



FEBRUARY 2009

IMPORTANT STIMULUS ACT
OBLIGATIONS INSIDE

PILCHAK COHEN & TICE, P.C.
THE EMPLOYERS LAWYERS

WORKPLACE CHRONICLE

CONDUCTING REDUCTIONS IN FORCE

By William E. Pilchak

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Recent Victories for Our Clients

- PCT successfully obtained the voluntary dismissal of a noncompete claim. Before the client retained PCT, a grounds maintenance company obtained an injunction, preventing our client from engaging in a competitive business. Within two weeks, PCT secured the client's right to compete for the business of a national franchise. And, within two months the plaintiff agreed to dismiss. The successful defense concentrated on quickly demonstrating the maintenance company had no competitive or contractual protectable interest. This was a referral case and models how PCT can assist other lawyers, as well to meet client needs.
- PCT obtained quick dismissal of an action for false arrest, malicious prosecution and other claims by the former bookkeeper of a company, just 90 days after the suit was filed and without legal fees for discovery. PCT successfully argued that the bookkeeper, who convinced a local prosecutor to drop the company's embezzlement charges against her, should have brought her claims in a prior fee dispute that resolved for nuisance value.



Historically, eliminating personnel in a reduction-in-force (RIF) has been one of the "safest" ways to achieve a termination. For many years, federal discrimination law provided that plaintiff-employees had to meet higher burdens in the RIF context. And, Michigan courts have held that a termination for economic reasons is "just cause" as a matter of law, for those employers without at-will protection.

However, as noted in the November, 2008 Chronicle, the pendulum has started to swing back, and we are seeing more decisions favorable to plaintiffs coming from the Sixth Circuit Court of Appeals. In that light, let's review some of the safeguards that should be kept in mind in RIF planning.

RIF's Should Be Noted As a Permanent Separation, Unless the Employer Affirmatively Desires To Recall Employees- A "layoff" is a much more acceptable form of ending the employment relationship than a "discharge," or even a "termination," which HR professionals consider to be a neutral description, but which employees consider to be a loaded term. Therefore, communicating a "layoff" decision is less likely to trigger the feelings of rejection and emotions that underlie many lawsuits.

However, "layoff" also connotes to some employees that they may be called back to work. The employer who wants to achieve a permanent separation without claims that former employees are entitled to recall when business picks up, will tell employees: it cannot predict if and when economic conditions might change or how the business might be structured to meet new business conditions, and accordingly, employees should consider the layoff to be permanent and not delay efforts to obtain substitute employment.

Of course, those employees subject to collective bargaining agreements likely have recall rights. And those employers wishing to preserve a talent pool, may forego the "permanent layoff" message if they hope that the talent remains available when the economy picks up.

Avoid the Temptation To Engage in a Subjective Clearing of the Dead Wood- One of the biggest mistakes that employers make is thinking that an economic downturn enables them to simply target and clean out all of the problem employees in the workforce. While a RIF may result in the elimination of the least productive employees, simply engaging in a subjective determination of who should be laid off will severely diminish the legal safeguards otherwise provided by the RIF process. Courts routinely hold that selecting someone for the RIF on the basis of their race, sex, age, or the other 32 or so "protected status" categories recognized by the law is actionable. Therefore, an employer who subjectively "picks" a person in a protected category for layoff is in no better position than someone who "picks" a protected person for discharge.

Focus on the Position- The key to successful defense of a RIF is that the value of the work being done in the position is outweighed by the cost of staffing the position in an environment of declining revenues. If the position eliminated involves securing "below prime" financing and those financing opportunities have disappeared in the credit crunch, eliminate the position, without mentioning that the incumbent is a slacker or has attendance or attitude problems. However, performance is relevant in a subtle context that should not be forgotten: Top performers generally make their positions valuable



by mastering the basics of the job and then expanding their responsibilities. In this context, the "positions" of top performers might be different than the positions of slackers. Therefore, look at the actual work being done in each position.

