UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 16-24818-CIV-MARTINEZ-GOODMAN

JAMIE BRYANT, DAWN SMITH, CURTIS BAKER, and EARNEST PENEDIANCO, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC., ADMINISTRATIVE COMMITTEE OF THE WALMART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,

Defendants.
___________________________________ /

BRIEF OF AMICI CURIAE
THE AMERICAN BENEFITS COUNCIL AND
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTERESTS OF AMICI CURIAE[1]

The American Benefits Council ("Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, like this one, involving issues of national concern to the business community.

Amici's members provide health coverage to millions of Americans through the group health plans that they sponsor, many of which are subject to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). The vast majority of employers, including many of *amici's* members, delegate the administration of COBRA programs to third parties who have the requisite

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[1] No counsel for a party in this litigation authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

expertise to administer COBRA's highly reticulated requirements. And because those third-party administrators are best equipped to answer qualified beneficiaries' questions about continuation of coverage, those businesses typically identify and provide contact information for the COBRA administrator in COBRA election notices, just as Walmart did here. If adopted, Plaintiffs' theory that COBRA prohibits this longstanding, nearly universal practice would dramatically alter the way that businesses handle COBRA, to the detriment of qualified beneficiaries and plans. *Amici* and their members therefore have a substantial interest in this Court's resolution of Plaintiffs' claims.

INTRODUCTION

The regulations implementing the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by COBRA, require an election notice to contain the "name, address and telephone number of the party responsible under the plan for the administration of continuation coverage benefits." *See* 29 C.F.R. § 2590.606-4(b)(4)(i).

In most cases, that party is *not* the "Plan Administrator" (i.e., the "administrator" of an employee benefit plan as that term is defined in ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A)). Instead, consistent with ERISA, most businesses delegate this role to third parties, known as COBRA administrators. Those third-party COBRA administrators are thus the "party responsible" for the administration of COBRA benefits and should be listed, with contact information, on the COBRA election notices—not the Plan Administrator.

As discussed below, adhering to COBRA's highly reticulated requirements requires experts specialized in COBRA administration. COBRA administrators have developed the particularized knowledge required to comply with COBRA's matrix of regulatory requirements and to respond to participant inquiries. Moreover, ERISA and, indeed, the COBRA regulations at issue here, expressly

contemplate that Plan Administrators will delegate their duties. Identifying and providing contact information for the COBRA administrator in the election notice advances the statute's goals by ensuring that qualified beneficiaries can communicate with the most knowledgeable people capable of assisting them. Plaintiffs' contrary arguments contravene not only the statute and regulations, but also the widely used practice of employer plan sponsors to delegate the administration of COBRA benefits to third-party COBRA administrators to ensure qualified beneficiaries' access to COBRA.

Upholding the plain language of the COBRA regulations would not only be consistent with the law; it also would help ensure that qualified beneficiaries receive the best assistance possible during the COBRA process. Moreover, such a ruling would address the recent increase in meritless COBRA notice class action litigation, which ultimately hurts both qualified beneficiaries and plans.

1. The Statute and Regulations Permit Plan Administrators to Identify and Provide Contact Information for Third-Party Administrators on COBRA Election Notices

Plaintiffs bring their claims under ERISA section 606(a)(4), which requires COBRA qualified beneficiaries to be given notice of their COBRA election rights but defers to "regulations prescribed by the Secretary [of Labor]" to establish the details of the notice. *See* 29 U.S.C. § 1166(a).

The regulations, in turn, prescribe the information that must be included in the COBRA election notice (*see* 29 C.F.R. § 2590.606-4) and offer a "model notice that is intended to assist administrators in discharging the notice obligations." *See* 29 C.F.R.§ 2590.606-4(g). While using the model notice "will be deemed to satisfy the notice content requirements," the regulations expressly provide that using the model notice is "not mandatory." *Id*. In fact, the regulations explain that

the model notice can, and should, be modified or supplemented as appropriate." *Id.*

i. Identifying and Providing Contact Information for the COBRA Administrator in the Election Notice Satisfies the Regulations

Importantly, neither 29 C.F.R. section 2590.606-4(b)(4)(i), nor any other subpart of the COBRA regulations requires that a COBRA election notice identify or provide contact information for the "Plan Administrator." "Administrator" is defined under 29 U.S.C. § 1002(16)(A), and if the Department of Labor had intended to require contact information for the Plan Administrator to be provided in the election notice, it would have used that term—which is a universally understood term of art in the ERISA context. Instead, section 2590.606-4(b)(4)(i) simply requires that the COBRA election notice identify "the party responsible under the plan for the administration of continuation coverage benefits." The model notice includes a consistent prompt: "If you have any questions about this notice or your rights to COBRA continuation coverage, you should contact *[enter name of party responsible for COBRA administration for the Plan, with telephone number and address]."* 29 C.F.R. § 2590.606-4 (App'x).

