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The firm is pleased to announce that Chip Paternoster became a partner as of July 1, 2009. Chip will continue his practice focusing on employment litigation and complex commercial litigation. Chip also chairs the firm's litigation department.

As we close out 2009 and look forward to the challenges and rewards of 2010, the firm has grown to 17 attorneys, comprised of 5 partners, 8 associates, and 4 of counsel.

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**Parsons Farnell & Grein, LLP** is a boutique firm specializing in helping Northwest businesses and their leaders. Our law practice concentrates on general business litigation, policyholder insurance disputes, construction litigation, business formation, business and real estate transactions, estate planning, probate, and tax planning/litigation.

### Federal Stimulus Bill Imposes - COBRA Premium Subsidy Burden on Employers

Amy L. Larson



**MOST PEOPLE ARE AWARE** that the federal stimulus bill (the American Recovery and Reinvestment Act of 2009, or the "Act") enacted by Congress in February 2009 has far-reaching implications. What

some employers may not be aware of is the Act's effect on their obligations under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). COBRA gives eligible former employees and certain qualified beneficiaries the right to temporary continuation of health coverage at group rates for a specified period following termination of employment. In the past, eligible individuals were responsible for 100% of the continuing health coverage premium. However, under the Act, eligible individuals receive a 65% discount on the premium. The catch for employers is that what is a discount for the individual is actually a subsidy imposed on the employer. In other words, the 65% not paid by the employee is paid by the employer. The subsidy applies to eligible employees (and qualified beneficiaries covered through such employee) who are involuntarily terminated on or after September 1, 2008 through December 31, 2009. A complete summary of the Act's impact on COBRA is beyond the scope of this article, but some of the more significant highlights affecting employers are described below. We encourage all employers who offer health benefits to employees to consult their benefits advisor or other professionals to ensure their compliance with the Act.

#### *Which Employers are Affected?*

The subsidy requirement applies to group health plans that are subject to federal COBRA continuation coverage requirements or to similar requirements under state law. With some exceptions, COBRA generally covers group health plans maintained by employers with 20 or more employees in

the prior year. COBRA does not apply to plans sponsored by the federal government and certain church-related organizations.

Employers with such covered plans who receive a payment of 35% of the continuing coverage premium from an “assistance-eligible” individual are responsible for paying the remaining 65% of the premium. The employer may take the subsidy amount as a credit on its quarterly employment tax return. Employers who pay the subsidy should consult their accountant to ensure they are able to take advantage of the tax credit.

#### *Who is Eligible for the Subsidy?*

The subsidy applies to “assistance eligible” individuals. An assistance eligible individual can be any COBRA qualified beneficiary associated with a covered employee who was (or is) involuntarily terminated at any time from September 1, 2008 through December 31, 2009. The covered employee must have had health coverage at the time of termination. However, individuals who are eligible for other group health coverage (such as through a new employer’s plan or a spouse’s plan or Medicare) are not eligible for the subsidy.

#### *How Long is the Subsidy Period?*

With some exceptions, assistance eligible individuals are entitled to subsidy assistance for 9 months from the time of the covered employee’s termination. The subsidy currently extends only to employees terminated between September 1, 2008 and December 31, 2009.

#### *What are the Employer’s Notice Obligations?*

Under the Act, employers must notify all qualified beneficiaries who are covered through employees involuntarily terminated from employment from September 1, 2008 through December 31, 2009 of the premium subsidy. Notice is required even if the employee did not initially elect COBRA coverage. **All qualified beneficiaries must have been notified by April 18, 2009.** The Department of Labor has developed model notices to help employers comply with the notice requirements.

#### *What Steps Should Employers Take?*

If they have not already done so, employers should move quickly to address the changes imposed by the stimulus bill.

Employers should immediately determine whether or not they are subject to COBRA and if so, should take immediate steps to notify by April 18, 2009 all qualified beneficiaries who are covered through employees terminated involuntarily from September 1, 2008 through December 31, 2009. We encourage employers to consult their benefits advisor or other professional advisor to ensure compliance with the Act, especially if the April 18, 2009 deadline was not met. Ω

## **Employee Emails and the Attorney-Client Privilege**

*John D. Parsons*



**MANY EMPLOYERS MAINTAIN** access to their employee’s workplace computers, smart phones, etc. This right of access makes sense in light of the employers’ potential liability for the acts and omissions of its employees. Many employers have written policies with respect to the workplace, including provision that the employer may monitor what the employees do on their workplace computers and that company equipment is not for personal use.

