Miller LAW GROUP

Employment Law Update

Question & Answer Summary

March 17, 2009 Webinar

Key Workplace Agreements, Handbooks and Forms: Drafting Documents that Stand Up in Court

When is the last time your company reexamined its key workplace documents? Based on frequent changes in employment law – stemming from court decisions, new statutes and expansive regulations -- employers need to continually review and revise their employment documents, including application forms, commission agreements, bonus plans, handbook policies, employee notices and more. On March 17, 2009, Miller Law Group presented an in-depth webinar, "Key Workplace Agreements, Handbooks and Forms: How to Draft Documents That Stand Up in Court," designed to inform employers about the latest legal developments impacting workplace documents. The following are answers to questions asked by webinar attendees.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

Miller Law Group is the leading women-owned employment law firm in California, specializing in representing management in all facets of employment litigation and counseling. 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.

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Q. IS THE NEW COBRA SUBSIDY AVAILABLE ONLY TO EMPLOYEES TERMINATED AFTER SEPTEMBER 1, 2008?

A. The new COBRA subsidy, created by the American Recovery and Reinvestment Act (ARRA), is only available to individuals who were involuntarily terminated between September 1, 2008, through December 31, 2009. An employee who was terminated earlier is not eligible for the subsidy under any circumstances.

Q. DOES THE COBRA SUBSIDY APPLY ONLY TO LAYOFFS, OR ALSO WHEN AN INDIVIDUAL RESIGNED OR WAS FIRED FOR CAUSE?

A. The subsidy applies to involuntary terminations. This includes layoffs and other terminations, unless the discharge was for gross misconduct. In addition, employees who voluntarily resigned are not eligible for the subsidy.

Q. ARE THERE SAMPLE NOTICES EMPLOYERS CAN USE TO COMPLY WITH THE REQUIREMENT THAT INDIVIDUALS BE NOTIFIED OF THE NEW COBRA SUBSIDY PROVISIONS?

A. On March 19, 2009, the U.S. Department of Labor (DOL) published four model notices. The first is an expanded COBRA General Notice about election rights and the premium subsidy that can be sent to any individual experiencing a qualifying event in the applicable time period. The second is an abbreviated General Notice for individuals who already have elected COBRA, to notify them about the new reduced premium rate. A third notice is for individuals who are eligible for continuation coverage under a state law, such as Cal-COBRA. The fourth is an "extended election period" notice, to be sent to individuals terminated between September 1, 2008, and February 16, 2009, who either did not elect COBRA or elected COBRA but subsequently terminated coverage. Employers can use the model notices or create their own. For more information and to link to the forms, go to http://www.dol.gov/ebsa/COBRAmodelnotice.html.

The DOL also has published new FAQs regarding the COBRA subsidy. Employers can download the FAQs at http://www.dol.gov/ebsa/faqs/faq-cobra-premiumreductionER.html.

Q. CAN YOU EXPLAIN THE NEW CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT OF 2009 AND THE IMPACT FOR EMPLOYERS?

A. The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) was recently signed into law and takes effect on April 1, 2009. CHIPRA authorizes states to subsidize premiums for employer-provided group health coverage for certain low-income

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children and families. In addition, CHIPRA requires group health plans to offer new special enrollment rights to individuals who lose coverage under Medicaid or a state children's health insurance program (CHIP), and to individuals covered under Medicaid or a state CHIP program who become eligible for a state's premium assistance subsidy for children and families. The special enrollment period must be at least 60 days, measured from the date of coverage loss or eligibility for the premium subsidy.

Employers should review plan documents now to include information about the new CHIPRA special enrollment rights effective on April 1. In addition, the U.S. Department of Labor is charged with developing model notices by February 4, 2010, for use when an employee becomes eligible for special enrollment.

Q. CAN AN EMPLOYER PRORATE A BONUS FOR AN EMPLOYEE WHO WAS ON FAMILY AND MEDICAL LEAVE DURING THE BONUS PERFORMANCE PERIOD?

A. The new Family and Medical Leave Act (FMLA) regulations permit employers to deny or prorate bonuses that are based on the achievement of a specified goal, such as attendance or performance, if the employee fails to meet the bonus criteria because of a FMLA leave. Bonuses can be prorated or denied in this situation only if the employer would take the same action for employees on an equivalent leave status for a reason other than FMLA leave.

An employer's right to deny or prorate a bonus does not permit the employer to otherwise penalize an employee for failing to meet the bonus criteria. For example, an employer cannot discharge or otherwise discipline an employee for failing to meet a production quota when the employee's failure was due to FMLA leave.

Q. TO OBTAIN WAIVERS OF AGE DISCRIMINATION CLAIMS IN CONNECTION WITH A GROUP TERMINATION, HOW MANY EMPLOYEES MUST BE INVOLVED FOR IT TO BE CONSIDERED A GROUP TERMINATION?

