

EMPLOYER PREVAILS IN COBRA SUBSIDY DISPUTE

By: *Patricia McGrath, Esq.*
Email: pmcgrath@devinemillimet.com
Phone: 603.695.8537

MAY 28, 2010

Employers are likely becoming comfortable with the COBRA subsidy provisions under American Recovery and Reinvestment Act, or "ARRA". A United States District Court case in the District of Columbia examined the provisions under ARRA regarding the appeal process after a denial of the subsidy to a terminated individual. In Dorsey v. Jacobson Holman, the District Court ruled that an individual cannot bypass the appeal provisions of ARRA before bringing a lawsuit against an employer to receive the subsidy.

In brief, ARRA provides certain workers who have been involuntarily terminated between February 17, 2009 and May 31, 2010 (known as "assistance eligible individuals"), with a 65% subsidy on their COBRA continuation health insurance premiums for up to 15 months. An "assistance eligible individual" (AEI) is generally someone who: (1) is eligible for continued health insurance coverage under COBRA at any time between September 1, 2008 and May 31, 2010; (2) elects to continue health insurance coverage and pay COBRA costs; and (3) is involuntarily terminated or had hours significantly reduced so as to deprive the employee of eligibility for health insurance during the relevant period. The provisions, applications and timeframes of ARRA have been discussed in a number of prior Email Alerts.

ARRA provides that individuals who are denied the subsidy by a plan, employer or insurer may appeal that decision by filing an "Application for Expedited Review of Denial of COBRA Premium Reduction" with the DOL. The DOL must issue a decision within 15 business days after receipt of the application.

In the Dorsey case, Debra Dorsey had been an employee of Jacobson Holman until September 16, 2007. Although the District Court ruling does not state all of the pertinent details, Ms. Dorsey was initially out of work under the Family Medical Leave Act ("FMLA"). On April 10, 2009, Ms. Dorsey asked Jacobson Holman to reduce her health insurance premium payments under COBRA to take into account the ARRA legislation.

In her request, Ms. Dorsey told Jacobson Holman in an email: "... I am eligible for a reduction in my COBRA benefits. ... I spoke with Mr. _____ at

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvabuskirk@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

the Department of Labor this morning, and he confirmed that I was eligible for COBRA benefits and asked that I contact you immediately to obtain the required information.” Jackson Holman disagreed with Ms. Dorsey and wrote back in an email that day, saying in part: “We respectfully disagree . . . In our view, you voluntarily resigned . . . You effectively abandoned your job by not returning to it at the expiration of the FMLA period.”

Ms. Dorsey then stated in her court filing that a DOL representative contacted Jacobson Holman on her behalf to advise the company that the DOL had determined that Dorsey was eligible for the COBRA subsidy. Jacobson Holman continued to deny the subsidy to Dorsey.

Ms. Dorsey next filed a lawsuit asserting that she met the requirements to receive the subsidy and that the DOL had already “determined” her eligibility for the subsidy. In response, Jackson Holman asserted that Dorsey was required to exhaust her administrative remedies - by filing an application with the DOL for expedited review of the subsidy denial - before pursuing her claim in court. Therefore, said the employer, the District Court suit should be dismissed.

The District Court agreed with Jacobson Holman. While ERISA does not specifically require the exhaustion of administrative remedies with respect to health plans, the District Court determined that the courts have uniformly applied this requirement as “a matter of judicial discretion”.

As a separate consideration, the court also discussed the section of ARRA that requires the DOL to decide any COBRA subsidy appeal within 15 business days of receipt of a completed DOL application, and the courts are directed to give deference to the DOL’s decision.

Here, the court ruled that Ms. Dorsey could not pursue her lawsuit because she had not filed an application with the DOL for expedited review of the subsidy denial. In issuing its ruling, the court wrote: “It is entirely consistent with the emergency nature of [ARRA] that Congress established a swift and sure administrative review process of any plan or employer or insurer’s denial of COBRA premium reduction. . . . Under this regime, individuals who are eligible for premium reductions can obtain that benefit almost immediately, which is in direct furtherance of the congressional purpose.” It makes no sense, then, to permit individuals to file suit for relief. In fact, the court pointed out, by pursuing this matter in court, Ms. Dorsey spent 10 months, from June 2009 to April, 2010, waiting to hear the court’s decision, and the decision did not even address whether she in fact was involuntarily terminated. The court finished by noting: “It would have been far more speedy to follow the congressional path.”

Granted, the District Court’s decision does not break new ground. Nonetheless, the decision gives guidance to employers on a couple of points. First, it is clear that the DOL, supported by the federal court, means what it says: terminated individuals must use the appeal process set out

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

in ARRA if they want to dispute an employer's subsidy denial. Second, this case offers a how-to lesson for employers who must respond to a similar situation: Jacobson Holman responded within a day to Ms. Dorsey's request; the response was in writing; the response was clear and to the point, stating the reason for the denial of the subsidy. Finally, the wording of Jacobson Holman's response was language that presented well in a public forum.

Unfortunately, even if it seems a foregone conclusion that an employee's suit against an employer will fail, such cases will still be filed. However, an employer that follows a consistent, routinized procedure to respond to claims regarding COBRA subsidy decisions will be better positioned to support its decision and prevail.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at employment@devinemillimet.com.

"This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Devine, Millimet & Branch, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that any reader should rely on it as such."