

# Labor & Employment Law UPDATE

*Practical and preventive information for managing  
your workplace*

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## *COBRA Subsidy and Extension of Coverage under the American Recovery and Investment Act*

On February 17, 2009, the American Recovery and Reinvestment Act was signed into law. The Act makes changes to the coverage continuation provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) that apply to all health plans other than health care spending accounts offered through a cafeteria plan. The Act provides federal assistance for payment of COBRA premiums to employees and covered family members with adjusted gross incomes below a maximum threshold who lost or will lose coverage due to an involuntary termination of employment from September 1, 2008 through December 31, 2009. As discussed below, the Act will provide certain individuals with COBRA premium subsidies and impose new notice requirements upon employers.

### **COBRA Premium Subsidy for Eligible Individuals**

The Act provides a subsidy of 65 percent of

the COBRA continuation coverage premiums for eligible individuals for a maximum of nine months, so that an eligible individual will only have to pay 35 percent of the COBRA premium to get coverage. The balance of the COBRA premium is paid by the employer sponsoring the group health plan (or the plan itself if a Multi-employer plan). The employer paying the subsidy will receive reimbursement in the form of an offset in the amount of its payroll taxes by the amount of the subsidy that has been paid by the employer.

An individual is eligible for this COBRA premium subsidy if he or she lost or loses health coverage as a result of an involuntary termination of employment during the period beginning September 1, 2008 and ending December 31, 2009, and is eligible to elect COBRA during that time. Individuals who elected COBRA due to an involuntary termination of employment on or after September 1, 2008, but prior to the date of enactment, are eligible to receive the subsidy

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on a prospective basis, beginning on the date of enactment (February 17, 2009). Individuals who were eligible to elect COBRA during this time period due to an involuntary termination, but did not elect COBRA will need to be given the opportunity to elect COBRA on a prospective basis, with the maximum coverage period measured from the earliest date that COBRA coverage could have been elected. Employers or plans will have to provide notice to these groups of individuals, as described below.

#### **Notice Requirements**

The Act requires employers to modify current COBRA election notices or to provide separate, supplemental notices to all individuals who become entitled to elect COBRA continuation coverage during the period beginning September 1, 2008, and ending on December 31, 2009. Such notices must describe the new premium subsidy, and, if applicable, the right to change coverage options, as well as other information. Individuals who became entitled to elect COBRA before the date of enactment must be provided additional notification from the employer within 60 days after the date of enactment (April 18, 2009).

The Act also provides that the Department of Labor, United States Treasury and Health and Human Services will develop a model notice within 30 days of the enactment.

You should contact an attorney with any questions or concerns regarding the COBRA premium subsidy, the new notice requirements for the COBRA subsidy, or any other matters of the Act affecting your group health plan.

**Adam L. Cockerill**

## *New Health Plan Special Enrollment Period under the Children's Health Insurance Program Reauthorization Act of 2009*

On February 4, 2009 the Children's Health Insurance Program Reauthorization Act of 2009 was signed into law, extending and expanding the state children's health insurance program (SCHIP). The law gives states the option to provide a premium assistance subsidy for qualified employer-sponsored coverage to all low-income children eligible for SCHIP who have access to such coverage, if the child (or child's parent) voluntarily elects to receive such a subsidy. The new law allows the state to make subsidy payments directly to the employee or to the employer, with the employer having the option to elect to opt out of being paid directly by the state. The law, which goes into effect April 1, 2009, will require health and cafeteria plans to be amended to accommodate for special enrollment periods and new notification and disclosure duties.

*The Act requires employers to modify current COBRA election notices or to provide separate, supplemental notices.*

## Special Enrollment Periods for Group Health Plans

Effective April 1, 2009, Group Health Plans will be required to establish new special enrollment rights that permit employees and dependants not enrolled in group health plan coverage to enroll if (1) the employee's or dependants' Medicaid or SCHIP coverage is terminated as a result of loss of eligibility and the employee requests coverage under the Plan within 60 days after the termination, or (2) the employee or dependent becomes eligible for a premium assistance subsidy under Medicaid or SCHIP, and the employee requests coverage under the plan within 60 days after eligibility is determined.