(See "Reduction Cont." on page 2)

(Continued from page 1)

Reduction Cont.

Transfers and Bumping To Avoid RIF-

While there is no obligation to transfer an employee in a RIF, the courts hold that offering to transfer some employees but not others can give rise to discrimination claims. Ideally, the “rules” of the RIF in non-union environments will provide that there will be no transfers, and certainly not “bumping,” which will complicate matters exponentially and lead to more claims. If transfers or bumping are somehow desirable, to minimize claims, set clear rules. For example, the following rules might apply to transfers to open positions:

- Employees may not achieve a promotion and take a position higher than theirs;
- Employees must have performed the open job previously to qualify to take an open slot;
- Where more than one person has performed the job previously, the person with the (pick one of or rank the following) longest service time/ longest service in the position/ highest evaluations while in the position (etc) gets the job.

Objective Criteria- The Sixth Circuit has recently stated that the lack of an objective plan will greatly ease the plaintiff’s burden in attacking the bona fides of a RIF. Designing a RIF plan that accomplishes the employer’s needs is somewhat of an art. However, some of the basics are easy. For example, one of the most common “rules” is that managers are to select the position that can most easily be eliminated with the work spread around to remaining employees.

Adopting rules that will dictate who gets picked for elimination when one of several identical positions must be eliminated is important. Obviously, selecting on the basis of longevity is eminently sustainable. However, the effect may be elimination of the most technically savvy members of your workforce. Alternative measures are: objective productivity (not just parts produced, but reports prepared, customers served, sales made); cross-training achieved; revenue generated; technical skills possessed.

Evaluations and Forced Ranking- When no other objective criteria makes the distinction

needed, an employer may resort to reliance on evaluations. Though evaluations are themselves subjective assessments by supervisors, courts will accept reliance on past evaluations as a legitimate criteria, especially when they are remote from the RIF decision. In other words, evaluations performed when the supervisors were merely trying to improve performance, and when termination was not in the picture are more easily accepted by courts.

Evaluations performed to assess which employees will be kept/released in the case of cutbacks are often referred to as forced rankings. Forced rankings can occur well before cutbacks are actually needed. However, since the results of the ranking may be termination, they are easily characterized as a subjective selection of who is to be terminated. Certainly courts scrutinize them more than those imparted when termination is not in the picture. To avoid such an exercise from being labeled a subjective termination selection process, attempt to build in as much objective criteria into the evaluation as possible.



Impact Analysis- Human Resources should not be shy about conducting an “impact analysis” of the RIF selection process. Though there is a natural reluctance to compile age, race and sex demographics, because we are taught to stay away from those factors in termination decisions, looking at demographics **after the RIF process** has resulted in a population, is eminently defensible. In fact, since the employer must guard against the objective, neutral selection criteria having a disparate impact upon protected employees, it is nearly mandatory that an analysis be conducted. (See Chronicle, July, 2008)

If the population selected in the RIF is skewed against a protected class, the employer must determine which criteria has led to the statistics and determine if the criteria is justified by business necessity. If not, the criteria must be revisited.



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- Consent and Authorization to Release Employment Information
- Employment Application
- Fair Credit Reporting Act Forms
- Garnishee Disclosure Form
- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

STIMULUS ACT CHANGES EMPLOYER COBRA OBLIGATIONS

By William E. Pilchak

The American Recovery and Reinvestment Act of 2009 recently approved by Congress and signed by the President on February 17, 2009 provides a federal government subsidy of COBRA premiums for up to nine months after an employee's involuntary termination of employment and also provides a special COBRA election right.

The Subsidy

The subsidy granted by the Act is 65% of COBRA premiums for up to nine months. Assistance eligible individuals" now need only pay 35% of their COBRA premiums. The remaining 65% of the premiums are paid by the employer (or a plan, if a multi-employer plan), which will be reimbursed to the employer or plan by the federal government. This reimbursement is accomplished by allowing the employer a credit against payroll taxes. The reimbursement will be taken on Form 941 that is filed for the period during which the subsidized premium is paid, and the payment of the subsidized premium will be treated as a deposit of payroll taxes. If the payroll tax credit does not fully reimburse the subsidy, the remaining amount will be reimbursed by check from the Treasury. The Secretary of the Treasury is expected to issue further guidance on the tax credit. The subsidy is not available for flexible spending accounts.

