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Pitfalls of Employer Measures Aimed at Avoiding Layoffs

In these tough economic times, many companies have been faced with the necessity of cutting costs, while struggling to retain valued employees who will be needed when their economic situation improves.

According to the Labor Department's Bureau of Labor Statistics, in February 2009, 295,477 workers lost their jobs as a result of 2,769 mass layoff actions taken by employers. However, a recent survey by Watson Wyatt revealed that the number of companies planning future layoffs has fallen from 23 percent to 13 percent. While there are many examples of this trend, the widely reported choice made by Boston-based Beth Israel Deaconess Medical Center is illustrative. When faced with a possible reduction in force, Paul Levy, the President and CEO of the hospital, proposed that some employees give up a portion of their salary or benefits in order to avoid the lay off of other employees. His proposal was met with overwhelming support, and other companies are following suit.

"Employers must be careful to avoid options that disparately impact employees in a statutorily protected class or adversely affect those who have engaged in activities protected from retaliation."

Employers are seeking cost-cutting alternatives to layoffs in increasing numbers. According to the Watson Wyatt survey, 56 percent of companies have implemented hiring freezes, and 42 percent have implemented salary freezes. Companies also are reducing salaries and/or work hours, reducing or eliminating bonuses, asking employees to pay a larger share of health care premiums, lowering their 401(k) match, and instituting furloughs.

While there are many good reasons to consider layoff alternatives, companies should evaluate these options carefully with counsel to avoid the potential pitfalls. The best option for the company will depend, in part, on the employer's obligations in any applicable collective bargaining agreements (CBAs) or other employment agreements. In addition, employers must comply with state, federal and local laws prohibiting discrimination and regulating employee wages and benefit plans. Otherwise, the resulting exposure to the company may outweigh the intended savings.

Reduction in Pay and/or Hours

An employer considering rolling back salaries or reducing the work week must be aware of state and federal minimum wage and overtime laws in order to avoid inadvertent violations. For example, an employee who is exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) must be paid his or her full salary for any week in which the employee performs *any* work. Moreover, exempt employees must be paid at least $455 per week, and many states' laws establish a higher minimum weekly wage for an employee to qualify as exempt. If a reduced work week results in an exempt employee being paid less than his or her full salary or the applicable

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minimum wage, that employee's exempt status will be jeopardized and the employer may unwittingly run afoul of wage laws that carry stiff penalties.

To avoid problems, the company must make it clear that employees' salaries are being reduced along with any reduction in the work week, and must avoid cutting salaries below levels established by applicable law. For example, if a company is implementing a 10 percent reduction in pay for all employees, it may reduce the salaries of lower paid employees below minimum wage or salary requirements for exempt employees, inadvertently triggering a statutory violation. To avoid this, the company should consider implementing a scaled reduction in pay (i.e. lower paid employees will be subject to a smaller reduction in pay than more highly compensated employees) to insure that the salaries of employees on the lower end of the pay scale do not fall below any statutory minimums. Also, any reduction in the work week, and resulting reduction in salaries, may not be made based on a short-term lack of work or day-to-day or week-to-week determinations of the operating requirements of the business. An employer may make deductions from an exempt employee's salary for full-day absences only, and not part-day absences, without jeopardizing the employee's exempt status.

Reductions in pay and work hours are examples of adverse employment actions that may expose an employer to liability under anti-discrimination laws. Employers must be careful to avoid options that disparately impact employees in a statutorily protected class or adversely affect those who have engaged in activities protected from retaliation.

An employer of a unionized workplace will have to bargain with the union over any reduction in employee pay or hours, unless the relevant CBA expressly permits the employer to take such unilateral action without bargaining.

If a reduction in hours affects an employee's eligibility for healthcare benefits, it may trigger an employer's obligation to comply with notification and other provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA). For qualified beneficiaries who experience a qualifying event between September 1, 2008 and December 31, 2009, employers must also provide notice of the availability of the federal COBRA premium subsidy made available by American Recovery and Reinvestment Act of 2009.

Furlough

Alternatively, an employer may consider a furlough, such as a temporary layoff or mandatory unpaid holidays or vacation during which employees retain their benefits but do not receive their regular pay.

To avoid wage and hour infractions, an exempt employee on furlough must be directed not to perform any work, including the most minimal of tasks, such as checking e-mail or voicemail.

CBAs and other applicable contracts can limit an employer's right to unilaterally implement a furlough. A CBA or federal labor law may require an employer to bargain before implementing a furlough, and a CBA may contain provisions relating to the use of vacation or paid time off during the furlough.

When an employer implements a long furlough, or an employee's hours are reduced by more than 50 percent, the federal Worker Adjustment and Retraining Notification Act (WARN) and similar state laws (applicable to certain mass layoffs) may apply. These laws generally require an employer to give advance notice (usually 60 days) to its employees that such a furlough will be implemented some time in the future.

> *"While many employers wish to avoid layoffs to be good corporate citizens in tough economic times, even decisions motivated by noble intentions can be fraught with landmines."*

Employee Benefit Cuts

Another option for companies looking to cut costs is to reduce employee benefits. A company may increase the amount employees must contribute toward health care coverage or decrease employer matching contributions to 401(k) plans.

In implementing changes to employee benefits, employers must be aware of the Employee Retirement Income Security Act (ERISA). ERISA applies to retirement, health and other welfare benefit plans, such as life and disability insurance, and imposes standards of conduct on the fiduciaries who are responsible for administering these plans. ERISA also contains provisions that assure that plan participants who qualify receive the benefits to which they are entitled. An experienced employee benefits lawyer can help guide employers on the proper implementation of cost-saving measures that may implicate ERISA or related regulations.

Again, employers should consult any CBAs or other applicable contracts, which may contain provisions guaranteeing certain employee benefits.