Although it is possible that, for a given plan, the "party responsible…for the administration of continuation coverage benefits" could be the Plan Administrator, that would be rare. In most cases, especially when dealing with mid- to large-sized businesses, "the party responsible under the plan for the administration of continuation coverage benefits" is not, in fact, the formal "Plan Administrator." Because COBRA administration can be complex and cumbersome, most businesses outsource this role to third-party administrators. In fact, studies show that COBRA administration is one of the most commonly outsourced benefit functions. For example, a Hewitt Associates study found that over 77% of large companies rely on third-party administrators and insurers to administer their

COBRA programs. C. Hirschman, Sending COBRA Off to the Experts, HR Magazine (March 1, 2006) reprinted in https://www.shrm.org/hr-today/news/hr-magazine/pages/0306srhirschman.aspx. A more recent study by the International Foundation of Employee Benefit Plans found that 63.6% of employers outsource COBRA administration. https://www.ifebp.org/bookstore/corporate-benefits-departments/Pages/default.aspx. Anecdotally, small businesses—which typically have no sophisticated in-house benefit capabilities—outsource COBRA even more frequently.

This is no surprise: COBRA programs implicate a myriad of specialized issues and their administration is complex. The COBRA requirements are detailed, extensive, and loaded with varying deadlines. The Plan Administrator is required to send a host of notices, the content and timing of which are often individual-specific, including the general notice of continuation coverage (provided to covered employees and their spouses generally 90 days after the plan coverage begins), the COBRA election notice (provided to qualified beneficiaries generally 14 days after the Plan Administrator receives notice of the qualifying event from the individual or from the employer, as applicable), notice of unavailability of continuation coverage (provided to individuals 14 days after notification of the qualifying event, if applicable), and notice of early termination of continuation coverage (provided to the qualified beneficiary as soon as practical after the determination of early termination is made, if applicable). *See* 29 C.F.R. § 2590.606-1, 29 C.F.R. § 2590.606-4(b), (c) and (d).

In addition, the COBRA billing and premium payment process creates a patchwork of individual-specific deadlines which are key to COBRA election and continued coverage. A qualified beneficiary has at least 60 days from the COBRA qualifying event (or in some cases, 60 days from notification of the qualifying event) to elect COBRA and then another 45 days to pay the premium related to the

initial election. *See* 29 U.S.C. § 1165(a)(1), 29 U.S.C. § 1162(3). After the initial election, premiums are due monthly but the individual gets a 30-day grace period each month. *See* 26 C.F.R. § 54.4980B-8, Q&A 5. Both during the election period and grace period, until the premium has been paid, the plan may either provide coverage and retroactively terminate it if the premium is not ultimately paid or may cancel coverage and retroactively reinstate the coverage when the premium is paid. *See* 26 C.F.R. § 54.4980B-6, Q&A-3, 26 C.F.R. § 54.4980B-8, Q&A-5.

These COBRA requirements and deadlines can be confusing for qualified beneficiaries, and require handholding from experts, because the rules are complex and differ from how the group health plan operated for the participant before COBRA was triggered. For the plan, not only are the rules complex, but they often apply to a population with which the employer's systems are not generally designed to interact—that is, terminated employees, ex-spouses, and children. As these individuals do not have a connection to the payroll system, systems for billing, collecting, and remitting payments generally need to be developed separately for COBRA. Implementing systems and developing the expertise to navigate COBRA are costly endeavors, and errors can be costly as well. *See* 26 U.S.C. § 4980B; 29 U.S.C. § 1132(c). As such, the ability to outsource COBRA administration to third-party administrators who have economies of scale and deep expertise is essential. This ensures that qualified beneficiaries have the opportunity to obtain the coverage that COBRA provides, including by giving individuals access to the COBRA experts.

When the plan has outsourced COBRA administration, it makes little sense to require a company to list and provide contact information for the Plan Administrator in the election notice when the Plan Administrator is not actually administering the COBRA program. The third-party COBRA administrator—as the "party responsible" for administering the program—should be listed instead.

That is the person who can answer qualified beneficiaries' questions and ensure that COBRA is administered properly. This is why the regulations unambiguously allow a COBRA election notice to include contact information for the COBRA administrator.

