KOUMAS LAW GROUP

# Employment Law Update

*February 2010*

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## NEW COBRA NOTICES REQUIRED BY FEBRUARY 17, 2010

Our March 2009 legal update informed employers about the increased COBRA obligations created by the American Recovery and Reinvestment Act of 2009 ("ARRA" also known as "The Stimulus Package Act.) Eligible individuals pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider (employer) through a tax credit. Initially, to be eligible, the employee must have been subject to involuntary separation between September 1, 2008 and December 31, 2009.

As part of the Department of Defense Appropriations Act of 2010, the ARRA's COBRA subsidy program has been **extended** to cover employees laid off or terminated before February 28, 2010. This means that employees are now eligible for up to 15 months of COBRA premium assistance through the subsidy program. As a result of the extension of the subsidy, plan providers/employers are obligated to notify certain current and former participants and beneficiaries about the premium reduction extension.

Employees who separate from a company that has 20 or more employees at any time before February 28, 2010 should get the *General Notice*.

The *General Notice* should also be provided by **February 17, 2010** to any employee who has separated from employment since September 1, 2008 and who has not already been given COBRA notice and/or notice of the subsidy program.

Employees who are already enrolled in the ARRA COBRA subsidy program should receive the *Premium Assistance Extension Notice*, also by **February 17, 2010**.

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Employees of companies with between 2 and 19 employees that provide health coverage under Cal-COBRA should receive the *Alternative Notice* by the same deadline as the other notices.

Employees who separate from employment between February 17 and February 28, 2010 should receive the applicable notice upon termination, or as soon as possible thereafter.

Regardless of whether an employee was terminated, laid off, or resigned, if the employee receives employer-sponsored health benefits, and who has separated from employment, must receive a COBRA notice and notice of the subsidy program. Continuation coverage requirements vary among States and employers should modify the Department of Labor's model notices as necessary to conform to the California law.

**PRACTICE TIP:** Conduct an audit and determine which notices are needed for which employees, and send in a timely manner. To access the COBRA notices identified above, please visit the firm's website home page at www.koumaslaw.com

## BIG BROTHER IS WATCHING! EMPLOYERS SHOULD REVIEW EMPLOYEE-RELATED PLANS AND PRACTICES

The Internal Revenue Service has recently announced plans to conduct payroll tax audits of approximately 6,000 companies and increase its focus on compliance issues relating to section 409A of the Internal Revenue Code of 1986. Section 409A provides that all amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income, unless certain requirements are met.

If severance compensation (including restricted stock) qualifies as deferred compensation, and it does not comply with the 409A regulations, it could be subject to an additional 20% tax. On December 4, 2009, the IRS released a memorandum dated July 28, 2009, (from the Office of Chief Counsel) on when a company can take a deduction for contingent bonus compensation. Companies with contingent bonus arrangements should make sure they are taking deductions in the correct year.

Given the complex nature of the final regulations for Section 409A , and the potentially severe tax consequences, on January 5, 2010, the IRS issued Notice 2010- 6, which generally provides companies the ability to correct certain document failures under Section 409A. The document correction procedures will result in the reduction and, in many circumstances, the avoidance of the Section 409A tax penalties. If corrections for certain document failures are implemented by 2010 year-end, the Notice provides that the tax penalties will not be incurred in such instances.

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In addition to providing the document correction procedures, Notice 2010-6 provides insight to practitioners on how the IRS views certain provisions of Section 409A. For example, the Notice addresses the timing of severance payments that are conditioned upon an execution of a release by the recipient and requires that such severance be paid at the end of a specified period regardless of when within that period the release is executed.

> **TIP:** To be ready for such audits, employers should collaborate with their accountants or tax experts and review worker classifications, fringe benefit polices, executive compensation arrangements and Code-qualified employee benefit plans now.

