Louisiana EMPLOYMENT Law Letter

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Jones Walker

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ARBITRATION

A marriage made in heaven, modified on earth, and stuck in purgatory

by Antonio D. Robinson

Employment relationships, like marriages, don't always work out. At the beginning of any relationship, we always hope for the best but often have to prepare for the worst. Like a prenuptial agreement for the betrothed, an arbitration agreement is one way an employer and applicant can plan for future disputes. Many employers consider arbitration an easy, cost-effective, private way to bring an end to what has become an unproductive employment union. But if you don't cross your t's and dot your i's when putting the agreement in writing, a discharge can become just as ugly as a divorce.

The prenuptial

A Christian-based elementary school eyed an attractive candidate for its top job — principal. After the courting process, the school extended an offer, which was accepted. Upon consummating the relationship, the school and the new principal entered into a written employment contract containing a provision that provided for "biblically-based mediation." No, there wasn't a fire-and-brimstone requirement, but everyone was subject to the Golden Rule.

Referring to passages of Scripture, the mediation agreement purported to provide a way for the school and its new principal to resolve any employment disputes in accordance with biblical tradition. The agreement contemplated mediation initially and, if necessary, arbitration. The parties also agreed not to sue each other except to enforce the agreement's terms.

Irreconcilable differences

As quickly as the relationship began, it started to deteriorate. Only a few months after starting her job, the principal was told the relationship wasn't working out. While the school offered to continue paying her salary and benefits, it would do so only if she wouldn't return to the school. Breaking what the school considered one of the Ten Commandments, the principal sued it. In response, the school asked the court to make the former principal proceed first with mediation, to be followed by arbitration only if it became necessary. The court agreed.

Self-help offers no cure

After mediation failed, the estranged parties proceeded with arbitration. Before doing so, however, they entered into another written agreement, this time a form arbitration agreement. The school and the principal agreed to change the form by crossing out a provision that prevented either party from using any confidential testimony from the arbitration in any potential court proceeding. Second, they added a provision that neither party waived the right to appeal.

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Jones Walker is a member of the *Employers Counsel Network*

Once the ground rules were set, the parties conducted an arbitration that lasted six days. After all was said and done, the principal won her claim against the school. The arbitrator said the school didn't resolve its initial conflict with the principal according to Scriptures found in the mediation agreement. The school asked the arbitrator to reconsider, but he refused.

Divine intervention

Still unhappy with the results of the arbitration, the school continued its efforts to have the decision set aside. It asked a federal trial court to reverse the arbitrator's decision. The school argued that the written modifications to the arbitration agreement allowed the trial court to revisit the substance of the claim instead of limiting its review to the correctness of the arbitrator's decision. The trial court declined to expand its review of the dispute, sending the school to the federal appeals court in New Orleans for a second opinion.

At the outset of its review, the appeals court explained the general role courts play in reviewing arbitration decisions. Specifically, the appeals court noted that courts can change an arbitrator's decision only when the arbitrator (1) is corrupt, (2) was guilty of misconduct during the proceeding, (3) exceeded his authority, or (4) acted with a disregard for the law. This general rule is good to remember when opting for arbitration because in most cases, you will be stuck with the arbitrator's decision absent an abuse of his authority.

The appeals court, however, explained that the rules can change if the terms of an arbitration agreement are unclear. The court then examined whether the parties' modifications to the agreement had that effect. The court further explained that courts will look beyond the face of an unclear agreement to determine the intent of the parties. What's more, a court's reviewing authority can be expanded if the parties choose to expand that authority in the agreement.

With respect to this case, the court suggested that by adding language to a form contract that otherwise contained no provision concerning appeal of an arbitration award, the parties intended to expand the scope of judicial review. The court also noted that the parties agreed to allow it to consider evidence from the arbitration.

Still, the appeals court decided that it needed more information about the intent of the parties before it could make a decision about the scope of its review, concluding that the agreement was ambiguous regarding its authority. So for a resolution of that issue, the court sent the case back to the trial court for further evidence and consideration. *Prescott v. Northlake Christian School*, 369 F.3d 491 (5th Cir. 2004).

Not another messy divorce

Not all employment relationships will work out — sometimes for the better and other times for the worse. When a separation isn't amicable, many of you rely on arbitration agreements to avoid the publicity, cost, and time associated with litigation. Usually, those agreements accomplish your objective. As illustrated by this case, however, relying on forms and less-than-clear modifications to form agreements can send you right into public, costly, and time-consuming litigation.

