

MARYLAND STATE BAR ASSOCIATION
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FROM THE CHAIR

By Peter D. Guattery

Summer has left us and a new Supreme Court term has opened with newly confirmed Justice Sotomayor taking an active role in her first argument. While this term is not as heavy with labor and employment cases as last term, one employment case on the docket is *Lewis v. City of Chicago*, a disparate impact case involving racial disparities in the results of a written test given to firefighter applicants. The issue in this case is procedural – when does a claim “accrue” for purposes of the 300 day charge filing period.

In other developments, on September 23, 2009, the EEOC has issued a Proposed Rule with Regulations to implement the amendments to the Americans with Disabilities Act, which was the topic of our Fall Dinner Meeting last year. You may find the regulations at this link: <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>

Please join us for the Section Fall Dinner Meeting, where our guest speakers will be Thomas Perez, until recently the Secretary of the Maryland Department of Labor, Licensing and Regulation, and Jean Flanagan, Special Assistant to the Secretary. The topic of discussion will be the Maryland Workplace Fraud Act of 2009. No sooner had our flier gone out to the membership than Mr. Perez was confirmed by the U.S. Senate to his appointment as Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice. The dinner meeting will take place at the Sheraton Columbia Town Center Hotel, on Thursday, November 12, 2009, beginning at 6:15 PM. I look forward to seeing you there.

I would like to thank everyone who helped to make our Annual Meeting program a success. The program was well received, entertaining and informational. The local “jury” provided interesting insight into the dueling presentations by Jeanne Phelan and Robin Cockey, and a change of pace from our panel discussions of the past. I invite all members to contact the Section Council with your ideas as to programs at our future events. Finally, thank you as well to Doug Desmarais and his colleagues at Smith & Downey, P.A. in Towson for providing the articles for this edition of the Newsletter.

EDITOR'S CORNER

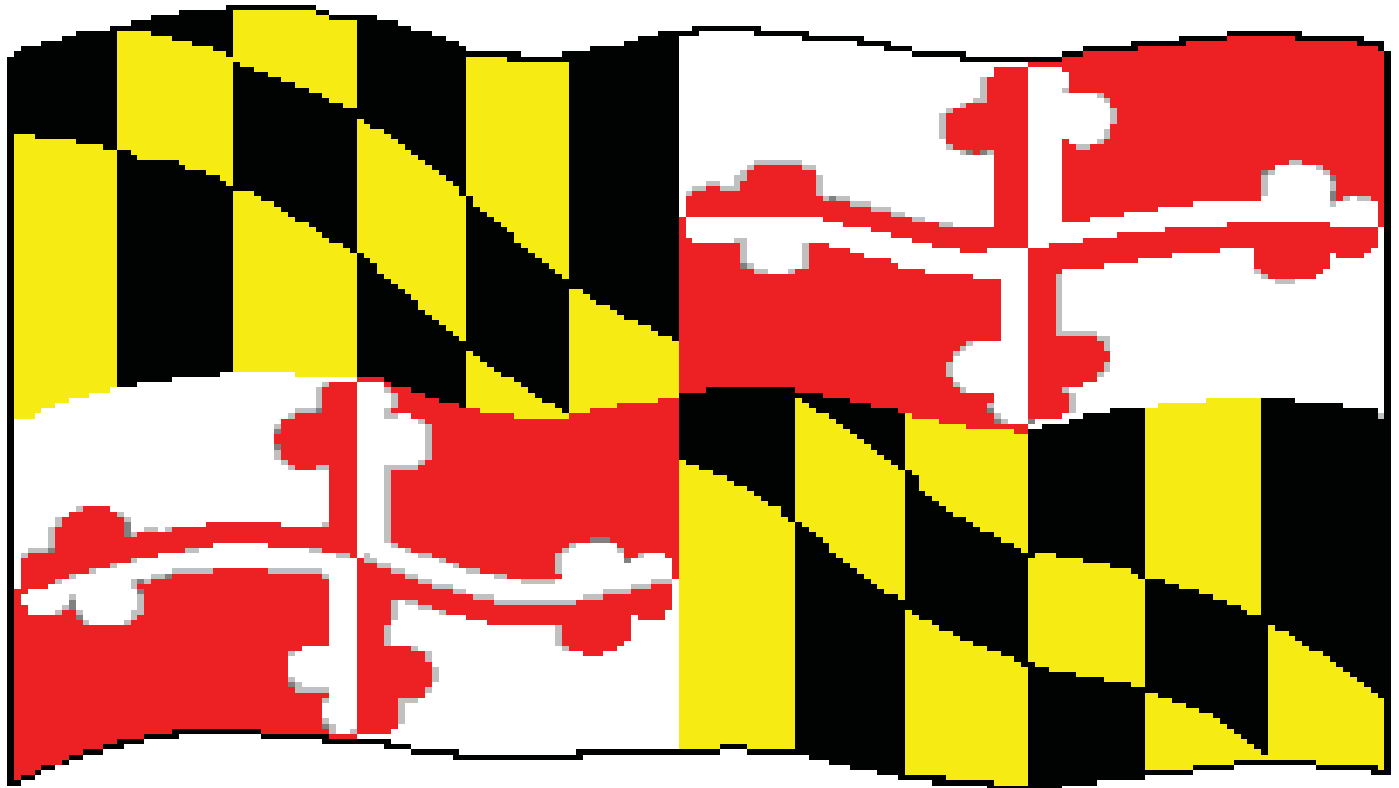
By Albert Palewicz

Welcome to fall, and lookout for winter, which is right around the corner—like in Missouri, and moving east fast. This issue of the Newsletter is a very fine one. It deals with updates on several of the laws that will affect employees seriously as they have to adjust to the vagaries of the market place caused by the current recession. The articles deal not just with the laws themselves, but add discussion of tax and other consequences of what can happen in these tough times. Our thanks go to the attorneys at Smith & Downey, P.A., in Baltimore. With Doug Desmarais as coordinator, they have given us much useful information. The next issue of the newsletter will be sponsored by Venable LLP in Baltimore. We can look forward to a very useful issue for the winter edition, I am sure.