The subsidy begins at the next COBRA coverage period beginning after the date of the Act. For plans that use calendar months, this will be March 1, 2009. The subsidy ends at the earliest of the following: (1) the date the COBRA beneficiary becomes eligible for other group health plan coverage, (2) nine months after the date the subsidy began, or (3) the end of the maximum COBRA coverage period.

Assistance Eligible Individuals

The COBRA premium subsidy is applicable to "assistance eligible individuals" who are (1) involuntarily released from employment and eligible for COBRA coverage

between September 1, 2008 and December 31, 2009, (2) elect COBRA coverage during the original or special election period. A qualified beneficiary of an assistance eligible individual may likewise re-elect and claim the subsidy, even if the formerly covered employee does not. The subsidy is phased out for individuals with adjusted gross income between \$125,000 and



\$145,000 (\$250,000 to \$290,000 for joint filers.) Those who earn in excess of \$145,000/\$290,000 will not benefit from the subsidy, because such individuals must repay the subsidy as a special tax for the year in which the subsidy is provided.

Special COBRA Election Period

The Act also provides individuals a second opportunity to elect COBRA coverage. Individuals who lost coverage due to involuntary termination on or after September 1, 2008, and who either did not elect COBRA or elected and then dropped such coverage or were terminated from coverage for not paying premiums, are

given a second chance to elect COBRA coverage. If such individual elects COBRA coverage during the 60-day period after such individual receives notification of the special election, such individual will also qualify for the subsidy. However, the new election does not extend the 18/36 month COBRA coverage expiration dates that have always applied. (In other words, one terminated September 1, 2008, who did not elect coverage before, but elects coverage March 1, 2009, will have lost six months of available COBRA coverage. The 18 month period still expires on March 1, 2010.)

Required Employer Actions

Information about the premium subsidy and the option to enroll must be added to current COBRA notices or provided to employees in a separate document. The additional information or notification must include:

- The forms necessary for establishing eligibility for premium reduction;
- The name, address and telephone number of the plan administrator;
- A description of the 60-day extended election period;
- A description of the beneficiary's obligation to notify the plan of eligibility for coverage under another plan or Medicare, and the penalty for failing to do so; and
- A prominently displayed description of the qualified beneficiary's right to a reduced premium and any conditions on entitlement under the reduced premium.

The U. S. Dept. of Labor is required to issue model COBRA notices that comply with the requirements of the ARRA by March 19, 2009. The Plan Administrator must provide the amended COBRA Notices to assistance eligible individuals by April 18, 2009. However, since the subsidy takes effect on March 1, Pilchak Cohen & Tice, P.C. has posted a suggested preliminary form on its website, under "Forms and Resources." ❖

NEW DEADLINE FOR NEW FORM I-9 EFFECTIVE APRIL 3, 2009

By Rhonda H. Armstrong

The Employment Eligibility Verification process (the I-9 process) scheduled to change February 2, 2009 has now been temporarily suspended until April 3, 2009. **EMPLOYERS SHOULD NOT USE THE NEW FORM I-9 BEFORE THE NEW EFFECTIVE DATE, AS THEY COULD BE SUBJECT TO MONETARY PENALTIES.**

In December 2008, U.S. Citizenship and Immigration Services (USCIS) – formerly Immigration and Naturalization Service (INS) – issued an interim rule, published in the Federal Register. The new rule narrows the list of acceptable documents, requires use of a new form, and for the first time prohibits employers from relying on expired documents. The stated purpose for the changes is to improve the security in the employment eligibility verification process.

The most sweeping change is that **expired documents are no longer considered acceptable.** Previously, a U.S. Passport and all List B documents were



deemed acceptable, even if expired. Since expired documents are more apt to be counterfeit or used fraudulently, requiring unexpired documents (often with updated security features) will reduce this risk.