Currently, HIPAA already provides special enrollment rights upon certain losses of eligibility for group health coverage or health insurance coverage, and upon the acquisition of a new spouse or dependent by marriage, birth, adoption, or placement for adoption. The new law goes further to allow special enrollment as a result of loss of eligibility under a Medicaid plan or SCHIP and upon becoming eligible for a premium assistance subsidy under Medicaid or SCHIP. In contrast to the other special enrollment rights, which require plans to allow enrollment for at least 30 days after coverage or acquisition of a new dependant (unless a longer period is provided by the plan document), the new special enrollment rights include a 60 day period for requesting coverage.

## New Notification and Disclosure Duties

Your plan will have to provide notice to employees about the new premium

assistance opportunities available under state law. You will not be required to distribute these notices, however, until the Department of Health and Human Services has issued model forms. The new law requires the Department of Health and Human Services to develop national and state-specific model notices by February 4, 2010. This notice requirement will become effective for plan years beginning after the date in which model notices are first distributed by the Department of Health and Human Services.

The new law will also require the administrators of your plan to disclose information about Plan benefits to states upon request to assist states in (1) determining whether participants in your plan are eligible for premium assistance and (2) to determine the SCHIP program's duty to provide supplemental benefits.

## Action to Take

Under the law's general effective date, plans must accommodate requests for the new special enrollment rights beginning April 1, 2009. This will require you to amend your plan to offer this special enrollment right by the effective date of the law and examine your plan's coordination of benefit rules to see if they need to be updated to reflect that SCHIP supplemental coverage will pay secondary to your plan.

**Adam L. Cockerill**

*Your plan will have to provide notice to employees about the new premium assistance opportunities available under state law.*

# *Retaliation Clause Applies to Internal Investigations*

On January 26, 2009, the U.S. Supreme Court held in *Crawford v. Metropolitan Government of Nashville* that Title VII’s “opposition clause” prohibits an employer from retaliating against an employee who voices disapproval of discrimination when questioned in the course of an internal investigation. The opposition clause states that “it shall be unlawful practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this title.”

In 2002, the Metropolitan Government of Nashville and Davidson County Tennessee received complaints about sexual harassment by Dr. Gene Hughes, the school district’s employee relations director. Because the employee relations director (Dr. Hughes) would normally have been responsible for investigating the complaints, they were instead assigned to the assistant director of human resources for investigation. The human resources department interviewed several female employees who worked with Dr. Hughes, including payroll department employee Vicky Crawford. Although she had not complained, she said that Dr. Hughes had

sexually harassed her and other employees. The school district completed its investigation and issued a report in which it concluded that Dr. Hughes had engaged in inappropriate conduct. He was issued a verbal reprimand.

The school district also commenced an investigation of the business practices within the payroll department. Following this investigation it terminated Crawford for embezzlement—an accusation that Crawford denied. Crawford brought suit, alleging that Metro unlawfully retaliated against her in violation of Title VII. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court’s award of summary judgment in favor of the school district. The Sixth Circuit noted that Crawford had not “instigated or initiated” any complaint prior to her interview and merely providing unfavorable information during an interview “is not the kind of overt opposition that we have held is required for protection under Title VII.”

In a unanimous decision, the Supreme Court reversed the Sixth Circuit and found that the opposition clause extended to Crawford’s complaints. The Court noted that “nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.” The Court concluded that the opposition clause applied to Crawford because her articulated complaints during the internal investigation were an “ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee.”

*The benefits of comprehensive investigations should far outweigh the possibility that employees who are interviewed will later claim retaliation.*

When conducting internal investigations, employers should assure employees who are interviewed that they will not be subjected to retaliation. Furthermore, employers should scrutinize any adverse action that is contemplated against an employee who was interviewed and complained about discriminatory treatment to be certain that the adverse action is legitimate and not a pretext for retaliation. Finally, the Court's holding should not discourage employers from conducting investigations for fear that other employees, during the course of the investigations, will complain about discriminatory conduct. The benefits of comprehensive investigations should far outweigh the possibility that employees who are interviewed will later claim retaliation.

**R.J. (Randy) Stevenson**

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