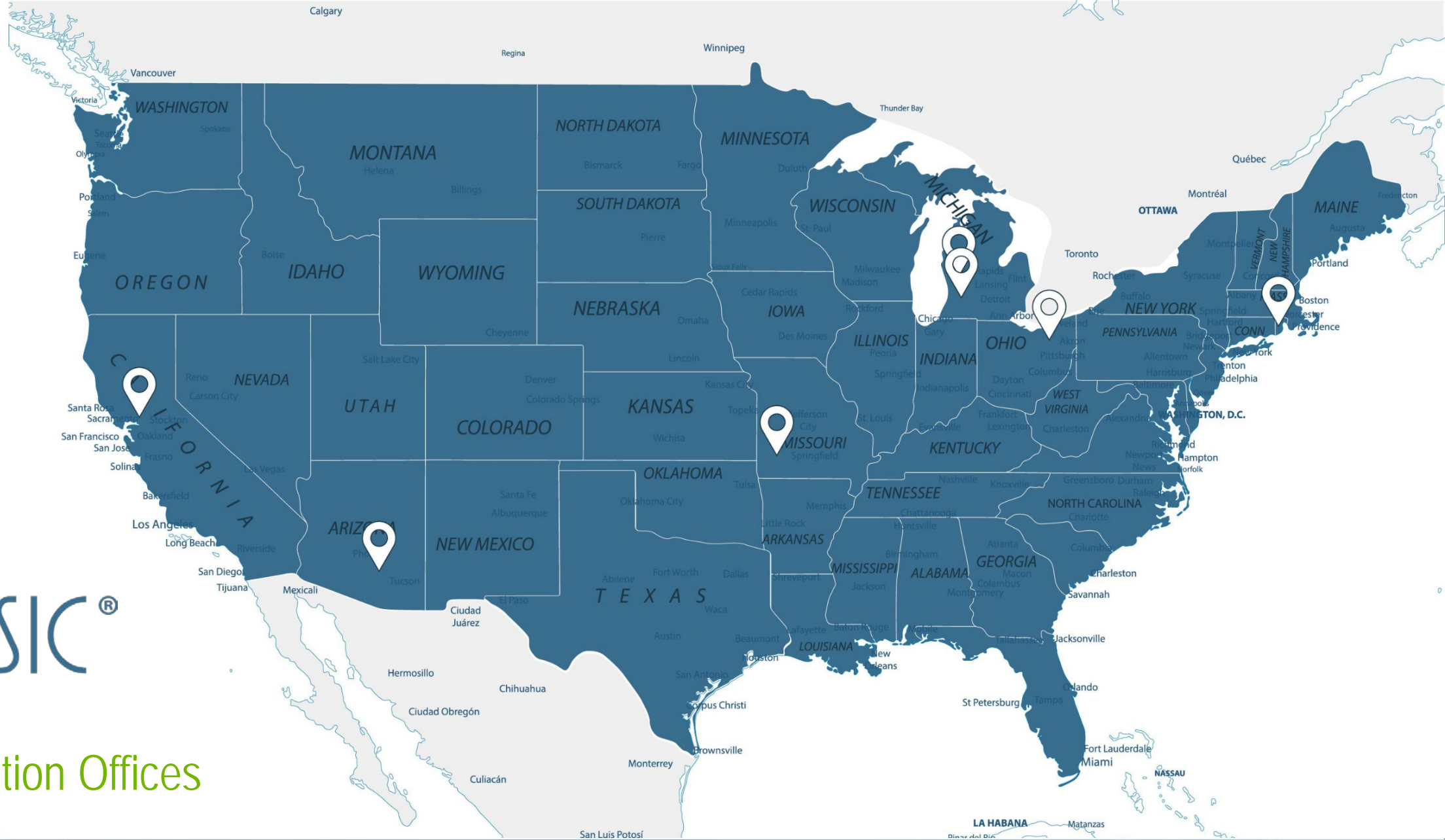




Costly COBRA Mistakes and How to Avoid Them



Presented by: Stephanie H. Grant, Esq.



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Stephanie H. Grant
Warner Norcross & Judd LLP

➤ What is COBRA?

- “COBRA” = Consolidated Omnibus Budget Reconciliation Act of 1986, as amended
- Provides for continuation of existing group health plan coverage for qualifying employees, covered spouses and covered dependents
- Legally protected right under the Internal Revenue Code, Employee Retirement Income Security Act of 1974, and the Public Health Service Act

➤ Which Employers Must Comply?

