

# Labor & Employment Law UPDATE

*Practical and preventive information for managing  
your workplace*

January, 2010  
Volume 19, Number 1  
Allison D. Balus, Editor

## *Independent Contractors Are Now “Employees” For New Hire Reporting Purposes*

In 1996, Congress enacted a law called the “Personal Responsibility and Work Opportunity Reconciliation Act,” (or PRWORA), as part of Welfare Reform. This legislation created the requirement for employers in all 50 states to report their new hires and re-hires to a state directory. The initial purpose of new hire reporting was to speed up the child support income withholding order process, expedite collection of child support from parents who change jobs frequently, and quickly locate non-custodial parents to help in establishing paternity and child support orders.

In response to Congress’ mandate, Nebraska adopted the New Hire Reporting Act in 1997. Since that time, employers and/or labor organizations doing business in the State of Nebraska have been required to report the following employees to the State:

- *New employees:* Employers must report all employees who reside or work in the State of Nebraska to whom the employer anticipates paying earnings. Employees should be reported even if they work only one day and are terminated (prior to the employer

fulfilling the new hire reporting requirement).

- *Re-hires or Re-called employees:* Within 20 days of rehire employers must report re-hires, or employees who return to work after being laid off, furloughed, separated, granted a leave without pay, or terminated from employment. Termination of employment does not include temporary separations from employment, such as unpaid medical leave, an unpaid leave of absence, a temporary lay-off, or an absence for disability or maternity.
- *Temporary employees:* Temporary agencies are responsible for reporting any employee whom they hire to report for an assignment. Employees need to be reported only once; they do not need to be re-reported each time they report to a new client. They do need to be reported as a re-hire if the worker has a break in service or gap in wages from the temporary agency.

In 2009, the Nebraska Legislature passed LB 288, which amended the New Hire Reporting Act to include independent contractors in the definition of Employee

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# *COBRA Premium Subsidy Extension Update*

for reporting purposes. Employers are reminded that they are required to report to the State of Nebraska within 20 days of hire all independent contractors hired on or after January 1, 2010. While the statute does not define the term “independent contractor”, the Nebraska New Hire Website notes the following: “Per IRS, the general rule is that an individual is an independent contractor if you, the person for whom the services are performed, have the right to control or direct only the result of the work and not the means and methods of accomplishing the result.” There is no minimum threshold for reporting (unlike the IRS regulations covering payments in excess of \$600), so employers should report ALL independent contractors who perform service and who are compensated for those services, no matter how small the payment.

It is also worth noting that the Nebraska Department of Labor and the Nebraska Department of Revenue combined their contractor registry databases effective January 1, 2010. This combined database, coupled with the new reporting requirements of independent contractors, has already resulted in employers receiving tax lien and child support notifications for independent contractors. Given all of the scrutiny on independent contractor status, the inclusion of the term “independent contractor” within the definition of employee creates potential hazards for employers who hire independent contractors. Employers should be cautious about how they fill out any requests for information they receive from the State of Nebraska to ensure that they comply with the law while not inadvertently calling into question the independent status of the contractor. We anticipate that the state will work through these issues and a number of other unanswered questions about how it will attempt to recover child support from independent contractors through businesses that engage them.

**David J. Kramer**

The American Recovery and Reinvestment Act of 2009 (“ARRA”), as amended on December 19, 2009, by the Department of Defense Appropriations Act of 2010 (“DOD Act”), provides for premium reductions for health benefits under COBRA. The DOD Act amends the ARRA by extending the COBRA premium subsidy eligibility period for two months from the original end date of December 31, 2009, to February 28, 2010. The DOD Act also extends the length of time the subsidy can be received an additional six months, from nine months to fifteen months. To be eligible for the COBRA premium subsidy, an individual must be an “assistance eligible individual.” An individual is an “assistance eligible individual” if the individual or a member of the individual’s family: (1) has a qualifying event for continuation coverage under COBRA—that is the employee’s involuntary termination of employment—at any point from September 1, 2008, through February 28, 2010; and (2) timely elects COBRA continuation coverage. It is important to note that the individual does not need to lose coverage prior to February 28, 2010; they simply need to experience a qualifying event (*i.e.*, an involuntary termination of employment).

## **Actions Required on Your Part**

ARRA, as amended by the DOD Act, mandates that plans notify certain current and former participants about the premium reduction. The Department of Labor has issued the following model notices to assist in complying with the requirements of the ARRA and DOD Act:

*The DOD Act amends the ARRA by extending the COBRA premium subsidy eligibility period for two months from the original end date of December 31, 2009, to February 28, 2010.*

- **General Notice** - This notice must be provided to all qualified beneficiaries, not just covered employees, who experienced a qualifying event at any time from September 1, 2008, through February 28, 2010, regardless of the type of qualifying event, and *who have not yet been provided an election notice*. Individuals who experience any qualifying event after December 19, 2009, must get the updated General Notice within the normal time frame for providing a COBRA election notice. The updated model General Notice includes information on the premium reduction, the extension of the premium reduction, and information required in a COBRA election notice.

- **Premium Assistance Extension Notice** - Plan Administrators must also provide notice to certain individuals who have already been provided a COBRA election notice that did not include information regarding the DOD Act's amendments to the ARRA. This model Premium Assistance Extension Notice includes information about the changes made to the premium reduction provisions of ARRA by the DOD Act. The following individuals are required to receive this notice: (1) individuals who were "assistance eligible individuals" as of October 31, 2009 (unless they are in a "transition period") and individuals who experienced a termination of employment on or after October 31, 2009, and lost coverage (unless already provided a timely General Notice) must be provided notice of the changes made to the premium reduction provisions of ARRA by the DOD Act by February 17, 2010; and (2) individuals who are in a "transition period" must be provided notice of the changes made to the premium reduction provisions of

the ARRA by the DOD Act within 60 days of the first day of the "transition period," with the "transition period" beginning immediately after the end of the nine months of premium reduction in effect under ARRA before the Amendments made by the DOD Act, as long as the premium reduction provisions of the DOD Act would apply to the extension from nine to fifteen months.