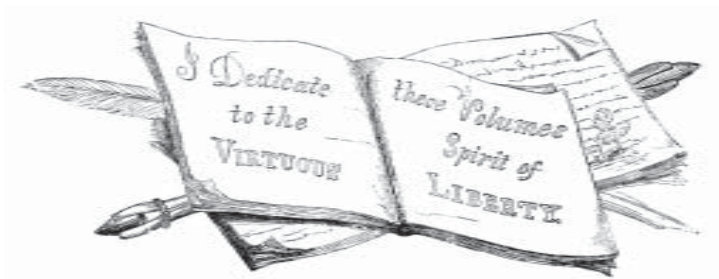
I would like to reinforce Peter’s message regarding the Section Fall Dinner Program on November 12, at the Columbia Sheraton. The speakers are knowledgeable and interesting people, who know their topics as well as anyone. We expect much useful information from them, as well as an opportunity to ask questions of well informed people. We hope a large group of Section members can make it to the meeting.

The newsletter is about to begin its fifteenth volume. It was fourteen years ago that we began what has become a very useful information tool for the Section. Sponsors are lined up for most of the issues in Volume 15, but we always like to end the anniversary year with a few new sponsors, who can help us keep going for another 5-year round of publication. If you firm or organization has not sponsored an issue, or has not done so in the last five years, and would be interested in finding out what is involved, please let me know at albert.palewicz@nlrb.gov.

As we drift into the height of the flu season, remember: wash your hands frequently, cough and sneeze into your sleeves, and search constantly for a source of vaccine. Maybe by the time the flu season is past we can all be vaccinated.



This Maryland State Bar Association Newsletter is not intended to provide legal advice, but rather to provide information concerning recent developments in the field of labor and employment law. Questions concerning individual problems or claims should be addressed to legal counsel. Any opinions expressed herein are solely those of the authors, and are not those of the Maryland State Bar Association. Finally, the articles contained herein are copyrighted, all rights reserved by the respective authors and/or their law firms, companies or organizations.



Waivers and Releases in 2009 and Beyond

By Douglas W. Desmarais

With the possible exception of laws dealing with the dissolution of marriages and child custody, nothing provokes a more dramatic emotional response than the laws impacting the termination of an employment relationship. In many instances, employees work their entire lives to have the precise position that is now being taken from them as the result of a reduction in force. In addition to the immediate impact of a salary loss, a downsized employee frequently feels personally “wronged” by the termination, and will often seek to remedy this perceived wrong by filing charges with various governmental agencies and/or filing a lawsuit.

Since most reductions in force are motivated by an employer’s desire to save money by eliminating wage and benefit obligations, employers are often faced with the dilemma of “robbing Peter to pay Paul”, i.e., trading one monetary burden (the payment of wages) for another (defense costs and/or settlement of lawsuits). While some employers are resolute in defending against lawsuits that challenge their good faith business decisions, others opt to minimize the escalation of litigation-related expenses by (a) offering separation pay and/or benefits in exchange for a release of claims; or (b) offering settlement pay and/or benefits to resolve an administrative charge or lawsuit.

As most labor and employment practitioners are aware, the seemingly simple task of “trading” payments and/or benefits in exchange for a release of claims is made complex by a host of laws and regulations that place parameters on the consideration offered to departed employees and the associated release of claims. Some of those key parameters are addressed below.

I. Waivers of Discrimination Claims.

Although not a regulation or enforcement guidance, the Equal Employment Opportunity Commission (“EEOC” or “Commission”) published in July, 2009 a document entitled “Understanding Waivers of Discrimination Claims in Employee Severance Agreements” (the “Understanding Waivers”), which serves as a primer for employees who have been asked to release claims against their employers. (See http://www.eeoc.gov/policy/docs/ganda_severance-agreements.html#12) In addition to educat-

ing employees about the fundamentals of separation agreements, this document also serves to educate employers about the strict scrutiny awaiting them when their separation agreements are presented to the EEOC for review.