Employers Should Avoid Pitfalls of Layoff Alternatives

While many employers wish to avoid layoffs to be good corporate citizens in tough economic times, even decisions motivated by noble intentions can be fraught with landmines. Regardless of the cost-cutting measure considered, companies should be wary of the risks associated with these measures.

McCaskill Amendment Provides New Whistleblower Protections


By Martin W. Aron
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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), a bill that contained an unprecedented investment in the faltering U.S. economy. The ARRA also contained a robust whistleblower provision, Section 1553, that was introduced by Senator McCaskill (D-Mo.) (the "McCaskill Amendment").

That provision covers both private and public employers that are recipients of stimulus funds. The McCaskill Amendment encourages public and private employees to disclose fraud, waste, gross mismanagement, public health and safety risks, and violations of law or regulations relating to "covered funds." Below are key highlights of the whistleblower provisions that are part of the McCaskill Amendment.

Covered Employers

The new whistleblower protections apply to private contractors, state and local governments, and other non-federal employers that receive a contract, grant or other payment appropriated or made available by the ARRA.

Protected Disclosures and Conduct

Like other whistleblower protection statutes, the McCaskill Amendment requires that employees satisfy certain requirements in order to be protected. Employee disclosures are protected under Section 1553 if they contain information that the employee reasonably believes is evidence of one or more of the following:

- the gross mismanagement of an agency contract or grant relating to covered funds;
- a gross waste of covered funds;
- a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
- an abuse of authority related to the implementation or use of covered funds; or
- a violation of law, rule or regulation related to an agency contract – including the competition for or negotiation of a contract – or grant, awarded or issued relating to stimulus funds.

One significant feature of the law is that internal disclosures are fully protected. Section 1553 also protects disclosures made by employees in the course of performing their job duties, also known as "duty speech." It is expected that courts evaluating the reasonableness of an employee's belief that wrongdoing has occurred will apply the standard employed in analogous whistleblower protection laws, such as Section 806 of the Sarbanes-Oxley Act, which requires that the evaluation be based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.

Broad Class of Recipients of Protected Disclosures

In addition to protecting internal disclosures and "duty speech," the McCaskill Amendment protects employee disclosures to the following broad class of recipients:

- the Recovery Accountability and Transparency Board;
- an inspector general;
- the Comptroller General;
- a member of Congress;
- a state or federal regulatory or law enforcement agency;
- a person with supervisory authority over the employee;
- a court;
- a grand jury;
- the head of a federal agency; or
- a representative of the listed persons.

Prohibited Acts of Retaliation

Under Section 1553, a covered employee may not be "discharged, demoted, or otherwise discriminated against" in retaliation for making the protected disclosure. The McCaskill Amendment, however, does not define the term "otherwise discriminated against," leaving open broad interpretations of retaliation. This clause likely will be read coextensively with U.S. Supreme Court guidance relating to "materially adverse actions" to include any action that would dissuade a reasonable person from engaging in the protected activity. Accordingly, the McCaskill Amendment would appear to leave open to litigation a wide range of actions, such as oral or written reprimands, lateral transfers or reassignments of duties that might be alleged as "materially adverse" even if they do not have tangible economic consequences.

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A Resource for Legal & Human Resources Professionals

The **Labor & Employment Practice Group** understands that our clients and friends have extremely busy work days and cannot always fit continuing education into their schedules. We are pleased to offer a library of complimentary recordings of all past webinars on eapdlaw.com. Topics that we've covered in the past year include:

- Managing Terminations and Reductions in Force
- New Federal Red Flag, Massachusetts and Other State Data Security Rules
- Preparing and Implementing Effective Employee Evaluations
- Overview of the ADA Amendments Act of 2008: Reasonable Accommodation Issues For In-House Counsel and Human Resources Professionals
- FMLA and New Jersey Paid Family Leave Update: New Responsibilities for Employers

"The new whistleblower protections apply to private contractors, state and local governments, and other non-federal employers that receive a contract, grant or other payment appropriated or made available by the ARRA."

Investigation and Litigation Under Section 1553

Whistleblower claims under Section 1553 will be administered by the individual agencies responsible for overseeing or distributing the covered funds at issue. An employee can file a claim with the inspector general of the government agency that has jurisdiction over the covered funds. Once a claim is filed, the inspector general must investigate the claim and issue a report or determine that the claim is frivolous within 180 days.

Key Procedural Provisions and Remedies

Burden of Proof

The employee has the burden of proof to demonstrate that the protected activity was a "contributing factor" in whatever retaliation he or she may have experienced. The ARRA specifically allows proof by circumstantial evidence, including the decision-maker's knowledge of the disclosure and the timing of the reprisal relative to the disclosure. For an employer to successfully defend the claim, it must show by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosure.

Determinations

Decision-making authority resides with the head of the agency controlling the covered funds. On the basis of the inspector general's investigative report, the agency head determines whether there is sufficient basis to find a prohibited reprisal. There is no express statutory provision providing for an evidentiary hearing or administrative appeal.

Enforcement of Agency Action and Available Remedies

The relief available under Section 1553 includes not only compensatory damages, but also reinstatement, back pay, repayment of benefits, attorneys' fees and an order that the employer take "affirmative action to abate the reprisal." The ARRA does not contain any express caps or limits on damages. Where a retaliatory act has been found to have occurred, an agency head is authorized to bring an enforcement action in the U.S. District Court to obtain compliance with the terms of an order.

Judicial Review

Any person, complainant or employer adversely affected or aggrieved by an agency order may seek review of the order in the U.S. Court of Appeals for the circuit in which the reprisal is alleged to have occurred. As set forth in the Administrative Procedures Act, the reviewing court is authorized to decide relevant questions of law, interpret statutory provisions and determine the meaning and applicability of agency action.

No Waiver of Rights

Employee substantive and procedural rights and remedies may not be waived by any agreement, policy, form or condition of employment, and predispute arbitration agreements will not be valid unless contained within a collective bargaining agreement.