Form I-9 contains three lists of documents: (1) List A – that confirm both identity and work authorization, (2) List B – that confirm only identity, and (3) List C – that confirm only work authorization. The substantive changes to the form are outlined as follows:

- List A - Three new documents were added to List A – a new U.S. Passport Card, a foreign passport notation on a machine-readable immigrant visa pre-printed with a temporary I-551 notation (legal permanent resident status confirmation), and a passport from the Federated States of Micronesia or the Republic of the Marshall Islands with a valid Form I-94 demonstrating valid status pursuant to the Compact of Free Association. Several documents were removed because they are no longer issued including: Form I-688 (Temporary Resident Card), and Forms I-688A and Form I-688B (Employment Authorization Cards).
- List C – The Form was amended to use the correct name for the “Social Security Account Number card” and clarify that such cards stating “not valid for employment purposes” are not acceptable.

The revised form incorporating these changes is available through the USCIS website at: http://www.uscis.gov/files/form/I-9_IFR_02-02-09.pdf.

DAVIS BACON OBLIGATIONS FOLLOW STIMULUS DOLLARS

Employers that obtain construction work funded in whole or part by the Stimulus Package must be aware that they have Davis Bacon Act wage obligations. Specifically, employers on those projects must pay the “prevailing wage,” which is generally the union wage in the locality. The Heritage Foundation notes that Davis Bacon wage costs fluctuate wildly by location, ranging from 51% above market rates in New York to below minimum wage in Sarasota, Florida. On average, though, “prevailing wages” average 22% higher than market rates, increasing construction costs by about 10%.

It is not always 100% clear if work is “construction” work. Demolition, for example, is the antithesis of construction, but is within the Act. Employers participating in any aspect of a federally funded project should always determine if their work falls within the Davis Bacon Act, and if so that they are paying the local prevailing wage.



E-VERIFY RULES FOR FEDERAL CONTRACTORS POSTPONED UNTIL MAY 21, 2009

By Rhonda H. Armstrong

Efforts to require federal contractors to use E-Verify have been temporarily suspended. E-Verify is an internet-based verification system that allows employers to confirm the identity and work eligibility of their workforce. As addressed the July 2008 Chronicle, President Bush greatly expanded who *must* participate in E-Verify by way of a June, 2008 Executive Order – requiring federal contractors and subcontractors to E-Verify. The Department of Defense (DOD) issued final regulations to implement the Executive Order on November 14, 2008, requiring federal contractor/subcontractor compliance by January 15, 2009.

However, the effective date was temporarily postponed on January 30th. **The effective date is now May 21, 2009.** In

December 2008, the U.S. Chamber of Commerce, with others, filed a lawsuit challenging the authority of the government to issue these regulations and also sought injunctive relief. The lawsuit remains pending, but reports indicate that the parties have agreed to an expedited briefing schedule. The U.S. Chamber of Commerce, in a Press Release issued January 9, 2009, announced that the federal government voluntarily agreed to the delay, and the Chamber's hope is that this time "will give the new administration an opportunity to re-evaluate the efficacy of the policy." Indeed, the government's stated purpose for the newest delay is "to permit the new Administration an adequate opportunity to review the rule." 74 Federal Register 5621.

Under these circumstances, it is difficult to predict whether the final regulations will be implemented, and, if so, whether they will remain intact. Nevertheless, covered employers should stand ready to meet the May 21st deadline. We will keep you posted on further developments.



SEEMINGLY SIMPLE LEDBETTER ACT ADDS TO HR'S TO-DO LIST

By William E. Pilchak

The Lilly Ledbetter Fair Pay Act, seems simple enough: It reverses the May, 2008, holding in *Ledbetter v Goodyear*, where the U.S. Supreme Court ruled that an employee was required to bring a charge of pay discrimination within 180 days (or 300 days in "deferral states," such as Michigan) of the decision setting the pay level. The LLFPA now provides that the delivery of each paycheck is a separate discriminatory act, so that the employee is armed with a continuous discrimination action, until at least 180/300 days after he/she is terminated.

