Overview of COBRA

COBRA provides certain former employees, retirees, spouses, former spouses, and dependent children (“qualified beneficiaries”) the right to temporary continuation of health coverage at group rates following a “qualifying event,” for example termination for reasons other than gross misconduct. For spouses and dependent children of a covered employee, qualifying events also include divorce, legal separation, and death of the covered employee, among other events. Employers with twenty or more employees must offer COBRA continuation coverage.

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In these uncertain economic times, many companies, large and small, are looking for practical ways to reduce costs and increase the bottom line. For some businesses, shrinking the number of employees is an attractive or even necessary option. This course of action leads to terminations, requested resignations, or early retirement.

While the economy may be a driving factor in workplace reductions, terminations and employment separations are full of pitfalls for the unwary employer.

Indeed, as terminated employees find it harder to obtain new employment, they may be more willing to file discrimination claims or other lawsuits resulting from the termination. Discrimination claims are fairly easy to make and some employees use these claims to exact a sense of revenge on the company—especially if they believe they have been treated unfairly. Disgruntled former employees can lead to expensive defense of claims or lawsuits, disruption in the workplace, and

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2009 Key Changes
Changes to COBRA continuation coverage under ARRA include:

>> Subsidy of Premiums
Certain “assistance eligible individuals” are entitled to a subsidy for 65% of their COBRA premiums for the subsidy period (up to nine months). Thus, assistance eligible individuals will be able to elect COBRA coverage while paying only 35% of the full COBRA premiums for the subsidy period. Employers or insurers are generally responsible to pay the balance and to seek reimbursement from the federal government.

An “assistance eligible individual” is any qualified beneficiary that became eligible for and elects COBRA coverage due to involuntary termination of the covered employee’s employment (or other qualifying event), occurring between September 1, 2008 and December 31, 2009.

The premium subsidy is available for up to nine months, but is subject to earlier termination if the individual becomes eligible for coverage under any other group health plan or Medicare or if the COBRA period expires during the subsidy period.

Assistance eligible individuals who have paid full premiums for COBRA coverage to their employer or insurer are entitled to a refund.

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COBRA (continued)

>> Extended Election Period

Assistance eligible individuals who did not elect COBRA continuation coverage, or who elected but subsequently discontinued COBRA coverage (e.g., because the premiums were too expensive) are eligible for a second COBRA election opportunity. If newly elected, COBRA coverage will begin retroactively from the date of the “qualifying event” such as involuntary termination, and continue for eighteen months.

>> Different Coverage

An employer may permit assistance eligible individuals to enroll in group health coverage that differs from the coverage the individual had at the time of the their involuntary termination or other qualifying event.

>> Notice Requirements

Employers subject to COBRA were required to notify former employees of the changes to COBRA by April 17, 2009. Model notice forms issued by the Department of Labor can be found at http://www.dol.gov/ebsa/COBRAmodelnotice.html.

For more information regarding the changes to COBRA please contact the Employment Law Group at Clyde Snow & Sessions.

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in line with your termination plan. Finally, monitor and document compliance with the plan.

**3. Assess the Risk**

To reduce risks and impact, be consistent in all actions related to the termination. Adequately document the behavior leading to termination and make sure you deal with such behavior consistently. You must carefully consider if the terminated employee’s position will be replaced by another employee or consolidated into another position, and how that will be perceived. If there is a significant reduction in work force, you may need to consider an audit prior to termination to avoid perceptions of discrimination of a protected class.

**4. Investigate Grounds**

It is important that you take seriously all possible grounds for termination and set parameters, including time frames, for investigating the reasons for termination. Before termination, carefully review the bases for the termination to ensure there is no discrimination as to a protected class. Make sure the termination is not retaliatory and that there are no recent claims made by the employee or any whistle blowing. Consistency in terminating employees is important. Make sure that others are not getting away with the same conduct.

**5. Communicate with Remaining Employees**

Only those deemed essential should typically be involved in the termination process. Ensure that those employees who are involved in the termination are sensitive to the pitfalls of being loose lipped or careless in their discussions with other employees. Carefully monitor all communications

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continued from page 3

concerning the termination and make sure that the facts are documented. Conflicting or contradictory statements may form evidence of pretext for termination.


Hopefully, prior to the need for termination, regular evaluations and notes concerning the employee’s conduct and performance have been placed in the employment file. For purposes of defending a possible claim, remember that if the employee’s conduct or prior discipline or company action is not in writing, the assumption is it never occurred. Provide training to human resources personnel and supervisors on how to document. Then, emphasize the need for documentation, especially in responding to a complaint or employee issue. Put notes in the employee’s file of meetings, warnings, and actions. Importantly, the documentation must demonstrate consistency between employees. Otherwise, such inconsistency may be viewed as pretext for company action.

7. Train Managers/Supervisors

Managers and supervisors must be aware of relevant laws involving discrimination and how to avoid such claims. They must know and be able to unambiguously state the company’s position on discrimination and harassment. They must learn to effectively document. They must treat employees equally and fairly. They must know the importance of treating similar situations consistently. In turn, you must hold supervisors and managers accountable in demanding consistency and fairness.

8. Be Consistent

To avoid a possible discrimination claim, employees must be managed and treated consistently. If termination is necessary, and after the company has assessed the risk, provide reasons for the termination. Ensure that your company has used objective and consistent criteria for termination and have the termination reviewed by upper management.

9. Show Respect During the Termination

Many claims can be avoided by treating the terminated employee with dignity and respect. With at least one other representative from the company, clearly explain the reasons for the termination to the employee. Be honest and straightforward with the employee. Don’t try to save the employee’s feelings by sugarcoating the reasons. Don’t lie or change the reason so that the employee can receive unemployment benefits. Don’t apologize or argue. Don’t make a companywide announcement about the reasons for termination. Don’t unnecessarily embarrass the employee by having her escorted out or by not allowing her to say goodbye to coworkers.

10. Consider Severance

One possible and practical way to avoid a claim is to obtain a release of potential claims in exchange for severance. Such an approach avoids the potential cost and distraction of a claim. However, you must be careful to adhere to all laws, including laws requiring a waiting period. Unless you are confident that you have a full understanding of all such laws, have your attorney review your separation agreement and release.