Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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IMPORTANT UPDATE: Congress Expands COBRA Obligations for Employers

In an effort to address rising unemployment, Congress has expanded the premium and notice obligations of employers under the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly known as COBRA. New legislation known as the American Recovery and Reinvestment Act of 2009 ("the Act") will reduce how much certain employees must contribute to obtain COBRA continuation health coverage, provides a subsidy to employers for their portion of the cost of coverage, and adds new requirements for notices which must be provided to COBRA qualified beneficiaries and employees (collectively referred to as "qualified beneficiaries").

The new changes to COBRA apply to public and private employers alike, and are ***effective immediately.*** Accordingly, employers must take quick action to comply with these new requirements. A summary of the changes is listed below, but a call to your Plan Administrator, attorney or consultant may be necessary for more details on these important changes.

What Qualifying Events are Affected?

The new provisions apply only to employees who have experienced a qualifying event of ***involuntary termination of employment***. The new provisions apply to all dependents of employees as well. Employees who experience a reduction in hours, or who voluntarily resign from employment are *not* affected, and individuals experiencing a second qualifying event (divorce, loss of dependent status, etc.) are also not covered by the new changes.

When Must the Qualifying Events Occur?

Instances of involuntary terminations occurring between **September 1, 2008** and **December 31, 2009** trigger the additional COBRA rights under the Act. Nothing under the Act, however, changes the length of available COBRA coverage (18, 29 or 36 months).

How Do Premiums Change?

Under ordinary circumstances, an employer may charge qualified beneficiaries who have elected COBRA continuation coverage 102 percent of the total cost of coverage. For qualified beneficiaries covered by the new statute, however, an employer may charge only 35 percent of the total cost of coverage and ***must pay the remaining 65 percent of the cost***. The 65 percent employer contribution lasts for nine months of the COBRA period, at which point the premium may be increased to 102 percent. It should be

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noted that the employer is entitled to a refundable credit toward payroll taxes for its 65 percent share of premiums. The credit may be taken as long as the qualified beneficiary's premium payment has been actually received by the employer or other payee.

How Will the Premium Change be Implemented?

Qualified beneficiaries who undergo a qualifying event on or after September 1, 2008, but before the COBRA changes became effective (February 17, 2009), are entitled to nine months of future coverage at a 35 percent premium contribution level. (The change in premium contributions is not retroactive for months of coverage prior to February 17, 2009.) However, recent regulations indicate that employees or their qualified beneficiaries must formally apply for the premium subsidy. The U. S. Department of Labor (DOL) has sample forms, including the formal application for the premium subsidy, available on its website at www.dol.gov.

When Does the Premium Change End?

The 35 percent premium contribution level for qualified beneficiaries ends nine months after an employer implements the changes required by the new law. The 35 percent premium contribution level also ends when a qualified beneficiary becomes eligible for coverage under another group health plan or Medicare, even if this occurs before the end of the nine months.

Is Anyone Excluded From the Premium Change?

The subsidized premium will be pro-rated for qualified beneficiaries with adjusted gross income of between $125,000 and $145,000 (single) or $250,000 and $290,000 (married) in the year of COBRA coverage. Qualified beneficiaries with adjusted gross income of more than $145,000 (single) or $290,000 (married) in the year of COBRA coverage are not eligible for the 35 percent premium contribution level.

How Do Employers Notify Affected Individuals?

Employers must offer an additional COBRA election period to any individual who became a qualified beneficiary due to involuntary termination on or after September 1, 2008, and who would be eligible for the reduced premiums if he or she were enrolled as of the effective date of the Act. The additional election period must be offered to individuals who previously turned down COBRA coverage as well as to individuals who elected and then terminated COBRA coverage. It is important to note that individuals who previously declined COBRA coverage or elected and terminated it have another opportunity to elect it under the new premium arrangement.

What are the Notice Requirements?

The additional election period ends 60 days after the employer provides notice to affected qualified beneficiaries. These notices must include a description of the new premium arrangement, its duration, and the option to enroll in different coverage if the employer normally permits COBRA qualified beneficiaries to enroll in different coverage. ***Employers must send out the additional election period notices within 60 days of the effective date of the Act***, or by April 18, 2009. The DOL has recently issued sample notices which may be found within their website. Employers should also revise their regular COBRA notices for upcoming qualifying events to incorporate the new 35 percent premium contribution level and the nine-month duration of that level as soon as possible.

Immediate Action Required !

