to his current (and correct) home address. While employed, he was covered under DBGs's group health plan. Following his termination, Hager elected to continue his group health plan coverage under COBRA. At some point during his COBRA continuation period, DBG terminated its group health plan, notice of which was mailed to Hager's *prior* home address. Hager claimed that he did not receive the notice. Despite terminating its group health plan, DBG continued to accept COBRA premiums from Hager.

Following the termination of the DBG group health plan, and during Mr. Hager's COBRA coverage period, Mr. Hager underwent colon cancer treatment. He later learned that the treatment had not been covered. (He allegedly incurred $36,000 for his cancer treatment before he learned the plan was canceled.) Hager sued DBG in the District Court for the Northern District of Texas, seeking reimbursement of his medical expenses for the period he was without coverage. The District Court dismissed Hager's claim, and he appealed to the Fifth Circuit Court of Appeals, which reversed and sent the matter back to the lower court. In so doing, the Fifth Circuit made clear that Hager could recover the costs of his treatment from DBG for its failure to provide proper notice, if he could establish the facts as he alleged them.

Assuming the allegations as true, one might be inclined to side with Hager, in which case the lesson of the case would be a pedestrian common sense one: don't send notices of plan termination to former employees who have elected COBRA to the wrong address. What makes this case interesting is the tortuous route the Court had to take to get to this result. In so doing, the Court meticulously parsed the statute, thereby, in our view, making it noteworthy.

## Analysis of the Court's Decision

### *The Threshold Issue of Whether Hager Could Bring a Claim*

Once Hager was no longer employed, did he have standing to bring his claim? Or, put more simply, is he among the class of individuals who the court will recognize as being entitled to be heard? The Court observed that, "Hager has no claim for benefits under the plan, because the plan no longer exists." Nevertheless, based on U.S. Supreme Court precedent, the Court concluded that Hager is a participant entitled to bring this action. Otherwise, said the Court, employers would be able to avoid ERISA lawsuits simply by terminating their employees' health benefits.

### *The COBRA Notice Requirement*

As plan administrator, DBG had an obligation to inform former employees of their COBRA rights. Applicable law established requirements for the content of the required notice to a "qualified beneficiary" (which includes a former employee) of his or her right to COBRA coverage. The Court determined that DBG properly provided this notice.

COBRA also imposes on employers the obligation to inform a qualified beneficiary of any termination of continuation coverage that takes effect earlier than the end of the maximum period of continuation coverage applicable to the qualifying event. Oddly, the District Court concluded that this notice was not required because "the maximum period of continuation coverage" cannot be longer than the plan's existence. The Fifth Circuit disagreed, saying that the maximum period referred to "is the 18- or 36-month maximum allowed under ERISA based on the qualifying event, not the lifespan of the plan."

### *Availability of a Remedy*

Hager claimed that DBG violated its COBRA notice obligations, but was he entitled to recover benefits, i.e., his medical costs? In the parlance of ERISA jurisprudence, such a claim is referred to as "compensatory," or as seeking "money" damages. One of the many oddities of ERISA is that money damages are not generally available for most claims involving benefits since ERISA refers expressly to allowing only claims that are "equitable." According to the Court, a claim "that only seeks to impose liability and require[s] the defendant to pay the plaintiff a sum of money" is a *legal* remedy, not an *equitable* one. Thus, said the Court, ERISA did <u>not</u> allow Hager to recover based on a claim for benefits under the plan. At this point, most plaintiffs would cry foul, and most defendants would heave a sigh of relief. This is not, however, the end of the proverbial story.

### *Recovery based on a Notice Violation*

Another provision of ERISA allows a participant or beneficiary to bring an action for civil penalties. While this provision generally contemplates a per diem penalty ($110/day), it also permits "such other relief as [the court] deems proper." Unlike the limitations imposed on claims for benefits, this provision is not limited to claims that are "equitable" in nature. Rather, courts are permitted to award a discretionary penalty against an administrator that does not comply—in this case—with the COBRA notice requirements. In exercising the discretion to grant such other relief, courts generally consider whether the employer acted in bad faith, which appear may be the case in this instance. It is here that Hager's claim gained some traction. According to the Court:

When an administrator fails to provide notice of COBRA eligibility, courts have stated that "the aim is to place the plaintiff ‘in the same position [he] would have been in had full continuation coverage been provided,’” and to “induce compliance by plan administrators.”

The Court thereupon remanded the case to the District Court to determine whether, “in light of the foregoing analysis, to award a penalty, and if it does, the amount of such penalty.”

## Concluding Thought

The *Hager* case highlights a previously little-noticed provision of ERISA: When it comes to penalties for failing to give notice the reference is to “other relief” not to “other *equitable* relief.” That this provision is unqualified means that courts are free to award damages for such things as uninsured medical benefits of the sort incurred by Hager. To be clear, Hager was unable to recover based on a claim for benefits under the plan, but he may get to the same result under the ERISA rules governing notice requirements.

The learning from this case is simple: don’t send notices of plan termination to former employees who have elected COBRA to the wrong address—and while you’re at it, be more careful to comply with <u>all</u> of ERISA’s notice requirements.



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