However, the implications of the LLFPA place new burdens on the human resources department. Since decisions on pay levels may be litigated years afterward, it would be wise to retain documentation of the pay factors for that entire time. Ideally, solid, non-discriminatory reasons for pay differentials would be placed in the personnel

file. However, as the Chronicle has reported before (See: Jan., 2005), the Equal Pay Act refuses to recognize some seemingly non-discriminatory reasons as legitimate. For example, employers paying a position traditionally filled by females at the "market rate," have found that EPA case law states that paying at that market rate perpetuates the effects of past discriminatory practices, so that "market rate" is not a defense. Likewise, employers who have paid what the employee asked for at her interview encounter law that states such demands are the product of depressed wages in the past, so that the employer is required to pay more than the demand if males are paid more for the same work.

HR should keep its eye on pay levels for jobs that are not identical but arguably similar. While we are not yet at the point where completely dissimilar jobs must be compared under the controversial "comparable worth" notion, EPA

cases quantify the different duties between two jobs and then determine if the difference merits higher pay for one category. Similarly, HR should examine decisions that translate into compensation, such as territories granted, commission rates provided, etc. to assure that there is not a pattern of women or minorities at the bottom end without good explanation (such as it is the territory or rate given to the most recent arrivals in the department).

Pay audits, especially if done in conjunction with labor counsel, and which can be shrouded by the attorney-client privilege, if needed, should be considered whenever the HR professional has concerns about differing pay levels. When favorable, the privilege can be waived and the audits used as evidence that the HR department conducted serious analysis of pay issues over the years.



Promotion

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**Michigan
Legal Profiles**

As Seen In... Forbes, February 2, 2009

Pilchak Cohen & Tice, P.C.

Whenever an employee is terminated, no matter how legitimate the reason, there is a chance of a lawsuit, asserting any of two dozen legal theories, such as discrimination, retaliation, or other forms of wrongful discharge. With the economy in a slump, that risk is on the rise, warns Dan Cohen, a shareholder in the Metro-Detroit law firm of Pilchak Cohen & Tice, P.C. (PC&T).

"When people lose their jobs and don't land on their feet, there is a greater likelihood of litigation," he says.

Pilchak Cohen & Tice is one of Michigan's leading management labor and employment law firms, representing employers of all sizes, from huge industrial concerns and Fortune 500 companies to family-owned businesses. PC&T has even been selected as labor counsel to a number of the district courts in Metro-Detroit.

At a time when independent management-side boutique firms are disappearing from the Detroit scene through mergers into large firms, PC&T is thriving. By combining big-firm excellence with small-firm value, PC&T's client-roster is growing steadily. The economic benefits of the business model are known to legal insiders: Small firms avoid costs built into larger firms, such as highly paid first-year attorneys who receive basic training at client expense. In contrast, PC&T's six lawyers have an average of 15 years of labor/employment experience. Another client benefit may not be so obvious: As business owners themselves, PC&T's shareholders have received invoices for legal services that seem inflated and have committed to assuring that doesn't happen to their clients.

One way to provide value is ending litigation quickly. The firm is adept at finding the "silver bullet" that does so. For example, when a client was sued by a notoriously contentious union in a \$9 million multi-count class-action federal case, PC&T filed a "failure to state a claim" motion that resulted in quick dismissal, saving more than \$100,000 in legal fees.

PC&T's ability to provide value results in part because it is the exclusive Michigan member of Worklaw® Network (WLN), the



From left: Bob Tice, Bill Pilchak, John Schwartz, Paul Kramer, Dan Cohen (seated) and Rhonda Armstrong

international association of management labor & employment firms. When a new issue arises, PC&T has electronic access to more than 350 attorneys, who can supply briefs, strategies, or legal research at almost no cost to clients.