Although these changes to employer obligations under COBRA are temporary, they are significant and affect almost every employer in some way. You should access the DOL's website for helpful forms and you should begin reviewing your COBRA policies and practices immediately to comply with these new requirements.***

Latest Developments with The Employee Free Choice Act

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Introduced before both chambers of Congress on March 10, 2009, the proposed Employee Free Choice Act (EFCA) would amend the National Labor Relations Act to make it easier for employees to form, join, or assist labor unions, as well as provide for mandatory injunctions for unfair labor practices occurring during organizing efforts. For details of this very dangerous and controversial amendment to the National Labor Relations Act, please see our November 2008 Newsletter.

As with the other changes to the law mentioned in this Newsletter, if you are concerned, you are strongly urged to immediately contact your local U. S. Congressperson or U. S. Senator and share your views on these substantial changes.***

Ledbetter Fair Pay Act Could Lead to Increase in Pay Discrimination Claims

Within days of taking office, President Barack Obama signed into law the Ledbetter Fair Pay Act. The statute was enacted in direct response to the decision of the United States Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.,* which holds that employees have a shortened amount of time in which to allege they have been subjected to pay discrimination. With the enactment of this new legislation, employees now have a much longer amount of time in which to sue for pay discrimination based on race, gender, religion, national origin, disability and age under the major federal employment discrimination laws, and may allow suits based on pay decisions made years or decades ago.

The Original *Ledbetter* Decision

Lilly Ledbetter worked for Goodyear for approximately 19 years. Ledbetter's salary was determined annually, and was based on supervisor evaluations. Ledbetter was the only female manager at the company's tire plant in Alabama. Ledbetter's evaluations consistently indicated that her supervisor ranked her lower than most of her male coworkers. As such, Ledbetter received smaller salary increases than other employees. By the time she retired from Goodyear, Ledbetter's small annual raises resulted in a large disparity between her pay and that of other similarly situated male employees.

Shortly before she voluntarily retired, Ledbetter filed a charge with the Equal Employment Opportunity Commission (EEOC) and later a federal lawsuit, alleging that Goodyear had for years unlawfully given her lower performance ratings and raises because of her gender. However, Ledbetter did not claim that Goodyear made any pay decision based on her gender within the 180-day limitations period before she filed her EEOC charge. Instead, she argued that each paycheck she received was a "new" discriminatory act, and that as long as she sued within 180 days of any such paycheck, she should be able to sue for pay disparities occurring during her entire history with Goodyear.

In rejecting Ledbetter's "relation back" argument, the Supreme Court ruled that Ledbetter's pay discrimination claim was barred by the 180-day charge filing limitations period in Title VII of the Civil Rights Act of 1964 (Title VII). The Supreme Court ruled that to challenge an allegedly discriminatory pay decision, the employee must file an EEOC charge alleging pay discrimination within 180 days of the original allegedly discriminatory pay decision. Specifically, the Court asserted that the time to challenge pay decisions must run from the initial discriminatory pay decision, in order to avoid the prospect of an employer having to defend against claims that may have arisen years before.

Congress Responds with New Legislation

The Ledbetter Fair Pay Act amends Title VII, the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973 (Rehab Act) and the Age Discrimination in Employment Act of 1967 (ADEA) to provide that an employee must file an EEOC charge alleging pay discrimination within 300 days (180 days in states that do not have a fair employment agency) after the latest of the following: (1) a discriminatory compensation decision or other practice is made or adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by the application of a discriminatory compensation decision or practice (including each time wages, benefits or other compensation is paid). Thus, the charge filing period restarts each time an employee receives a paycheck that is based upon or is lower because of a past discriminatory compensation decision. In practice, this means an employee can challenge pay decisions made many years ago.

The Ledbetter Fair Pay Act is retroactive to May 28, 2007, the day before the *Ledbetter* decision, and applies to all pay discrimination claims pending on or after that date.

How the Statue Affects Your Payroll Practices

Provided your company can successfully demonstrate that pay decisions are based upon legitimate, non-discriminatory bases, the Ledbetter Fair Pay Act will not result in additional pay discrimination liability. The law does, however, significantly expand the length of time during which your pay decisions – including past decisions – may be subject to challenge and litigation. As long as an employee files an EEOC charge within 300 days after receiving *any* paycheck he or she claims reflects past discrimination, that individual will be able to

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challenge any allegedly discriminatory pay decision affecting that paycheck – even if the decision was made decades ago.