## PREVAILING EMPLOYERS NOT AUTOMATICALLY ENTITLED TO RECOVER ATTORNEYS' FEES

Employers often ask during litigation, which is often viewed by them as frivolous, whether they are entitled to recover their attorneys' fees that have been incurred as a result of having to defend themselves against a former employee's lawsuit. The answer is *maybe*. The general rule for recovery of attorneys fees is as follows:

> Except as *otherwise expressly provided by statute*, a prevailing party is entitled as a matter of right to recover 'costs' in any action or proceeding." (Code Civ. Proc., § 1032 (b).) The type of costs that are permitted upon recovery by a prevailing party are governed by statute. (Code Civ. Proc. , § 1033.5.)

So what does that all mean? First, there needs to be an understanding of the distinction between *costs* and *fees*. "Costs" are those expenses incurred in litigation, such as court reporters, filing fees, witness fees, and those other items identified as recoverable in section 1033.5. As frustrating as it may be, not all costs incurred in litigation are allowable. On the other hand, "fees" are the sums incurred for counsel to render legal services in the litigation. A prevailing party is entitled to recover its *costs* so long as they are listed as allowable under the statute. *Fees* are another story.

Under the general rule, also known as the American Rule, "[e]xcept as attorney's fees are provided for by statute, the measure and mode of compensation of attorneys is left to the agreement of the parties…." Code Civ. Proc. § 1021; *Trope v Katz* 11 Cal.4th 274, 278 (1995). Which means, if there is no statute which allows the defending employer to recover fees, **or** the action is not a breach of [employment related] agreement which contains a clause allowing a prevailing defendant to recover fees, an employer cannot recover them. Likewise, unless a statute sued upon permits a prevailing plaintiff to recover attorneys fees or a contract proven to have been breached by an employer contains a

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prevailing party fee recovery clause, the plaintiff employee will not be entitled to recover his or her attorneys' fees.

However, in the employment law arena, many actions are filed asserting violations that arise from the California Fair Employment and Housing Act ("FEHA"), codified in Government Code § 12900 et seq. Government Code section 12965's subdivision (b) empowers the court, in its discretion, to award attorney fees to a *prevailing party*. The statute expressly provides:

> In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity. (Gov't Code § 12965(b).)

This statute has been interpreted to mean that in a FEHA action a trial court should ordinarily award attorney fees to a *prevailing* plaintiff unless special circumstances would render a fee award unjust. (*Young v. Exxon Mobil Corp*. 168 Cal.App.4th 1467, 1474 (2008); *Steele v. Jensen Instrument Co*. 59 Cal.App.4th 326, 331 (1997).) The same interpretation does not apply to a defending employer's right to recover fees.

In determining whether to award a defending employer fees under FEHA, a court will typically apply the rule set forth by the Supreme Court. See *Christiansburg Gament Co.v E.E.O.C.* 434 U.S. 412 (1978). The Supreme Court's standard holds that that a prevailing defendant employer should be granted attorney's fees *if* (*and only if)* the court finds that the plaintiff's claim was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," or that the plaintiff continued to litigate after it clearly became so. *Id.* 434 U.S. at 421-422.

Although this standard is more difficult to satisfy, all hope is not completely lost. Conducting written discovery and obtaining the employee's deposition shortly after the initiation of FEHA litigation can more often than not provide valuable information to determine fairly early in litigation whether FEHA claims have any factual merit (or are simply a product of plaintiff's personal beliefs unsupported by any evidence) or, alternatively, the employer may have a reasonable chance to recover fees incurred in defending the frivolous claims, which may provide leverage in settling a case sooner rather than later, before more unnecessary fees and costs are incurred.

Unfortunately, what is good for the goose is not necessarily good for the gander. If your company finds itself on the receiving end of a truly meritless FEHA claim, hopefully defense counsel will be able to obtain adequate factual support to persuade a court the claim was frivolous and that your company is entitled to recover some (or all) of its fees. Otherwise, the expense of attorney fees incurred to defend the employee's lawsuit has to be viewed as a cost, albeit high sometimes, of doing business.