No Exclusivity

The ARRA's whistleblower provisions are not exclusive. Consequently, individuals may proceed simultaneously in multiple state or federal administrative or judicial proceedings, depending on the underlying statutory or common law basis of each claim. This includes claims under state or federal whistleblower statutes, in addition to claims of wrongful discharge for violation of public policy available in some states.

Posting Notice

Each employer receiving covered funds is required to post a notice of the whistleblower rights and remedies provided by the ARRA.

Practical Steps for Employers

Retaliation and whistleblowing claims have become increasingly prevalent throughout the United States. In order to prevent and address whistleblower claims, employers should consider taking the following steps to establish a strong defense to potential employee claims. As a prophylactic measure, employers should have a comprehensive compliance program with strongly worded policies that mandate not only compliance, but ethical business practices.

In addition, corporate policies should encourage all employees to help prevent and detect mismanagement, fraud, waste, situations creating public danger, abuse or unlawful activity concerning covered funds, and prohibit against discrimination and retaliation for reporting what employees reasonably believe to be wrongdoing relating to any of the aforementioned categories of protected disclosures. Similarly to well-drafted antidiscrimination policies, employees should be provided with multiple avenues of reporting any alleged wrongdoing, including one that is outside of the employee's direct line of supervision.

Further, employers should educate managers and supervisors on compliance with applicable laws, rules and regulations relating to the use of funds appropriated or made available by the ARRA, as well as training on awareness and prevention of whistleblower retaliation.

Finally, employers should make certain that complaints and claims made by whistleblowers are promptly, thoroughly, and fairly investigated by someone who is knowledgeable about the subject matter of the complaint with appropriate guidance and assistance from those who are experienced in the investigation of workplace misconduct.

Moonlighting Employees: How to Avoid the Legal Risks


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In this unpredictable economic climate, many employees are looking for additional sources of income. This may mean working a second or third job or starting a business "on the side." While most employers prefer not to intrude needlessly on employees' private lives, "moonlighting" has the potential to create serious problems for employers.

For example, moonlighting employees may not have the energy to perform at their full capacity, which in turn may pose a safety hazard. In addition, moonlighting may hinder an employee's ability to work overtime, there is an increased risk that confidential information will be divulged when an employee works more than one job and moonlighting may create a conflict of interest if the employee works for a competitor. Employers should take the following steps to lawfully address employee moonlighting.

STEP 1: Identify business-related concerns related to moonlighting.

The best way for an employer to craft a moonlighting policy is to first evaluate the specific employment setting and identify business-related concerns. Only then can an employer develop policies that address those specific business-related concerns, and, most importantly, apply those policies in a uniform and consistent manner.

Any policy should deal only with business-related criteria and should avoid restrictions on employee conduct that is not tied to the employer's legitimate business interest. Common business-related concerns include:

- prohibiting any employment that creates conflicts of interest, including working for a competitor;
- maintaining trade secrets or confidential or proprietary business information;
- prohibiting any act or behavior that adversely affects the primary employer's image or reputation;
- prohibiting outside work during normally scheduled work hours;
- prohibiting employees from representing the primary employer while performing outside work;
- prohibiting solicitation for outside employment, including sales or pyramid marketing;
- prohibiting use of work resources, equipment, or benefits (including negotiated discounts or other company perks) for outside employment; and
- prohibiting any outside work that interferes with the employee's job performance.

This list is not exhaustive and an employer may have additional business-related concerns depending upon the industry, size of the employer, or nature of its employee relationships. That said, it is critical that employers identify the specific aspects of moonlighting that pose a real or potential threat to its business interests, rather than simply operating from an assumption that all moonlighting is prohibited.

STEP 2: Develop business-related policies and apply them consistently.

A blanket policy which categorically prohibits moonlighting may create employee retention problems or poor employee relations, and it may not be legal. Some states, such as California, Colorado, New York and North Dakota, have enacted broad statutes which protect employees from adverse employment action when they engage in lawful conduct while off duty and away from the worksite. These are referred to as "lawful conduct" statutes, "off duty protection" statutes, or "lifestyle discrimination" statutes.

Because most "lawful conduct" statutes have an exception for business-related concerns, employers should tie their moonlighting policy to the business-specific concerns, such as those identified in Step 1 above. Alternatively, instead of implementing a policy directly addressing moonlighting, an employer may choose to address employee moonlighting as it relates to each particular business-related concern. For example, an employer may address

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"While most employers prefer not to intrude needlessly on employees' private lives, "moonlighting" has the potential to create serious problems for employers."

Recognitions

On April 27 **Barbara Lee**, counsel in the firm's Madison office, received Rutgers University's Daniel Gorenstein Memorial Award. The award, first presented in 1994, is given each year to a Rutgers University faculty member noted for both outstanding scholarly achievement and exceptional service to the University.

Barbara's leadership roles at Rutgers have ranged from Chair of the Department of Human Resource Management to Director of the Center for Women and Work to Dean of the School of Management and Labor Relations. She has authored or co-authored more than 75 books, chapters, and articles on issues related to governance, gender, disability, harassment, collective bargaining, grievance procedures, conflict resolution and others and is frequently invited to lectures by the top scholarly associations in higher education law and at the major conferences in industrial relations and human resource management.

"A blanket policy which categorically prohibits moonlighting may create employee retention problems or poor employee relations, and it may not be legal."

potential moonlighting problems by developing a conflict of interest policy, an overtime policy, and a policy regarding confidential information. A general conflict of interest policy is often a good way to ensure that an employee's primary responsibility is to his or her full-time employer.

An employer may also establish an approval process for employees to follow before accepting or engaging in outside work that may pose a conflict of interest. For example, an employee may be required to notify the human resources department and obtain approval in writing before accepting outside employment in a competing industry. Whether an employer should adopt a specific moonlighting policy or address moonlighting concerns in a non-moonlighting specific policy depends on the employer's individual circumstances.