How can you avoid that situation? Be smart and never use form agreements or revise or edit any agreement without consulting your labor counsel. It can be tempting to draft agreements, rely on forms, or make changes yourself when time's short or in special circumstances. Resist the temptation. As illustrated by this case, you could end up in a war of the roses instead of a peaceful separation.

You can catch up on the latest court cases involving arbitration in the subscribers' area of HRhero.com, the website for Louisiana Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 51

Web Alert Older but no richer

Our website, HRhero.com, gives you the latest national news in employment law. Go to www.HRhero.com/news to read:

- **"Six-year age difference isn't enough for ADEA claim" —** According to a federal appellate court, an employee replaced by somebody six years younger didn't suffer age discrimination.
- **"Shoe department employee walks away empty-handed" —** An employee's workers' comp retaliation case fails when the employee tries to change damaging testimony to win her case.
- **"A real downer: Employee loses depression claim" —** An employee can't show that he was fired because of his depression when the evidence reveals that poor job performance was the only reason.
- **"Willful or not willful — that is the question" —** A federal court of appeals decides when an employer's violation is willful for statute-of-limitations purposes.
- **"Contagious discrimination: It's enough to make you sick" —** An employer finds that it can be held liable for discrimination because it unwittingly based employment-related decisions on information provided by an age-biased employee. ❖

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Q&A Dissecting the ADA: answers to your questions

by Antonio D. Robinson and Jennifer L. Anderson

The Americans with Disabilities Act, better known as the ADA, isn't exactly light reading with all its definitions, cross-references, and technical rules. Throw in the accompanying regulations and the Equal Employment Opportunity Commission's technical assistance manual and you have a sure-fire remedy for insomnia. That's why we're here. This month, we answer a few of your questions to help you identify your rights and obligations in dealing with mental disability issues in your workplace.

Q: During an emotional breakdown, an employee told her supervisor she's bipolar. With that unofficial notice, what are our obligations under the ADA, or do we have any since she hasn't presented any documentation? She's disruptive, usually having shouting matches and disagreements in her department with other employees.

A: Just because an employee volunteers that she has a condition that may be a disability, you aren't automatically required to perform some act under the ADA. Mere knowledge that an employee has a disability doesn't require you to probe or investigate into her medical history.

You do, however, have an obligation to engage in an informal "interactive process" with an employee who requests an accommodation, identifies limitations associated with a disability, or otherwise indicates that a disability is restricting her ability to perform a major life activity, including work. The lack of medical documentation is irrelevant because your obligation is triggered upon your receipt of the information in any form. At that point, you should:

- analyze the particular job involved and identify its essential functions;
- consult with the employee to determine the exact job limitations caused by the disability;
- identify and evaluate the effectiveness of potential accommodations with the employee; and
- select the most appropriate accommodation for you and the employee, if possible.

If by going through the interactive process you identify a reasonable accommodation that doesn't impose an undue hardship on you, then you must offer it to the employee.

But what do you do about the disruptive conduct? Most employers probably believe there's nothing you can do about a disruptive employee whose behavior is caused by a disability. Not so. You can discipline an employee with a disability just as you would an employee who doesn't have one. In disciplining a disabled employee, you need to make sure that the policy being violated is job-related and consistent with business necessity. In this case, you as the employer have a business necessity to maintain a workplace free from disruptive conduct to ensure such things as productivity and employee morale. Therefore, you can discipline the employee without fear of violating the ADA for her disruptive conduct as long as you apply your policy consistently.

Q: An employee presented us with a letter from a counseling center stating that he "has depressive and panic symptoms related to current personal situations." It goes on to read that "because of the extreme stress the employee is facing at this moment, he should be excused for the past five days" and "he's not able to do the activities he used to do before." The letter doesn't say he can't work, and it refers, as you can see, to a "current" personal situation causing this. Does the ADA apply here?

A: Maybe. First, you need to determine whether the employee has a disability covered by the ADA. In this case, that requires you to ascertain whether his depression is a short-term or long-term impairment. An impairment isn't substantially limiting within the meaning of the ADA if it lasts for only a brief time or doesn't significantly restrict one or more major life activities. Although the employee suffers from depression, he may not be protected by the ADA if it will last only a short time and he will suffer no permanent or long-term effects from his "current" situation. If he doesn't have an ADA-covered disability, you don't have to excuse his absences as a reasonable accommodation. Keep in mind, however, that your obligations regarding those absences may be different under the Family and Medical Leave Act (FMLA) if the employee is eligible for FMLA leave and his depression constitutes a "serious health condition."