# DO YOUR COMPANY PRACTICES COMPLY WITH STATE AND FEDERAL DISABILITY LAWS?

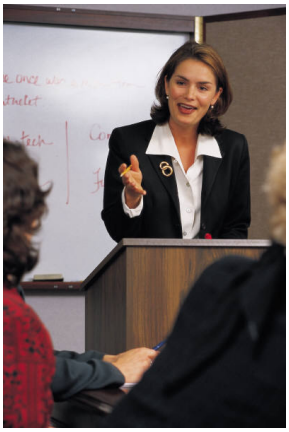
Do you know the correct answer to the following questions:

- Whether episodic conditions or those in remission constitute disabilities under the proposed EEOC regulations
- How to tell if an impairment will — almost always — meet the definition of disability
- How to determine if someone is substantially limited in the major life activity of working
- The types of impairments that generally won't be considered substantially limiting
- The mitigating measures that may eliminate an impairment altogether and the ones you can not consider when determining whether someone is disabled
- What it now means under the law to regard someone as being disabled

Last year, the amendments to the ADA became effective under the ADAAA. Recently, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations that, along with the ADAAA, represent the first major overhaul to the ADA. The proposed regulations contain a list of major life activities which may result in expanded coverage. The agency also gives specific examples of impairments that constitute disabilities in the proposed regs.

Stay tuned for an update on the status of the proposed regulations in a future legal update, as well as practical steps you should take to ensure that you are in compliance with the ADA and FEHA.

**PRACTICE TIP:** Regardless of whether the proposed regulations are finalized, employers are encouraged to train managers on ADA and FEHA compliance and to audit (and if necessary revise) their existing policies and procedures to ensure compliance. Ms. Koumas conducts training to employers that provides guidance for handling disability issues. That arise in conjunction with medical leaves of absence. For more information contact Ms. Koumas at ejk@koumaslaw.com or (619)398-8301.



►Several people were interested in attending this informative seminar, but due to the date and/or time, they were unable and missed it. As a result of additional interest shown in this seminar, it is being scheduled again. If you are one of the many who wanted to attend but have had calendar conflicts with the scheduled dates, please email Elizabeth Koumas at ejk@koumaslaw.com to express your interest, and include preferred day(s) and time of the week you could attend a follow up session.

# FUTURE SEMINARS

## ***Safe Recruiting Practices***

Many employers overlook the fact that liability can arise in the hiring process. We will discuss proper/improper use of applications and references, rights of disabled applicants, proper/improper interview questions, and the obligations of an employer with respect to Background Checks/ Credit Reporting.

**Date:** February 18, 2010 **Time:** 11:30am-1:00pm
**Location:** The Brigantine Restaurant, La Mesa **Sponsor:** East County Personnel
**Cost:** Members $30, Non-members $35

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## ***Surviving the Economic Times:***
## ***50 Tips For Avoiding Employment Lawsuits***

This in-house luncheon seminar will provide a 50-point self-audit checklist of important areas that should be reviewed at least annually by small and large employers. Periodic compliance of procedures is an essential preventative tool, especially in the current economic climate where many companies face daily challenges to remain in business. One lawsuit could decide that fate and close the doors. We will discuss practice tips for before, during and after employment, as well as 10 tips if you are sued.

**Date**: March 18 **Time**: 11:30-1:00 **Cost**: $35pp (includes meal)
**Location**: The Chamber Building, 110 West C Street, 7th Floor Conference Room A, San Diego, CA 92102

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American Payroll Association, North San Diego Chapter

**Date:** April 15 or 22, 2010 **Time:** 6:30pm-7:30pm
**Location:** Invitrogen, Carlsbad **Topic:** *TBD*
**Cost:** $30 (annual membership fee)

## ***SUBSCRIBE NOW!***

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