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NEW COBRA CONTINUATION COVERAGE ASSISTANCE UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA" or "the Act"). The Act is part of the federal government's efforts to jumpstart an ailing economy by attempting to make government and the private sector more efficient, responsible, and accountable.

Increased layoffs and terminations due to the failing economy have led to an increase in individuals losing health care coverage and thus becoming uninsured. ARRA addresses this issue and attempts to provide assistance to certain eligible individuals; it is also an attempt to provide a tax relief for the administrators of group health plans.

The type of continuation of health care coverage subject to the Act is that provided under COBRA, among others such as federal government plans, state programs providing comparable coverage to COBRA and plans under the Public Health Service Act. However, we will limit our discussion to the impact of ARRA on plans subject to COBRA.

The ARRA mainly provides for COBRA premium reductions; additional election opportunities for health benefits; new notice requirements for plan administrators; expedited review of denials of premium reductions; and opportunities for participants and beneficiaries to change benefit options. The most significant aspect of the new legislation is the immediacy with which plan administrators must meet their new obligations under ARRA so as to avoid liability.

One of the most significant aspects of ARRA is the premium reduction for "assistance eligible individuals;" this is a new term created by the Act. An "assistance eligible individual" is an employee who is eligible for COBRA continuation of coverage as a result of his/her involuntary termination at any time between September 1, 2008 and December 31, 2009, and has elected COBRA. The term also includes an employee's family member who is eligible for COBRA continuation of coverage at any time between September 1, 2008 and December

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31, 2009, and has elected COBRA. Individuals who are eligible for other group health coverage, such as a spouse's plan or Medicare, are not eligible for the premium reduction. It is important to note that in order to be excluded from the Act's coverage these individuals do not have to be enrolled in other group health coverage for which they are eligible; by merely being eligible for the same they do not qualify for premium assistance. Also, the reduction does not apply to premiums that have been already paid for periods of coverage prior to February 17, 2009.

The premium assistance consists of a reduction in premiums of 65% for assistance eligible individuals. Therefore, individuals who pay 35% of the COBRA premium will be treated as having paid the full amount. The premium reduction of 65% will be reimbursable to the employer, insurer, or health plan as a credit against certain employment taxes. If the credit is higher than the taxes due, the Secretary of the Treasury will directly reimburse the employer, insurer, or plan for the excess. However, employers who have paid 100% of the premium, for example, under a type of separation agreement, will not be eligible for the government subsidy.

Premium assistance begins on the first day of the first month of the period of coverage beginning on or after February 17, 2009. This means that the premium reduction will begin on March 1, 2009, for plans that charge for COBRA coverage on a calendar month basis. The premium reduction for individuals ends at the earliest of one of the following: a) if such individual becomes eligible for other group health coverage (or Medicare); b) after nine months of the reduction; or c) when the maximum period of COBRA coverage ends. It is the individual's responsibility to notify the plan if they become eligible for group coverage under another plan or Medicare.

The COBRA qualifying event notice must also be modified in accordance with ARRA. On March 19, 2009, the U. S. Department of Labor ("DOL") published new model notices which comply with ARRA's requirements. The type of notice to be used will depend on the date of the qualifying event and loss of coverage, and the type of qualifying event, among others.

The ARRA provides a special election opportunity to individuals involuntarily terminated from September 1, 2008 through February 16, 2009 who did not elect COBRA when it was first offered or who elected COBRA but are no longer enrolled in the group health plan. The election period for this new opportunity begins on February 17, 2009 and ends 60 days after the plan provides the required notice to the eligible individuals. It must be noted that this opportunity does not extend the period of COBRA coverage beyond the original maximum period, which is 18 months from the involuntary termination or the date in which coverage ended as a result of the involuntary termination. Plan participants that elect COBRA coverage during this special election period will have coverage that begins with the first period of coverage beginning on or after February 17, 2009. This notice should have been provided within 60 days following February 17, 2009.

Also, the ARRA requires plan administrators to provide notice of the premium reduction to all eligible individuals who have a COBRA qualifying event from September 1, 2008, through December 31, 2009 (regardless of the type of qualifying event) who either have not yet been provided with an election notice; or who were provided an election notice on or after February 17, 2009, that did not include the information required by ARRA. This notice may be included within the COBRA election notice or in a separate document.

Also, a supplemental notice which includes the information required by ARRA should be sent to individuals who experienced any qualifying event on or after September 1, 2008 and who elected and currently have COBRA coverage. The Act also provides assistance eligible individuals with a mechanism to request expedited review from the DOL. This review is available in the event that the individual has been denied treatment as an assistance eligible individual and is consequently denied eligibility for the premium assistance. In the event of such a request for review, the DOL must make a determination within 15 days. The DOL is currently in the process of drafting an official application form required to complete the review.

