



BUSINESS AND EMPLOYMENT NEWSLETTER

FIRST QUARTER, 2009

WHAT EMPLOYERS NEED TO KNOW ABOUT THE FEDERAL COBRA SUBSIDY

By Amy Robinson

By now most of you have heard about the COBRA premium subsidies made available as part of the stimulus package signed into law by President Obama in February, formally known as the American Recovery and Reinvestment Act of 2009 (the "ARRA"). Specifically, ARRA created a federal subsidy to be used for the payment of premiums for continuing health care for certain laid-off/involuntarily terminated workers under the Consolidated Omnibus Budget Reconciliation Act of 1985 (known as "COBRA").

COBRA, as you also likely

know, requires employers with 20 or more employees to offer employees and their families the opportunity to extend health coverage under a group health plan if it would otherwise terminate as a result of a qualifying termination event (i.e. death, disability, or termination of the employee's employment).

The new federal subsidy is available to cover 65% of the cost of the COBRA premiums that would otherwise be paid by eligible individuals¹, and extends the continuation coverage for an additional period of nine (9) months. It is available only to employees who were laid-off or involuntarily terminated between

September 1, 2008 and January 1, 2010.

How does the subsidy work?

Eligible individuals (the terminated employee, spouse or dependant) can now elect COBRA continuation for a reduced contribution amount (35% of the individual's portion) with the government picking up the tab for the other 65% for a period of up to nine (9) months. The employer "fronts" the expense by paying the 65% portion, and receives a credit against its payroll taxes to offset the expense. If this amount exceeds payroll taxes, the employer can apply for reim-

Continued on Page 4

IN THIS ISSUE

LIABILITY FOR UNPAID WITHHOLDING TAXES	2
TRIPLE NET: WHAT DOES IT MEAN?	3
LEDBETTER FAIR PAY ACT OF 2009	5
CORPORATE OFFICERS AND UNEMPLOYMENT	6
FEDERAL CONTRACTORS E-VERIFY RULE POSTPONED	7
PERSONAL NOTE FROM THE DEPARTMENT	9
CONTRIBUTORS AND EDITORS	9



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PERSONAL LIABILITY FOR UNPAID WITHHOLDING TAXES

By Dennis Williams

In the current economic climate, business owners may be tempted to divert taxes withheld from their employees' wages to pay other creditors. This is an extremely risky strategy and could result in the IRS collecting the unpaid amounts, plus penalties and interest, personally from the business owners or other responsible parties, including officers, shareholders, directors, managers and bookkeepers.

As an owner or officer of a business, you are the first person the IRS will look to for collection of unpaid withheld taxes. If you are found to be the person responsible for withholding, collecting and paying the taxes withheld from your employees' wages, you will be personally liable for any nonpayment that is considered to be willful. This means you will have to pay these amounts out of your own pocket.

Under the system established for withholding taxes, your employees are credited for any income taxes, Social Security taxes and Medicare taxes withheld from their wages. The employer is deemed to hold the withheld taxes "in trust" for the federal government. The withheld taxes are often referred to as "trust fund taxes." Employers who are experiencing financial difficulties may use trust fund taxes to pay

creditors and suppliers in order to keep the business operating. However, if the business eventually fails, the employees are not liable for the unpaid taxes, and the business is unlikely to have sufficient funds to satisfy the trust fund tax liability.

By enacting Section 6672 of the Internal Revenue Code, Congress made sure that the IRS would have the means to recover trust fund taxes if, for any reason, they are not paid. Section 6672 imposes personal liability on any person who is required to collect, account for and pay over trust fund taxes, but who willfully fails to do so. This is often referred to as the "100% Penalty" because the amount of the liability is equal to 100% of the trust fund taxes.

There are two factors that must be considered for liability under Section 6672: *responsible person*; and *willfulness*.