No matter how an employer chooses to deal with moonlighting employees, it is important to have a set policy and, if applicable, set procedures for giving or withholding approval for outside employment. If policies are not applied consistently, and a protected employee is adversely impacted, an employer may find itself the subject of a discrimination claim. An employer should take extra care to document legitimate, business-related bases for denying an employee's request to partake in outside employment or for taking adverse employment action against an employee as a result of moonlighting activities.

By Lori A. Basilico
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COBRA Premium Subsidy Included in American Recovery and Reinvestment Act of 2009

Recognizing that few laid-off employees can afford to continue health coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), laid-off employees will now be eligible for a temporary reduction in their COBRA premiums under the American Recovery and Reinvestment Act of 2009 (the "Act").

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The Act creates a federal subsidy that will cover 65% of the COBRA premium for a nine-month period, with employees paying only 35%, rather than 102%, of the COBRA premium. Employers will be able to recoup the 65% subsidy from the federal government in the form of a credit against federal payroll taxes. The subsidy applies to COBRA premiums paid on or after March 1, 2009.

Eligibility for Premium Subsidy

Employees (and their qualified beneficiaries) who lose health coverage due to the employee's involuntary termination of employment between September 1, 2008 and December 31, 2009 are eligible for the premium subsidy. The subsidy does not apply to other COBRA qualifying events such as divorce, a reduction in hours or a dependent child aging out of eligibility.

According to the IRS, an involuntary termination is a termination where the employer exercises its unilateral authority to terminate employment even though the employee remains willing and able to work. An involuntary termination includes a lay-off with recall rights, a temporary furlough period or other suspension of employment in which the individual's work hours are reduced to zero, the non-renewal of an employment agreement, and certain "good reason" terminations if the employer action causes a material negative change in the employment relationship for the employee. Further, an employee-elected termination in return for a severance or retirement incentive package will be considered an involuntary termination where, absent the employee-elected termination, the employer would have terminated the employee's employment and the employee knew that he or she would have been terminated.

Amount of Premium Subsidy

Subsidy-eligible individuals who elect COBRA coverage will be responsible for paying 35% of the COBRA premium. Employers are required to pay the remaining 65% of the premium and will be reimbursed for such amount in the form of a credit against wage withholding and FICA payroll taxes.

The premium used to determine the 35% share that must be paid by (or on behalf of) a subsidy-eligible individual is the cost that would be charged for COBRA continuation coverage if the individual was not eligible for the subsidy. For example, if, without regard to the subsidy, the individual is required to pay the standard COBRA rate of 102% of the applicable premium, the individual will be required to pay 35% of the 102%. However, if the premium actually charged is less than the maximum COBRA premium because, for example, the employer subsidizes all or part of the COBRA cost, the subsidy-eligible employee will pay 35% of the amount actually charged (and the employer will be reimbursed for 65% of the amount actually charged to the individual). Employers should consider eliminating voluntary subsidies for involuntary terminations through December 31, 2009 in order to take full advantage of the COBRA premium subsidy.

The COBRA premium subsidy is phased out for subsidy-eligible individuals with adjusted gross incomes beginning at $125,000 ($250,000 for joint filers) and eliminated for subsidy-eligible individuals with adjusted gross incomes of $145,000 or more ($290,000 for joint filers). Individuals who receive the COBRA subsidy during a year in which they exceed these income limits will be required to repay the subsidy in the form of an additional tax on their tax return. As a result of this income limitation, these "high income individuals" may make a permanent election to waive the subsidy.

Duration of Premium Subsidy

The subsidy is available with respect to premiums paid on or after March 1, 2009, and lasts for up to nine months, ending earlier if the subsidy-eligible individual becomes eligible for coverage under another group health plan or Medicare. The individual is required to notify the group health plan when he or she becomes eligible for other group health coverage or Medicare. If the subsidy-eligible individual fails to notify the plan in a timely manner, the individual is liable for a penalty equal to 110% of the subsidy that is provided after eligibility terminates.

Note that eligibility for the premium subsidy ends (but not COBRA coverage) when the subsidy-eligible individual becomes eligible for other coverage, even if the individual does not enroll in, or become covered by, such other coverage. COBRA coverage ends when the qualified beneficiary actually becomes covered by another health plan.

Because this new legislation becomes effective immediately, individuals who are eligible for the premium subsidy may have already paid the full COBRA premium for March and/or April 2009. The Act entitles any subsidy-eligible individual who paid more than 35% of the COBRA premium amount during the first two coverage periods following enactment of the Act to reimbursement from the employer for the excess over the amount which the individual is required to pay, or to a credit of that amount against future COBRA premium payments. For example, if a subsidy-eligible individual paid the entire COBRA premium for March 2009, the individual may receive a refund or credit equal to 65% of the COBRA premium.

Special COBRA Election

Plans must provide a second COBRA election to qualified beneficiaries who lost group health plan coverage as a result of a covered employee's involuntary termination on or between September 1, 2008 and February 16, 2009 and who did not elect COBRA during their initial COBRA election period or elected COBRA but discontinued it. Such individuals will have 60 days in which to elect COBRA coverage. If elected during this special election period, COBRA coverage will begin on March 1, 2009 (the first period of coverage beginning on or after the enactment of the Act) rather than the date of the employment termination, but will not extend beyond the original COBRA period, measured from the date of the employment termination. For example, a subsidy-eligible individual terminated on November 30, 2008 who makes a timely election during this special COBRA election period will be entitled to COBRA coverage beginning March 1, 2009 and ending May 31, 2010 (18 months from November 30, 2008).