The Ledbetter Fair Pay Act also appears to allow individuals to file claims after they have retired and begun receiving "discriminatory" pension checks. As a result, not only will plaintiffs be able to seek back pay, but they will also be able to request a recalculation of their pension benefits, which are not capped by the statute.

What to Expect Because of the Ledbetter Statute

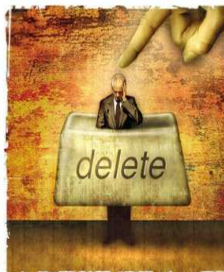
The Ledbetter Fair Pay Act's lengthened statute of limitations for wage disparity claims will undoubtedly result in increased pay discrimination litigation. Accordingly, it is extremely important for employers to demonstrate that their pay decisions are based on legitimate non-discriminatory criteria. Documentation of employee performance is the most effective method of demonstrating the reasons for pay decisions. Indeed, these types of personnel records will be essential to defending a wage disparity claim.

It may be also good practice to create "checks and balances" such that supervisors and managers do not have the ultimate final say regarding compensation decisions. Like virtually any employment practice, other managers or human resources personnel may be needed to review pay decisions in order to ensure that they are fully supportable.

Finally, employers should review their policies with respect to retention of documents concerning compensation decisions. Under the Ledbetter Fair Pay Act, employers will likely need to retain information regarding compensation decisions for substantially longer than they did in the past. If you have any questions regarding document retention or how the Ledbetter Fair Pay Act may impact your business, please do not hesitate to contact the attorneys of Holland & Holland LLC. ***

Facing Realities: Conducting Terminations of Individuals in Uncertain Economic Times

In tough economic times such as those currently facing the business community, it may become necessary for individual positions to be eliminated. While the reasons for these eliminations are generally centered on "stopping the bleeding" or saving costs, if an individual termination is improperly handled, the result may be the considerable expense of having to defend against any number of possible claims. While nothing can prevent a former employee from suing or asserting a claim if he or she is so inclined, employers can often save considerable heartache and expense if certain guidelines are adhered to with regard to individual terminations. When management decides to terminate an individual employee, as opposed to implementing a reduction in force (RIF), it is still equally important that the employer methodically document and implement the termination in a manner that minimizes any legal liability. Outlined below are several key issues that employers should consider in individual termination situations.



Maintaining Scrupulous Documentation Regarding Employee Performance

An employee who is completely caught off guard by his or her termination will often consider pursuing litigation. However, if advance written notice of performance problems (preferably in writing) is given, and a timeframe by which performance must improve is provided (without altering his or her at-will status), a negative response can be minimized. Indeed, advance notice of deficiencies, whether in written warnings or formal performance reviews, plays an important part in documenting the employer's legitimate business reasons for the termination to courts and administrative agencies such as the Texas Workforce Commission or EEOC.

It is also important to remember to retain all relevant documentation and information related to a potential termination. Where the employee's written work product is involved, the supervisor should save draft writings in order to document substandard performance. Other relevant documentation may include expense reports, timesheets, recordings, building entry/exit records, voicemail, e-mails, computer and internet usage records, and other data.

Reviewing an Employee's Individual Circumstances

An employer should consider the employee's status before terminating him or her to make sure there are no potential claims lurking. For example, terminating an employee who is on a protected leave of absence under the Family and Medical Leave Act or the Uniformed Services Employment and Reemployment Rights Act may lead to a retaliation claim or a claim for failure to reinstate. Discharging an employee who has engaged recently in protected activity such as reporting harassment, discrimination or an on-the-job injury may also lead to retaliation

claims. The employer should carefully consider both the likelihood of such possible claims and the potential consequences before deciding to implement the termination.

Informing an Employee of His or Her Termination

Unless impossible to do so, terminations need to be conducted in person, and in a private location away from other employees' work spaces. During a termination meeting, it is often very easy to sound apologetic in an attempt to make a soon to be former employee "feel better." Equivocating on the reasons for the termination, or else praising the employee, can be risky and may lead to a finding that the employer's reasons for the termination are pretexts for an unlawful motive.

During the meeting, the employer should allow the employee to "vent" for a reasonable time, but should not be drawn into argument or defense of the termination decision. Always have an internal company witness present, and record notes during the meeting that may help rebut any future accusations and resolve factual disputes between the employee and supervisor or human resources representative.