A responsible person is one who has the power and authority to control the decision-making processes of the business regarding the payment of creditors. In most cases, the IRS looks to officers and owners of a business as responsible persons since they make the decisions concerning which creditors to pay and which ones not to pay. Courts have found shareholders, directors, managers and bookkeepers to be responsible persons because they

had the ultimate authority over the disbursements of the funds of the business. The 100% Penalty may be applied to more than one responsible person in a business.

The concept of willfulness does not require a bad motive or intent. Rather, willfulness can be established if there is evidence that the responsible person(s) knew that payments were being made to other creditors or suppliers at a time when trust fund taxes were not being paid to the IRS. Courts have held that the responsible person does not actually have to be aware that trust fund taxes are not being paid if there is a history of nonpayment of trust fund taxes in times of financial crisis.

As you can see, it is not difficult for the IRS to impose personal liability for unpaid trust fund taxes on the person(s) responsible for making financial decisions in a business. Moreover, this personal liability cannot be discharged in personal bankruptcy.

The 100% Penalty is a serious disincentive for any business owner to utilize trust fund taxes for payment of other creditors. In order to avoid personal liability, you should provide that the payment of trust fund taxes to the IRS is the first financial priority of your business.

To read past issues of our Newsletter—visit our website at:
www.barronsmithlaw.com and click on "Links and Resources."

TRIPLE NET: WHAT DOES IT MEAN?

PART 4 OF 5 IN THE ONGOING SERIES "COMMON LEASE TERMS"

By Sallye Quinn

One of the most common phrases bandied about in the commercial leasing world is "triple net" (sometimes designated by the acronym "NNN"). However, not everyone knows what triple net means and the variations it can take. Triple net generally means that the tenant is responsible for paying the property taxes, insurance and maintenance costs associated with the premises. These costs are "net" to the landlord, as opposed to a "gross" lease where the landlord pays those costs out of the rent paid by the tenant.

Leases can be single net (only property taxes are paid by the tenant), double net (property taxes and insurance are paid by the tenant), triple net (referenced above), and some leases are "absolute" net (sometimes called "hell or high water leases"), wherein the tenant pays for everything associated with the premises, including replacement costs for expensive structural or mechanical items, such as a roof or the heating, ventilating and air-conditioning system. We note that "net" lease expenses may be paid by the tenant directly, or may be paid to the landlord, and the landlord then pays the expenses.

In deciding whether a net lease or a gross lease makes sense in a given context, both parties need to consider whether they are willing to give the other party a certain level of control, and how risk is to be allocated.

In a triple net lease of a single tenant property, the landlord generally has the tenant obtain insurance and pay the premium directly, pay the tax bill directly and arrange for and pay for its maintenance issues directly. In that case, the landlord must trust the tenant to timely pay for insurance and taxes, keep up with the necessary repairs and pay all labor and materials providers so as to avoid the possibility of a mechanic's lien. If the landlord does not trust the tenant, then the landlord has the option of a triple net lease where the expenses are paid to the landlord or a gross lease where the landlord can build in the cost of the taxes, insurance and maintenance into the rent. A gross lease, however, does not account for unexpected expenses and the landlord bears the risk of those expenses under this arrangement. The tenant has the same considerations - will the landlord use its rent payment to pay for taxes, insurance and maintenance, or does it make more sense for the tenant to have control of those matters? How is the allocation of risk of unexpected expenses made?

In a multi-tenant leasing situation, the issue of control does not play as large of a role. This makes sense because a landlord does not want her tenants collecting money from each other to pay insurance or make repairs - it would be a logistical nightmare. Instead, control lies with the landlord. Multi-tenant leases are usually a type of "net" lease

where the tenant is billed for his pro rata share of the expenses of the property. The landlord typically pays for all costs related to the building, and then passes those costs along to the tenant based on the tenant's share of the entire premises. The landlord estimates what the tenant's share will be and requires monthly payments towards that amount with a true up completed within a few months of the end of the landlord's fiscal year to determine whether the tenant has made an overpayment or an underpayment of expenses.