PC&T's lawyers have been recognized as leaders in their field and have provided guidance on some of the most challenging issues. When the Department of Labor requested comment on proposed FMLA regulations, PC&T was one of only a few law firms nationwide that provided comments, which then appeared in the Federal Register. When the Michigan legislature accidentally negated 16 miscellaneous overtime exemptions by increasing the minimum wage, the State Chamber of Commerce worked with Cohen to design a fix because of his prior success litigating that statutory provision. Papers and articles by the firm have been presented at American Bar Association Annual Meetings and published in the ABA's prestigious Labor Lawyer law journal, with one such article honored as the year's best labor article. In addition, the firm has received the highest "AV" rating by Martindale Hubbell®, and Bill Pilchak and partner Bob Tice have been peer-voted as Super Lawyers® for two consecutive years.

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WHAT CAN BE DONE TO MEET DECLINING REVENUE AND WHAT CAN'T

By William E. Pilchak

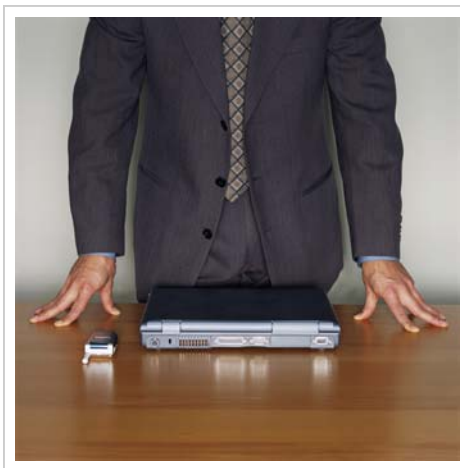
Like most of America, PC&T clients are struggling to deal with declining revenue in a slowing economy. Beyond layoffs, discussed elsewhere in this issue, which raise their own unique employment issues, this recession has resulted in creative approaches designed to retain talent while reducing what is most often a company's greatest expense, the cost of employment. Here are some of the approaches, and the implications they raise.

Adopting a 32-hour Work Week/ Reduction of Salaries

Salaried Status Employees- The savings achieved by a reduction of hours with regard to the hourly workforce are obvious. However, under the Fair Labor Standards Act, a salaried employee must be paid the designated salary for any workweek in which work is performed, subject to some allowable deductions not relevant in this context. One primary rule of salaried status is that the employer cannot deduct for time not worked when the employer is unable to furnish work to the employee. The employer's decision to reduce hours is squarely within this concept. The employer cannot "deduct" pay from the salaried employee because it will not let the employee work on the fifth day. Yet, the wise employer will not effectively cut the income of hourly employees by 20% while maintaining the income of the "suits," especially as the prospect of the Employee Free Choice Act and increased unionization looms. Therefore, employers should seek to reduce salaries by 20% if salaried employees will similarly work one less day. Normally, for an at-will employee and in the absence of a contract specifying a salary, a salary reduction can be accomplished by simply informing the employee in writing, that the employer will be paying a salary consisting of 80% of the regular salary during the "slowdown period." Such notification should always reference the economic hardships faced by the company and presented by the economy in general and be expressed as part of a plan to preserve jobs while dealing with the economy.

For salaried executives with contracts that specify salaries, a written agreement to

reduce that salary in this period of hardship must be negotiated. While selfish motives underlie the bulk of the disputes PC&T litigates, the executive with the best interests of the company in mind will agree to a temporary adjustment. Under Michigan law, there need be no "consideration" for an amendment to a prior contract, if the amendment is executed in writing and signed by both parties. For those who do not agree, the written contract should be examined to determine if the company has the flexibility to eliminate the position without being required to pay severance pay.