- Employed at least 20 or more employees in prior year
 - On at least 50% of typical business days
 - Controlled group aggregation rules apply
- Determined using full-time equivalents
 - Part-time employees counted; up to 8 hours per day, 40 hours per week maximum
- Downsizing employer rule
 - Shrinking: subject to COBRA until calendar year after the average is less than 20 and can't drop COBRA for grandfathered recipients
- Statutory Exemptions:
 - Church = Yes
 - Government = No

➤ Consequences of Failing to Comply with COBRA

- IRS excise taxes of \$200/day
- Statutory penalties of \$110/day
- Qualified beneficiaries can sue to recover COBRA coverage
 - Claims may not be covered by plan or stop-loss policy
- Courts may impose “other equitable relief”
- Attorney fees imposed if plaintiff is successful in court

Costly Mistake #1

Assuming COBRA Doesn't Apply to
All Group Health Plans

➤ Plans and Programs Subject to COBRA

- Medical
- Prescription Drug
- Dental
- Vision
- Substance Abuse
- Mental Health
- Disease Management Programs
- Health Flexible Spending Accounts
- Health Reimbursement Accounts
- Employee Assistance Programs (maybe)
- Wellness Programs (maybe)
- On-site Clinics (maybe)

➤ Unaffected Plans and Programs

- Life Insurance
- Short-Term Disability
- Long-Term Disability
- Accidental Death & Dismemberment
- Dependent Care FSA
- Long-Term Care Plan
- On-site Gyms
- Health Savings Account Contributions Program
- Medical Savings Account
- Workers' Compensation
- On-site Clinics (maybe)

➤ Wellness Program Rules

- Benefits of wellness programs must be offered if such benefits provide “medical care”
- Wellness incentives
 - Don't have to offer to COBRA beneficiaries if \$ outside the health plan
 - Must offer incentives regarding cost-sharing for services, such as lower deductibles, copayments, etc.

➤ Tips for Avoiding Costly Mistake #1

- Review EAPs, on-site clinics and wellness program
 - Do they provide “medical care”?
- Remember that health FSAs under a cafeteria plan are subject to COBRA
- Don't assume HIPAA excepted benefits are also excepted from COBRA

Costly Mistake #2

Failing to Recognize That A Leave of Absence
Could Be A Qualifying Event

➤ What is a Qualifying Event?

- Seven qualifying events:
 - Termination of employment
 - Reduction in hours
 - Divorce or legal separation
 - Death of covered employee
 - Dependent child ceasing to be a dependent under the plan
 - Entitlement to Medicare
 - Bankruptcy (retirees only)
- Event must cause a “loss of coverage”
- What is not a qualifying event?
 - Modification or termination of plan
 - Chapter 11 bankruptcy for non-retiree
 - Employee’s failure to pay required premiums

➤ FMLA Leave of Absence

- Beginning of FMLA leave *is not* a qualifying event
- End of FMLA leave *is* a qualifying event *if* employee does not return to work
 - Even if employee did not maintain coverage during FMLA leave
 - Even if employee doesn't repay premiums in arrears during leave

➤ Non-FMLA Leave of Absence

- If non-FMLA leave is a reduction in hours and results in loss of coverage, then it is a qualifying event
 - No loss of coverage, no qualifying event
- When should election notice be sent?
- When does the COBRA coverage period begin?

➤ Tips for Avoiding Costly Mistake #2

- Offer COBRA coverage to employees on FMLA leave only if employee does not return from FMLA leave
- Address non-FMLA leaves of absence in leave policy
 - Options
 - Treat start of non-FMLA leave as qualifying event
 - Treat end of non-FMLA leave as qualifying event
 - Treat start of non-FMLA leave as qualifying event, but offer alternative coverage
 - Having no policy is a bad policy!