One of the points emphasized in Understanding Waivers is that “agreements that attempt to prevent employees from cooperating with the EEOC interfere with enforcement activities because they deprive the Commission of important testimony and evidence needed to determine whether discrimination has occurred.” *Id.*, at fn 12. The EEOC references its 1997 Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes (See <http://www.eeoc.gov/policy/docs/waiver.html>), which notes that although an employer can require an employee to waive recovery of any damages arising out of an EEOC charge, it cannot prohibit the employee from filing a charge with the Commission. *Id.* The EEOC takes the position that “agreements that attempt to bar individuals from filing a charge . . . run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission.” *Id.*

The EEOC’s position in its 1997 Enforcement Guidance was addressed by the United States District Court for the District of Maryland in the case of *EEOC v. Nucletron Corporation*, D.C. Md., Civil Action No. L-07- 2644 (2008). In *Nucletron*, the court held that a “mere offer of [a severance agreement requiring an employee to waive the right to file an EEOC charge of discrimination] is insufficient to constitute discrimination in the retaliation context”, and that “the employer’s action only reaches the level of retaliation if it denies severance benefits that are otherwise promised or owed or if the employer sues to enforce the agreement.” *Id.*, pp. 8-9.

Although *Nucletron* softens the blow against employers when the wrongdoing (i.e., requiring an employee to waive his/her right to file an EEOC charge) never results in any tangible loss to the employee or enforcement action against the employer, it nevertheless remains imperative that employers avoid “boiler plate” provisions that attempt to restrict without limitation an employee from filing any “lawsuit, complaint, action or charge”. Such a provision – which the *Nucletron* court noted is unenforceable – will surely incur the wrath of the Commission, as well as lay the foundation for a claim of retaliation should an employer be foolish enough to attempt to bind the employee to his/her promise with respect to charge-filing.

II. Older Workers Benefit Protection Act.

The primary focus of Understanding Waivers is on the Older Workers Benefit Protection Act (“OWBPA”), and the expansive reading given by the Commission of that law.

A. Knowing and Voluntary Waivers.

By way of background, Congress amended the Age Discrimination in Employment Act (ADEA) in 1990 by adding the OWBPA, which establishes specific requirements for a valid release of ADEA claims to guarantee that an employee has adequate opportunity to make an informed choice whether or not to sign the waiver. The hallmark of the OWBPA is the requirement that a waiver be “knowing and voluntary”, which consists of seven (7) mandatory factors:

1. A waiver must be written in a manner that can be clearly understood. Understanding Waivers emphasizes that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) presented with the separation agreement. The EEOC has interpreted this requirement to mean that employers should substitute “legalese” for more simplistic language void of “technical jargon” and “long, complex sentences”. In addition, the Commission points out, waivers “must not have the effect of *misleading, misinforming, or failing to inform* participants and must present any advantages or disadvantages without either *exaggerating the benefits or minimizing the limitations.*” (Understanding Waivers, emphasis in original.)

2. A waiver must specifically refer to rights or claims arising under the ADEA. Understanding Waivers notes that EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.

3. A waiver must advise the employee in writing to consult an attorney before accepting the agreement. To emphasize the affirmative obligation of an employer to direct specifically an employee to consult with an attorney, Understanding Waivers cites *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998), which notes that “to ‘advise’ means affirmatively to ‘caution,’ ‘warn,’ or ‘recommend’”. Thus, a release stating “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims,” did not comply with the OWBPA’s requirement that an individual be “advised” to consult with an attorney.

4. A waiver must provide the employee with at least 21 days to consider the offer. Understanding Waivers notes that the 21-day consideration period runs from the date of the employer’s final offer, and not from the date of the preliminary offer. If material changes to the final offer are made, then the 21-day period starts over. (Unlike the seven-day revoca-

tion period discussed below, the 21-day waiting period and the 45-day waiting period (discussed below) can be waived by the employee, provided that the waiver is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day time period B], or by providing different terms to employees who sign the release prior to the expiration of such time period. 29 C.F.R. 1625.22 (e) (6).)

5. A waiver must give an employee seven days to revoke his or her signature. The seven-day revocation period cannot be changed or waived by either party for any reason.

6. A waiver must not include rights and claims that may arise after the date on which the waiver is executed. This provision bars waiving rights regarding new acts of discrimination that occur after the date of signing. To avoid challenges to a release, employers should explicitly advise the employee of this fact.

7. A waiver must be supported by consideration in addition to that to which the employee already is entitled. By way of example, if the only consideration being offered to a departing employee is a benefit guaranteed under a severance plan, this consideration will be inadequate to support an OWBPA release, unless the severance plan makes clear that payment of severance is conditioned upon the employee executing a waiver of claims. Otherwise, the previously guaranteed unconditional payment does not constitute new consideration, and will not satisfy this seventh requirement of the OWBPA.

B. Group Waivers.

The EEOC identifies two types of group terminations: “exit incentive programs” (i.e., voluntary programs) and “other employment termination programs” (i.e., involuntary programs). Under either program, the EEOC emphasizes that an employer must provide enough information about the factors it used in selecting employees for termination to allow employees to assess whether their age was a factor in their selection for termination.

1. Programs v. Isolated Terminations. The EEOC provides that the existence of a “program” depends on the facts and circumstances of each case. However, the Commission provides the general rule is that a “program” exists if an employer offers additional consideration – or, an incentive to leave – in exchange for signing a waiver to more than one employee. The EEOC points out, however, that if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that such a “program” exists.

