



NEWS FLASH

COBRA Subsidy Extended

An estimated one million out-of-work people nationwide waited patiently following the loss of their eligibility for extended unemployment insurance and the COBRA subsidy on Sunday, February 28, 2010, after Sen. Jim Bunning's (R-Ky) filibuster blocked a Senate bill, the Temporary Extension Act of 2010, that would have temporarily continued the benefits for 30 days while senators worked out a longer, more permanent plan.

Late Tuesday night, March 2, Senator Bunning gave up his filibuster and the Senate quickly passed, and the President quickly signed, a temporary 30-day extension. The Senate can now focus on a much broader bill that will extend these benefits and potentially add additional jobless benefits through the end of 2010 and possibly longer.

What does this temporary extension mean for employers and their obligations under the COBRA subsidy? Initially, it should be noted that the temporary extension does not change the benefits in any way. Unlike the previous extension, this temporary extension does not extend the time period for receiving benefits. The maximum time an eligible employee can receive the COBRA subsidy still remains 15 months. The only action an employer needs to take at this time is to provide employees laid off between February 28 and March 31, 2010 the same COBRA notice that was provided to those employees who lost their jobs in January or February 2010. The U.S. Department of Labor has updated its website to reflect this change (www.dol.gov/COBRA) and it is in the process of updating its forms and other materials.

We fully expect to have another extension providing these benefits through April (and possibly beyond), unless Congress can agree on terms of a longer plan. We will keep you informed.

EEOC Issues Proposed Regulations Under ADEA

On February 18, 2010, the U.S. Equal Employment Opportunity Commission ("EEOC") proposed new

regulations¹ defining "reasonable factors other than age" under the Age Discrimination in Employment Act ("ADEA").

Historically, even where an employer is not motivated by discriminatory intent, the employer has been prohibited from using facially neutral employment practices that have an unjustified adverse impact on members of a protected class, such as age. This type of discrimination is referred to as "disparate impact." For example, if an employer determined that all of its employees needed to learn to use a certain machine or would be terminated, and the impact of this mandate and resulting terminations affected older workers more than younger workers, this could be considered disparate impact discrimination. Recent U.S. Supreme Court decisions in *Smith v. City of Jackson* and *Meachum v. Knolls Atomic Power Laboratory*, however, clarified that an employer might be able to avoid liability for employment actions resulting in a disparate impact on older employees if the employer could articulate that the employment action was based on reasonable factors other than age.

The EEOC's proposed regulations are intended to clarify the scope of this "reasonable factors other than age" defense. As an initial matter, we point out that the analysis of whether a particular employment practice is based on reasonable factors other than age is based on the facts and circumstances of each particular situation. The regulations set forth a two-part test.

First, the regulations ask whether the action taken was reasonable. A reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances, i.e., it is one that would be used in a like manner by a prudent employer mindful of its responsibilities under the ADEA. The challenged practice must be reasonably designed to further or achieve a legitimate business purpose and reasonably administered to achieve that purpose. What the employer knew or should have known about the employment practice's impact when it took the challenged action is also considered.

The following is a non-exhaustive list of factors that may be relevant in analyzing whether a particular action is reasonable:

¹See <http://edocket.access.gpo.gov/2010/pdf/2010-3126.pdf>

1. Whether the employment practice and the manner of its implementation are common business practices;
2. The extent to which the factor is related to the employer's stated business goal;
3. The extent to which the employer took steps to define the factor accurately and to apply the factor fairly accurately (e.g., training, guidance, instruction of managers);
4. The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
5. The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventative or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
6. Whether other options were available and the reasons the employer selected the option it did.

Second, the regulations ask whether the action taken was based on a factor other than age. The following is a non-exhaustive list of factors that may be relevant in analyzing whether a particular action was based on a factor other than age:

1. The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
2. The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes, like flexibility, willingness to learn and technical skills; and

3. The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

In general, the proposed regulations merely set forth considerations that most prudent employers should take into account regardless of whether the regulations are passed in their current form. The emphasis on training and educating supervisors, however, is a strong indicator that the EEOC may focus its investigations on such training if the regulations are passed.

As always, we will continue to update you on these and other regulations as information comes available. If you have questions about the proposed regulations discussed above or would like guidance or assistance in analyzing the disparate impact your employment practices may have on older workers, please contact any member of the Koley Jessen Employment, Labor and Benefits Group.

Upcoming Webinars Employment Law 101: Back To Basics

The Koley Jessen Employment, Labor and Benefits Group will be presenting a two-part webinar on basic employment practices. Employment Law 101: Back to Basics is intended to provide a refresher for experienced HR professionals and an introduction to employment law for newcomers to the HR profession. Please see the attached invitation for additional information about the topics to be addressed and the dates and times for the webinars. We hope you can join us.

This document is intended for informational purposes only and should not be construed as legal advice.

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