Option to Change Coverage

Under COBRA, qualified beneficiaries must be offered the same coverage they had at the time of their qualifying event and cannot change their coverage until the next open enrollment period. The Act permits employers to offer subsidy-eligible individuals the opportunity to elect COBRA coverage under the benefit option in which he or she was enrolled at the time of the qualifying event or to change to a lower-cost health plan option offered to active employees. Subsidy-eligible individuals must make this change within 90 days after receiving notification to elect a different option.

New COBRA Notices

Plans must provide individuals who become eligible for COBRA coverage between September 1, 2008 and December 31, 2009 with notices explaining the availability of the premium subsidy and the option to enroll in different health plan coverage, if permitted by the employer. The Department of Labor recently released model COBRA notices to assist employers and health plans in complying with this notice requirement. The model notices are available at http://www.dol.gov/ebsa/COBRAmodelnotice.html.

- ***General Notice – Full Version***
  This notice should be sent to all qualified beneficiaries (not only covered employees) who experienced a qualifying event between September 1, 2008 and December 31, 2009 and who have not previously received a COBRA notice and election form, regardless of the type of the qualifying event. This full version model notice contains information on the COBRA premium subsidy as well as general information contained in a COBRA election notice.

- ***General Notice – Abbreviated Version***
  The abbreviated version of the General Notice should be sent to COBRA qualified beneficiaries who had a qualifying event on or after September 1, 2008, have already elected COBRA coverage and still have that coverage. This abbreviated version addresses only the subsidy and may be provided in lieu of the full version.

- ***Notice of Second Election Period***
  This notice should be sent to any qualified beneficiary who lost group health plan coverage as a result of a covered employee's involuntary termination and who did not elect COBRA or elected COBRA but subsequently let it lapse. This notice includes information about the second COBRA election opportunity as well as the COBRA premium subsidy.

Reporting Requirements for Employers

The Act requires employers to initially pay the 65% premium subsidy and recoup such amount through reduced federal payroll tax payments. These payroll taxes include federal income tax withholding as well as the employer and employee share of FICA. If the amount of the subsidy paid by the employer exceeds the amount of the employer's liability for these federal payroll taxes, the employer will receive a direct payment from the federal government.

Employers will be required to file reports relating to the subsidy, including attestations that each employee receiving the subsidy was involuntarily terminated, calculation of the offset, the amount of the subsidy provided to each individual and information as to whether the subsidy is for individual or family coverage.

Conclusion

These new COBRA requirements require employers to take immediate action, identifying all former employees who must receive notice of the premium subsidy, offering the special COBRA election period to those subsidy-eligible individuals who previously declined COBRA coverage, revising COBRA communications materials and coordinating with COBRA administrators and payroll providers to develop systems and procedures for recouping the federal subsidy.

Legal Updates

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Supreme Court Rules for Employer in Maternity Leave Case

In AT&T *Corp. v. Hulteen*, the United States Supreme Court was asked to determine whether employers violate Title VII of the Civil Rights Act by not fully restoring service credit for pregnancy leaves taken before the 1978 passage of the Pregnancy Discrimination Act (PDA) for employees who retire post-PDA. The Court recently ruled in favor of the employer and held that maternity leave taken prior to the passage of the 1978 Pregnancy Discrimination Act need not be considered in calculating employee pension benefits.

In 1968, Noreen Hulteen took maternity leave and then was hospitalized for a medical condition requiring post-partum surgery. She missed a total of 240 days of work due to her pregnancy and surgery, but her employer, Pacific Telephone and Telegraph (now AT&T), credited her with only 30 days of paid leave, since under the company's seniority-based system, her pregnancy leave was considered personal, not disability related. By contrast, had she had been out on disability leave unrelated to pregnancy she would have received credit for the entire absence. As a result, when Hulteen retired in 1994, she received credit for service as originally calculated in 1968, despite the enactment of the PDA in 1978.

In 2001, Hulteen and several other women sued AT&T, alleging that its decision to pay them smaller pensions because of their pregnancy disability leaves constituted an unlawful employment practice under the Pregnancy Discrimination Act, an amendment to Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of pregnancy and allows those on maternity leave the same coverage as other medical leave. AT&T argued that the law cannot be applied retroactively.

The U.S. District Court for the Northern District of California granted summary judgment on behalf of the women, based on a 1992 Ninth Circuit case, *Pallas v. Pacific Bell*. A three-judge panel of the Ninth Circuit reversed the district court's holding, contending in its 2-1 ruling that Pallas' holding gave retroactive effect to the PDA, and that this retroactivity was impermissible in light of the Supreme Court's 1994 decision in *Landgraf v. USI Film Prods*. In August, 2007, the Ninth Circuit heard the matter en banc and reinstated the grant of summary judgment in favor of Hulteen and the others.

The Supreme Court granted certiorari to resolve a split in the circuits, in part so that employees in a national pension plan would not receive conflicting decisions depending upon the geographic area in which they litigated the issue. In a 7-2 decision, the Court ruled in favor of AT&T, finding that (l) that the PDA is not retroactive and (2) that AT&T's benefit-calculation rule is exempt from Title VII of the Civil Rights Act because it is a "bona fide" seniority-based system that did not discriminate intentionally against pregnancy.

Justice Ruth Bader Ginsburg filed a strong dissenting opinion, joined by Justice Stephen Breyer, contending the company committed a current violation of the law by continuing to rely on a pre-1978 calculation of benefits. "It is at least reasonable to read the PDA to say, from and after the effective date of the Act, no woman's pension payments are to be diminished by the pretense that pregnancy-based discrimination displays no gender bias."

Federal Minimum Wage Set to Increase in July 2009

The federal minimum wage is set to increase to $7.25 on July 25, 2009. This is the final part in the three-year annual increases begun in 2007.