2. Additional “Knowing and Voluntary Requirements for Group Waivers. In addition to the “knowing and voluntary” requirements set forth in Section II.A, *above*, an employer must include the following:

a. 45-Day Consideration Period. The employer must provide the employees with at least 45 days (as opposed to the 21-day period for isolated separations) to consider the waiver before signing it.

b. Decisional Unit Information. The employer must provide in writing a summary of the class, unit, or group of employees from which the employer chose the employees who were and who were not selected for the program. The particular circumstances of each termination program determine whether the decisional unit is the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification.

c. Eligibility Factors. The employer must identify the eligibility factors for the program.

d. Time Limits. The employer must identify any time limits beyond the 45 day consideration period.

e. Census Information. Finally, the employer must provide to each member of the group information regarding the job titles and ages of all individuals who are eligible or who were selected for the program and the ages of all individuals in the same job classifications or organizational unit who are not eligible or who were not selected. The Commission points out that the use of age bands broader than one year, such as “age 40-50” does not satisfy this requirement.



C. Invalidating Waivers.

In Understanding Waivers, the EEOC infers the broadest possible preservation of ADEA rights for terminated employees, and points to the following as examples of circumstances that will invalidate an OWBPA waiver:

1. A failure of even one of the seven key OWBPA requirements renders the waiver invalid and unenforceable.

2. An otherwise valid OWBPA release will be invalid if an employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement. To clarify this position, the Commission provides summaries of two cases that address the “fraud, undue influence, or coercion” exception:

a. Fraud. In the case of *Lauderdale v. Johnston Indus., Inc.*, 31 Fed. Appx. 940 (11th Cir. 2002), an employee who was told that his termination resulted from “reorganization” signed a waiver in exchange for severance pay. After a younger person was hired to do his former job, he filed a lawsuit alleging age discrimination. The company then changed its position and claimed that the real reason for the employee’s discharge was his poor performance. The court found that fraud was a sufficient reason for invalidating the waiver.

b. Duress. In the Maryland case of *Cassiday v. Greenhorne & Omara, Inc.*, 220 F.Supp. 2d 488 (D. MD 2002), an employee was terminated and given severance pay in exchange for signing a waiver. She later filed a lawsuit alleging age and sex discrimination. In response to the employer’s attempt to dismiss her suit, she alleged that the waiver was an ultimatum which effectively gave her no choice since she was her grandchildren’s guardian and her family’s source of income. The court held that the employee’s financial problems and prospective loss of her job did not constitute “duress” for the purpose of invalidating a waiver.

3. An employer cannot attempt to “cure” a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original agreement. Although the authority in support of this position is minimal, the EEOC nevertheless takes the position that an employer has one chance, and one chance only, to “get it right” with respect to OWBPA compliance.

4. Consideration periods begin anew after a material change to the separation agreement. The Commission

takes the position that a material change to the final offer triggers a new 21-day (45 in the case of a group program) consideration period.

5. The status of separation payments during OWBPA-related litigation.

a. During the challenge of the validity of an OWBPA waiver. The Commission provides that it is unlawful for an employer to stop making promised severance payments or to withhold any other benefits it agreed to provide merely because an employee is challenging the lawfulness of a waiver.

b. Subsequent to the successful challenge of an OWBPA waiver. In the event that an employee successfully challenges an OWBPA waiver; proves age discrimination; and obtains a monetary award, then the employer may offset money it paid the employee in exchange for waiving his/her rights, provided that the employer's recovery does not exceed the amount it paid for the waiver or the amount of the employee's award (if less).

D. Summary.

Understanding Waivers provides both employers and employees with important insight into the strict scrutiny that the Commission will apply when an employer attempts to have an employee waive his/her rights under the ADEA and other discrimination laws. Although it is doubtful that the Commission's broad vision will find complete acceptance in all jurisdictions, it nevertheless behooves the prudent employer to draft and administer waivers with an eye towards full adherence to the EEOC's directive.

III. Release of Claims Under the Family and Medical Leave Act ("FMLA").

In 2007, the Fourth Circuit held that employees could not voluntarily settle past FMLA claims unless the Department of Labor or a court approved the settlement. *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007). In response to *Taylor*, the DOL included in its newly issued regulations a provision (29 C.F.R. §825.220(d)) which makes clear that, in fact, employees can release FMLA claims based on past employer conduct without the approval of the DOL or a court. Although the DOL did not provide any guidance as to the format of such a release, it nevertheless would be prudent for employers to have a separate FMLA waiver section in its separation agreements to memorialize that the employee is knowingly and voluntarily releasing his/her rights under FMLA. (The new regulations do not alter the prohibition against waiver of future claims under FMLA.)

IV. Release of Claims Under the Fair Labor Standards Act ("FLSA").

"Boilerplate" employment-related settlement agreements frequently include references to waivers of claims under the Fair Labor Standards Act. However, unlike the recent change to the waiver requirements under FMLA, waivers of overtime and/or minimum wage claims under FLSA still require supervision by the United States Department of Labor or a court. As pointed out by Judge Nickerson in the case of *Rogers v. Savings First Mortgage, LLC*, 362 F. Supp.2d 624, 629 (D.Md. 2005),

[i]n interpreting the FLSA, the Supreme Court has frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* at 740 (citing *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945)).

Accordingly, an employer seeking assurance that its settlement payment is purchasing relief from future litigation – which is the *raison d'être* for making the payment – then it must be prepared to seek approval from either a court or the DOL before consummating the transaction.

