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Mitchell & Sheahan, P.C. Newsletter

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Welcome to our June newsletter.

Our newsletter features three articles.

The first article, written by Attorney Peg Sheahan is *Cobra: Connecticut's New, Long Length and The Continuing, Confusing Saga of Subsidies; More Notice Obligations Arise*, includes important information on Connecticut's new 30 month rule.

Written by Attorney Bob Mitchell is the second article, *A Piece of Practical Advice*.

The third article, *NLRA Claims For Unrepresented Employees*, written by Attorney Bob Mitchell was featured in the April 26, 2010 CT Law Tribune.

COBRA: CONNECTICUT'S NEW, LONG LENGTH AND THE CONTINUING, CONFUSING SAGA OF SUBSIDIES; MORE NOTICE OBLIGATIONS ARISE

CONNECTICUT'S NEW 30 MONTH RULE

By Peg Sheahan

As of Governor Rell's May 5, 2010 signing of Public Act 10-13, insurers and health care centers that issue group health insurance policies and coverage for hospital, medical/surgical and major medical expenses in Connecticut have a new continuation coverage rule to administer.

Specifically, such plans must offer up to 30 months (up from the prior maximum of 18) of opportunity for a participant to buy the coverage at group rates when coverage loss is triggered by layoff, hours reduction, leave of absence or employment termination caused other than by death or gross misconduct. The new extension does not apply to other kinds of triggering events like losing coverage because of an employee-spouse's death, divorce or aging out of dependent coverage. The new duration of continuation coverage

purchasing opportunity has no effect on the duration of any applicable federal subsidy of coverage costs.

The new rule does not apply to self-insured employers but does apply to insured groups of all sizes and employers of all types, i.e., public, private, non-profit and religious.

Dental, vision and prescription coverage is affected only if it is offered as part of a more comprehensive plan, not in free standing, separate coverage vehicles.

The longer extension period is available to qualifying beneficiaries who lose coverage on or after the effective date and to those then purchasing continuation coverage from covered plans. Notice to affected beneficiaries must be delivered by July 4, 2010. Notice is the responsibility of the insurer or health care center "in conjunction with their employer group policyholders," according to the bulletin issued by the Connecticut Insurance Department on the new State law earlier this month.

COBRA SUBSIDIES

One early and sustained focal point of the federal government's reaction to the economic downturn has been easing the burden on Americans who find themselves out of work. Congress and the President have extended unemployment compensation benefits eligibility many times and aimed several government spending efforts at job-creating construction and other projects since the beginning of the current recession.

One measure sought to avoid the large number of recession-displaced workers and their families being added to the ranks of the uninsured.

COBRA is a federal statute that gives employees terminated (for other than "gross misconduct") and their dependents the opportunity to participate in the employer's group health insurance program at their own expense for specified periods of time after they would normally lose eligibility, which can provide a bridge to a new job and its medical coverage. (The statute also provides this "continuation coverage" opportunity to dependents losing coverage by virtue of divorce, separation or "aging out" of dependent coverage.) Typically, the period of continuation coverage available after job loss is 18 months. Even at comparatively low group rates, however, the "full freight," cost of the coverage, that is, without any share being picked up by the employer, and usually with a 2% administration fee, can be prohibitive. So, the federal government is subsidizing the COBRA continuation coverage costs of many workers who lost jobs in this recession and their dependents.

The first iteration of this benefit was in the American

Recovery and Reinvestment Act ("ARRA") that President Obama signed on February 17, 2009. It gave employees (with incomes less than \$125,000 individually and \$250,000 if filing jointly) who were involuntarily terminated and therefore lost active-employment-based coverage in the period from September 1, 2008 through December 31, 2009, the right to a 65% premium subsidy for up to nine months. (The higher income employees' subsidies are subject to taxation on a progressive scale.) The subsidy mechanism is that the employer collects only 35% of the COBRA premium from the former employee and pays the balance itself. The federal government pays back the employer by allowing a credit for the subsidized COBRA premium payments to be taken on the employer's next quarterly payroll tax bill. Employers' initial ARRA challenge was to identify and contact potentially eligible employees and dependents who had been off payroll for months and give them a second opportunity to elect COBRA if they'd initially declined and an opportunity to accept the subsidy if they'd elected COBRA and paid full freight.

The federal COBRA continuation obligation applies only to employers with 20 or more employees. However, ARRA also extended the premium subsidy to smaller employer plans subject to State "mini-COBRA laws." Connecticut has such a law. In those situations, the insurer, rather than the employer was responsible for sending out notice and election opportunities to qualifying employees.

The subsidy was extended in two ways in legislation passed as part of a defense appropriations bill in December, 2009. First, the initial nine month subsidy period maximum was increased to 15 months. This required employers and insurers to give notice and election options to former employees who had lost their subsidy after nine months and either dropped coverage or started paying "full freight," to give them an opportunity to take advantage of the new expanded subsidy period. Second, the eligibility period was extended through February, 2010 and was triggered by the date of employment termination rather than the earlier iteration's focus on the COBRA eligibility date (often later, e.g., the first day of the month following termination). All those notice and election forms needed another overhaul!

