

employment law update

winter 2010

COBRA SUBSIDY EXTENDED

On December 19, 2009, President Obama signed into law an extension and expansion of the premium subsidy now available under the Consolidated Omnibus Budget Reconciliation Act of 1985 "COBRA". COBRA was previously amended to establish a new government subsidy "Subsidy" designed to help workers who were involuntarily terminated from employment continue health care benefits at an affordable (or at least lower) rate. The Subsidy provides that employees who elect continuation coverage under COBRA must pay only 35% of the premium that would otherwise be charged under the employer's plan, with the government subsidizing the remaining 65%. For such involuntarily terminated employees, employers cover 65% of the cost of the premium payment, but are reimbursed through a payroll tax credit or refund. To obtain the tax credit, employers should use the updated Form 941, Employer's Quarterly Federal Tax Return.

Originally, the Subsidy applied only to workers who were involuntarily terminated between September 1, 2008 and December 31, 2009. Under the extension, involuntarily terminated employees are eligible for the subsidy if the termination occurred between September 1, 2008 and February 28, 2010. In addition, the length of the premium assistance period was extended from 9 months to 15 months.

Employers with 20 or more employees are required to distribute written notices to employees who would be eligible to elect subsidized COBRA coverage. The Employee Benefits Security Administration (EBSA) of the Department of Labor has issued updated model notices that incorporate these changes to COBRA. Model notices may be found at www.dol.gov/ebsa/COBRAmodeInotice.html.

If you have any questions concerning the Subsidy extension or the updated notices issued by EBSA, please contact any member of the Kaufman and Canoles' Employment Team. Also, members of our Team will be on hand to answer specific questions at the next showing of the 26th Annual Employment Law Update on April 22 at the Greater Richmond Convention Center.

26TH ANNUAL EMPLOYMENT LAW UPDATE

YOUR EMPLOYMENT LAW SURVIVAL KIT



On April 22nd, the K&C Employment Law Team will host the second showing of the 26th Annual Employment Law Update: *Your Employment Law Survival Kit* at the Greater Richmond Convention Center. The 26th Annual Employment Law Update is designed to provide employers with an employment law survival kit, particularly during these tough economic times. Anyone involved in employment decisions and/or practices should attend. In addition to a general update, all attendees will be given the opportunity to have specific employment law questions answered by specialists in the field.

Attendees will select their choice of several of our educational workshops. Topics include: Handling a Government Investigation, Controlling Workers' Compensation, Effective Performance Reviews, Drafting/Updating Employee Handbooks, and more.

For more information, visit our website at www.kaufCAN.com or contact Kerry Martinolich at (757) 624-3232 or (804) 771-5722.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

EMPLOYERS SHOULD CHECK FMLA POLICIES IN LIGHT OF RECENT CHANGE IN LAW

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (“NDAA”). The NDAA includes provisions that expand the two types of military-related leave that became available under the Family and Medical Leave Act (“FMLA”) in January 2008: “qualifying exigency” leave and military caregiver leave.

According to the 2008 FMLA amendments, eligible employees may take leave for a “qualifying exigency” arising out of a spouse’s, child’s or parent’s active duty or call to active duty as a member of the Reserves or National Guard in support of a “contingency operation” declared by the U.S. Secretary of Defense, the President, or Congress. Employees are entitled to take up to 12 workweeks of unpaid leave in any rolling 12-month period under this provision. Under the NDAA, this leave is now available to eligible families of members of the National Guard and Reserves, as well as to eligible families of any member of the Armed Forces.

Under the military caregiver provisions, eligible family members may take leave to care for a current member of the Armed Forces, National Guard, or Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in out-patient status, or is on the temporary disability retired list for serious injury or illness. An eligible employee may take a combined 26 workweeks of military caregiver leave in a single 12-month period that begins on the date the employee first uses the leave and ends 12 months later. The NDAA extends the entitlement to military caregiver leave to the families of veterans. It also expands the definition of “serious injury or illness” for purposes of military caregiver provisions, to facilitate extending coverage to families of veterans.

PRACTICAL POINTER

FMLA regulations require that employers with 50 or more employees within a 75-mile radius include all of the information in the Department of Labor’s notice in their handbook. Accordingly, covered employers should review their handbooks to ensure that their FMLA policies are complete and accurate. The information required by Department of Labor includes: basic leave entitlements, military family leave entitlements, benefits and protections, eligibility requirements, definition of serious health condition, use of leave, substitution of paid leave for unpaid leave, employee responsibilities, employer responsibilities, unlawful acts, and enforcement.