V. References.

In addition to the payment of wages and benefits, the next most coveted consideration in an employment-related settlement agreement is often a positive reference. It is well-established that most employers follow a "neutral" reference policy, providing confirmation of job title, dates of employment and, in some circumstances, confirmation of salary. This "neutral" approach minimizes the risk of litigating a defamation claim in which the former employee alleges that the employer's dissemination of false, unflattering information resulted in damages to the former employee. Settlement agreements that result in a "neutral reference" provision require little more than careful administrative oversight by the employer that this neutral policy is carried out in accordance with the terms of the settlement agreement.

Absent an explicit reference provision, an employer is given substantial statutory protection with respect to its right to "tell it like it sees it" with respect to the performance of its former employees. Section 5-423 of the Courts and Judicial Proceedings article provides that an employer acting in good faith may not be held liable for disclosing in response to an inquiry from a prospective employer any information about the job performance or the reason for termination of employment of a former employee. Md. Code Ann. [Cts. & Jud. Proc.] §5-423. This immunity from liability and presumption of good faith can only be defeated by a

showing of actual malice or intentionally or recklessly disclosing false information about the former employee. *Id.*

In spite of the protections provided to employers with respect to providing employment references, most employers entering into separation agreements with former employees seek an end to the stress and cost of ongoing conflict. To that end, employers have a shared interest with former employees in establishing clear expectations regarding future reference requests. If the former employee's counsel doesn't ask first, then the employer's counsel should take the initiative of including a provision addressing employment references.

VI. Miscellaneous.

In addition to the issues set forth above, the payment of deferred compensation in a settlement agreement can trigger complex issues under Internal Revenue Code section 409A that require careful consideration by counsel for both parties. Similarly, the extension of health care benefits can raise comparably complex concerns under COBRA. (A detailed overview of both issues is included in articles below.) Add to the equation unique state law requirements that may surface for employers with a multi-state presence, and employment counsel charged with memorializing a settlement agreement is left with a task far more challenging than the mere insertion of party names in a boilerplate document.



WARN Update

By Patrick D. Sheridan

The Worker Adjustment and Retraining (“WARN”) Act is intended to provide workers affected by mass layoffs or plant closings with sufficient time to prepare for a transition into a new job. WARN requires advance notice because such notice “provides workers and their families some transition time to adjust to the prospective loss of employment and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.” 20 C.F.R. § 639.1(a).

The WARN Act requires most employers with 100 or more employees (not including workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) to provide 60 day advance written notification of a mass layoff or plant closing to the state dislocated worker unit and chief elected official of the local government. In Maryland, WARN notifications should be made to the Dislocated Workers Unit of the Department of Labor, Licensing and Regulation (the “DLLR”) and the executive of the county in which the closing or layoff is occurring.

An employer who violates WARN is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days. This may be reduced by the period of any notice that was given, and any voluntary payments that the employer made to the employee. An employer who fails to provide the required notice to the applicable state agency or local government unit is subject to a civil penalty not to exceed \$500 for each day of violation. The employer may avoid this penalty by satisfying the liability to each employee within three weeks of the closing or layoff.

Through WARN, Congress sought to protect employees’ expectation of wages and benefits, not their expectation of performing work. Therefore, while WARN requires an employer to compensate employees for back pay and benefits when the employer fails to provide the requisite notice, nothing in WARN requires an employer to allow employees to continue to work during the 60 day period. See Long v. Dunlop Sports Group Americas, 506 F.3d 299 (4th Cir. 2007).

Who is protected, and who is not protected, by WARN?

Any employee, hourly or salaried, full or part-time, managerial and supervisory, who may be expected to experience an employment loss is protected by WARN, including:

- Employees terminated or laid off for more than 6 months or who have their hours reduced 50% or more in any 6 month period as a result of the plant closing or mass layoff;
- Employees who may reasonably be expected to experience an employment loss as a result of a proposed plant closing or mass layoff. If the covered employer has a seniority system involving bumping rights, the employer should use its best efforts to give notice to the workers who will actually lose their jobs as a result of the system. If that is not possible, the employer must give notice to the incumbent in the position being eliminated;
- Workers who are on temporary layoff but have a reasonable expectation of being recalled, including workers on worker's compensation, medical, maternity, or other leave;

Employees not protected by WARN include:

- Strikers or workers who have been locked out in a labor dispute;
- Temporary workers;
- Contract employees, partners, and consultants assigned to the business but who are self-employed or employed and paid by another entity; and
- Federal, state, and local government employees.

When is WARN triggered?

In determining whether a layoff or closing triggers WARN, the following employees are not counted:

- Part-time workers;
- Workers who resign, retire, or are terminated for cause;
- Workers offered a transfer to another site of employment within a reasonable commuting distance, provided that the closing or layoff is the result of a relocation or consolidation of all or part of the employer's business, and the transfer involves no more than a six month break in employment; and
- Workers offered a transfer to another site of employment outside of a reasonable commuting distance, provided that the closing or layoff is the result of a relocation or consolidation of all or part of the employer's business, and the transfer involves no more than a six month break in employment, and the worker accepts the offer within 30 days of the offer or the closing or layoff, whichever is later.

WARN is triggered when a covered employer:

- Closes a facility or discontinues an operating unit permanently or temporarily, affecting at least fifty employees at a single site of employment;
- Lays off 500 or more workers at a single site of employment during a 30 day period; or lays off 50-499 workers, if such layoffs constitute 33% of the employer's total active workforce at the single site of employment;
- Announces a temporary layoff of less than 6 months and then decides to extend the layoff for more than 6 months. If the extension occurs for reasons that were not reasonably foreseeable at the time of the original announcement, notice need only be given when the need for the extension becomes known. Any other case will be treated as if notice was required for the original layoff; or
- Reduces the hours of 50 or more employees by 50% or more for each month in any 6 month period. A plant closing or layoff need not be permanent to trigger WARN.