If you determine that the employee has an ADA-covered disability, you must then begin the interactive process to clarify what job-related limitations he has because of his depression and whether a reasonable accommodation is available. Generally, a leave of absence can be a reasonable accommodation. The length of such an absence and whether it will be considered reasonable will depend on the nature of your business, the job at issue, and the disability at issue, but courts generally consider some period of leave to be reasonable in most positions.

Q: We have a problem manager who resigned. The manager came in a week later and notified her supervisor

that she had been diagnosed with clinical depression and wishes to rescind her resignation. Ordinarily we would, of course, start the interactive process called for by the ADA. But my gut says that since she had resigned before the notification, we aren't obligated. What do you think?

A: Trust your gut. Generally, you have no obligation to an employee who voluntarily resigns even if the alleged disability contributed to the decision to resign. But before you rush to decline reinstatement or rehire, you must review your policy or practice regarding reinstating or rehiring employees who resign. You must also determine how that policy or practice has been applied to others who don't have disabilities. Although she's no longer your employee, you still have to treat her the same way you would any other former employee seeking to rescind a resignation.

Your obligation may be different, however, if the employee is formally reapplying for the position or another position and her condition constitutes a disability under the ADA (see our answer to the preceding question). If that's the case, you have an obligation to engage in the interactive process as you would with any other applicant. Through that process, the former employee/applicant would have to identify job-related limitations associated with her disability or request specific accommodations that you would then consider in determining whether you could reasonably accommodate her in the position sought.

ADA epilogue

The ADA can be difficult to follow and interpret, especially when it comes to your obligation to engage in the interactive process and provide a reasonable accommodation. ADA issues are very fact-specific and aren't susceptible to resolution by reference to blanket rules. As we discussed above, you have to know when an employee has an ADA-qualifying disability, when to engage in the interactive process, whether to provide an accommodation, and what accommodations are considered reasonable under the circumstances and the law. You will likely need help in fulfilling those obligations. That's when your labor counsel can provide direction. ❖

FREE SPEECH

'Good cop, bad cop': No good deed goes unpunished

by Shelley Sullivan

You've asked for more articles about public employers, and we hear you loud and clear. A recent case from the federal appeals court in New Orleans offers a good reminder to public employers: Think before firing or disciplining an employee who says or writes something you don't like. The First Amendment to the U.S. Constitution protects public employees who speak out about matters involving public concern. Public employers may expose themselves to First Amendment retaliation claims if they aren't cautious about disciplining or terminating an employee for saying or writing something that could be considered an expression about a public concern. Here's how.

Force feels heat from abuse allegation

Several officers participating in an arrest later felt the heat when one of their own was accused of using excessive force. A police sergeant who watched the arrest reported his fellow officer to internal affairs. The incident was investigated by the city, and the city agreed with the sergeant's story. A few months later, the arrestee sued the city and several officers, including the sergeant who reported the abuse. The sergeant told the chief of police that he was worried about his and his fellow officers' reputations and hoped that the chief would defend them.

Think before firing or disciplining an employee who says or writes something you don't like.

No protection for sergeant who spoke to reporter covering story

A few days later, the chief instructed police department employees in a memo not to talk to anyone about the case, except the city's attorneys. The chief was too late. Word about the use of excessive force and the lawsuit had already gotten out and become a matter of public concern, gaining coverage by the local newspaper. In fact, a reporter had already contacted the sergeant a few days before he got the memo. After the memo went out, the reporter contacted the sergeant again, but this time, he refused to comment. An article in the local newspaper reported that the sergeant was ordered not to discuss the case, jumped on the sergeant's silence, and alleged a cover-up.

Worried that the chief and the city wouldn't protect him and the other officers, the sergeant spoke to the reporter again. He told the reporter that he was asked to make two reports about the abuse incident, one that said the other officer used excessive force and one that said he didn't. The sergeant said he refused to write the two separate reports. He wanted to make sure people in town knew that he and the other officers did nothing wrong and that the officer who engaged in the abuse acted alone.

Sergeant's comments seen as assault on city

The chief considered the sergeant's remarks an act of insubordination because they violated his instructions in the earlier memo. The chief suspended the sergeant with pay for speaking to the reporter pending an investigation. The sergeant was ultimately demoted to patrol officer,

suspended without pay for five days, and put on probation for 90 days. As soon as the probation was over, the sergeant was fired for failing to issue traffic tickets. (Aha! We knew there was a quota!) Not surprisingly, he sued for retaliation under the First Amendment.

