

# Practical Answers

## to Your HR Questions

By Florence M. Vincent

**Q** *We are a relatively small employer, but our workforce has begun to grow. In the past, we were advised that we were not subject to COBRA because we had a small workforce. Recently, one of our terminating employees asked about COBRA continuation coverage. Because our workforce has increased, are we now subject to COBRA?*

**A** The federal Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) applies to employers who offer group health plan coverage to their employees. However, some small employers are exempt from COBRA. Employers that employed fewer than 20 employees on a typical business day during the preceding year are exempt from COBRA. This is known as the “small-employer exception.”

There are special rules on how employees are counted for purposes of the small-employer exception. One such rule pertains to how part-time employees are counted. Another rule requires certain subsidiaries or sister companies to aggregate their employees with the employees of their respective parent company or sister companies. Since these rules can be complex, and a correct determination of whether the small-employer exception applies is critical in stemming potential liability, it would be prudent to consult with legal counsel in making that determination. Also, small employers should make that determination on an annual basis since the exception could apply in one year, but not the next.

An incorrect determination, either way, about the applicability of COBRA could result in large liabilities. For example, if, on the one hand, an employer incorrectly determines it is subject to COBRA and the employer offers COBRA continuation coverage to its terminating employees, the insurer may deny COBRA claims made by those terminating employees. The employer then becomes liable for COBRA claims made by those terminating employees. And, with the high cost of health care, those claims could be quite large. If, on the other hand, an employer incorrectly determines that it is not subject to COBRA, it could face liability for excise taxes and penalties for non-compliance. Statutory penalties for non-compliance can be as much as \$110 per day per employee. Excise taxes for non-compliance can be as much as \$200 per day. In one instance, a court imposed a

\$40,000 statutory penalty on an employer for COBRA non-compliance. Such excise taxes and penalties are imposed in addition to liability for COBRA claims for coverage.

Accordingly, to avoid potential COBRA liability, it is critical that employers correctly identify whether they are subject to COBRA. If they are subject to COBRA, they should make sure they are in compliance with its requirements. If they are not subject to COBRA, they should assess whether they are subject to any similar requirements on a state level, such as the requirements imposed on small employers in Utah under Utah’s “mini-COBRA” statute. Furthermore, in either instance, employers should also determine whether they are subject to any COBRA-like requirements by reason of any special circumstances, such as where departing employees are leaving active employment for military service (in which case, employers are subject to certain health-care continuation coverage and notice-of-rights requirements under the Uniformed Services Employment and Reemployment Rights Act, or “USERRA.”

**Q** *If an employer is subject to COBRA, what compliance measures should it take?*

**A** The most critical compliance measure pertains to COBRA’s notice requirements. The Department of Labor (“DOL”) issued final rules on COBRA notice requirements on May 26, 2004. These rules are now in effect. These rules set forth COBRA rights and responsibilities as they relate to (i) group health plan administrators, (ii) group health plan participants and their beneficiaries, and (iii) the employer/sponsor of group health plans.

Within 90 days (in most instances) of enrollment, a group health plan administrator (depending on plan design, the plan administrator may be the employer or a third-party administrator) must provide a general COBRA notice to each enrolling employee and his or her spouse. The general notice must include an explanation of which events qualify a

**Practical Answers**  
Continued on page 20

## PRACTICAL ANSWERS Continued...

covered employee or his or her qualified beneficiaries for COBRA continuation coverage, and must explain the timing related to each COBRA notice. The DOL final rules include a Model General Notice for use by single-employer group health plans, which is available at [www.dol.gov/ebsa/modelgeneralnotice.doc](http://www.dol.gov/ebsa/modelgeneralnotice.doc).

Covered employees and their qualified beneficiaries qualify for COBRA continuation coverage if they experience a loss of coverage as a result of a "qualifying event." Qualified events include a loss of coverage by a covered employee due to termination of employment (for reasons other than the employee's gross misconduct) or due to a reduction in his or her hours of employment. In such instances, a covered employee and each of his or her covered beneficiaries may elect COBRA continuation coverage. In addition, an employee's covered spouse also has a right to elect COBRA continuation coverage if he or she loses coverage as a result

of the employee's loss of coverage, a divorce, or a legal separation. Finally, an employee's covered dependent children may elect COBRA continuation coverage if they lose coverage as a result of a loss of coverage by the covered employee or the covered employee's spouse, or because the child ceases to be eligible for coverage as a dependent.

