Law Offices of Mary L. Topliff
Workplace Wave

Key Provisions of the COBRA Subsidy Law and the Lily Ledbetter Fair Pay Act

By Mary L. Topliff, Esq.

If the first two months of 2009 are any indication, employers who work wisely will stay on top of legislative proposals. Two significant federal employment law developments have already occurred this year, one designed to assist laid off workers with continuation coverage under group health insurance plans through the end of 2009 and the other designed to strengthen employment discrimination laws regarding employee compensation determinations. The following provides the latest federal agency guidance on COBRA and practical considerations for employers regarding their pay practices.

COBRA Subsidy Developments

A long-standing federal law, the Consolidated Omnibus Budget Reconciliation Act (better known as COBRA) allows employees and their covered dependents who participated in their employers' group health benefit plan to continue their coverage by paying the full cost of premiums upon certain events, including separation from employment. The American Recovery and Reinvestment Act of 2009 (ARRA, otherwise known as the Stimulus Package), enacted on February 17, 2009, provides a 65 percent COBRA premium reduction to certain involuntarily terminated employees and their covered dependents for up to 9 months. This premium amount, paid by employers or their insurers, will be subsidized by the federal government through a payroll tax credit.

To be eligible for the premium reduction, an employee's termination must occur

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Public Speaking

4/29/09
'How Compensation Design and FLSA Analysis Work Hand-In-Hand'
HR West, NCHRA, 2009 Annual Conference
South San Francisco, CA

5/1/09
'How to Handle Difficult Employee Conversations Smoothly, Effectively, and Legally'
Employer Resource Institute Audio Conference

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sometime between September 1, 2008 and December 31, 2009. The nine-month premium reduction extends from the first date of COBRA coverage following the law's enactment and begins on the first period of coverage after February 17, the specific date depending on whether premiums are charged monthly or otherwise.

On March 31, 2009, the Internal Revenue Service issued a detailed guidance that provides further clarification regarding this new law. Questions have arisen as to what constitutes an "involuntary termination" since COBRA did not previously define this term. The new guidance clarifies circumstances that qualify as "involuntary terminations," which generally track definitions used for eligibility for unemployment insurance benefits. Generally, an "involuntary termination" includes separations from employment as a result of the employer's action, as well as an employer's failure to renew a contract. It specifies that a layoff, even if it includes a right to be recalled (e.g., under a collective bargaining agreement or other policy), or a temporary furlough period, is considered involuntary. However, a reduction in hours alone would not qualify.

Other "involuntary terminations" would include an employee's election to take a voluntary severance (or buy-out) package if associated with a layoff, rather than simply an individual employee requesting a severance package. It would also include an employee's decision to leave employment if due to the employer's action causing a material negative change in the employment relationship, an example would be a significant reduction in hours that causes the employee to terminate. Employers sometimes agree to refer to an employee's separation as a resignation or even a mutual agreement to separate as a means of assisting the departing employee's future employment prospects or simply based on the employee's request. The guidance states that terminations will be viewed based on the facts and circumstances such that if the employer would have terminated the employee's services and the employee had knowledge that he or she would be terminated, then the termination would be viewed as involuntary, despite the employer's reference to the action as a mutual parting of the ways.

COBRA continuation is not required to be offered to an employee who is terminated due to gross misconduct. The COBRA subsidy under ARRA does not change that.

Given that the law was enacted after employees had been terminated who would become eligible, logistical issues have arisen. The law requires employers to provide notice to all employees who would be eligible, even if they had not previously elected COBRA continuation coverage.

The guidance covers the scenario in which an employer pays for the full cost of group health benefits for a period of time following separation, typically as part of a severance package. It provides that eligibility for the subsidy must occur when there is an involuntary termination

and loss of coverage prior to December 31, 2009. If the employer treats the continued benefit payments pursuant to a severance package as COBRA continuation coverage on behalf of the terminated employee, then the loss of coverage would occur following the termination rather than at the conclusion of the employer's payments. For example, if the employee elected COBRA coverage and the employer reimbursed the employee for the employee's portion. If, however, the employer simply pays for the benefits without attributing them as COBRA continuation payments, then the loss of coverage would occur at the conclusion of the payments.