Public vs. private debate

The key to a retaliation claim under the First Amendment is that the statements at issue are a matter of public, not just private, concern. Under the First Amendment, the person who made the statement must also show that he suffered an adverse employment action (*e.g.*, a termination, demotion, or cut in pay) and that the statements he made were the cause of the adverse employment action. The trial court said that the sergeant didn't have a case because his interests in speaking to the reporter were to protect his own job and reputation (*i.e.*, purely private) and weren't an issue of public concern.

Appeals court comes to sergeant's aid

The sergeant appealed, and the appeals court disagreed. The sergeant's statements to the reporter were made to protect himself and his fellow officers but also to point out public corruption present in the police department, the court said. The First Amendment protects statements like those made by the sergeant about public corruption but not purely private statements about his own innocence and the innocence of other officers. Obviously, public corruption is a matter of public concern. The fact that the sergeant made comments about his own innocence as well meant that the speech was mixed — both public and private. That triggered the protections of the First Amendment, the court explained.

The form of the statements — in a local newspaper article — was also public. Had the sergeant spoken only to the police chief or someone else in the department, his statements wouldn't have been protected because they wouldn't have been public. The context of his statements was also public. The sergeant's statements came at a time when a suit had been filed against the city for alleged excessive force. The local newspaper had already run a story about it. Moreover, the sergeant didn't come forward with his statements; a reporter contacted him about the story. Based on all those factors, the only conclusion possible was that the sergeant was terminated in retaliation for statements made that were of public concern and thus protected by the First Amendment. *Markos v. City of Atlanta, Texas*, No. 03-40140 (5th Cir. April 8, 2004).

Remember the First Amendment, public employers

If you're a public employer and are considering firing or disciplining an employee for something he said or wrote, remember the First Amendment before doing so. If the person makes the statements in a public manner about a public concern, his speech (be it verbal or written) may be protected under the First Amendment. Keep that in mind the next time you want to discipline or terminate a public employee for saying or writing something you don't like, and when in doubt about your rights as opposed to his rights, get legal advice *before* you act. ❖

LABOR LAW

NLRB rescinds *Weingarten* rights in nonunion companies

Employees in nonunion companies are no longer entitled to have a co-worker present when they're being interviewed as part of a disciplinary investigation, according to a recent decision from the National Labor Relations Board (NLRB). The decision, in which the NLRB overturns its own decision to the contrary only four years ago, is the Board's latest flip-flop on the issue. Don't know what the fuss is all about? Then read on!

Some background

Under the National Labor Relations Act (NLRA), employees are legally entitled to engage in "concerted activities for the purpose of mutual aid or protection." That basically means they can join together to oppose injustices imposed on them by their employers. Some examples of concerted activities include discussing salary inequities and protesting unsafe working conditions.

If you're a nonunion employer that hasn't subscribed to this newsletter for very long, you may be wondering what the NLRA has to do with you. The short answer is that unless you're in the airline, railroad, or agriculture industry, some parts of the Act almost certainly apply to you — even if you're not unionized.

More specifically, the NLRA says that all employees, *even those in a nonunion setting,* are entitled to engage in concerted activities for the purpose of mutual aid or protection. The question addressed in the NLRB's new decision is whether a nonunion employee's request to have a co-worker present at an investigatory interview is concerted activity under the NLRA.

The last time this issue was big news was back in 2000, when the NLRB ruled in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), that even employers with nonunion workplaces had to allow workers to have a co-worker present during an interview that they reasonably believed could lead to discipline. That decision was based on a 1975 U.S. Supreme Court decision granting union employees the right to have a union representative present during investigatory interviews. Those rights are commonly referred to as "*Weingarten* rights" after the name of the case in which they were first established.

Facts

IBM, whose employees aren't represented by a union, denied three employees' requests to have a co-worker present during investigatory interviews about a former employee's allegations that they had engaged in harassment. An NLRB administrative law judge, relying on the Board's analysis in *Epilepsy Foundation,* found that IBM violated the NLRA by denying the employees' requests.

IBM appealed the administrative law judge's decision to the NLRB, which reversed *Epilepsy Foundation* and found that employers don't have to allow a co-worker to be present in investigatory interviews after all. *IBM Corp.*, 341 NLRB No. 148 (2004).