There are leases of multi-tenant premises that are gross leases - again, meaning that all of the costs are included in the rent and paid by the landlord - but such a lease is fairly unusual.

Continued on Page 8

Commercial leases
can be:

Gross

Single Net

Triple Net

Absolute Net



FEDERAL COBRA SUBSIDY—CONTINUED

bursement through the IRS.

Notably, the subsidy is not available to employees who have voluntarily terminated² or to highly compensated employees, i.e. in this instance, individuals whose adjusted gross income exceeds \$125,000 or \$250,000 for joint filers).

The subsidy is also not available or ends if the individual is or becomes eligible for group health coverage, such as may be available from a new employer or a spouse's employer, or Medicare.



What do employers need to do now?

If you are an employer who had 20 or more employees in 2008, you are required to provide special notice to any eligible individual who:

1. Was involuntarily terminated¹ (or is the family member of an employee who was involuntarily terminated and who was eligible for benefits) anytime between September 1, 2008 and February 16, 2009; and
2. The individual either did not elect COBRA coverage at the time of the qualifying event (i.e. involuntary termination), or who elected coverage but coverage has since ended.

PLEASE NOTE: Notices must be provided by April 18, 2009!!!

Employees terminated on or after February 17, 2009 and before December 31, 2009 should also receive a COBRA continuation notice that includes subsidy-specific information.

The notice must include the required information about the COBRA enrollment extension and federal subsidy availability. We advise that you use the model notice published by the Department of Labor, to avoid any inadvertent errors or omis-

ACTION ITEM

Provide the required COBRA notices to employees terminated between September 1, 2008 and February 16, 2009 no later than April 18th.

sions. See <http://www.dol.gov/ebsa/COBRAModelNotice.html>.

Employers are permitted under the new law to offer different health care coverage than existed at the time of the termination, but you are not required to do so. In general, the alternate coverage option(s) should be equally available to active employees and not more expensive than the original option. Of course, the decision to offer alternate coverage should be made with extreme caution, and we recommend that it be done only in consultation with counsel.

In addition to complying with the notice and enrollment requirements, in order to receive the tax credit for the premium portion paid, the IRS has recommended that employers maintain the following supporting documentation:

- Documentation of receipt of the employee's 35% share of the premium.
- In the case of insured plans, a copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier.
- Declaration of the former employee's involuntary termination.³

Helpful Links and Resources

If you would like more information about the COBRA premium subsidy or need additional guidance, here are some helpful resources we recommend:

The DOL's dedicated COBRA website at www.dol.gov/COBRA

For specific questions, consider calling 1.866.444.3272 and speaking with an Employee Benefits Security Administration Benefits Advisor at the Department of Labor.

For information about the tax credit, compliance-related issues, or filing your quarterly Federal Tax Return Form 941 (<http://www.irs.gov/pub/irs-pdf/f941.pdf>), visit the IRS website at <http://www.irs.gov/newsroom/article/0,,id=204505,00.html>

Employees should likewise be informed about their rights and responsibilities under COBRA (see FAQ for Employees at http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html) as well as the potential tax

Continued on Page 8

LEDBETTER FAIR PAY ACT OF 2009

By Amy Robinson

The Lilly Ledbetter Fair Pay Act of 2009 was the first bill signed into law by President Barack Obama on January 29, 2009. The bill amends the Civil Rights Act of 1964, and serves to overturn the 2007 Supreme Court Case of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2009), which held that the statute of limitations period for an Equal Pay Act case begins to run at the date the initial pay discrepancy occurred, not at the date of a most recent paycheck, and the action must be filed within a short 180 day window thereafter.¹ While that may sound reasonable, the effect of that case was to effectively preclude any cases (and in fact the most common scenario for a

pay discrimination case) where the pay disparity was not discovered until some time after initial employment, once a clear disparity and pattern were discoverable.