At this point it would be prudent to examine your current COBRA continuation coverage notices and administration practices to ensure that they satisfy the requirements issued under the ARRA and the DOD Act, as well as identify any individuals that may need to receive an updated General Notice or Premium Assistance Extension Notice. Finally, the state in which you are located may have "mini-COBRA" rules that are affected by the ARRA and DOD Acts, in which case you should examine those state continuation coverage rules to ensure compliance.

**Adam L. Cockerill**

## *Retaliation Charges On The Rise*

Retaliation charges are on the rise. Employers are acutely aware of the potential for a claim of retaliation after an employee has engaged in some form of protected conduct. Retaliation charges can be devastating because even though a current or former employee's underlying claim of alleged discrimination or harassment may

*Even though a current or former employee's underlying claim of alleged discrimination or harassment may have no merit, the employee may still have an actionable claim for retaliation if the employer alters its treatment of him because of his protected activity.*

have no merit, the employee may still have an actionable claim for retaliation if the employer alters its treatment of him because of his protected activity.

According to the EEOC, retaliation charges increased from 32,690 in Fiscal Year 2008 to 33,613 in Fiscal Year 2009, which was the second highest number of charges in a given category. From 1997 to 2009, the number of retaliation charges increased by a staggering 15,415 charges per year. Because of this dramatic increase in retaliation charges, this article examines a recent Eighth Circuit decision to remind employers of the reality of charges of retaliation.

In September 2009, the Eighth Circuit decided *Sutherland v. Mo. Dept. of Corrections*, in which the plaintiff sued her employer, the Missouri Department of Corrections, for sex discrimination, sexual harassment, and retaliation under Title VII. The plaintiff, a corrections officer, had been employed by the defendant since 1999. In this case, the plaintiff filed internal grievances and then charges of discrimination and a lawsuit alleging that a co-worker sexually harassed her and that her other co-workers retaliated against her for complaining about the sexual harassment.

The Eighth Circuit held that filing an incident report, a Charge of Discrimination, and a lawsuit were all protected activity. To establish a retaliation claim, a plaintiff must show (1) he engaged in a protected activity; (2) a reasonable person would have perceived the alleged retaliatory action materially adverse; and (3) this adverse action was causally linked to his protected conduct. While the plaintiff in this case established that she engaged in protected activity, she also needed to prove that a “reasonable person would perceive as retaliatory the actions she finds offensive” and the “retaliation produced an injury or harm.”

Against this backdrop, the plaintiff alleged that the re-classification of her performance from “highly successful” to “successful” three months after her complaint was a material adverse action done in retaliation for filing a charge of sexual harassment against a co-worker. However, following the new evaluation, plaintiff had no reductions in pay, salary, benefits, or prestige. The Eighth Circuit held that a “lower satisfactory evaluation, by itself, does not provide a material alteration of [plaintiff’s] employment and is not actionable.”

The plaintiff also alleged that her non-supervisory co-workers’ actions—*e.g.* spilling coffee on her and trying to intimidate her—constituted retaliation. However, the Eighth Circuit held that “[p]etty slights and minor annoyances in the workplace, as well as personality conflicts and snubs by co-workers, [were] not actionable.” In the end, the Eighth Circuit upheld the grant of summary judgment in favor of the defendant.

This case clarifies for employers in the Eighth Circuit what constitutes “actionable retaliatory actions.” Nonetheless, employers should continue to be cautious of the treatment of those who file internal complaints, charges, and even lawsuits to ensure that they are not treated differently or disparately because of their engagement in such protected activity.

**Quinn H. Vandenberg**

**LABOR, EMPLOYMENT  
AND EMPLOYEE  
BENEFITS LAW OR  
RELATED SERVICES**

Jill Robb Ackerman (1)  
Allison D. Balus (6)  
Kirk S. Blecha (1)  
Gary N. Clatterbuck  
Adam L. Cockerill (1)  
Steven D. Davidson (2)  
Alison A. Dempsey (1)  
Amy L. Erlbacher-Anderson  
Heidi A. Guttau-Fox (1)  
Christopher R. Hedican (5)  
David J. Kramer  
Kelli P. Lieurance (1)  
Lindsay K. Lundholm (1)  
Scott P. Moore (4)  
Scott S. Moore (3)  
R.J. (Randy) Stevenson (1)  
Quinn H. Vandenberg (7)  
Todd A. West (1)

*All attorneys are admitted to practice in Nebraska unless otherwise noted.*

- (1) Also admitted to practice in Iowa
- (2) Also admitted to practice in Missouri
- (3) Also admitted to practice in Iowa and Colorado
- (4) Also admitted to practice in Iowa and Missouri
- (5) Also admitted to practice in Iowa, Kansas, Missouri, Wyoming, Montana and South Dakota
- (6) Also admitted to practice in Virginia and the District of Columbia
- (7) Also admitted to practice in Massachusetts



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**BAIRD HOLM**  
1500 Woodmen Tower  
1700 Farnam St  
Omaha, NE 68102  
402.344.0500  
402.344.0588  
[www.bairdholm.com](http://www.bairdholm.com)

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