Words of warning

The NLRB's 2000 decision in *Epilepsy Foundation* was big news, primarily because the potential for unsuspecting employers to violate it was extremely high. The requirements of the NLRA aren't a standard topic of training for supervisors and managers in many nonunion workplaces, and many smaller companies still have no idea that the NLRA can apply to them. The *Epilepsy Foundation* decision was a good opportunity to educate nonunion employers not only about the new disciplinary interview requirement but also about other NLRA requirements that could apply to them.

Many smaller companies still have no idea that the NLRA can apply to them.

Now that the NLRB has overturned that decision, it would be easy to get complacent. That would be a bad idea. This is the *third* time the Board has changed its mind on whether *Weingarten* rights apply in a nonunion setting. NLRB members are appointed by the president, and the Board's position on *Weingarten* rights has changed depending on the political leanings of its members.

For example, in 1982, when the NLRB had several members who were appointed by President Jimmy Carter, it ruled that nonunion workers were covered by *Weingarten.* In 1985, when President Ronald Reagan was in office, the Board reversed that decision. Then in 2000, when President Bill Clinton was in office, it reversed itself again, ruling that *Weingarten* rights applied to nonunion employees. And now it has changed its collective mind again, roughly a year after several new members were appointed by President George W. Bush.

The point is that with the possibility of John Kerry as our next president, the NLRB could easily change its mind on this issue again in the next few years. One can hope that the U.S. Supreme Court will eventually tire of the Board's repeated flip-flops and resolve the issue once and for all. But until that happens, nonunion employers should keep a close eye out for further rulings on the subject. You may even want to consider allowing employees to bring a co-worker with them to investigatory interviews just to cover all your bases. ❖

HEALTH INSURANCE

DOL issues final COBRA notice regulations

The U.S. Department of Labor (DOL) has finalized regulations setting minimum standards for certain notices that most employers are required to provide employees under COBRA's group health plan provisions. Although the regulations are extremely (some would say painfully) detailed, they provide much-needed clarification regarding the content and timing of notices required when an employee becomes covered under a group health plan or faces loss of coverage under that plan.

An introduction

In general, COBRA requires most employers to give employees and their families the opportunity to continue their group health coverage for 18 or more months when it would otherwise be lost for reasons such as termination of employment, divorce, or death. Those are generally referred to as "qualifying events." When a qualifying event occurs, you must offer continued coverage to employees and their dependents who were also covered under the plan. Those individuals are generally referred to as "qualified beneficiaries."

To provide some context for the application of the new rules, let's take a look at a typical scenario in which the COBRA notice requirements are triggered. We will refer to this scenario throughout this article to illustrate how the new regulations may apply to your workplace.

Let's say Bob Jones and his wife Barbara are both covered by the group health plan offered by Bob's employer, Acme Architects. First of all, the Joneses should have received a *general notice* of their COBRA rights when they first became covered under the plan (that notice may be included in the summary plan description).

After laying Bob off, Acme generally has 30 days to notify its group health plan administrator that a qualifying event has occurred. The plan administrator then has 14 days to provide Bob and Barbara with a more detailed *election notice,* which must include such information as the length of time they have to elect coverage, the amount it will cost them, and the dates on which payments are due. Special timing rules are provided if the employer *is* the plan administrator.

General notices

The first type of notice discussed in the new regulations is the general notice of COBRA rights that you must

give employees (and their spouses, if covered under the plan) when their coverage commences under a group health plan. Generally, that notice must be furnished within 90 days after the employee or spouse first becomes covered under the plan. It may be included in the summary plan description or provided as a separate notice, or both. If a qualifying event occurs during the initial 90-day period, you can satisfy the general notice requirement by providing the more detailed election notice discussed below.

You can usually comply with the general notice requirement for both the employee and the employee's spouse by mailing the notice to their joint address. But if the general notice is hand-delivered to employees at work, it must also be mailed separately to covered spouses at their home address.

The regulations provide a model general notice for use by employers, which can be accessed online at www.dol.gov/ebsa/modelgeneralnotice.doc.

Qualified beneficiary notices

The new rules also discuss the type (and timing) of notices that employers may require qualified beneficiaries to provide when they experience a qualifying event. For example, in the above scenario, assume not that Bob is being laid off but that he and Barbara are getting divorced. Acme is entitled to notice of the divorce so that it can inform Barbara of her right to elect continuation coverage under its group health plan. Qualified beneficiaries must be given at least 60 days to provide notice of the qualifying event to the health plan (although the plan may give them longer). In general, that 60-day time frame begins to run on the date of the qualifying event or the date on which coverage would be lost, whichever is later.

