

LEGAL ALERT

March 9, 2009

“STIMULATING” COBRA REQUIREMENTS FOR EMPLOYERS

By Robert C. Stone, Attorney

As all of the media commentators have pointed out, there are many pieces to the stimulus puzzle known as the American Recovery and Reinvestment Act of 2009, signed into law by President Obama on February 17, 2009. One of those pieces is a new requirement for employers under COBRA, the statute that requires employers to offer health insurance to employees who have experienced a “qualifying event” such as layoff, discharge or a significant reduction in hours. Also under COBRA, spouses and dependents can continue coverage after a covered employee’s death, divorce, legal separation or certain other events.

Prior to the new stimulus package, the full cost for the eligible employee’s health insurance continuation under COBRA was paid by the employee based on the employer’s premiums plus a small administrative fee. However, under the new law that “employee pay” formula has been modified in certain situations and the employee does not have to pay the entire premium for a portion of the COBRA continuation period. Instead, a qualifying employee only has to pay 35 percent of the premium and the employer must consider the premium paid in full. Although the employer absorbs the remainder of the premium cost temporarily, the employer can then obtain a reduction in its payroll taxes to cover the balance

of the employee’s premium costs.

Several eligibility requirements for the reduced COBRA include:

- Employees must have been involuntarily terminated (for other than gross misconduct) between September 1, 2008, and December 31, 2009. Employees terminated on or after September 1, 2008, who were eligible for COBRA but did not elect continuation coverage, have additional time to change their election decision.
- The reduced premium period is limited to nine months beginning March 1, 2009. There is no retroactive coverage for premiums already paid.
- The reduced premium is fully available without tax consequences only to employees with an adjusted gross income of \$125,000 or less (\$250,000 for joint returns). Employees with an adjusted gross income of between \$125,000 (\$250,000 for joint returns) and \$145,000 (\$290,000 for joint returns) will have the subsidy effectively phased out through a pro rata increase in their income tax liability up to the full amount of the subsidy. Employees

at this higher income level can waive the subsidy to avoid the increased tax liability.

Congress did not provide employers the typical amount of lead time for such a significant change. **The Act became effective on March 1, 2009, and employers must update COBRA election notices and other documents to reflect the new requirements for COBRA notices used on or after March 1, 2009. In addition, employers must provide information about the subsidy to employees who were involuntarily terminated on or after September 1, 2008, but did not elect**

continuation coverage, and give them another chance to elect COBRA coverage. This notice must be provided by April 30, 2009 (60 days from the effective date of the Act). Employers also need to establish procedures for paying their insurance carrier the 65 percent subsidy amount and obtaining reimbursement from the federal government for those payments.

While the stimulus package's impact on the economy is yet to be seen, it is clear that the COBRA portion of the new law has stimulated a great deal of work for employers in a very short period of time.

EMPLOYEE FREE CHOICE ACT – WHAT'S IN A NAME?

By Robert C. Stone, Attorney

Although union membership overall continues to be weak, particularly in the private sector, there may be some changes on the horizon. Recent press accounts state that the overall percentage of union membership has increased for the second year in a row. While still well below peak levels of approximately 35 percent in the 1950's, the number of union members rose from 311,000 in 2007 to 428,000 in 2008. In addition, the change in the political landscape in Washington makes it more likely that legislation friendly to organized labor will pass and become law.

Most notable of these pro-labor legislative proposals is the ironically named "Employee Free Choice Act". Throughout the history of the National Labor Relations Act, the heart of the unionization process has been the right of employees to decide if they wanted a union

through a secret ballot election conducted by the National Labor Relations Board (NLRB). If passed, the Employee Free Choice Act will eliminate those elections.

Under current law, a union must provide evidence to the National Labor Relations Board that at least 30 percent of the employees want to be represented by a union. This "showing of interest" is usually accomplished by getting employees to sign an "authorization card" saying they want the union. The cards are then presented to the NLRB (the employer never sees them). If at least 30 percent of the employees have signed the cards, the NLRB schedules a secret ballot election. If a majority of the employees voting by secret ballot want unionization, then the union is certified as the representative of the employees.

The so-called "free choice" legislation eliminates

the election portion of the process and requires that if a majority of employees sign a card, then the union is certified. No election is held. While these cards have been used for years for the “showing of interest”, they are considered to be notoriously unreliable as a true indicator of the employees’ wishes. The card signing process is not private and significant pressure can be brought to bear on employees to sign the cards. Under the proposed legislation, these cards will be the sole basis for certifying a union as the employees’ representative.

In addition to the “card check” portion of the proposed legislation, the bill will require employers to begin negotiations within 10 days of the first “written request for collective bargaining” by a newly certified union. If agreement on a contract is not reached after 90 days, then either party can request mediation. If there still is no contract after 30 days of mediation, the dispute will be referred to “an arbitration board”. This board will be able to impose a contract on the parties for a two year term. In other words, wages,

benefits, terms and condition of employment for two years will be set by an outside arbitration panel.

The bill also calls for triple backpay to employees who are terminated in violation of the National Labor Relations Act while a union is attempting to organize the employer and during negotiations of the first agreement. The NLRB will also be able to seek an injunction forcing reinstatement of a terminated employee before there is a ruling on the appropriateness of the termination. In some cases, there can be \$20,000 in civil penalties for each violation of the statute. Violations of the statute by unions do not increase penalties.

The Employee Free Choice Act has widespread support among Democratic members of Congress and President Obama has stated that he will sign the bill if it is passed. Business groups are strongly opposed to the bill and battle lines have been drawn. We will watch to see if it passes the Senate and becomes law.

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