Plaintiffs insist that the Plan Administrator must be listed in the notice, but where COBRA administration has been delegated, the Plan Administrator generally will lack the specialized expertise and familiarity with the program that qualified beneficiaries need. A requirement that the Plan Administrator, instead of the third-party COBRA administrator, be listed in the notice would frustrate the statutory goal of providing COBRA coverage. Indeed, Plaintiffs have not alleged that they contacted the COBRA administrator listed in the Walmart notice, much less that they were provided inaccurate or unhelpful information, or that contacting the Plan Administrator would have helped them in any way. Instead, they claim that listing the COBRA administrator instead of Walmart's Plan Administrator in the notice constitutes a *per se* violation entitling them to a windfall of statutory damages.

Moreover, no other portion of the regulations requires identification of the Plan Administrator in the COBRA election notice. Section 2590.606-4(a), for example, provides:

> Pursuant to section 606(a)(4) of the Employee Retirement Income Security Act of 1974, as amended (the Act), *the administrator of a group health plan* subject to the continuation coverage requirements of Part 6 of title I of the Act shall provide, in accordance with this section, notice to each qualified beneficiary of the qualified beneficiary's rights to continuation coverage under the plan

29 CFR § 2590.606-4(a) (emphasis added). While this regulation requires the Plan Administrator to *provide notice* of continuation coverage, it does not require that the Plan Administrator be *listed* in the notice. And as explained above, the

regulation that governs the content of the notice, section 2590.606-4(b)(4)(i), requires identification of, and contact information for, only "the party responsible under the plan for the administration of continuation coverage benefits"—language that plainly encompasses COBRA administrators. Thus, while Plaintiffs seize upon section 2590.606-4(a)'s use of the term "administrator," their reliance is misplaced. The fact that the term "administrator of a group health plan" is used elsewhere in the COBRA regulations, but *not* in the provision addressing the contact information to be included in COBRA election notices, 29 C.F.R. § 2590.606-4(b)(4)(i), only refutes the restrictions Plaintiffs seek to impose. *Cf. Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018).

ii. ERISA Permits Plan Administrators to Delegate Duties

At bottom, Plaintiffs' position is that the COBRA regulations do not permit Plan Administrators to delegate their duties by designating a third-party COBRA administrator on election notices to respond to participant inquiries. This argument flies in the face of ERISA, the accompanying regulations, and agency guidance, which permit delegation of duties. In particular, the statutory and regulatory scheme contemplates that Plan Administrators will use third-party administrators to assist them in delivering services.

ERISA itself acknowledges that delegation plays an important role in administering plans and providing benefits—hardly a surprise, given the statute's complexity, *see supra* 7-10. It is common for "plan fiduciary functions [to be] delegated under the statutory framework of sections 402 and 405 of ERISA, then customized to fit the particular needs of the employer through bargained service agreements between the employer and third-party professional fiduciaries." Medill, Regulating ERISA Outsourcing, 102 Iowa L.Rev 505, 508 (2017), reprinted in, https://ilr.law.uiowa.edu/assets/Uploads/ILR-102-2-Medill.pdf. As the DOL Advisory Council has observed, "[t]hrough outsourcing, plan sponsors

can gain access to expertise and technology, achieve economies of scale, and reduce costs. Outsourcing also permits a plan sponsor to focus on its core business rather than managing its employee benefit plans."
https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2014-outsourcing-employee-benefit-plan-services.pdf.

Section 2590.606-4(b)(4)(i) reflects the same, consistent policy, by permitting plans to list, and provide contact information for, the COBRA administrator in the COBRA election notice. Not only does the regulation's text reflect the underlying ability to delegate (with the reference to "the party responsible . . . for the administration of continuation coverage benefits"), but the preamble to the COBRA regulations reinforces that the Department of Labor contemplated that COBRA administrative functions would be delegated to COBRA administrators. *See, e.g.*, 69 Fed. Reg. 30084, 30095-30096 (May 26, 2004). Specifically, in the section of the preamble evaluating the potential costs of the notice requirements for plans, the Department of Labor stated that "[e]conomies of scale also tend to moderate COBRA administrative costs because the majority of notice obligations are met through the purchase of COBRA administrative services from a number of COBRA administrators that is small relative to the number of group health plans they serve." *See* 69 Fed. Reg. 30084, 30092 (May 26, 2004). That is, rather than prohibiting delegation of COBRA administration to third parties, the regulations and related preamble language specifically acknowledge the importance and prevalence of that practice in the COBRA context.