It's Acme's responsibility to inform qualified beneficiaries how to go about providing notice of qualifying events. Specifically, its summary plan description must:

- provide instructions on who's designated to receive notices from qualified beneficiaries;
- specify a reasonable method of giving such notices; and
- specify the required content of such notices.

It's OK to require beneficiaries to provide specific information using a specific form.

Bob or Barbara may also be required to notify Acme if they become disabled or if a second qualifying event occurs while they're on COBRA coverage. (If that happens, they may be entitled to extend the duration of the COBRA coverage beyond the 18 months typically provided.) Acme must allow at least 60 days for that type of notice as well.

U.S. Supreme Court Summary

Employees can't sue HMOs under state law. The U.S. Supreme Court has struck down a Texas law that allowed employees to sue their employer-sponsored health maintenance organizations (HMOs) in state court. Under the federal Employee Retirement Income Security Act (ERISA), employees aren't allowed to sue for damages caused by an HMO's refusal to pay for medical treatment that's recommended by their doctors. For several years now, Congress has tried to change that by passing a federal "Patient's Bill of Rights" that would — among other things — allow employees to sue for large sums over adverse coverage decisions. But that law has repeatedly foundered, and some state legislators have taken the matter into their own hands by passing laws allowing employees to sue in state court. The Supreme Court's decision rules that those laws are "preempted" by ERISA.

The only recourse for employees who disagree with a coverage decision is to sue in federal court for the cost of the denied treatment. They *can't* sue for damages caused by the denial of treatment — such as if the employee's condition worsens because of the denial of coverage. The Court's decision is considered a victory for insurers, who argued that such lawsuits drive up already skyrocketing health care costs. It appears to also invalidate similar laws in Arizona, California, Georgia, Maine, New Jersey, North Carolina, Oklahoma, Washington, and West Virginia. *Aetna Health v. Davila,* No. 02-1845 (June 21, 2004).

Pension cuts for retirees limited. In a unanimous ruling, the Supreme Court held that ERISA plans can't reduce pension benefits for employees who retire and then reenter the workforce for another employer. The Court found that ERISA protects employees against cuts in benefits that take effect after a worker has retired. The case involved a former construction worker who retired with full pension benefits at the age of 39. After retiring, he took a job as a construction supervisor. He had received benefits for two years when the plan was revised to eliminate benefits to early retirees who continued to work in the construction industry — even those who had already retired. By applying the new rule to employees who had already retired, the plan violated ERISA's "anti-cutback" rule, which prohibits plans from reducing or eliminating benefits that have already accrued. *Central Laborers' Pension Fund v. Heinz,* No. 02-891 (June 7, 2004). ❖

Election notices

The regulations also give detailed instructions about the election notices that plan administrators are required to provide to employees and their spouses when a qualifying event occurs. Generally, the plan administrator must provide those notices within 14 days after receiving notice of a qualifying event. If you're your own plan administrator, you're allowed 44 days to provide such notice to qualified beneficiaries.

As for the content of election notices, you must provide detailed information and instructions about qualified beneficiaries' COBRA rights and what they must do to elect coverage. Here are some of the highlights of what such a notice must include:

- a description of the qualifying event, a list of qualified beneficiaries who are entitled to elect continuation coverage, and the date on which coverage will terminate if an election isn't made;
- an explanation of the procedures for electing continuation coverage, including the date by which the election must be made, the cost of coverage for each qualified beneficiary, the dates when payments will be due, and the date on which coverage will commence and terminate if an election is made;
- a description of the qualified beneficiaries' rights and obligations if a second qualifying event occurs while COBRA coverage is in effect; and
- an explanation of the consequences of failing to elect or waiving continuation coverage.

In short, the information that must be provided in an election notice is *extensive*. Fortunately, the DOL has provided a model election notice that can be used to comply with the new regulations. That notice can be accessed online at www.dol.gov/ebsa/modelelectionnotice.doc. 29 C.F.R. Part 2590.

Some final notes

The time frames that apply to the different notice requirements can get extremely confusing. The intricate details of how all these deadlines interact are simply too much to cover in this article, but suffice it to say that they can make your head spin. Nevertheless, the incredible detail provided by the regulations is actually a good thing for employers, who previously had to try to decipher and interpret the deadlines without adequate guidance from the DOL.

The final rules and model notices are available on the DOL's website at www.dol.gov/ebsa/. To give plans enough time to modify their notice procedures, the new rules don't take effect for most plans until 2005. Until then, plans may choose to comply either with the regulations that were proposed in May 2003 or with the final regulations.

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