General Contractors May be Liable for OSHA Violations by Subcontractors

The U.S. Court of Appeals for the Eighth Circuit, in *Solis v. Summit Contractors, Inc.*, recently upheld OSHA's multi-employer worksite citation policy and found that the Occupational Safety and Health Review Commission (OSHRC) abused its discretion when it interpreted 29 C.F.R. § 1910.12(a) to be in conflict with the multi-employer worksite citation policy. Section 1910.12(a) states "[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work…." OSHRC held that this provision did not apply to a general contractor if the general contractor's own employees were not exposed to a found hazard, even if the general contractor was found to be a "controlling employer" under the multi-employer worksite policy.

The Eighth Circuit found OSHRC's reasoning to be at odds with the language of the regulation in that the general contractor was required to "protect the place of employment, including [subcontractors' employees], so long as [the general contractor] also has employees at the place of business."

Summit, the general contractor, had only four of its own employees at the construction site, and none were exposed to the violations found by OSHA. Summit's project superintendent had notified a subcontractor to remedy the violation at issue without success. In effect, the multi-employer citation policy makes the construction general contractor the guarantor of all construction work at a worksite when it has employees present, whether or not its employees are at fault or affected.

New Jersey Issues Regulations Regarding Family Leave Insurance Benefits

New Jersey Department of Labor and Workforce Development (NJ DOL) has issued regulations interpreting New Jersey's newly implemented paid family leave law, formally known as the "Family Leave Insurance Law."

The new law became effective January 1, 2009, when employee contributions commenced. Eligible employees can take advantage of the law's leave benefits beginning July 1, 2009. The law provides eligible employees with up to six weeks of paid leave during any 12-month period to care for a sick family member or to bond with a newborn or a newly adopted child.

The new regulations address private plan approvals, employer notice requirements, claim filing and payment procedures, paid leave in lieu of FLI benefits, reduction of benefits under various circumstances and intermittent leave. Some of the more notable regulations are:

Private Plans

Employers with private plans must submit them to the NJ DOL for prior approval. The new private plan approval process mirrors the regulations governing private plan approval for Temporary Disability Insurance Benefits. (N.J.A.C. 12:21-2.1 through 2.28).

The regulations also address how to handle employee contributions to private plans. Specifically, employee contributions to a private plan cannot be commingled with an employer's assets and must be deposited in a trust fund account, which are to be used only for the administration and payment of FLI benefits. The trust fund accounts must be made available by employers for periodic inspection by the NJ DOL Division of Temporary Disability Insurance.

Notice Requirements

Employers are required to post in an accessible worksite area a printed notification of covered employees' rights pertaining to FLI benefits. Employers also must distribute a written copy to each employee - which may be in electronic form - within 30 days of adoption of the regulations (March 2, 2009), at the time of hiring, whenever the employee provides notice to the employer, or upon the first request of the employee of a need for FLI benefits. Employers can request both the written notification poster and the written copy of the notification from the NJ DOL.

New York Employers Must Take Steps to Secure Employees' Social Security Numbers

New York is the most recent jurisdiction to enact legislation intended to protect employees from identity theft. New York recently amended its Labor Law, adding section 203-d to prohibit all employers, regardless of size, from:

- publicly posting or displaying an employee's Social Security number;
- visibly printing an employee's Social Security number on any identification badge or card, including any time card;
- placing a Social Security number in files with unrestricted access; or
- communicating to the general public employees' personal identifying information including: Social Security numbers, home addresses or telephone numbers, personal electronic mail addresses, Internet identification names or passwords, parent's surname before marriage, or drivers' license numbers.

The law also prohibits employers from using a Social Security number as an identification number for purposes of any occupational licensing. Employers must take "reasonable measures" to ensure that the personal identifying information is not disseminated. Such measures include, informing employees of their rights under the new law, as well as implementing procedures and mechanisms to safeguard the information.

The law imposes a civil penalty of up to $500 on any employer for a "knowing violation" of this statute. A violation is "knowing" if an employer has not implemented any policies or procedures to safeguard against such violation, including procedures to notify employees of the law.

Labor Law section 203-d is silent as to what constitutes a single "violation." Consequently, it remains unclear whether an employer's publication of a single list containing the personal identifying information of several employees would amount to single or multiple violations.

The Labor Law amendment also is silent as to whether there is a private right of action and whether employers are restricted from using the last four digits of an employee's Social Security number or any number derived from the full Social Security number for identification purposes, seniority lists or for any other reason. The Labor Law amendment does not define "Social Security number," unlike New York's Public Officers' Law and General Business Law which defines "Social Security Account Number" to include "the nine digit account number issued by the federal social security administration and any number derived therefrom."

The New York State Department of Labor, charged with interpreting and enforcing the Labor Law, has not issued any regulations that would provide guidance regarding these issues.

Events / Announcements

- On April 28, **Mark Schreiber**, a partner in the firm's Boston office, spoke on "Balancing Due Diligence with Privacy Laws" at the American Conference Institute's *FCPA and International Anti-Corruption for the Pharma and Medical Device Industries* conference in New York.
- On April 30, **Mark Schreiber**, a partner in the firm's Boston office spoke on "Global Anti-Corruption and Data Protection" for the Ethics and Compliance Officers Association (ECOA) in Colorado Springs.
- On May 1, **Paulette Brown**, a partner in the firm's Madison office, spoke on "Ethical and Professionalism Problems that Arise During Discovery and Pretrial" at the ABA's 2009 Litigation Section Annual Conference in Atlanta, Georgia.
- On May 14, **Mark Schreiber**, a partner in the firm's Boston office, presented at the Boston Bar Association's "Compliance with The New Massachusetts Information Security Regulations: Dealing with the Toughest Issues" seminar hosted by the Privacy Law Committee.
- On June 5, **Martin Aron** and **Paulette Brown**, both partners in the firm's Madison office, will be presenters at the New Jersey Institute for Continuing Legal Education's *Hot Tips in Labor & Employment Law: 2009* seminar in New Brunswick, New Jersey. Marty will address the topic of "Restrictive Covenants" and Paulette will discuss "Federal Court Summary Judgment Practice." For more information, visit: http://www.njicle.com.
- On June 25, **Barbara Lee**, counsel in the firm's Madison office, will speak at the National Association of College and University Attorneys' (NACUA) 49th Annual Conference in Toronto. The title of the talk is "New Theories of Institutional Liability for Student Misconduct under Title IX." For more information, visit: http://www.nacua.org/meetings/ac2009/interior.html.