WARN also applies when the sale of all or part of a business results in a mass layoff or closing. The seller is required to give notice if the layoff or closing occurs after the sale becomes effective, and the buyer must give notice where the layoff or closing occurs after the effective date of the sale.

WARN is concerned with employment losses occurring over a 30 day and 90 day period. If an employer closes a plant employing 50 workers, laying off 40 workers immediately and the remaining ten 25 days later, WARN notice is required. An employer must also give notice under WARN if it conducts a series of small terminations or layoffs, none of which trigger WARN individually, but whose cumulative numbers require notification under WARN. If the employer is able to demonstrate that the series of terminations resulted from separate and distinct actions and are not an attempt to evade WARN requirements, the employer is not required to give notice.

To determine whether separate but related events trigger WARN requirements, an employer should look ahead and behind 90 days. For example, on Day 1, an employer has 180 employees. On Day 2, the employer terminates 30 employees, leaving 150 employees; on Day 31, 29 more employees, leaving 121; on Day 60 6 employees, leaving 115; and on Day 90, 5 employees, leaving 110. If these layoffs did not occur for separate and distinct causes, and the Company failed to give the required notice under WARN, it is liable to all 70 terminated employees. The mass layoff threshold was reached through these separate, but related lay-

offs. Therefore, every employee terminated within the 60 days is entitled to 60 days notice before termination.

Exceptions to WARN's notice requirements

Three exceptions exist to the full 60-day notice requirement:

- Faltering company: Before a plant closing, the company is actively seeking capital or business, believes in good faith that advance notice would preclude its ability to obtain such capital or business, and the new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period;
- Unforeseeable business circumstances: The closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required. For example, a customer unexpectedly cancels a major order, or there is a sudden, dramatic, and unexpected event beyond the employer's control; or
- Natural disaster: When the closing or mass layoff is the direct result of a natural disaster, notice may be given after the event.

Even when an exception applies, an employer must provide notice to affected employees as soon as practicable as well as a statement supporting its reason for not providing the requisite notice.

Notice to Employees and the Government

Employers should provide notice to employees of a mass layoff or closing using clear, specific, and easily understood language. At a minimum, the notice must include:

- Whether the planned layoff is temporary or permanent, or whether the entire plant is being closed;
- The expected date when the mass layoff or closing will begin, and the expected separation date for the individual employee;
- A statement as to whether bumping rights exist;
- The name of the telephone number of the company official to contact for further information.

If the employees are represented, the notice to the union representative must also include the anticipated schedule of layoffs. WARN requirements do not supersede the terms of any collective bargaining agreement that provides for additional notice, rights, or remedies. Collective bargaining agreements may not reduce a worker's rights under WARN.

The notice to the state dislocated worker unit and chief elected local government official must include, at a minimum:

- The name and address of where the mass layoff or plant closing is to occur;
- An explanation as to whether the employment loss will be temporary or permanent, or whether the entire plant is being closed;
- The expected date of the first job losses, along with a schedule of any further employment reductions;
- The positions affected and the number of employees in each position;
- A statement as to whether bumping rights exist; and
- The name and contact information for the company official to contact for additional information

In Maryland, employers who have given WARN notifications report may be contacted by the Unemployment Insurance Division of the DLLR and asked to provide the names and social security numbers of affected workers for the purpose of determining the workers' eligibility for unemployment benefits. Although the regulation cited by the DLLR when seeking this information, COMAR 09.32.02.06, requires the disclosure only when the mass layoff is temporary, the DLLR has taken the position that such a disclosure is required in circumstances triggering WARN.

Employers with locations in multiple states should be aware that a number of states, and some localities, have enacted "Baby WARN" laws containing additional notice requirements.

The United States District Court for the District of West Virginia recently certified a class consisting of all employees who lost their jobs when a company suddenly and simultaneously closed three facilities and failed to give the requisite notice under WARN. See *Nolan v. Reliant Equity Investors, LLC* (N.D. W. Va. Case No. 3:08-cv-62). Given the continuing difficult economic situation, employers must be aware of their obligations to workers affected by layoffs and closures or face liability and accompanying litigation expenses.

COBRA Update

By Scott C. Moeves

Cobra Notice Rules

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) allows certain employees and certain of their family members (i.e., qualified beneficiaries) who lose health benefits in certain situations to elect to continue those benefits, at their own cost, for limited periods of time.

Only losses of coverage in connection with a “qualifying event” (such as the loss of employment for reasons other than “gross misconduct”, reduction in hours, death, divorce, etc.) result in these COBRA election rights.

COBRA is generally applicable to health plans of employers with 20 or more employees (as defined in the COBRA Regulations). Generally, COBRA continuation coverage begins on the date of the qualifying event and continues for 18 months, 29 or 36 months, depending on the type and timing of the qualifying event. Certain events cause COBRA coverage to terminate earlier, such as the qualified beneficiary failing to pay the required premium, the qualified beneficiary becoming covered under another group health plan after the date of his or her COBRA election (so long as no pre-existing condition limitation applies), and so on.