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ARRA also allows assistance eligible individuals to switch coverage options; this option is available if the employer offers additional coverage options to active employees. However, the employer is not required to offer additional coverage options. Assistance eligible individuals must bear in mind that if they do chose to switch coverage options it must be for a premium equal to or lower than the premium under the individual's original coverage; otherwise they run the risk of losing their eligibility for the premium reduction. If employers allow assistance eligible employees to change coverage options, plan administrators must notify the assistance eligible employee of such an option. The option is provided in the amended election notice or by separate document as mentioned above.

Finally, an individual's eligibility for the premium reduction depends on his or her income. If an individual's modified adjusted gross income for the tax year in which the premium assistance is received exceeds $145,000 (or $290,000 for joint filers) then the amount of premium reduction for the tax year in question must be repaid. In the case of taxpayers with an adjusted gross income between $125,000 and $145,000 (or $250,000 and $290,000 for joint filers) the amount of premium reduction which must be repaid is reduced proportionately. Also, an individual may waive the right to premium reduction. However, once waived, the premium reduction may not be regained if the adjusted gross income falls below the limits.

"The most significant aspect of the new legislation is the immediacy with which plan administrators must meet their new obligations under ARRA so as to avoid liability"

A plan administrator who engages in a violation of the new notice requirements which ARRA imposes will be subject to penalties. These are up to $110 per day as mandated by ERISA, $100 per day in excise taxes for failure to comply with COBRA, as well as other possible penalties under COBRA. Therefore, now more than ever, COBRA compliance is of the highest relevance in the administration of benefits in the workplace. If you require assistance with these or any other welfare benefit concerns, do not hesitate to contact any of the attorneys in the McConnell Valdés LLC's Labor and Employment Law Practice Group. M&V

AN INTERNAL INVESTIGATION TESTIMONY IS A PROTECTED ACTIVITY UNDER TITLE VII

by: Maristella Collazo-Soto

In the recent case of Vicky S. Crawford v. Metropolitan Government of Nashville, 129 S.Ct 846 (January 26,2009), the United States Supreme Court ventured in an analysis of whether or not the protection afforded by the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, extends to an employee who speaks out about discrimination, not as a personal initiative, but in response to questions during an internal investigation conducted by the employer.

The facts of the case are the following. Petitioner Vicky S. Crawford (hereinafter "Crawford") was a 30-year employee of the Metropolitan Government of Nashville (hereinafter "Metro"). As part of an internal investigation that Metro was conducting, a human resources officer questioned Crawford as to any witnessing on her part of "inappropriate behavior" by another coworker named Gene Hughes (hereinafter "Hughes"). In response to such questioning, Crawford confirmed that indeed she had witnessed "inappropriate behavior" by Hughes. Not only had she witnessed it, Crawford expressed, but she had been the recipient of such inappropriate and sexually harassing behavior at times.

Crawford detailed several incidents that had taken place. Metro took no action against Hughes but fired Crawford instead, alleging that she had been involved in an embezzlement scheme. Crawford responded by filing a charge alleging a violation of Title VII's anti-retaliation clause before the Equal Employment Opportunity Commission (hereinafter "EEOC"), followed by this suit in the United States District Court.

The Title VII anti-retaliation provision has two clauses which make it "an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." The first is commonly known as the "opposition clause" and the second is known as the "participation clause."

The term "oppose," included in the opposition clause, has not been defined under Title VII. It is commonly known or conceived as an "active" or "consistent" behavior to oppose. However, the Supreme Court determined that under Title VII, the term shall carry its ordinary meaning which, in addition to the "active" or "consistent" behavior to oppose, also includes actions to resist, confront or antagonize. The EEOC Guidelines explain that "[w]hen an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication" almost always "constitutes the employee's opposition to the activity."

As previously mentioned, the Supreme Court further discussed that the word "oppose" goes beyond an "active" or "consistent" behavior to oppose. Also included in its definition are: oppositions demonstrated by refusing to act upon supervisor orders, as well as oppositions by responding to questions inquired by others. The Supreme Court made it clear that nothing within Title VII indicates that anti-retaliation protection will be provided to an employee who denounces discrimination by reporting it, but will not be provided to an employee who also denounces discrimination only when asked if such discrimination exists.

"This decision significantly increases the employer's responsibility when dealing with employees that have been part of an internal investigation"

Crawford alleged that Metro had violated both the opposition and the participation clauses. According to the Supreme Court, the mere fact that Crawford avowed the occurrence of Hughes' incorrect behavior towards her and other employees was an act of opposition on behalf of Crawford towards that rejected behavior carried out by Hughes. Thus, Crawford's conduct while responding to the internal investigation was, in fact, covered by the opposition clause, to the extent that it demonstrated disapproval and resistance against Hughes' behavior.