H-1B Employees- In difficult times like these, employers sometimes forget that H-1B workers must be paid the wage specified in the Labor Condition Application (LCA) filed with the Department of Labor. Employers cannot pay less, just because work is unavailable, while still maintaining employment of the H-1B worker. (Sophisticated employers know that they cannot "bench" H-1B employees with no pay or at a pay level below that stated in the LCA when there are lapses in available work.) However, if the H-1B employee has received pay increases since the LCA has been filed, pay can retreat to the levels stated in the LCA. Where these implications of H-1B status lead to the employer's conclusion that it would be better off with someone without the H-1B conditions attached, the law does not preclude employers from terminating strictly on the basis of H-1B status. While the employer cannot insist that U.S. citizens fill a position, (except in very limited circumstances involving de-

fense, classified or sensitive information), an employer may make a decision on the basis of H-1B status. (See Chronicle, July, 2008) H-1B employees are not "protected persons" under the Immigration and Reform Act of 1986)

Fringe Benefits- Employers must review their fringe benefit plans and make sure that they remain in compliance when hours are reduced. If the employee handbook, summary plan description or other documents that would be considered ERISA employee welfare plan "plan documents" state that fringe benefits are provided to full-time employees regularly scheduled for 40 hours, several problems can arise if benefits are still provided to employees who work 32 hours for an extended period.

First, federal audits of employee health and welfare plans (fringe benefits) have been on the increase over the past several years. (See Chronicle, Nov, 2007) Non-compliance can result in plan disqualification, with the result that contributions are not deductible and become taxable corporate income! Accordingly, the best case scenario where an audit shows non-compliance may be steep monetary penalties.

Second, where plan criteria breaks down, part-time employees without benefits may mount an ERISA action claiming the monetary equivalent of benefits they, too, "should have enjoyed."

These two issues can be met by adopting plan and handbook amendments. Where a plan has been initially been adopted by Board Resolution, this will require similar formalities.

Some of the best ideas we have encountered involve amendments that state that "emergency measures" are being taken during declining economic conditions and stating that during the emergency period, "full time" benefit eligibility is determined on the basis of whether the position (as opposed to the individual) has involved 40 hours in the majority of weeks in the one year prior to adoption of the emergency measures. This

(See "Decline Cont." on page 8)

(Continued from page 5)

Decline Cont.

effectively “grandfathers” in full time personnel forced to a part-time schedule.

The third benefits problem is the prospect of a contract breach with providers. Employers should review their contracts with health care and other providers to determine if an hour-threshold is set. One wouldn’t want to create a loophole that might give the provider a means to avoid coverage for an expensive medical condition, while the provider too struggles to keep its expenses to a minimum. This issue is easily solved by a written “agreement” by the provider that those subject to a temporary, forced reduction of hours remain within the plan. Formality is not required. As noted above, there need be no exchange of consideration, as long as the parties agree in writing. And, under the Uniform Electronic Transaction Act, the parties can agree by e-mail, provided that each party’s e-mail bears something each party intends as a “signature.”

Elimination of Paid Holidays or Paid Time Off Accrual

Benefits not subject to ERISA can be changed prospectively, but not retroactively, by written notification to the employees that the benefit has become unavailable. This may require a handbook amendment, which can be accomplished by a memo or other written notification distributed to all employees. Ideally, the employer would accomplish distribution through a means by which it could prove that employees received notice, such as distribution via paychecks or paystubs or hand-outs with receipts. In all cases, it would be wise to post the amendment on the employee bulletin board, so that it would be difficult for an employee to take the position that she didn’t see the posting or that it wasn’t a topic of discussion among workers.

Salaried employees are insulated from the elimination of paid holidays, because they must be paid their regular salary in any week in which they perform work, as stated above. Accordingly, to avoid dissatisfaction and morale problems within the hourly

workforce, salaries would ideally be lowered in an amount that equates to the loss of paid holidays, under the mechanism described above for reducing salaries. For example, if the company observed eight holidays and all of them would involve an actual day off work on the present year’s calendar, the equivalent reduction of salary would be 3.07% (against a 260 day work-year).



As might be obvious, any tinkering with pay and benefit mechanisms in place raises implications that might not be obvious. As such, reviewing such strategies with labor counsel before implementing them can prevent a plan to achieve small, but meaningful savings from leading to claims resulting in massive liability.

