
**ROSSWAY MOORE
& TAYLOR**

ATTORNEYS AND COUNSELORS AT LAW

JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
JAMES A. TAYLOR, III*
THOMAS W. TIERNEY**

THE OAK POINT PROFESSIONAL CENTER
5070 NORTH HIGHWAY A-1-A, Suite 200
VERO BEACH, FLORIDA 32963
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-4430
Web site: www.verobeachlawyers.com

SHANNON BANITT
LOUIS LUPIN
DEBORAH MARTIN-LEE
STEPHANIE VELASQUEZ

MICHAEL J. SWAN
Of Counsel

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*also admitted in
The District of Columbia
**also admitted in California

LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

New Legislation

COBRA Changes in Stimulus Package

Subject to income limitations, employees who are terminated "involuntarily"¹ between September 1, 2008, and December 31, 2009, and their covered dependents, would be eligible for a subsidy of 65 percent of the premiums they would be required to pay for up to nine months for any group health plan in which they participated at the time of termination, excluding health flexible spending accounts (FSAs). The COBRA premium assistance benefits will end before the end of the nine-month period if the assistance eligible individual becomes eligible for coverage under another group health plan or Medicare. Assistance eligible individuals

who become eligible for coverage under another group health plan or Medicare are required to notify the group health plan that they are eligible for such other coverage. These "assistance eligible individuals" would be required to pay only 35 percent of the premium charged under a plan. Employers would not receive any subsidy payment upfront, but would be able to recover the other 65 percent of premiums in the form of a credit against their income tax withholding and FICA taxes. If the premiums due an employer exceeded its tax obligations in any given quarter, the U.S. Treasury would issue a check to make up the difference. This tax credit arrangement also applies to insurers and multiemployer plans to whom COBRA premiums are payable.

This subsidy would not apply to employees (or their dependents) who have an adjusted gross income of more than \$125,000 (\$250,000 for joint filers) in the year in which they would receive a subsidy.

¹ "Involuntary" is not defined in the legislation, but it appears that COBRA premium assistance benefits will not be available to employees who participate in voluntary buyouts or other voluntary severance programs.

Each assistance eligible individual who does not have a COBRA election in effect on the enactment date (February 17, 2009) but who qualified for COBRA continuation coverage as an assistance eligible individual on the enactment date must be given a special opportunity to elect COBRA continuation coverage. As a result, employers will need to revisit each employee termination that occurred since September 1, 2008, to determine if the termination was involuntary and if the employee was eligible for COBRA continuation coverage at the time of termination. Such employees would have 60 days after they receive the notices required by the Act to elect to start COBRA coverage at the subsidized rate. Their COBRA coverage would start on the enactment date of the Act and would *not* continue past the date that would have been the end of the maximum coverage period had they elected it initially – *i.e.*, generally 18 months after termination. By contrast, employees terminated involuntarily on or after September 1, 2008, who did elect COBRA when initially eligible, would be eligible for the new subsidy, but not retroactive to their termination dates. Similarly, an employee who elected COBRA initially but then lost coverage due to nonpayment of premiums would be entitled to the notices and premium subsidy. Information about the new subsidy and the option to enroll in different coverage would have to be added to current COBRA notices or provided in separate documents. Model notices are scheduled to be provided by the Secretary of Labor within 30 days of the enactment date.

The Stimulus Act does not lengthen the regular COBRA continuation coverage period for an assistance eligible individual. Therefore, a group health plan can terminate COBRA continuation coverage for an assistance eligible individual when such coverage could otherwise be terminated under the regular COBRA rules.

As a result of these changes, plan administrators will need to act quickly, in some cases as soon as March 1 for plans using calendar months as the period of coverage, to update their systems and to notify affected individuals of their rights and obligations under the Act. In addition, payroll departments must coordinate with plan administrators to prepare for new reporting and disclosure requirements relating to the employer's payroll tax liabilities.

Stimulus Bill Includes Whistle Blower Protection

Another provision in the Economic Stimulus package is whistle blower protection for employees of private contractors and state and local governments who report gross mismanagement, gross waste, public safety issues, abuse of authority, or violation of law in the implementation or use of the stimulus funds. The protection means that the employer is prohibited from taking any action toward an employee that would dissuade a reasonable person from making such a disclosure. Employees alleging a violation of the Act must file a complaint with the appropriate inspector general who will resolve it in 180 days. Following this action, the employee may file a complaint in federal district court. The employee can prove retaliation by temporal proximity or the employer's knowledge. The employee is entitled to have the case heard by a jury.

E-Verify Effective Date Changed—Again

The U.S. government has agreed to yet another delay until May 21, 2009, for the implementation of a new rule requiring federal contractors to use the federal government's E-Verify employment eligibility system. Many employer organizations have a lawsuit pending against the government challenging the legality of the mandate and the Obama Administration has put on hold all regulations

that were published in the Federal Register but not yet taken effect, so there is the possibility that E-Verify may just go away.