In its analysis, the Supreme Court discussed how detrimental it would be for all employees if the conduct of denouncing discriminatory behavior as part of an internal investigation would not be protected activity under the Title VII. The Court elaborated by stating that such a ruling would create a "catch-22" for all employees. That is, if the employee reported or expressed the discriminatory behavior, his or her job might be in jeopardy if the employer decided to penalize the employee for his or her expressions. On the other hand, if the employee maintained silence with regards to the discrimination, and later filed a suit under Title VII, the employer might not be held responsible on the grounds that it "exercised reasonable care to prevent and correct [any discrimination] promptly" but "the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer."

It is noteworthy that the Supreme Court did not discuss the participation clause arguments presented by the parties. Given that it concluded that Crawford's conduct was covered by the opposition clause and, as such, protected under Title VII, the Court determined that it was unnecessary to consider the participation clause argument at this time.

The statements made by the Supreme Court in this case significantly expand the protection afforded to employees when reporting discriminatory behavior through their statements as part of internal investigations. As a direct correlation, it also significantly increases the employer's responsibility when dealing with employees who have been part of an internal investigation. As such, employers must now be aware that all interrogated or questioned employees, with regards to any investigation about allegations of dicrimination, shall be protected under Title VII's anti-retaliation clause. Employers now need to factor in this protection when evaluating a potential discharge or any other action which may be considered retaliatory towards employees who have been part of internal investigations. MCV

PRACTICE GROUP NEWS

by: María Antongiorgi

The Labor and Employment Law Practice Group hosted its annual Labor and Employment Law Update Seminar on April 3, 2009. The all-day seminar was held at the San Juan Marriott Resort and Stelaris Casino in San Juan, and over 110 clients and friends of the firm were in attendance. The seminar covered all significant labor and employment law developments during 2008 and the first trimester of 2009 in the areas of welfare benefits, the Employee Free Choice Act ("EFCA"), Family and Medical Leave Act, disability discrimination, immigration law, approved legislation, pending legislation, recent jurisprudence, and the government's labor plan and its effect on private employers. The speakers, who are all members of the Practice Group, were: **Sandra L. Negrón Monge, Juan Felipe Santos, Francisco Chévere, Anita Montaner, Francisco Vargas, María Antongiorgi, Agustín Fortuño, Rafael Rodríguez, Radamés Torruella, Rica López de Alós, Jorge Antongiorgi, Miguel Rivera Arce and Alfredo Hopgood**. After the seminar, participants and members of the practice group gathered for a friendly cocktail.

Sandra L. Negrón Monge was a speaker at a seminar sponsored by Ikon Group on March 26, 2009. The seminar was held at Los Chavales Restaurant in Hato Rey and over 95 clients and friends of Ikon Group attended the same. **Sandra's** topic was the American Recovery and Reinvestment Act of 2009.

Francisco (Frankie) Chévere and **Anita Montaner** were speakers at the 6th Labor Law Conference offered by the Inter-American University School of Law last April 16th and 17th, 2009. More than 350 attorneys from the private and public sectors were in attendance. **Frankie**, a member of the organizing committee of the Conference, gave a presentation about recent developments related to the Employee Free Choice Act ("EFCA") and was moderator of a panel which discussed the Puerto Rico Public Workers Unionization Act (Act No. 45) and the impact of the recently enacted Puerto Rico Act No. 7 on said statute. **Anita** discussed recent federal and local employment related legislation and case law.

Francisco A. Vargas López is a Member in the Labor and Employment Law Practice Group of McConnell Valdés LLC.

ARE YOU AWARE OF YOUR OBLIGATIONS UNDER ASUME WHEN CONDUCTING AN EMPLOYMENT TERMINATION?

In an effort to ensure that legally responsible parents comply with their obligations for child support, the Puerto Rico legislature created The Child Support Administration Organic Act, Act No. 71 of June 20, 1956, as amended ("Act No. 71"). Under this statute, employers are obligated to provide information with respect to the employment, compensation and benefits of any person hired as an employee or contractor. Similarly, employers are also responsible for deducting the amounts determined in a child support withholding order, and for remitting them to the Child Support Administration, also known as "ASUME" for its acronym in Spanish.

Most companies and HR professionals are very familiar with the obligations and responsibilities imposed by ASUME during the course of an employee's employment. However, some are unaware of the obligations imposed by the statute at the time of an employee's voluntary or involuntary termination, which generally are as follows:

1. The employer must notify the court or ASUME, as the case may be, of the employee's termination, including the employee's last known address, and the name and address of the new employer, if known.

2. The aforementioned notification shall be made within 30 days following the date of the employee's termination.

3. If the employee is entitled to the liquidation of any amounts at the time of termination, the employer shall procure a certificate of debt from ASUME.