Plaintiffs' position would undermine the critical role that third-party administrators play in ensuring proper administration of COBRA programs. By requiring election notices to identify the Plan Administrator instead of the COBRA Administrator as the entity for qualified beneficiaries to contact, Plaintiffs' rule

would deprive those individuals of access to the resource most capable of providing the answers they need. At the same time, it would require Plan Administrators to resume the very roles that they appropriately delegate to COBRA administrators, increasing their costs and depriving them of important economies of scale. That result would not be good for anyone.

2. Non-Meritorious Litigation Only Raises the Cost of Providing Benefits to all Participants' Detriment

By making clear that COBRA repudiates Plaintiffs' claims, this Court will also help stem the tide of meritless litigation regarding COBRA notices. Opportunistic law firms recently have filed a flurry of class action lawsuits pressing almost identical claims as the Plaintiffs here.[2] The plaintiffs in these other lawsuits, like the Plaintiffs here, do not assert that they actually attempted to enroll in COBRA and were frustrated, but instead allege only technical violations of the COBRA regulatory scheme. The complaints uniformly claim that the notice provided to qualified beneficiaries was deficient because the COBRA administrator, rather than the Plan Administrator, was listed. Many defendants have chosen to settle rather than incur the costs of defending against the astronomical awards sought by plaintiffs.

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[2] Five cases have settled. *See Hicks v. Lockheed Martin Corp.*, Case No. 8:19-cv-00261 (M.D. Fl.), ECF 34; *Valdivieso v. Cushman & Wakefield Inc.*, Case No. 8:17-cv-00118 (M.D. Fl.), ECF. 92; *Vazquez v. Marriott Int'l, Inc.*, Case No. 8:17-cv-00116 (M.D. Fl.), ECF 117; *Sefchick v. Branch Banking & Trust Co.*, Case No. 8:16-cv-03303 (M.D. Fl.), ECF 13; *Delaughter v. ESA Mgmt., LLC*, Case No. 8:16-cv-03302 (M.D. Fl.), ECF 58. Five others are stayed pending mediation, arbitration, or an undecided motion to dismiss, or have a pending motion to compel arbitration or to stay before the court. *See Conklin v. Coca-Cola Beverages Fl., LLC*, Case No. 8:19-cv-02137 (M.D. Fl.); *Strickland v. United Healthcare Servs.*, Case No. 8:19-cv-01933 (M.D. Fl.); *Grant v. JPMorgan Chase & Co.*, Case No. 8:19-cv-01808 (M.D. Fl.); *Rigney v. Target Corp.*, Case No. 8:19-cv-01432 (M.D. Fl.); *Riddle v. PepsiCo, Inc.*, Case No. 7:19-cv-03634 (S.D.N.Y.). One was dismissed with prejudice when the plaintiff named an improper defendant. *See Tadal v. Pavestone, LLC*, Case No. 8:19-cv-00053 (M.D. Fl.).

As courts have observed, there are deleterious costs to meritless employee benefits litigation. In the defined benefit pension plan arena, for example, meritless litigation and plan sponsors' concomitant concerns over fiduciary liability has played a large role in plan freezes. As Judge Easterbrook explained in *Cooper v IBM Personal Pension Plan*, 457 F.3d 636, 642-43 (7th Cir. 2006):

> Litigation cannot compel an employer to make plans more attractive (employers can achieve equality more cheaply by reducing the highest benefits than by increasing the lower ones). It is possible, though, for litigation about pension plans to make everyone worse off. After the district court's decision IBM eliminated the cash-balance option for new workers and confined them to pure defined-contribution plans. … Whether that is good or bad (for employees or society as a whole) is not for us to say. What we can and do conclude, however, is that the decision may again be made freely, governed by private choice rather than legal constraint.

Id. at 642-43. Although offering COBRA coverage is mandatory if an employer is sufficiently large and decides to offer a group health plan, this is not a zero-sum game. In the extreme, employers could choose not to offer group health plans to avoid COBRA liability, notwithstanding that for some that may lead to an assessable payment under the Affordable Care Act's "employer mandate." *See* 26 U.S.C. § 4980H. More likely, the expenses that an employer incurs in defending meritless claims will inevitably be charged to all participants, potentially by reducing the level of benefits or increasing employee contributions. Plan sponsors may be forced to restrict the choices available in health plans or offer less robust benefits. That would "make everyone worse off." *Id.* at 642.

3. Conclusion

For these reasons, the Court should grant Defendants' motion for summary judgment and enter judgment for Defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFIY that on the 29 day of June 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send a notice of filing to all counsel of parties of record on the service list.

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