Discrimination

Another Expansion of Retaliation

Vicky Crawford, a 30-year employee of the Metropolitan Government of Nashville, claimed she was fired in retaliation for answering a human resource officer's questions as to whether Ms. Crawford had witnessed another employee engaging in inappropriate behavior. Ms. Crawford confirmed that she had been the recipient of such behavior but did not complain about it. The employer took no action against the alleged harasser but discharged Ms. Crawford allegedly for embezzling. Ms. Crawford filed a lawsuit alleging retaliation under Title VII's anti-retaliation provision which has two clauses: (1) opposing unlawful employment practice or (2) participating in an investigation. The trial court dismissed the case and the court of appeals affirmed the dismissal finding that Ms. Crawford neither opposed unlawful activity nor participated in a proceeding under Title VII. The U.S. Supreme Court disagreed holding that Ms. Crawford opposed unlawful conduct when she gave her statement to the human resource officer that included her own account of sexually obnoxious behavior toward her by a fellow employee. The case was sent back to the Sixth Circuit to consider several other defenses raised by the employer to Ms. Crawford's retaliation claim. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595 (2009)

Worker Can Pursue "Regarded As" Claim Under the Americans with Disabilities Act

A former UPS driver had lifting restrictions due to a shoulder injury. He alleged in a lawsuit that he was regarded as disabled by his employer. The Court agreed explaining that the company's 100% healed policy, meaning the company will not consider an employee for any position until he or she has been released for work without restrictions, suggests that the company regards even employees with temporary impairments such as the plaintiff as being incapable of performing a broad class of jobs. The former driver had applied for several less demanding positions with the employer as a reasonable accommodation but was told by a company employee that "we don't bring cripples back." This, the court held, was evidence sufficient to defeat the employer's summary judgment motion. *Supinski v. United Parcel Service, Inc.*, No. 3:CV-06-0793 (M.D. Pa. 2009)

Miscellaneous

President Obama Reverses Bush Administration Executive Orders

Organized labor enjoyed a victory earlier this month when President Obama signed three executive orders intended to reverse policies imposed by the Bush Administration regarding labor unions. The executive orders require federal contractors to offer jobs to current workers when contracts change and make it more difficult for those contractors to impede union activity. Following the signing ceremony, Vice President Joe Biden turned to the audience filled with labor leaders and said, "Welcome back to the White House."

IRS News Release

Media Relations Office

Washington, D.C.

Media Contact: 202.622.4000

www.irs.gov/newsroom

Public Contact: 800.829.1040

IRS Releases Information to Help Employers Claim COBRA Coverage Credit on Payroll Tax Form

IR-2009-15, Feb. 26, 2009

WASHINGTON -- The Internal Revenue Service today released detailed information that will help employers claim credit for the COBRA medical premiums they pay for their former employees.

The IRS unveiled new information on the IRS Web site, irs.gov, that includes an extensive set of questions and answers for employers. In addition, the Web site contains a revised version of the quarterly payroll tax return that employers will use to claim credit for the COBRA medical premiums they pay for their former employees.

[Form 941](#), Employer's Quarterly Federal Tax Return, will also be sent to about 2 million employers in mid-March. The form is used to claim the new COBRA premium assistance payments credit, beginning with the first quarter of 2009.

"This is the first step in our effort to provide employers with information on this important health benefit for people who have lost their jobs," IRS Commissioner Doug Shulman said. "We will continue our work in the weeks ahead to help employers implement this crucial change for the nation's unemployed."

The American Recovery and Reinvestment Act of 2009, which became law last week, includes changes to the health benefit provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly referred to as COBRA. The new law will affect former employees and their families, employers and others involved in providing COBRA coverage.

Under the new law, eligible former employees, enrolled in their employer's health plan at the time they lost their jobs, are required to pay only 35 percent of the cost of COBRA coverage. Employers must treat the 35 percent payment by eligible former employees as full payment, but the employers are entitled to a credit for the other 65 percent of the COBRA cost on their payroll tax return.

Employers must maintain supporting documentation for the credit claimed. This includes:

- Documentation of receipt of the employee's 35 percent share of the premium.

- In the case of insured plans: A copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier.
- Declaration of the former employee's involuntary termination.

COBRA provides certain former employees, retirees, spouses, former spouses and dependent children the right to temporary continuation of health coverage at group rates. COBRA generally covers health plans maintained by private-sector employers with 20 or more full and part-time employees. It also covers employee organizations or federal, state or local governments. It does not apply to churches and certain religious organizations. The new COBRA subsidy provisions also apply to insurers required to offer continuation coverage under state law similar to the federal COBRA.

More information about COBRA payments and the new law is available on the [Department of Labor Web site](#).