4. If the certificate reveals that one or more payments are in arrears, said amounts shall be deducted from the liquidation payment and remitted to ASUME.

It is unclear whether the severance payment under Act No. 80 of May 30, 1976, as amended (commonly known as the Puerto Rico's Wrongful Discharge Act), needs to be considered part of an employee's "liquidation" for purposes of ASUME. This is so because the term "liquidation" is not defined by Act No. 71, nor is there any regulation or guideline prepared by ASUME addressing the issue. For this reason, every case should be evaluated and examined on an individual basis.

Should an employer fail to comply with any of the obligations mentioned above, it may be subject to penalties, such as a judgment for the payment of the total amount that was not deducted and/or remitted to ASUME, plus fines, expenses and interest.

In sum, every time an employer conducts a termination of any kind (voluntary or involuntary), including a reduction-in-force, it should always verify whether the employee who is going to be discharged or laid off has a withholding order for child support against him/her. If so, the employer should follow the steps mentioned above. In doing so, the employer will not only comply with the legal requirements established by Act No. 71, but also, will protect itself from potential sanctions or penalties. For more information regarding employers' obligations under ASUME, you may contact any of the attorneys in our Labor and Employment Law Practice Group. MCV

"Everytime an employer conducts a termination of any kind (voluntary or involuntary), including a reduction-in-force, it should always verify whether the employee who is going to be discharged or laid off has a withholding order for child support against him/her"

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LILLY LEDBETTER FAIR PAY ACT OF 2009 OVERRULES U.S. SUPREME COURT DECISION

In Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), a divided U.S. Supreme Court affirmed the Court of Appeals for the Eleventh Circuit's decision to dismiss Lilly Ledbetter's claims under Title VII of the Civil Rights Act of 1964 ("Title VII") because they were time-barred.

Lilly Ledbetter ("Ledbetter") filed a sex discrimination suit under Title VII against her former employer, Goodyear Tire & Rubber Company. She alleged that during the course of her employment she was paid merit increases lower than similarly situated and in some cases lesser-qualified men. The U.S. Supreme Court held that an employee must file charges with the Equal Employment Opportunity Commission("EEOC") within the period specified in Title VII (180 or 300 days) after the alleged discriminatory pay decision was taken; this time requirement applies regardless of whether the employee is aware of the employer's alleged discriminatory employment practice or whether the effects of the practice have been felt. In other words, contrary to Ledbetter's allegations, subsequent paychecks and raise denials did not trigger a new time period to file a charge with the EEOC.

To nullify the U.S. Supreme Court's decision in Ledbetter, Congress passed H.R. 11: Lilly Ledbetter Fair Pay Act of 2009 (the "Act"). Subsequently, on January 29, 2009, President Barack Obama signed it into law. This was the first piece of legislation which he signed. During the signing ceremony, Lilly Ledbetter stood by President Obama's side.

The Act amends not only Title VII but also the Age Discrimination in Employment Act of 1967 ("ADEA"); it also modifies the Americans with Disabilities Act of 1990 ("ADA") and the Rehabilitation Act of 1973 ("Rehabilitation Act"). The Ledbetter Act specifies that a discriminatory compensation decision, which starts the clock for filing an EEOC charge, will occur each time compensation is paid pursuant to the decision, and not just when the employer first made the adverse decision.

Under the Act, an unlawful employment practice occurs with respect to discrimination in compensation when:

> *The Ledbetter Act specifies that a discriminatory compensation decision, which starts the clock for filing an EEOC charge, will occur each time compensation is paid pursuant to the decision, and not just when the employer first made the adverse decision.*

1. a discriminatory compensation decision or other practice is adopted;

2. an individual becomes subject to a discriminatory compensation decision or other practice; or

3. an individual is affected by application of a discriminatory compensation decision or other practice (including each time wages, benefits) or other compensation is paid, resulting in whole or in part from such decision or other practice.

Employers should note that the Ledbetter Act and its amendments became retroactively effective to May 28, 2007(one day before the Supreme Court's decision in Ledbetter); it applies to all Title VII, ADEA, ADA, and Rehabilitation Act disparate pay claims that were pending on or after that date.

The same day the bill was signed by President Obama, the EEOC issued a press release confirming that it receives upwards of 5,000 wage bias charge filings each year. With the Ledbetter Act now the law of the land, this number is likely to rise.

In an effort to minimize liability, employers should review their compensation practices, establish guidelines for compensation decisions, and review decisions that have already been taken.

Should you have any questions regarding this matter or should you like assistance reviewing compensation guidelines or policies, please contact any of the attorneys of the McConnell Valdés LLC's Labor and Employment Law Practice Group. McV

McConnell Valdés LLC invites you to visit our website at www.mcvpr.com

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