A. The Older Workers Benefit Protection Act (OWBPA) establishes specific requirements for a release of Age Discrimination in Employment Act (ADEA) claims to be valid and legally enforceable for employees age 40 and over. If the termination is in connection with an exit incentive or other employment termination "program" to two or more employees, there are some additional requirements. In particular, employees must be given 45 days to consider the release, and the employer must provide employees with the following information: job titles and ages (but not names) of affected and unaffected employees considered for the program; eligibility criteria for the program; applicable time limitations for considering the severance offer;

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and requirements of the plan.

A "program" exists when you offer two or more employees additional consideration (money or benefits, for example) for signing a waiver pursuant to an exit incentive or other employment termination. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs are not generally subject to negotiation between the parties.

Q. OUR HOME OFFICE IS NOT LOCATED IN SAN FRANCISCO, BUT WE DO HAVE EMPLOYEES WHO LIVE AND WORK IN SAN FRANCISCO. IS OUR BUSINESS REQUIRED TO COMPLY WITH THE SAN FRANCISCO PAID SICK LEAVE ORDINANCE?

A. With limited exceptions, all employees who perform work in San Francisco, whether on a part-time or full-time basis, accrue paid sick leave for those hours worked in San Francisco, even if the employer is not located in San Francisco. Employees who work in the city on an occasional basis (that is, fewer than 56 hours in a calendar year) or come to the city solely to attend or present at a convention or conference (again, for fewer than 56 hours in a calendar year) are not eligible to accrue paid sick leave.

Q. DOES THE SAN FRANCISCO PAID SICK LEAVE ORDINANCE ONLY APPLY TO EMPLOYERS WITH 50 OR MORE EMPLOYEES?

A. The paid sick leave ordinance covers all employers that have employees who work in San Francisco. If the employer has fewer than 10 employees, the employer is considered a “Small Business.” Business size is determined by counting the total number of employees, including those that work at locations outside of San Francisco. Small businesses are covered by the law, but can place a 40-hour cap on the amount of paid sick leave an employee can have “in the bank.” Larger employers can place a 72-hour cap on accrued paid sick leave.

Q. CALIFORNIA’S ALTERNATIVE WORKWEEK LAW, AS RECENTLY AMENDED BY A.B. 5, ALLOWS EMPLOYEES TO MOVE FROM ONE (APPROVED) SCHEDULE OPTION TO ANOTHER ON A WEEKLY BASIS. IS THE EMPLOYER REQUIRED TO NOTIFY EMPLOYEES THAT THEY CAN SWITCH BETWEEN SCHEDULE OPTIONS?

A. California law permits employers to adopt an “alternative workweek schedule” (AWS) under which nonexempt employees work up to 10 hours a day without the payment of daily overtime (note that there are some differences for the health care industry). An AWS can be adopted

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only if two thirds of the employees affected vote in favor of the schedule in a secret ballot election. Among the many detailed procedures that must be followed to set up an AWS, the employer must give employees a written proposal that sets out the specific AWS or a menu of AWS options menu of work schedule options, from which each employee would be entitled to choose. The menu can include a regular eight-hour day option. The AWS law recently was amended to permit employees to move between schedule options from week to week, with the employer's approval.

The best practice is to indicate in the proposal whether or not employees will be permitted to move between schedule options from week to week and whether employer approval will be required for such switching. Employees will be more likely to vote in favor of the AWS if they understand that they can switch between the different schedules as needed.

It is important to note that the procedures for setting up an AWS are detailed and must be followed strictly in order for the AWS to be valid.

Q. DOES THE SECRET BALLOT REQUIREMENT TO ADOPT AN ALTERNATIVE WORKWEEK SCHEDULE APPLY JUST TO UNIONIZED EMPLOYERS?

A. Any employer -- union or non-union -- that wishes to adopt an AWS for California employees must, among other things, hold a secret ballot election that permits affected employees to vote on the AWS proposal. Note that this AWS election requirement is not related to secret ballot requirements for union organizing under federal labor laws.

Q. HOW ARE PROVISIONS PROHIBITING EMPLOYEES FROM SOLICITING CLIENTS OR RECRUITING EMPLOYEES IMPACTED BY THE CALIFORNIA SUPREME COURT'S RECENT DECISION STRIKING DOWN NONCOMPETITION AGREEMENTS?

A. In *Edwards v. Arthur Andersen LLP*, (2008) 44 Cal.4th 937, the California Supreme Court ruled that noncompetition agreements in California are invalid under California law, even if the noncompete provisions are narrowly drawn, unless they fall within an express statutory exception (*i.e.* where a person sells the goodwill of a business or where a partner agrees not to compete in anticipation of dissolution of a partnership or limited liability corporation).

The high court declined in this decision to address the validity of the so-called "trade secrets exception," which has been carved out by lower courts to the rule against noncompete agreements. Therefore, post-*Edwards*, it is unclear whether California employers can use noncompete provisions even if necessary to protect trade secrets, such as customer lists, and

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an employer that continues to use noncompetes even for this limited purpose runs some risk that the agreement will be unenforceable. The risk is increased if the information an employer is seeking to protect does not in fact qualify as a trade secret, such as when the information is readily ascertainable through public or other outside sources or the employer has failed to take other steps to protect the confidentiality and sensitivity of the information.

This webinar and Question and Answer Summary are presented by Miller Law Group and Parachute 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.

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