The guidance also provides more information on topics such as, how to calculate the premium reduction, the type of coverage eligible, and the length of the subsidy period, among other items. The complete IRS guidance can be found on its website. Additional helpful information can be found on the Department of Labor's website, at www.dol.gov/ebsa.

Lily Ledbetter Fair Pay Act: Practical Considerations

Discrimination in an employee's pay can have a continuing effect that other forms of discrimination do not share. For example, if a supervisor decides to provide no merit increase for an African American employee due to biased views of his work ethic while providing merit increases for Caucasian employees when there is no discernible difference in their job performance, this may be a discriminatory decision. That discriminatory decision has a continuing effect each pay period that the African American employee receives less pay. Yet, since employers do not typically disclose to employees how much their co-workers are paid, an employee may not discover the pay inequity for some time (in contrast to other adverse actions, such as terminations).

The first law signed by President Obama overturned the 2007 United States Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* That case and the new law relate to the appropriate time period in which plaintiffs must file complaints of discrimination as to how they are paid. The high court held that a plaintiff must file a discrimination complaint with the Equal Employment Opportunity Commission during the applicable charge-filing period (either 180 or 300 days, depending on the state) following the date when the initial discriminatory pay action occurs. It held that the discrimination does not continue with each paycheck unless pursuant to a discriminatory pay structure. Thus, under the scenario above, the employee would be required to file his complaint based on the date of the supervisor's decision.

The Ledbetter Act amends several federal employment discrimination laws: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act of 1973, all of which require plaintiffs to prove that their employer engaged in intentional discrimination on the basis of their protected characteristic. With respect to

compensation determinations, the Ledbetter Act sets forth the operative points in time when the discrimination occurs: (1) when a discriminatory compensation decision or other practice is adopted; (2) when an individual becomes subject to a discriminatory compensation decision or other practice; or (3) when an individual is affected by the decision, including each time wages, benefits or other compensation is paid. This latter phrase means, in effect, that the discriminatory decision is deemed to continue with subsequent paychecks that reflect the prior act.

Potential Ramifications:

- Media attention generally raises awareness by employees which can lead to more discussion amongst employees regarding their pay;
- Economic downturns tend to result in increased employment claims;
- Pay discrimination and related failure to promote cases lend themselves to class actions;
- As overtime exemption cases continue to proliferate, compensation decisions can be expected to receive greater scrutiny (for example, instead of just addressing whether an employee was properly classified, the questions will include how the employee was paid compared to others).

Practice Tips:

- Know your own data and regularly review compensation levels from different perspectives, for example, across gender, age and race lines and within job grades, departments and the like;
- If managers have discretion to award pay increases, ensure that there is documentation on the decisionmaking process and implement a higher level review/approval process -- or severely limit the amount of discretion;
- Do not prohibit employees from discussing their pay as a way of avoiding disclosure of pay differentials (the California Labor Code prohibits terminations on such grounds);
- If you don't have a pay structure, implement one with help from a compensation professional.

For more information on these issues, contact the author at topliff@joblaw.com.

Public Speaking (cont.)

5/7/09
'Advanced Time Off and Leaves of Absence Challenges'
NCHRA
Fairfield, CA

5/12/09 & 5/13/09
'Responding to Changing Legislation'
Watson Wyatt Worldwide
Santa Clara, CA & San Francisco, CA

5/20/09
'California HR Self-Audits'
Employer Resource Institute Audio Conference

5/28/09
'Reducing Employment Law Risks During Uncertain Economic Times'
The Bar Association of San Francisco
San Francisco, CA

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