Guess what happened on the night of March 2, 2010? A one month extension of the eligibility date was enacted, causing a bit of a scramble for employers who terminated employees on March 1st and 2nd! On April 15th, they did it again! The eligibility period now extends to employees involuntarily terminated anytime through May 31, 2010.

An interesting problem arose for employers who provided their own COBRA subsidy as a severance benefit. The government subsidy can only be applied to a premium amount the employee or beneficiary would be obligated to pay

otherwise. Therefore, if the employer were picking up 50% of the tab as a severance benefit, then the 65% subsidy (in effect, the employer's tax credit) could only apply to the 50% the employee would pay. The employer would do better to let the federal government foot that bill for its former employees. Many severance plans and practices were amended to do just that, with complicated alternatives sometimes crafted to save the employer-paid subsidy for more highly compensated employees for whom the federal government subsidy had no practical advantage.

Will May, 2010 bring further subsidy extension by the Congress and President? Or will June 1 mean a return to the original COBRA paperwork and system for terminating employees? Only time will tell. In the meanwhile, plan administrators must keep alert and be ready to change course again.



A PIECE OF PRACTICAL ADVICE **By Bob Mitchell**

For more than a century, employers have looked to employment-at-will as the principal doctrine governing the Connecticut workplace. Many small and medium employers have long assumed that, aside from some very specific statutory carve-outs, they have the power to hire and fire, as the doctrine says, "for any reason or no reason at all". Those statutory exceptions were understood to prevent adverse job actions from being taken based on an employee's protected class characteristics (such as race, sex age or disability) and to prevent retaliation against an employee for standing up to protect his or her rights under various federal and State laws such as the State's Workers' Compensation Act, the federal and State wage and hour laws or for trying to organize a workplace labor union. All of these exceptions to the "at-will" employment rule are still with us today, but in 1995 the Connecticut Supreme Court blew another serious breach through the employment-at-will wall; a breach that is often overlooked or unknown to the small business person.

The Court's decision in TOROSYAN v. BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., 234 Conn. 1 (1995), permitted an employee to establish that his

employment was governed by a contract that was created by implication from the words and actions of the employer, whether or not that had been the employer's intention.

Prior to coming to work in Connecticut, Torosyan had been employed in California as a radiochemist. In late July, 1982, he had visited Connecticut at the defendant's invitation and expense, for job interviews with five of the defendant's employees. At several of the interviews, Torosyan had informed the defendant's employees that he was seeking "long-term" employment, and that he did not want to move his family from California unless the defendant could guarantee him job security. In response, one interviewer told the plaintiff that if he did a good job, the defendant would "take care" of him. Another interviewer told Torosyan that he hoped he would stay forever and mentioned that Torosyan would have an opportunity to examine the company's employee manual to determine whether it provided the guarantees that he sought. The Court concluded that those oral representations had been material to the plaintiff's decision to accept, by telephone, an offer to take a position with the defendant. ***At trial each of the Company's employees denied having made any of the statements attributed to them by the plaintiff.*** Those denials were not enough for the trial court. It discredited the Company's witnesses and credited Torosyan's version of events. In addition, the defendant had statements in its employee handbook to the effect that termination would only be for good cause. The Court made it clear that the interview statements attributed to company representatives alone would have been enough for the Court to conclude that the Company had entered an implied contract with the plaintiff to terminate him only for good cause. The handbook remarks sealed the deal.

There were several other significant points made by the Torosyan Court, but this orally created implied contract is the most problematic from a management point of view, because it leaves employers subject to risk at the hands of any disgruntled ex-employee who is willing to make up a story of verbal promises. As such, it transforms the classic unwritten "employment-at-will" doctrine from a bedrock defining the employment relationship into somewhat of a legal dinosaur relied upon only at an employer's peril. There is, however, a solution to the dilemma: Every employee at whatever level in the company should be employed through a written contract.

This contract must contain at least three provisions: (1) it must state that the employee is subject to an employment-at-will standard; and (2) it must contain a clause negating any and all previous or other promises or agreements that might have been communicated to the employee; and (3) it must require any future contract amendments to be made in writings signed by at least the party against whom the contract

is likely to be enforced. The form of such a contract can be very simple. For example, it can be an offering letter that requires a countersignature by the new employee.

By memorializing the employment-at-will right to fire at the employer's discretion within a simple, properly drafted written agreement the dinosaur can be given new life and teeth. Such a document can be created as a basic form and should be part of every new employee's hire package. It is a practical solution to a problem with far reaching consequences for Connecticut employers.