GINA CREATES NEW PROTECTED CLASS

The employment discrimination provisions of the Genetic Information Nondiscrimination Act of 2008 (“GINA”) are now in effect. GINA adds a protected category based on “genetic information” to the existing ADA, ADEA and Title VII protected categories of disability, age, race, color, religion, national origin, and sex. GINA’s employment discrimination enforcement mechanisms for private-sector employees parallel those of Title VII and the ADA, using the same remedies and Charge-filing scheme. In addition, GINA makes it unlawful for employers to request “genetic information” from employees.

Remember that “genetic information” is defined to include not only the results of genetic testing, but also “the manifestation of a disease or disorder in family members” of an employee – to the fourth degree (first cousins once removed)! Thus, for example, post-offer medical examinations, permitted by the ADA, are no longer permitted to obtain family medical history. Limited safe harbor provisions exist for genetic information acquired inadvertently; acquired as part of an ADA “reasonable accommodation” exchange, and acquired for FMLA purposes. Such information must be kept in a segregated, confidential file.

There has been some debate over how much of an impact GINA will actually have, but one immediate effect is to change the employment rights poster requirements for most employers. The EEOC’s current employment rights poster, which contains reference to GINA, can be obtained at <http://www.eeoc.gov/employers/poster.cfm>

USING SEVERANCE AGREEMENTS: SPECIAL CONSIDERATIONS FOR OLDER WORKERS

Employers sometimes find that the best separation strategy for unsatisfactory or difficult workers is a negotiated severance agreement with a waiver and release of legal claims. These agreements enable employers to avoid the risks of most types of litigation and the workforce disruption often caused by a contested separation. Loose ends can all be tied into the single thread of a binding legal document. In a reduction in force situation, severance agreements provide a roadmap for implementation and a source of certainty for both the employer and the employee in this particularly stressful time.

In preparing effective severance agreements, employers need to consider more than just the amount of severance pay and any continuing employee benefits. For example, since many reductions in force involve workers over age 40 who are protected by the ADEA and its imbedded provisions known as the Older Workers Benefit and Protection Act (OWBPA), additional provisions may be required. Under the OWBPA, the release and waiver of an age discrimination claim requires a written agreement specifically mentioning the ADEA and suggesting that the employee seek the advice of an attorney. When such agreements apply to a single employee, that worker must be given up to 21 days to consider the severance offer and if accepted, seven days to revoke acceptance. When two or more employees are involved up to 45 days to consider must be given as well as seven days to revoke. Also, in group (two or more) lay-off situations, information disclosing the positions and ages of those persons in the employees' department or work unit who receive a severance offer and those not receiving an offer must be supplied.

PRACTICAL POINTER

Employers should not only take care to comply with all legal requirements when using severance agreements, but they should make sure they avoid the appearance of being overly concerned about being sued when discussing such agreements with employees. Such discussions should be very matter-of-fact and non-defensive. Otherwise, an employee may seek legal advice to bring a claim that he or she had not previously considered. The K&C Employment Team will be available on April 22 at the next showing of the 26th Annual Employment Law Update at The Richmond Convention Center to answer all legal and practical questions any attendee considering using a severance agreement might have.

CASUAL EMAIL USAGE LEADS TO COSTLY CLAIM

An employer in Idaho, El Centro Finance, recently discovered how costly an inadvertent email can be. After reviewing an applicant's email forwarding a job application, El Centro's Chief Executive Officer, Benjamin Page, mistakenly sent the applicant an e-mail intended for someone else. Mr. Page's email stated, "Damn . . . Check it out—I don't know what I think. He must be old—and just looking for something to do."

Not surprisingly, when the applicant received Mr. Page's email, he deduced that his age may have had something to do with being rejected for the job. He then filed a charge of age discrimination with the Idaho Human Rights Commission and the EEOC. After the applicant received a right-to-sue letter, he filed a lawsuit in federal court and a federal judge has now ruled that his claim can proceed with the inadvertent email as the principal evidence of age discrimination. Some say that age is just a number, but El Centro is probably worried about how big a number their CEO's faux pas may ultimately cost.

PRACTICAL POINTER

This case points out not only the need for appropriate email policies, but also the need to train all employees on appropriate email usage. Among other things, employees need to understand that when they are creating even internal emails, they are creating evidence that can be retrieved for use in a discrimination case even after it has been deleted.

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Visit our new website at www.kaufCAN.com
for timely updates or to register for our seminars.

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