The new law provides that the 180-day statute of limitations period for equal pay cases resets with each new discriminatory paycheck. Notably, a previous version failed in the 110th Congress, but was supported by every Democratic Senator and all four Republican female senators, as well as Arlen Specter, the lone Republican male senator in support.² It is a result that President Obama was particularly vested in seeing come to fruition

during his presidency. As the official White House blog said:

*President Obama has long championed this bill and Lilly Ledbetter's cause, and by signing it into law, he will ensure that women like Ms. Ledbetter and other victims of pay discrimination can effectively challenge unequal pay.*³

It's perhaps not surprising that President Obama had a unique and personal perspective on the first bill he was to sign as President, but it may surprise you to learn that one of Barron Smith Daugert's own also has a unique and entertaining window into this bill and its history, and we thought we'd get him to share it. Take it from here Larry.....

Footnotes on Page 7

A DIFFERENT PERSPECTIVE ON THE LILLY LEDBETTER BILL

By Larry Daugert

Since our daughter moved to Washington DC my wife Barbara and I travel there on a regular basis. Some time ago, I argued a matter before the Supreme Court (photograph attached: I lost) [For bonus points, what other Whatcom County lawyers have argued a case before the Supreme Court? Answer next month]. Then we actually went inside the building, sat down in the huge Courtroom, and were privileged to listen to petitions seeking admittance to the Bar of the Court by "fine upstanding young lawyers in fine upstanding DC firms" etc. etc. *ad*

nauseum. It got better only when all of the Justices sat down and orally delivered their opinions in the Ledbetter case.

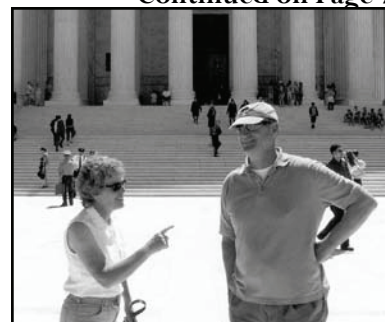
What struck both of us was that as Justice Ginsberg delivered her dissent several of the majority turned away from her, folded their arms, appeared to take a nap, and acted almost as though they were embarrassed to have her in their company. Not to say her own tone was necessarily polite and respectful (e.g. 'you guys should consider growing up and living in the real world'). The words "bitterness" or "incivility" came to mind.

Fast forward to January 20th this

year when we made another trip so I could take the oath of office on the capital steps as the newly elected President of the Elder Road Water Association.

As it happened my plans were

Continued on Page 7



Larry Daugert argues before the Supreme Court with his wife Barbara.

EXEMPTING CORPORATE OFFICERS FROM UNEMPLOYMENT INSURANCE

By Debbie Nelson

Until recently, when a for-profit corporation opened an account with the Employment Security Department ("ESD") corporate officers were **automatically exempt** from unemployment insurance coverage unless the corporation elected coverage.

Beginning January 1, 2009, officers of for-profit corporations who provide services in Washington are **automatically covered** by unemployment insurance unless the corporation specifically exempts them. RCW 50.04.165.

Corporations previously registered with ESD were notified of this new law prior to January 1, 2009, and were instructed to complete a registration form exempting corporate officers at that time if they elected to do so. The form must have been received by ESD no later than January 15th for the exemption to be effective January 1, 2009. Exemption requests received after January 15th will not take effect until January 1, 2010. Exemption requests made when the corporation first registers with ESD, i.e. at incorporation or hiring of the first employee, are effective at the time of regis-

tration.

If your corporation did not receive notification and you wish to have the corporate officers exempted, you must notify ESD using the approved form. The form must be signed by each exempted officer. WAC 192-310-160.

Corporations with uncompensated officers or no employees are treated differently - they do not qualify for coverage at all.

So does this apply to Foreign Corporations? Yes. The law applies to all corporations that have employees in Washington, even if the corporation is based in another state or country or if it is organized as a domestic or foreign corporation. The law applies generally to corporate officers, regardless of where they reside.

How about Nonprofits? Probably not. If a nonprofit corporation does not pay its officers, it does not need to register those officers. If its officers are not volunteers and are paid, the corporation must register them.