What some employers may not realize is that COBRA imposes several notice requirements on employers throughout the work cycle of an employee and beyond, and that failure to satisfy these notice requirements results in potentially significant dollar exposure to the employer.

The Initial COBRA Notice. COBRA requires a covered employer to provide an “Initial COBRA Notice” to the employee within 90 days after the employee becomes covered under the employer’s group health plan. In addition, the Initial COBRA Notice must be provided to the employee’s spouse (if any) within 90 days after the spouse becomes covered under the employer’s group health plan. Interestingly, if a COBRA qualifying event occurs during the first 90 days of coverage and before the Initial COBRA Notice is provided, the Initial COBRA Notice requirements still apply. In such cases, the Initial COBRA Notice must be provided by the earlier of the normal 90 day deadline or the deadline for providing the qualifying event notice.

Fortunately, the Department of Labor has issued a form Initial COBRA Notice that may be used by employers as a safe harbor.

Employers should keep proof that the Initial COBRA Notice (or

a Summary Plan Description [SPD] that includes the Initial COBRA Notice) was delivered to each employee and to each covered spouse.

Qualifying Event Notice and Election Forms. Upon each qualifying event, the employer must provide to each qualified beneficiary a Notice of Qualifying Event containing information specified in the COBRA Regulations. The employer must provide this Notice to affected qualified beneficiaries within 44 days after the employer has or receives notice of the qualifying event. The COBRA Regulations contain specific rules about how to deliver this Notice to each affected qualified beneficiary. The employer must give a qualified beneficiary 60 days from the date the Notice is mailed to elect health care continuation coverage under COBRA.

Employers should keep proof that the Notice of a Qualifying Event was delivered to each affected qualified beneficiary in the manner and at the time specified in the COBRA Regulations.

Notice of Unavailability of COBRA Coverage. Employers must provide this Notice to any individual who notifies the health plan of a potential qualifying event (including a second qualifying event or a determination of disability by the Social Security Administration) if COBRA coverage (or an extension of the maximum period of COBRA coverage) is not available because of that event. The employer must provide this Notice within 14 days after the health plan receives notice of a potential qualifying event.

Notice of Termination of COBRA Coverage. Employers must provide this Notice to qualified beneficiaries for whom COBRA coverage ends for any reason other than the end of the maximum COBRA coverage period. If the health plan offers any conversion rights or any other alternative for continuing coverage following termination of COBRA coverage, information about those rights must be provided with the Notice. This Notice must be provided as soon as practicable after the health plan determines that coverage will be terminated.

To avoid any argument that the health coverage continues beyond the maximum required coverage period based on, for example, the inadvertent acceptance by the employer of a COBRA payment, verbal representations by the employer’s representatives and the like, an employer may wish to consider providing this Notice even where the coverage lapses because of the end of the maximum required coverage period.

Covered employers should familiarize themselves with these COBRA Notice requirements and be sure to comply with the various technical and timing requirements of COBRA.

Cobra Discount/Subsidy Rules

Overview. The American Recovery and Reinvestment Act of 2009 ("ARRA") included a temporary program that subsidizes the costs of health care continuation benefits for qualifying individuals. The federal subsidy covers 65% of the normal cost of continuation coverage, as long as the eligible individual pays 35% of the full COBRA premium. The subsidy is available for COBRA coverage (including so-called "Public Health Services Act [PHSA] continuation coverage" provided by governmental plans) or for qualifying State law continuation premiums. It applies for all types of coverage that is subject to COBRA, PHSA or State continuation requirements except for health care flexible spending accounts. The subsidy is not available for any continuation coverage that is provided on a voluntary basis, such as self-funded coverage voluntarily provided by some church plans that are not subject to COBRA or State continuation requirements.

Assistance Eligible Individuals. The subsidy is available to "assistance eligible individuals". An AEI is someone who became (or becomes) eligible for COBRA, PHSA or State continuation coverage based on an involuntary termination of employment (other than for gross misconduct as defined in COBRA and the PHSA) occurring between September 1, 2008 and December 31, 2009, if the continuation coverage, if elected, would begin before January 1, 2010. To qualify for the subsidy, an AEI must elect continuation coverage and must pay the 35% of the actual continuation coverage premium. In addition, an individual is not eligible for the subsidy for any month in which he or she is eligible for coverage under any employer's group health plan or under Medicare.

Recapture of Subsidy. The subsidy is available regardless of income, but the amount of the subsidy credited during a tax year for an eligible individual is partially or fully "recaptured" (i.e., added to the taxpayer's income tax liability for the year) for any taxpayer with modified adjusted gross income for that year of over \$125,000 (or over \$210,000 for a joint return). An individual may, but is not required to, waive his or her right to the subsidy by making a permanent election and notifying the employer or insurer of that election.

Duration of Subsidy. The federal subsidy is available for up to nine months, but is not retroactive. That is, even though individuals whose qualifying event was as long ago as September 1, 2008 may qualify for the subsidy, the subsidy applies only to coverage periods beginning after February 17, 2009.

Reimbursement for Subsidy. For any coverage that is subject to COBRA or the PHSA, employers are responsible for providing the subsidy to eligible individuals and "collecting" a reimburse-

ment of the subsidy from the federal government. For fully insured coverage that is provided under State continuation coverage laws, the insurance carrier is responsible for providing the reduced premiums for eligible individuals and collecting the reimbursement from the federal government. The reimbursement is accomplished through a credit applied by employers or carriers to their federal income tax withholding and payroll taxes due to the Treasury.

