RAINEY • KIZER
REVIERE & BELL PLC

Jackson Offices
105 S. Highland Avenue
Jackson, TN 38301
and
209 E. Main Street
Jackson, TN 38301
P 731.423.2414

Memphis Office
Morgan Keegan Tower
50 N. Front Street, Ste. 610
Memphis, TN 38103
P 901.333.8101

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EMPLOYMENT LAW ALERT

Spring 2009 Issue

DON'T GET BITTEN BY THE NEW "COBRA"

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 ("ARRA") into law. Among the many components and expenditures contained in this "stimulus bill," ARRA also makes important changes to the COBRA insurance continuation program. Included in these changes are new premium assistance benefits, employer notice requirements, and benefit eligibility requirements.

Perhaps the most publicized change to COBRA is the new "premium assistance" provision. With the passage of ARRA, certain employees are now only required to pay thirty-five percent of the COBRA premium otherwise due for the employee to continue coverage under the Act. The remaining sixty-five percent is initially paid by the employer but is later "refunded" by way of a payroll tax credit. That is, the employer's payroll tax liability is reduced by the amount of COBRA premiums paid by the employer on behalf of the eligible employee. This "subsidy" is effective for COBRA premiums paid on or after February 17, 2009.

To be considered an "assistance-eligible individual," COBRA-qualified beneficiaries who elect COBRA coverage must experience a "qualifying event," which is defined under the new Act as the involuntary termination of the employee's employment between September 1, 2008 and December 31, 2009. Employees who become COBRA eligible due to any other qualifying event (e.g. retirement, resignation, or reduced hours) do not qualify for the subsidy. Similarly, employees who are terminated as a result of gross misconduct do not qualify for COBRA or the subsidy. However, any other form of involuntary termination – including termination for cause – qualifies. The subsidy is also applicable to COBRA eligible spouses and dependents.

Although the maximum time during which COBRA continuation coverage must be offered remains the same, the subsidy is only available for a maximum of nine months. The subsidy ends sooner than nine months should the individual become eligible for group coverage under another health plan or through Medicare. If an employee who previously declined COBRA continuation coverage or lost COBRA due to failure to pay the COBRA premiums wishes to take advantage of the new changes, he or she has 60 days to elect coverage from the date he or she receives the "second chance" notice of the new changes and benefits from his or her employer. Employers were to provide this notice by April 18, 2009 to those who experienced a qualifying event prior to February 17, 2009.

ARRA also contains other new notice requirements with which employers must comply. In addition to the information already included in notices issued prior to ARRA's enactment, employers are now required to advise all employees who lost COBRA coverage on September 1, 2008 or thereafter of (1) the availability of premium assistance benefits, (2) the option to enroll in different lower cost coverage plans and apply the subsidy to one of those plans (if otherwise allowed by the employer to active employees), (3) the extended election period, (4) how to elect the subsidy, and (5) the obligations of the employee to notify the plan administrator of the employee's eligibility for coverage under another group health plan. The United States Department of Labor has established a model form that employers may use in complying with these new notice requirements which is available on the Department's website, http://www.dol.gov.

This article can only provide a brief summary of the changes to COBRA contained in the expansive ARRA legislation. There are other provisions and considerations that may apply in certain circumstances and to certain employees. If your company must comply with COBRA, now is the time to review your implementation policies to ensure compliance with the new provisions contained in the ARRA.

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Supreme Court Expands Employer Liability for Retaliation Under Title VII

The United States Supreme Court recently expanded the application of the "opposition clause" contained in Title VII of the Civil Rights Act of 1964. This clause protects employees from retaliation when an employee either "has opposed any practice made an unlawful employment practice by this sub-chapter" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the sub-chapter." 42 U.S.C. § 2000e-3(a)(2008). Under this section, the statute prohibits discrimination against an employee for both opposition to an unlawful practice and participation in a claim as defined by the statute.

In Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S.Ct. 846 (2009), a case originating in Tennessee, the Supreme Court was asked to determine whether the opposition clause protected even passive opposition to an unlawful activity, such as an employee's responding to questions during an investigation into an incident in which the employee was not even involved. In Crawford, the plaintiff worked for the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"). Although the plaintiff had never made any allegations of improper conduct against any other employee, Metro began investigating allegations of sexual harassment against its employee relations director, Hughes, made by other Metro employees. When the plaintiff was interviewed regarding Hughes, she informed the investigator that she had also been sexually harassed by Hughes on other occasions and detailed a number of inappropriate actions committed by Mr. Hughes during the time she worked with him.

Following this interview, the plaintiff was fired from her job amid allegations of embezzlement. The plaintiff then filed a charge with the EEOC and later sued Metro alleging that it had retaliated against her in violation of Title VII. In response, Metro filed a Motion for Summary Judgment, arguing that the statements which the plaintiff made during the course of its investigation of Hughes were not protected from retaliation because they did not fall within either the opposition clause or the participation clause contained in Title VII's anti-retaliation provision. The trial court granted Metro's summary judgment motion holding that Ms. Crawford "could not satisfy the opposition clause because she had not 'instigated or initiated any complaint,' but had 'merely answered questions by investigators in an already – pending internal investigation initiated by someone else.'" Further, the court held that her claim failed under the participation clause because that provision only applies "where that investigation occurs pursuant to a pending EEOC charge," and the investigation which led to the interview of the plaintiff was not the result of a pending EEOC charge.

On appeal, the 6th Circuit Court of Appeals affirmed the grant of summary judgment, stating that the opposition clause "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation." The Appellate Court found that the plaintiff "did not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing." Further, the court determined that she could show no participation because the employer's internal investigation had not been conducted pursuant to a pending EEOC charge.

The United States Supreme Court accepted the plaintiff's appeal and sought to determine whether reporting alleged sexual harassment in response to a question posed during an internal investigation was an action protected by the "opposition clause." To reach its decision, the Court relied upon Webster's dictionary to find that the term "oppose" means "to resist or antagonize . . .; to contend against; to confront; resist; withstand." The Court then determined that the statement which the plaintiff had given to the investigators was covered by the opposition clause because "Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as 'resist[ant]' or 'antagoni[stic]' to Hughes' treatment." Id. at 851. Thus, the Court determined that even answering questions in response to an internal investigation can bring an employee under the protection of Title VII's opposition clause, and prevents retaliation against the employee for speaking out about discrimination, even if that employee has not previously filed a discrimination claim. Because the Court found that the employee's activities were protected by the opposition clause, the Court did not reach the issue regarding whether her activities also satisfied the participation clause under the statute.

This decision by the Supreme Court increases the protection of employees' actions under the retaliation provisions contained in Title VII of the Civil Rights Act. Employers should be mindful of this expanded protection whenever termination of an employee who has been involved in an internal harassment investigation is being considered.