Who is Not Eligible? According to the new law, corporate officers are no longer eligible for unemployment benefits if they

or their corporate officer family members are shareholders in the corporation and that corporation is still in business.¹ This includes corporations that have elected unemployment coverage.

Resources

Following are some important links to resources surrounding this topic:

Process and forms for *exempting corporate officers*:

<http://www.esd.wa.gov/uitax/corporateofficers/exempt-officers-defined.php>

Cover letter about exempting corporate officers:

<http://www.esd.wa.gov/uitax/corporateofficers/letter.php>

Question and answers about exempting corporate officers and registration requirements:

<http://www.esd.wa.gov/uitax/corporateofficers/faq10-07.php>

Master Business Application:

<http://www.dol.wa.gov/forms/700028.html>

¹Corporate officers are not eligible for benefits if they 1) own at least 10 percent of stock in the corporation; 2) are related to another officer who owns at least 10 percent of stock in the corporation, even if the unemployed officer is otherwise eligible; and 3) remain officers, even if no wages are being paid. <http://www.esd.wa.gov/uibenefits/apply/eligibility/corporate-officers.php>

LEDBETTER ACT—CONTINUED

frustrated by another event scheduled for that very day and place, so we made do with a square foot or so on the Mall with several other souls, all of whom were very joyous and very rude: every time an image of a Bush or a Cheney appeared on a nearby Jumbo-Tron they immediately chanted “na-na-na-na, hey-hey, good-by”. It was an experience we’ll never forget.

During the next few days we

indulged in our favorite DC activity: sitting in the Senate gallery. There is no time limit for visitors, and it is fascinating to watch the dynamics between Senators on the floor. Even without being able to hear what they say to one another we quickly learned who are the real players, and who are excess baggage.

We sat through the Clinton confirmation vote, and stayed for

consideration of the Lilly Ledbetter bill [she too was in DC for the other event]. Someone had taken Ginsberg’s advice and attempted to change the language of the statute at issue. That effort had initially failed, but someone had asked for a recount after the 20th. We were deeply impressed with and moved by the eloquence and depth of the Senatorial debate. And the civility: not like those Supreme Court Justices.

¹An Equal Pay Act case arises when a female employee is paid less than her equally situated male counterpart(s). In the case of Lilly Ledbetter, she alleged that she had been receiving a disproportionately lower salary than other male production supervisors during her 20 year history with Goodyear. In her case, the pay discrepancy began early on in her career, but she did not file her case until 6 months before her early retirement in 1998 when she learned how much her male counterparts had been paid throughout the same period of time.

²Edward Kennedy was the only Democratic Senator not in attendance for the vote, due to health issues. U.S. Senate Roll Call Votes 111th Congress – 1st Session.

³“Now Comes Lilly Ledbetter” Whitehouse.gov blog, January 25, 2009, <http://www.whitehouse.gov/now-comes-lilly-ledbetter/>.

ATTENTION: FEDERAL CONTRACTORS

E-VERIFY RULE POSTPONED UNTIL MAY 21, 2009

By Debbie Nelson

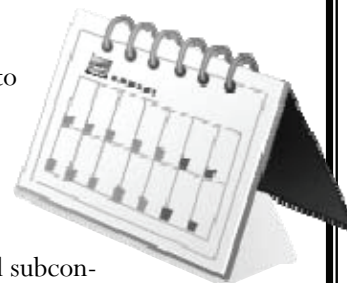
A new federal procurement rule requires federal government contractors to use E-Verify – an online system operated by the Department of Homeland Security, U.S. Citizenship and Immigration Services, and the Social Security Administration – to verify that new hires and certain current employees are legal residents in the United States.

The effective date of the final rule requiring certain federal contractors and subcontractors to use E-Verify has been delayed from January 1, 2009 to May 21, 2009. We understand that the new administration is reconsidering the rule.

Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security website: <http://www.dhs.gov/E-Verify>.