Employers Who Access Employees' Personal E-Mail May Be Liable for Punitive Damages and Attorneys' Fees

A recent case from the U.S. Court of Appeals for the Fourth Circuit, *Van Alstynes v. Electronic Scriptorium Ltd.*, held that an employer who accessed a former employee's personal e-mail account could be held liable for punitive damages and attorneys' fees under the federal Stored Communications Act (SCA), even without proof of actual damages.

After Electronic Scriptorium was sued by its former Vice President of Marketing, the company's president, Edward Leonard, gained access to her personal AOL e-mail account and over the course of a year, downloaded in excess of 250 e-mails. The former employee, Van Alstynes, learned of this access in response to discovery requests. She also discovered that Mr. Leonard had accessed the account at all hours of the day, and from home, work, and places as far away as London and Hong Kong. She sued the company and Mr. Leonard for violating the SCA. The SCA criminalizes unauthorized access to "electronic communications" in "electronic storage" at an "electronic communications service." The SCA authorizes a private cause of action for monetary damages, namely, actual damages, punitive damages, and attorneys' fees. The SCA states that "in no case shall a person be entitled to recover [actual damages] less than the sum of $1,000."

The defendants attempted to dismiss the claim on the basis that Mr. Leonard's actions had not caused any damages. The district court rejected this argument, and the jury returned a verdict against the company for $25,000 in compensatory damages and $25,000 in punitive damages, and $150,000 in compensatory damages and $75,000 in punitive damages against Mr. Leonard. The compensatory damages represented statutory damages of $1,000 each for each SCA violation. The court also awarded over $135,000 in attorneys' fees and court costs against the defendants, for a total award of over $400,000. The defendants appealed to the Fourth Circuit.

The Fourth Circuit upheld the decision but disagreed with the damages calculations. Interestingly, unlike the three federal district courts that previously considered the issue, the Fourth Circuit held that statutory damages of $1,000 per violation are not available in the absence of actual damages. The appellate court did find that punitive damages and attorneys' fees can be awarded in the absence of actual damages, but vacated the awards for those and remanded this case to the district court.

Employers Strictly Liable for Sexual Harassment Committed by Any Supervisor

In a recent decision, *Sangamon County Sheriff's Department v. Illinois Human Rights Commission*, the Illinois Supreme Court held that an employer is strictly liable for sexual harassment committed by any supervisory or management employee, even though the harasser had no supervisory authority over the complainant and did not have authority to affect the terms and conditions of the complainant's employment.

The complainant, Donna Feleccia, was a records clerk with the Sangamon County Sheriff's Department. Ron Yanor was a sergeant in the patrol division of the Sheriff's Department. Although he was a supervisor, he and Feliccia worked different shifts in different divisions of the Sheriff's Department, and Yanor had no supervisory authority over Feleccia. There was a three hour overlap in their shifts.

Feleccia had been working for the Sherriff's Department for six years when the alleged sexual harassment by Yanor began. These events included: an invitation by Yanor to take her to a bar that he told her would be attended by others in the Department but was not; a forced kiss when he drove her home from that bar; an unexpected appearance at her home to give her a Christmas cup filled with candies; and an encounter where Yanor asked Feleccia if she would like to go to a hotel with him for the night. All of these events allegedly occurred in a two-month time period in November and December of 1998. Feleccia did not report any of these events to the Sherriff's Department's other management.

On February 5, 1999, Feleccia received a phony letter on Illinois Department of Public Health letterhead informing her that she had been exposed to a sexually transmitted disease. The letter was determined to be a hoax and was eventually traced to Yanor, who confessed, claiming that he did it as a practical joke. Shortly thereafter, the Sherriff's Department gave Yanor a four-day suspension and a letter of reprimand.

Feleccia did not believe the sanction was severe enough and told higher-level officials in the Sherriff's Department about the prior incidents of sexual harassment by Yanor. She eventually filed a charge of sexual harassment and retaliation with the Illinois Human Rights Commission (IHRC) against the Sherriff's Department and Yanor. The IHRC found that Feleccia had established sexual harassment based on a hostile work environment. The IHRC found as a matter of law that the Sheriff's Department was strictly liable for Yanor's harassment of Feleccia because he was a supervisory employee, even though he was not Feleccia's supervisor. The Illinois Court of Appeals reversed, finding that Yanor was merely a co-employee of Feleccia since he had no supervisory authority over her. Accordingly, the appellate court found that the Sheriff's Department was not liable because it took reasonable corrective measures upon learning of the harassment when it suspended Yanor for four days without pay and issued a letter of reprimand.

The Illinois Supreme Court based its decision on the language of the sexual harassment provision in the Illinois Human Rights Act. The first clause of that statute in section 2-102(D) prohibits sexual harassment broadly. The second clause then limits the first clause by stating that "an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures."

The Court held that: "[w]here the offending employee is either a 'nonemployee' or 'nonmanagerial or nonsupervisory employee,' an employer is responsible for the harassment only if it was aware of the conduct and failed to take corrective measures." The court found that the statutory language was unambiguous and that the facts of the case did not fall within the limitation of the second clause of the statute because Yanor was "neither a 'nonemployee' nor a 'nonmanagerial or nonsupervisory employee.'" Therefore, the Sherriff's Department was liable for Yanor's sexual harassment regardless of whether it knew about it, and regardless of whether it took reasonable steps once it found out.