Vacating the Employer's Premises

Consider in advance whether the employer will ask the employee to leave immediately or within a certain amount of time. In some instances, there may be concerns that the employee will become disruptive, or attempt to steal company property. In such cases, the employer should take appropriate precautions to protect the safety of its employees and others and to protect the integrity of its property and information. In some cases, it may be easier for both the employer and the terminated employee to have a company representative pack up and send the employee his or her personal belongings. It should be noted that, how the removal of an employee's personal belongings takes place can have a major impact on whether a claim is eventually asserted, simply due to the potential for hard feelings.

Protecting Confidential and Proprietary Information

Another important consideration is the discharged employee's continued access to confidential information. Upon notice of termination or after the employee's last day of work, whichever is appropriate, the employer should immediately terminate the employee's access to the company's computer system, voicemail, and client and company documents. Such termination will minimize the opportunities for the employee to engage in damaging conduct. To the extent that an employee seeks access to a company computer in order to retrieve personal information, the employer should probably insist that a company representative perform such a task.

Regardless of the circumstances, if there is a high risk of litigation, employers should preserve the employee's hard drive, network files, e-mails, and portable communications devices. This is also useful in the event there are later suspicions regarding the misuse of confidential information and trade secrets. Where litigation is likely, the employer should consider performing some basic review of the preserved materials shortly after termination. Such a review may reveal that the employee misused company information or property or engaged in other misconduct during employment and, in some instances, may provide "after acquired" evidence of misconduct sufficient independently to justify the termination.

Recovering Company Property

The employer should also require that terminated employees return all company property, whether at the office, at home, or otherwise. Company manuals and other publications are easily overlooked by an employer, which may be focused on computer equipment, cell phones, and keys. In certain situations, the employer may consider obtaining written confirmation from the employee that he or she has returned all company property or a "certification of destruction" confirming that the terminated employee has removed all company information from his or her home computers and personal electronic devices. If an employee fails to retain company property, however, it is important that the employer not respond by withholding payment of any wages owed. Such action may expose the employer to liability and significant penalties under certain state termination or wage payment statutes. However, the employer may condition severance payments on the full return of company property.

Third Party Communications

To avoid defamation or retaliation actions, the employer should consider setting up a protocol for responding to any background or reference check inquiries. Such a protocol should address who will respond to any inquiries and what he or she will say. In general, a single representative of the employer should be designated as responsible for responding to outside employment inquiries. The best response to provide regarding a former employee is a neutral reference, consisting of only the dates worked, position, and job description. While it may be tempting to provide a letter of reference, an employee may use a positive reference against the employer in litigation to show that his or her performance was not worthy of termination.

Obtaining a Release or Waiver of Claims

Where warranted, employers should obtain a waiver or release of all claims against the company in exchange for additional severance pay or other benefits beyond what an employer is already obligated to give the employee. Employees will sometimes waive or release claims against the company for an insubstantial amount of money. Because the legal requirements of such waivers or releases change often, it is important to consult legal counsel. Any of the attorneys of Holland & Holland LLC are available to assist you and your company with the preparation of such releases, as well as counseling your company through the termination process.***

Employers With Pre-Dispute Arbitration Agreements Need to Make Their Feelings Known to Congress

Congress has recently introduced legislation that would essentially make pre-dispute arbitration agreements in employment, consumer, and franchise disputes, as well as claims arising under federal civil rights statutes, unenforceable. The legislation does not apply to arbitration provisions in collective bargaining agreements.

The so-called "Arbitration Fairness Act of 2009 (H.R. 1020)" was introduced in the House of Representatives on February 12, 2009. The legislation expressly criticizes a long line of decisions from the United States Supreme Court upholding arbitration agreements, stating that these decisions have changed the meaning of the Federal Arbitration Act so that it now extends to disputes between parties of greatly disparate economic power, "such as consumer disputes and employment disputes."

The legislation criticizes several aspects of private arbitration and states, "mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent." Further, the legislation states, "[m]any corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes."

Similar legislation was introduced in 2007, but was not passed. The chances of the legislation being enacted are difficult to gauge. Clearly, the legislation will face strong opposition from the business community. Indeed, pre-dispute arbitration agreements are now extremely common among larger employers seeking to avoid the protracted time and cost associated with lawsuits and the unpredictability of jury panels. If it is enacted, however, this legislation would dramatically alter non-union employee dispute resolution procedures. We will continue to keep you updated on the status of this legislation.***

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Keeping Employers Out of the Courtroom for over 20 Years

About the Firm

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available