In addition, you can find answers to FAQ’s on this rule at: http://www.uscis.gov/files/article/FAR_FAQ_13nov08.pdf.

As always, we will keep you posted on any changes to the effective date.



TRIPLE NET—CONTINUED

There are a couple of key points of negotiation in any type of net lease. First, a savvy tenant will insist on audit rights for the expenses and require the landlord to pay for the cost of the audit in the event that the tenant discovers that it has overpaid by more than 3% to 5%. A tenant should also look carefully at the common area maintenance or operating expenses. For example, a tenant should be sure that damage cause by another tenant is paid by that tenant and that any damage reimbursed by insurance proceeds is excluded from the net costs. We also suggest that a tenant limit its exposure for

the cost of capital improvements made by the landlord that have a useful life greater than the tenant's term. Tenants can do this by simply paying a portion of the capital expense based on a ratio comparing the useful life of the capital improvement and the lease term.

Also, in any net lease, the landlord must always be sure to categorize any payment of common area maintenance or operating expenses as additional rent. That way, if the tenant fails to timely pay for its share of common area maintenance or operating expenses, the land-

lord gets the benefit of the shorter cure period generally used for rent, i.e. 3 days, rather than the longer cure period typically given for other defaults, i.e. 15 to 30 days.

If you have any questions regarding this article, please feel free to contact me. Remember to look for our final installment in this series in next quarter's newsletter: "Things Change: Is Assigning or Subletting an Option?"

FEDERAL COBRA SUBSIDY—CONTINUED

consequences this benefit will have, by consulting with their personal tax professional and/or visiting the IRS website (www.irs.gov) on the ARRA (see <http://www.irs.gov/newsroom/article/0,,id=205370,00.html>).

Admittedly, this law is evolving rapidly as the administrative and compliance issues are being identified and resolved. We will of

course keep you posted with new information and guidance as it becomes available. In the meantime, we hope you find this brief summary of the new law helpful.

As always, for specific questions or additional guidance about COBRA compliance, including issues related to ARRA and the federal subsidy and what happens when the individual elects

coverage, we recommend you consult your employment counsel.



¹The subsidy is available only to fund the qualified individual's portion of continuation coverage. That means that if the employee is required to pay the full 100% (or more) of the premium, then only 35% of that amount must now be paid by the employee and the remaining 65% subsidized with federal money. If, however, the employer shares a portion of the costs of coverage, then the subsidy would apply to cover only 65% of the amount otherwise contributed by the employee.

²A resignation or termination for gross misconduct is not considered to be an "involuntary" termination under this statute. There is, however, some ambiguity about whether individuals who accepted a voluntary separation package or early retirement would be entitled to benefits. The IRS says they are (see AE-19 at <http://www.irs.gov/newsroom/article/0,,id=205364,00.html>) but the Department of Labor has not yet given any guidance on this issue, but we expect that they will issue a ruling or other guidance on that issue very soon. When they do, we'll be sure to alert you.

³See <http://www.irs.gov/newsroom/article/0,,id=204709,00.html>

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

Hello All,

This is one of my most favorite issues of our newsletter. It has a number of practical articles, updates on recent developments, some deadlines you should be aware of and a very funny article by Larry Daugert, who writes about his experience watching the US Supreme Court deliver its opinion in the Ledbetter case, and later returning to DC to watch the Senate “overrule” the US Supreme Court’s decision – our system hard at work. While the Ledbetter case is really about how long people have to sue for violations of the Fair Pay Act, it is an interesting example of the interaction and balance of power between the branches of government.

It has been a particularly cold and rainy season, and with the April 15th tax deadline rapidly approaching, CPAs are working non-stop, while the rest of us hold our breath awaiting the results of their work - we do not have clear information that there is a light at the end of this economic tunnel, but, I will tell you that we are hearty folk in the Northwest and Spring really will come!! Our clients and colleagues are resourceful, creative, hard-working people – so let’s look for good news from the CPAs, an early Spring and good economic news.



Kirsten Barron

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