

Question & Answer Summary

December 10, 2009 Webinar

The Year in Review and Looking Forward to 2010

On December 10, 2009, Miller Law Group presented “The Year in Review and Looking Forward to 2010,” our year-end webinar. We examined the legal developments impacting employers over the past year, as well as employment law developments that are on the horizon for the coming year. The following are answers to frequently asked questions by webinar attendees.

Q. DOES AN EMPLOYEE WHO IS TERMINATED AFTER 12/31/09 QUALIFY FOR THE COBRA SUBSIDY?

A. The original legislation implementing the COBRA subsidy provided the subsidy only for individuals involuntarily terminated between 9/1/08 and 12/31/09. However, on December 19, 2009, President Obama signed new legislation extending the COBRA subsidy by two months. Now, the subsidy applies to involuntary terminations through 2/28/10.

In addition, the new legislation has lengthened to 15 months the maximum period for which an “assistance eligible individual” can receive the subsidy, compared to the nine months permitted under the original legislation. The new legislation also specifies that so long as the qualifying event of termination takes place by 2/28/10, an assistance eligible individual may be eligible for the COBRA subsidy even if the individual does not become COBRA-eligible until a later date. Employers must provide notice of the subsidy extension to individuals who, on or after 10/31/09, are assistance eligible individuals or are involuntarily terminated. Information on the notice requirements will soon be available on the U.S. Department of Labor’s COBRA subsidy web page at <http://www.dol.gov/ebsa/cobra.html>.

Q. IS AN EMPLOYEE ELIGIBLE FOR THE COBRA SUBSIDY IF HE OR SHE LOSES BENEFITS AS A RESULT OF FAILING TO RETURN TO WORK FOLLOWING A FAMILY AND MEDICAL LEAVE ACT (FMLA) LEAVE?

A. It depends. The COBRA subsidy is available only to employees who have been involuntarily terminated. If an employee fails to return from a FMLA-covered leave but remains employed (for example, a longer leave might be required as a reasonable accommodation for a disability), the employee would not be eligible for the COBRA subsidy because there is no

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termination of the employment relationship. If the employee voluntarily quits at the end of a FMLA leave, the subsidy probably would not apply because there has not been an involuntary termination. On the other hand, if the employer severs the employment relationship as a result of the employee's failure to return, the subsidy would apply.

It is important to keep in mind that there may not be a clear line between a voluntary and involuntary termination. For example, an employee could argue that he was forced to quit – and therefore is eligible for the subsidy – because he could not return from the leave. Therefore, it is important to examine the facts and circumstances and to seek legal counsel when in doubt. More guidance on what constitutes an involuntary termination for COBRA subsidy purposes is provided by IRS Notice 2009-27, available at <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>.

Q. DOES AN EMPLOYER THAT RECEIVES A PAYROLL TAX CREDIT FOR THE COBRA SUBSIDY AUTOMATICALLY BECOME A FEDERAL CONTRACTOR BECAUSE THE EMPLOYER HAS NOW RECEIVED GOVERNMENT FUNDS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA)?

A. No. When an employee is eligible for the COBRA subsidy, the employee pays 35 percent of the normal COBRA premium and the employer pays the other 65 percent. Then, typically, the employer seeks reimbursement for its portion through a credit on its quarterly payroll taxes. This credit/reimbursement is not the same as an ARRA funding award that subjects the employer to federal contractor and other requirements imposed on recipients of ARRA funds.

Q. IS THE BUSINESS MILEAGE REIMBURSEMENT RATE PUBLISHED ANNUALLY BY THE INTERNAL REVENUE SERVICE (IRS) AN OPTIONAL REIMBURSEMENT RATE, OR IS IT MANDATORY FOR EMPLOYERS TO USE THE IRS RATE?

A. The IRS business mileage reimbursement rate – which will be 50 cents per mile in 2010 – is optional but strongly recommended because it is the rate that the IRS deems appropriate for mileage reimbursement. Using a higher or lower rate could create legal risks for the employer, depending on the circumstances. Note that when the IRS rate is used, there is a presumption that the amount is appropriate to cover the mileage costs. In fact, the California Division of Labor Standards Enforcement (DLSE) presumes, absent evidence to the contrary, that an employer that pays the IRS rate to cover an employee's driving expenses is in compliance with

Labor Code section 2802, which requires employers to reimburse employees for business expenses.

Q. WE UNDERSTAND THAT A NEW I-9 FORM WAS PUBLISHED IN 2009. DOES THIS MEAN WE HAVE TO GO BACK AND REVERIFY EMPLOYMENT, USING THE NEW FORM, FOR ALL OUR EXISTING EMPLOYEES?

A. As of August 2009, a new I-9 form is in use. This form is identifiable by an expiration date of "08/07/09" in lower right corner. Only this form and a prior version dated 02/02/09 are acceptable for use when verifying new employees or reverifying existing employees whose work authorization is expiring. Otherwise, employers are not required to fill out new I-9 forms for employees who went through the I-9 process when an older version of the form was in use. For more information on reverification requirements, visit the U.S. Citizenship and Immigration Services website at www.uscis.gov.

Q. FOR 2010, WHAT IS THE MINIMUM SALARY REQUIREMENT FOR EXEMPT EMPLOYEES IN CALIFORNIA?

A. For 2010, the minimum salary that employees must earn to qualify for the managerial, administrative, or professional exemptions in California remains unchanged at \$2,773.33 per month, or \$33,280 per year. This minimum exempt salary is based on two times the current California minimum wage, which currently stands at \$8.00 per hour. To qualify for the computer software professional exemption in 2010, employees must earn \$37.94/hour or a salary of \$79,050 for full time employment (or \$6,587.50 monthly).

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar and should not be considered legal advice.