D.C. Circuit Addresses Independent Contractor Status in a Recent NLRB Petition for Enforcement

In a significant labor law decision, the U.S. Court of Appeals for the District of Columbia Circuit held that Massachusetts drivers who voted for representation by the International Brotherhood of Teamsters were independent contractors who were not covered by the National Labor Relations Act *(FedEx Home Delivery v. NLRB*, D.C. Cir., No. 07-1391, 4/21/09). In a 2-1 decision, Judges Janice Rogers Brown and Stephen F. Williams set aside a National Labor Relations Board decision that the company unlawfully failed to bargain with Teamsters Local 25 after the union was certified as the bargaining agent for drivers at two FedEx Home terminals, finding that the board improperly classified the drivers as employees under the NLRA.

FedEx acquired Roadway Package Systems in 1998 and changed its name to FedEx Ground Package System Inc. The present company consists of a ground division that delivers packages primarily to and from businesses, and the home division, known as FedEx Home, that delivers packages primarily serving residential customers. FedEx Home entered into independent contractor agreements with about 4,000 drivers who are responsible for more than 5,000 delivery routes across the United States.

In July 2006, Local 25 filed representation petitions with NLRB, requesting elections at two small terminals in Wilmington, MA. An NLRB regional director determined that the drivers at both facilities were employees under the NLRA and directed that elections be held on the issue of union representation. The NLRB declined to review the director's decision, and the union won both elections. FedEx filed objections and refused to bargain with the union on the basis that the drivers were independent contractors rather than employees. The NLRB found that the company had violated Sections 8(a)(1) and 8(a)(5) of the NLRA. FedEx petitioned for review of the board order in the D.C. Circuit, and the NLRB filed a cross-petition for enforcement .

The majority of the D.C. Circuit vacated the Board's decision and refused to enforce the bargaining order. Writing for the majority, Judge Brown said the Board and the courts apply the traditional common law agency test in resolving independent contractor issues, but the test is not amenable to a "bright-line rule." She called uncertainty about independent contractor status "particularly problematic" under the NLRA, because the Act gives NLRB jurisdiction over statutory employees but "no authority whatsoever over independent contractors." Stating that the court is responsible for ensuring that the Board only exercises the power granted by the Act, the D.C. Circuit said it would not defer to NLRB decisions on independent contractor status. Instead, it said, the court would uphold the Board's decision if it reflected that the agency made a choice between "two fairly conflicting views."

The appeals court said the FedEx Home drivers appeared to share many "characteristics of entrepreneurial potential." The NLRB regional director found that the Massachusetts drivers sought by Local 25 had signed operating agreements that specified they were not employees of the company for any purposes, and that the contractor retained control over the "manner and means of reaching mutual business objectives." They provided their own vehicles, and bore the costs of operating and maintaining them. The court noted that NLRB also heard evidence that the drivers under contract with FedEx Home were free to use their trucks for any personal or commercial purpose, as long as they removed or covered company logos and markings when the equipment was not in service for FedEx Home. Contractors were free to serve multiple routes for FedEx Home, and had complete authority to hire and fire their own drivers. According to the decision, "contractors do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there."

The court noted that the NLRB regional director, in a decision upheld by the Board, found that the FedEx Home drivers were employees in part because the company required the contractors to wear uniforms, conform to grooming standards, complete a driving course, and be audited or observed twice a year. The director noted that the company also controlled the display of its logo on trucks, required contractors to have drivers available Tuesday through Saturday, and could reconfigure route assignments if a contractor's service was not adequate. The court found that "those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship."

The company requires drivers to wear uniforms to give customers a sense of security, not to control the drivers, it observed. "FedEx has an interest in making sure her conduct reflects favorably on that logo [once a driver is wearing it], for instance by her being a safe and insured driver—which is required by [Department of Transportation] regulations in any event," the court added.

The court observed that in finding the drivers to be employees under the NLRA, the Board's regional director emphasized that the drivers were performing a function that is a regular and essential part of the company's operations and that few took advantage of the entrepreneurial opportunity to hire other drivers. But the court was not persuaded by the analysis. "While the essential nature of a worker's role is a legitimate consideration, it is not determinative in the face of more compelling countervailing factors," the court said, adding that whether drivers took advantage of particular opportunities "is beside the point." Citing a prior decision, it said a worker's retention of the right to engage in entrepreneurial activity is more important than the regular exercise of that right.

"Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent," the court said, granting the company's petition for review, vacating the board's order and denying enforcement of the order that FedEx Home bargain with Local 25.

A list of our offices & contact numbers are below. We hope you find this publication useful and interesting and would welcome your feedback. For further information on topics covered in this newsletter or to discuss your labor & emploment issue, please contact one of the editors or any of the attorneys listed on page 12:

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Further information on our lawyers and offices can be found on our website at **www.eapdlaw.com**.

WEBINAR

COMPLIMENTARY WEBINAR PROGRAM

Preparing for the Employee Free Choice Act

Tuesday July 14, 2009

The Employee Free Choice Act (EFCA) legislation, which proposes to eliminate secret ballot elections in union organizing efforts, will have far reaching ramifications. Employee unions presently enjoy a 66 percent win-rate in NLRB elections and it is expected that the Act will sharply increase the success of employee organizing attempts.

Please join us for a complimentary webinar designed to help employers understand the impact that EFCA will have on unionization throughout the US and on their business. We will address the following topics:

- The political landscape surrounding EFCA and its current status
- What management needs to know about union organizing: do's and don'ts
- How the EFCA would change the law
- What the "card check" is and how it will work
- What the penalties are for unfair labor practices
- How employers can prepare.

DATE
July 14, 2009

PROGRAM
12:00PM - 1:30PM

SPEAKERS
Barbara A. Lee
Counsel, EAPD

Mark L. Zaken
Partner, EAPD

For further information e-mail Olivia Martinez at OMartinez@eapdlaw.com.

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