Costly Mistake #3

Failing to Provide COBRA Election Notice

➤ Election Notice

- Must be provided to each affected qualified beneficiary
 - Employee
 - Covered dependents
 - Covered spouses
- Can use single election notice if all reside at same address
- Must be sent within 14 days after receiving notice of qualifying event (or 44 days after qualifying event if employer is also plan administrator)
- Caution if using DOL's model election notice verbatim

➤ Tips for Avoiding Costly Mistake #3

- Routinely run audits of employee data
- Timely communicate employee data to COBRA TPA
- Fixing a failure to provide a notice
 - Provide notice as soon as possible!
 - May require drafting special COBRA election forms and special election procedures

Costly Mistake #4

Incorrectly Handling COBRA Premiums

➤ COBRA Premiums

- Monthly payments must be allowed
- Grace period must be allowed of at least:
 - 45 days after election of coverage – must be all premiums through payment date!
 - 30 days after first day of each month
 - Must be consistently applied
- If Qualified Beneficiary is incompetent, payment deadline must be extended
- Plan may pend claims until election and payment received

➤ Premium Shortfalls

- “Insignificant Shortfall”:
 - Lesser of \$50 or 10% of the premium due
- Plan can take following action for shortfall:
 - If insignificant, accept as full payment of the premium; or notify beneficiary and require repayment within a reasonable period (at least 30 days).
 - If significant, can cancel coverage

➤ Tips for Avoiding Costly Mistake #4

- Ensure procedures are in place to administer the grace period
- Establish procedures and framework to determine if there is an “insignificant” shortfall
 - Can’t cancel coverage for non-payment, if shortfall is “insignificant”
- Put notification procedures in place to alert qualified beneficiary to shortfall

Costly Mistake #5

Failing To Address Affordable Care Act Issues

➤ Affordable Care Act Concerns

- Interaction of COBRA with Stability Period if using a look back measurement period
 - What if employee no longer measures full-time and loses coverage?
 - COBRA maximum coverage period measured from either
 - Date of qualifying event (reduction in hours) or
 - Date of loss of coverage
- Report COBRA coverage on Form 1095-C

➤ Tips for Avoiding Costly Mistake #5

- Check COBRA language in plan documents and SPDs if using ACA look-back measurement method to determine plan eligibility
 - When does maximum COBRA coverage period begin, if employee has reduction in hours?
 - Amend if necessary
- Work with payroll provider or benefits consultant to ensure COBRA coverage is properly reported on Form 1095-C

Costly Mistake #6

Failing to Address COBRA Issues in
Mergers and Acquisitions

➤ Mergers and Acquisitions

- Business reorganizations or acquisitions can cause qualifying events
- Who is responsible for providing COBRA coverage?
- Asset vs. stock sales

➤ Identifying “M&A Qualified Beneficiaries”

- Qualified beneficiaries who are receiving COBRA under seller’s plan before transaction
- Employees of seller whose employment terminates because of the transaction
 - No qualifying event for seller’s employees who are employed by buyer after stock sale
 - No qualifying event for seller’s employees if buyer is a “successor employer” and employees are employed by buyer immediately after asset sale

➤ Which Plan Covers M&A Qualified Beneficiaries

- Default rules in regs, but buyer and seller can contract for different rules
- Seller must cover M&A qualified beneficiaries if it maintains any plan after transaction
- Buyer must cover M&A qualified beneficiaries if:
 - Seller ceases to maintain any plan after transaction or
 - Seller doesn't maintain any plan after transaction and buyer is a "successor employer" in asset sale

➤ Tips for Avoiding Costly Mistake #6

- COBRA rules in M&A deals are complex!
- Perform thorough due diligence on COBRA issues
- Make sure COBRA liability is allocated in the purchase agreement

Costly Mistake #7

Failing to Identify COBRA Issues in
Severance Agreements

➤ Coordinating COBRA and Severance

- Extension of group health plan coverage and/or COBRA premium subsidies common in severance agreements
- Severance agreements are not a substitute for COBRA compliance
- Poorly drafted severance agreements can cause confusion regarding when COBRA coverage begins

➤ Special Severance Issues

- Will insured plans or plans with stop-loss insurance cover claims, if COBRA coverage period is extended?
- Pre-tax COBRA premium payments only allowed from severance pay through the end of the year
 - Cafeteria plan must include appropriate language
- Discrimination issues

➤ Tips for Avoiding Costly Mistake #7

- Address COBRA in severance agreements
 - Be specific!
- Review insurance certificates and policies
 - Will claims be covered if group health plan coverage extends beyond COBRA maximum period?
- Review cafeteria plan documents if offering pre-tax payment of COBRA premiums

QUESTIONS



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➤ Contact the Presenter



Stephanie H. Grant

Warner Norcross & Judd LLP
2000 Town Center, Suite 2700
Southfield, MI 48075
sgrant@wnj.com
(248) 784-5068

THANK YOU