A growing body of law on this issue was recently expanded by a New York court which concluded that emails a physician was sending to his personal attorney by way of his work computer, owned by the hospital for which he worked, were not protected by the attorney-client privilege because the hospital had a policy mandating that the computer and email systems could be used only for business purposes. Moreover, the policy put hospital employees on notice that they should have no expectation of privacy. In the course of a lawsuit between the physician and the hospital, the trial court held that the employee physician had no expectation of privacy as a result of the hospital’s policy, which expressly stated that (1) the hospital computers should only be used for hospital business; and (2) that the employees should have no expectation of privacy for any communication created, saved, sent or received using the hospital’s computers.

Consequently, employers and employees should take care to know what policies are in place with respect to employer owned computers, telephones and other technology. Further, employees should be judicious in their application of employer owned technology for personal reasons, especially if they intend to engage in a communication they intended to be private or privileged. Ω

## Four Tips for Employers in Tough Times

Charles J. Paternoster



**THE NUMBER OF** employment-related lawsuits increases every year and is the fastest growing segment of the Court docket. We recognize, especially in this economy, that advice which results in expediting the incurrence of legal fees may be a bitter pill to swallow. However, when compared to the costs and strains associated with defending a lawsuit, focusing your resources on problem avoidance, rather than repair, is a topic worthy of your consideration.

Now, more than ever, you can't afford an expensive, drawn-out lawsuit that not only costs big money but saps time away from the people in your office. So there are good reasons to spend "smart" money up front. Think of it as preventative care. Think of it as money that could help avoid the lawsuit that could cripple your business. Think of it as money that will put you in the position to provide the best defense if an employee decides to bring you to Court.

With this in mind, here are four tips, highlighting places where a little money spent up front could go a long way toward saving you from a big bill later:

**Don't Underestimate the Administrative Process.** Many employment claims begin with filings by an employee or former employee with a state or federal agency, such as the Bureau of Labor and Industries (BOLI). To save on legal fees, many businesses choose to handle the administrative process through internal human resources, waiting to get lawyers involved until the agency has issued a finding. That can be too late. How you present information to the administrative agency telling your side of the story can have a significant effect on the outcome of the case. More importantly, obtaining a "no substantial evidence" finding in the administrative process can go a long way toward dissuading the former employee (and the lawyer that may be representing him or her on a contingency fee) from bringing an actual lawsuit. The money you spend up front to defend the administrative claim will also help to organize your defense early in the process. On the other hand, a mistake at this stage will cost you more money down the road.

**Smart Documentation.** While the saying "*document, document, document*" still applies, that alone is not

enough to protect you. Instead, in some cases, the wrong information in an employee file can be worse than nothing at all, especially with regard to employee discipline or the documentation of an employee termination. As an employer, you need to anticipate the claims an employee could bring when you prepare to document the employee's file. If the employee is being disciplined, could he claim others got off easier for the same offense? For an employee being transferred or terminated, have you documented the objective reasons why this person was selected and not others? The simple fact is that you can't "paper the file" after the fact. Spending the time and money to talk to your attorney and discuss the issues and possible scenarios before the report is prepared will leave you better protected later.

**Protecting your communications.** In the informal world of email and texting, it's easy to let your guard down. But it is critical that you keep in mind what internal communications in your company may be discoverable down the road in a lawsuit. For example, internal communications regarding investigations of an employee complaint, such as communications between supervisors and human resources, are not privileged. Simply copying an attorney on the correspondence is not enough. For the communication to be protected, it must be for the purpose of seeking or obtaining legal advice. You need to think about how you structure communications through the "chain of command" of your business so that communication works efficiently, but also with an eye toward preserving the confidentiality of communications. Spending time (and money) up front to do this is much more cost-effective than learning that a potentially damaging email or document has to be turned over to the former employee's lawyer later.

**More Preventative Medicine.** There are a number of other things you can do to reduce the chance of costly litigation, such as dealing with this exposure up front when hiring new employees. One option is to include a mandatory arbitration clause in your employee's contracts, taking a potential dispute out of the court system and into what can be a more cost-effective forum. But to do this, there are hoops to jump through to make it effective.

At the same time, when its time to show an employee the door, for whatever reason, you should consider whether the employee will sign a release – even if it means paying severance up front. In this economic climate, many employees are willing to take a severance payment in

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exchange for a release of claims he or she may have. Talk to your lawyer and think about making an offer. If the employee accepts, you may be able to avoid costly litigation for what was a small price to pay on the employee's way out the door. But again, making sure that this agreement is enforceable is the key. Ω

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