Second Chance Election Period. ARRA provided certain individuals with a "second chance" to elect COBRA coverage they may have waived (or elected but lost before February 17, 2009). Specifically, individuals whose qualifying event was an involuntary termination of employment occurring on or after September 1, 2008 who did not elect COBRA coverage when first eligible to do so (or who elected it but dropped it before February 17, 2009) should have been provided with a second Qualifying Event Notice by April 18, 2009 that informed them that they may elect continuation coverage within 60 days of the date of that second Notice. In some States, this "second chance" election may also be available to individuals who were eligible for State continuation coverage.

For anyone who elects continuation coverage under the second chance rule, the continuation coverage becomes effective with the first coverage period beginning after February 17, 2009 and ends on the date the continuation coverage would have ended had they initially elected COBRA or coverage.

Qualifying Event Notices. For the period when the subsidy is available, employers must revise or supplement their Qualifying Event Notices to include information about the availability of the subsidy. Note that all qualifying event notices must include information about the COBRA subsidy if the COBRA coverage would begin before January 1, 2010, even if the qualifying event is not an involuntary termination of employment. The Department of Labor has issued model notices that can be used (with appropriate modifications) while the COBRA subsidy is available. For anyone who was covered under COBRA on February 17, 2009 based on any COBRA qualifying event that occurred after August 31, 2008 or for anyone who was eligible for the second chance election, a notice regarding the subsidy should have been provided by April 18, 2009.

Employers should be sure that their Qualifying Event Notice contains the required information about the subsidy and that their operating procedures reflect all of the above, including preparing and providing all required notifications and installing the mechanisms for providing the discounted rate to eligible individuals and collecting the reimbursement of the federal subsidy through the offset of amounts due to the Treasury.

Internal Revenue Code Section 409A – Time for A Compliance Check-Up

By Henry A. Smith

In October 2004, in response to perceived abuses in the deferred compensation plans of Enron and other high-profile employers, the Congress enacted and the President signed new Internal Revenue Code Section 409A.

Although most commentators believe that Section used a howitzer to deal with a housefly -- for example, there are 397 pages (not a typo) of regulations to date interpreting approximately one-half of this one Code section -- Section 409A has been in effect since January 1, 2005 and doesn't appear to be going anywhere.

Fortunately, employers were not required to take final action to bring their affected plans into compliance until December 31, 2008, although interim compliance steps were required between the January 1, 2005 effective date and the December 31, 2008 final compliance date.

Given that all of the Section 409A rules are fully in effect, and given the extremely draconian penalties for even inadvertent non-compliance, now would be an excellent time for employers to consult with their advisors to perform a "self-diagnostic" on their Section 409A compliance efforts.

Determining Covered Plans. Section 409A applies to "deferred compensation plans". This seemingly innocent term is very broadly defined by Section 409A to include not only the types of plans traditionally referred to as "deferred compensation," but also a wide array of other arrangements such as severance, certain bonus programs, reimbursement programs, certain employment contract provisions, and the like. (Certain plans traditionally thought of as "deferred compensation," such as tax-qualified retirement plans, are statutorily exempt from Section 409A.)

Therefore, the first step of any Section 409A self-diagnostic is for an employer and its advisor to scour the employer's situation to identify all of its plans and arrangements subject to the Section 409A requirements.

(Note that arrangements meeting the "deferred compensation plan" definition but under which all benefits were accrued and vested before 2005 and that have not been "materially modified"

(as defined in Section 409A) since October 3, 2004 are grandfathered and exempt from the Section 409A rules.)

Documentary Compliance. The second step in a Section 409A self-diagnostic is to review the documentation for each covered deferred compensation plan. This is a very critical step because the 409A regulations provide that, unless various required provisions are contained in the governing documents for a deferred compensation plan (and certain impermissible provisions are omitted), the plan is not in compliance with Section 409A and its very onerous penalties apply.

Operational Compliance. The next step in a Section 409A self-diagnostic is to review the operations of each covered deferred compensation plan. This, too, is a very critical step because the 409A regulations provide that, unless a very long list of operational requirements are met (and another very long list of operational actions are avoided), the plan is not in compliance with Section 409A and is subject to its very onerous penalties.

Fortunately, the IRS has opened a limited "amnesty" program that can be utilized, for a limited period of time, to correct, with less severe penalties, certain operational errors.

Ongoing Procedures. The final step in a Section 409A self-diagnostic is to ensure that ongoing procedures are in place that ensure the continuing documentary and operational compliance of all existing, and any newly established, deferred compensation plans, and that a procedure is in place to monitor and respond to future regulatory and legislative developments.

409A's Penalties. A failure by a covered deferred compensation plan to comply with the many and varied documentary and operational requirements of Section 409A results in participants paying federal and State income tax, a 20% federal tax penalty, interest at the IRS underpayment interest rate, and a 1% additional interest penalty. In some factual scenarios, these penalties can equal -- or exceed -- the value of participant's interest under the plan.

In light of the complexity of the Section 409A rules -- many of which are counter-intuitive -- and the extraordinarily harsh penalties for non-compliance, all employers who have not done so should undertake a very thoughtful and thorough review of their Section 409A compliance efforts.