THE NATIONAL LABOR RELATIONS ACT - A FORGOTTEN REMEDY FOR THE INDIVIDUAL EMPLOYEE

By Bob Mitchell

Featured in April 26th CT Law Tribune

Section 7 of the National Labor Relations Act protects the right of employees to engage in "concerted activities" for the purpose of mutual aid or protection. Section 8(a) (1) prohibits employers from interfering with that right. The National Labor Relations Board exists to enforce the NLRA and is empowered to grant relief to employees whose Section 8 rights are violated by their employers. Specifically, the Board is empowered to issue orders that violators cease and desist their illegal practices and that they to take "such affirmative action including reinstatement of employees with or without backpay", as will effectuate the NLRA's policies. The NLRB carries out its work through a sophisticated case precedent-based administrative law system that begins with a complaint and investigation by the Regional Board Office and progresses through an administrative trial, appeal to the NLRB in the first instance and then to the Federal Circuit Courts. It is a system commonly thought of as addressing issues relating to the struggles between organized labor and industrial management. While that was indeed the genesis of the NLRA, the statute is far more flexible than that and can offer a viable path to remedying complaints of individual employee mistreatment whenever the employer's actions arise in response to an act which the NLRB would define as concerted activity. That bar is much lower than most practitioners might think.

The term "concerted activities" has been given a broad definition by the Courts and the Board. It applies to any employee group activity undertaken for the purpose of furthering the workplace interests of the group. Such a "group" generally requires at least two persons. However, concerted activity has been found where a single employee took action with the intention of inducing group activity. The kinds of workplace issues that have been held protected by the

NLRA are many and varied. Of course, there is protection for the employee group that tries to introduce a union into the workplace, but the NLRA's protections go far beyond this commonly understood scenario. They cover situations that often catch employers by surprise.

Complaints about an employer's failure to provide proper tools and equipment, the safety of company vehicles, alleged sexual harassment on the job, or company workplace mismanagement, if they result in damaging discipline or discharge, can all form the basis of a viable and legitimate NLRA section 7 "unfair labor practices" charge. Even criticism of general supervisory misconduct or incompetence can be protected by the NLRA. In one case, a Playboy Bunny was ordered returned to work when her discharge was held motivated by her participation in an informal "Bunny Council meeting" that had been called to protest what several Cincinnati Bunnies thought were bad working conditions and poor Club management at their facility. In another interesting example, two female employees prevailed when protected 8(a)(1) concerted activity was found in complaints that they made to supervisors about a malicious sexual rumor which had been started by their coworkers.

As is true with many other types of employment claims, to prevail a Charging Party in an NLRB unfair labor practice proceeding bears the burden of showing that the employer who committed the alleged wrongdoing acted with intent to punish the protected activity. This most often requires little more than proof that the employer knew of the Charging Party's having engaged in the protected act. An employee who participates in a group discussion of workplace matters with others and who is terminated as a result has a claim. A classic example is presented by the employee caught discussing wage rates and disciplined or discharged for violating a company pay "confidentiality" policy. This employee would almost surely find relief if the matter was brought to the NLRB's attention.

Once an unfair labor practice charge is filed with the NLRB's local office, an investigator is assigned who will take a written affidavit form the aggrieved employee. The NLRB's next step is to notify the employer of the pending charge and ask for its explanation of why the adverse action was taken. It is not unusual for follow-up questions, documents requests and further employee interviews to occupy a shoe4r period of time after the charge is filed. Once the investigator's file is, the case is reviewed and the Board's Regional Director decides whether to issue a formal complaint. If a complaint is issued, an NLRB attorney is assigned to prosecute the case, a complaint is drafted and the matter moves on into litigation. Unless settled, the case will go through a full trial on the merits with appropriate briefing and a written decision by the ALJ. In contrast to the performance of some other

employment related agencies, the time from the employee's filing his administrative complaint until an ALJ issues her decision will very seldom exceed a year at the most. In fact, the investigator will finish her work and the Regional Director will make a decision on whether to issue a complaint within just a few weeks, usually in less than a month. It is a process designed and operated to provide speedy adjudication. An employee's private counsel will be looked to during the investigatory stage to provide the evidentiary basis for the claimant's charge and to point to Board precedent supporting the employee's right to an NLRA-based remedy. If the Region issues a complaint and the matter is sent to NLRB trial counsel the private attorney's role will be defined by both the Board lawyer's willingness to allow participation and private counsel's own interest in doing so. Generally, Board attorneys are prepared to accept assistance from private counsel familiar with Board practices throughout the litigation and trial process.

A successful complainant can look forward to a cease and desist order and "make whole" relief, which generally includes reinstatement to a lost position and recovery of backpay, including the value of lost benefits. While the language of the statute implies a power to allow recovery of damages beyond backpay, the Board has been reluctant to do any such thing. Nevertheless, a charge brought to the NLRB can almost be guaranteed to get most employers' attention.

The NLRA is most often forgotten or ignored by attorneys considering the options of non-union employee clients. This is a mistake. Whenever an employer is found punishing employee activity that is protected by the NLRA, the Act's processes should be dusted-off and considered as a possible remedial route.

We hope you find these articles helpful and informative. As always, please contact us with any questions or concerns.

**Sincerely,
Mitchell & Sheahan, P.C.**

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