If a covered employee and/or his covered beneficiaries lose coverage as result of a qualifying event, the employer, the covered employee and his or her qualified beneficiaries, and the plan administrator all have differing notice obligations. COBRA requires that required notices be provided within specified time periods. The key to COBRA compliance is providing the right notice within the specified time period. Failure to do so could result in an employer being liable for COBRA claims that should have been covered as well as for statutory penalties and excise taxes.

Because COBRA administration is complex and the cost for non-compliance can be significant, it is important that employers review

their existing COBRA administrative systems, or, if applicable, implement proper COBRA administration systems. All COBRA materials provided should be clear, concise, uniform, consistent with COBRA requirements, and include a regular review mechanism. Employers can administer COBRA or contract with a COBRA administrator to do so. In any event, however, employers are well advised to consult with legal counsel about whether COBRA applies to them, and about implementing a proper COBRA administration system to avoid potential COBRA liability.



"Practical Answers" is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Florence M. Vincent, a business attorney and member of Van Cott's Labor and Employment Law Group. Ms. Vincent's practice concentrates in assisting employers with employee benefit plan issues, from drafting and implementing employee benefits plans and reviewing existing plans for compliance with federal and state law. You can reach Ms. Vincent at 801.532.3333. If you have questions you would like considered for publication in future issues of HR Views, please send them to [pamgunnell@pipelinewireless.net](mailto:pamgunnell@pipelinewireless.net).

## LEGAL & LEGISLATIVE Continued...

reasonably designed to promote good health or prevent disease, including giving individuals the opportunity to qualify for the reward at least once a year; (3) The reward must be available to all similarly situated individuals, and the program must provide individuals a reasonable alternative way to qualify for the reward if a medical condition makes qualifying unreasonably difficult or if it is medically inadvisable to attempt to qualify by satisfying the otherwise applicable standard; and (4) All plan materials describing the wellness program must disclose that a reasonable alternative is available. You should carefully consider these and related laws when providing for wellness services at work.

### CALIFORNIA TRAINING RULES CLARIFIED

Proposed new regulations have clarified the scope of a new rule requiring sexual harassment training for supervisors. The law applies to any company with at least 50 employees if any of those employees work in California. Any supervisors located in California must

receive the training, but the new regulations clarify that supervisors not located in California need not be trained. California rules also mandate the topics to be covered and the frequency and length of the training.

### FMLA UPDATES

The Family and Medical Leave Act (FMLA) has been in the news a lot lately. Here are some of the highlights. An article in the National Law Journal reports that employment lawyers across the country believe the FMLA is generating more and more lawsuits, particularly over the issues of what is/isn't a serious health condition and use of intermittent leave. The Tenth Circuit Court of Appeals (which governs federal court lawsuits in Utah) recently rejected an FMLA retaliation claim, primarily because of the employer's excellent and thorough documentation of behavior problems unrelated to FMLA leave. Finally, expansion of the coverage of the FMLA may be on the agenda of Congress. Legislators are floating proposals to apply the law so parents can take leave to attend their child's school activities and to reduce the coverage level to 25 (down from 50) employees.

### IMMIGRATION RAIDS ARE WAKE-UP CALL

National SHRM has devoted its entire December 2006 legal report to the topic of dealing with increasing immigration enforcement efforts (including in places like Hyrum in Northern Utah!). The legal report focuses on I-9 form compliance and how to deal with actual raids should they occur. Obviously, the best way to prevent and deal with raids is to carefully comply with the law and not hire undocumented workers in the first place. You can find the full report (if you are a national SHRM member) at: [http://www.shrm.org/hrresources/lrpt\\_published/CMS\\_019659.asp](http://www.shrm.org/hrresources/lrpt_published/CMS_019659.asp)



Mike O'Brien practices employment law with the law firm of Jones, Waldo, Holbrook & McDonough P.C. in Salt Lake City, Utah. He serves on various national and local boards and legislative committees for the local and national Society for Human Resource Management ("SHRM") and regularly addresses businesses and business groups on employment law topics. He recently was named Utah State Bar Employment Lawyer of the Year.