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Business Report

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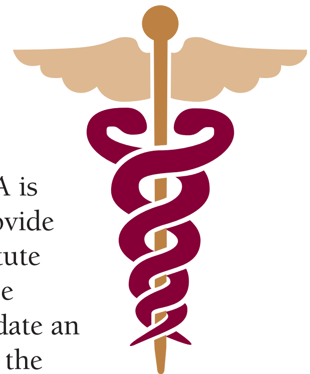
COBRA NOTICE MUST HAVE DROP DEAD DATE

Employers providing medical insurance to their employees have a legal obligation to offer unpaid continuing medical coverage ("COBRA") to both departing employees and their dependants.

> A description of the right to continuing coverage and how to elect it must be given when the employee first becomes covered by the medical plan.

In addition, a COBRA Notice detailing the same procedure must be given when the employee quits or is terminated. This Notice must specify that the people leaving have the right to continue the existing medical coverage by paying a premium directly to the employer or plan. This continuation coverage generally will last up to 18 months.

The continuation coverage will be terminated if the departed employee or dependent becomes covered by another group health plan which does not exclude preexisting conditions or the employee fails to pay the premium. In addition, the duration of the COBRA coverage is increased to 29 months if the employee or the dependent was disabled under Medicare at the time the election was made. It is increased to 36 months if the COBRA coverage is being offered due to a dependent reaching the maximum age under the medical plan or to a former spouse who was dropped by the plan after a divorce occurs.



The time specified in COBRA is when the employer must provide the COBRA Notice. The statute states that the Notice must be provided at the latter of the date an event occurs which qualifies the employee for COBRA, or the date the employee loses coverage under the Plan. For example, if the employee terminates on December 15th and the coverage does not terminate until December 31st, the employer must provide the COBRA Notice to the Plan on or before 30 days after December 31st. The Plan then must provide the COBRA Notice to the employee within 14 days after it learns of the COBRA event.

The issue of when the employer and Plan must provide notice is covered in the statute and regulations. What is not covered is when the employee must respond or lose the right to continue coverage. COBRA does specify that the employer must give the terminated employer or dependent at least 60 days to make up their mind after the notice is sent as to whether they want to continue coverage. If they elect coverage, they then get an additional 45 days to make the first premium payment.

However, in the case of *Life Care Hospitals, Inc. v. Health Plus of Louisiana, Inc.* an employer provided an oral and written COBRA notice to the spouse of an employee who was disabled with a neurological disease. Neither this notice nor the medical plan specified when the terminated employee must respond or lose coverage.

The employee stopped working on July 16th and was terminated from employment on August 13th. On July 24th, the employee's spouse met with the employer's supervisors and talked to them about her husband's medical insurance benefits. Although the representative

COBRA NOTICE MUST HAVE DROP DEAD DATE
article continued on page 2

WHAT'S INSIDE

	page
Non-Competes for Terminated Employees	3
Ed Bohrer Retires	4
Business Section Overview	4
401K vs SEP - Which Plan is Better?	5
Brad Hendrikson Joins the Firm	6

of the employer informed the employee's spouse of his need to elect continuation under COBRA and mailed the employee a written COBRA Notice on the termination of his coverage on August 31st, the COBRA Notice that was provided did not state that a written election had to be returned to the Plan by any particular date. (This is contrary to most COBRA notices which specifically state that the signed election to continue coverage must be returned within a 60 day period or COBRA coverage will be lost).

The terminated employee accrued substantial medical claims but did not elect COBRA. As a result, the hospital which treated the terminated employee inquired as to whether he had elected the COBRA coverage. When the hospital was informed that the former employee had not elected COBRA, the terminated employee and the hospital sent a bill in a completed COBRA election and 4 months worth of premiums on December 17th. The hospital also sent for the medical expenses that were incurred after the employee was terminated from the medical plan.

As the employer and the insurance company tried to figure out what happened and who was responsible for this situation, litigation was started in Federal District Court. After reviewing the fact situation involved here, the District Court held that the employer had not provided an adequate COBRA Notice to the terminated employee and ordered the employer to pay the $252,000 in medical expenses that had been rendered by the hospital to the former employee. The employer appealed.

The Fifth Circuit Court of Appeals held that the District Court was wrong. The Court held that an adequate COBRA Notice was provided to the former employee, but that this Notice did not specify a date by which it had to be returned or coverage would be lost.

As a result, the Fifth Circuit Court of Appeals held that the former employee had the right to make the election more than 60 days after the COBRA Notice was given because neither the COBRA Notice nor the Plan specified that it had to be returned within any specific period of time. Since the Plan didn't have a deadline on electing COBRA, the 5th Circuit held that the only applicable deadline was the 18 month maximum for COBRA coverage. Because the former employee gave notice of his election within 18 months, the employer and employee won and the COBRA insurer had to pay the bills.

Litigation is the wrong way to resolve issues on whether a proper COBRA notice was given. Check the COBRA language in your plan documents and Notices to make sure that they are not subject to the same problems.

If you have any questions, please contact Terry Cullen of our Minneapolis Office.

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NON-COMPETES FOR TERMINATED EMPLOYEES

Non-competition agreements are the cell phones of employment contracts. They are easy to produce and explain; almost every company has a blank non-competition form sitting in a desk drawer to be handed out to a new employee.

They also are easy to forget and to lose. Our office frequently is asked by businesses we represent to prepare non-competition agreements and advise them on the procedures that need to be followed for the non-competition agreement to be enforceable. Those rules are fairly simple to state, but frequently are difficult to follow.

Non-competition agreements are enforceable under Minnesota law and the laws of many states. For a non-competition agreement to be enforceable under the laws of the State of Minnesota, the employer must advise a prospective employee that a non-competition agreement will be required for the employee to commence work.

The prospective employee must be told of the non-compete requirement simultaneous with or prior to the employer making an offer of the employment that will be subject to the non-compete. The non-compete itself then must be signed by the starting employee on or before the employment commences.

If the company intends to provide consideration other than a new job to the employee for signing the non-compete, (for instance, a cash signing bonus or other related benefits) the employer does not need to be as meticulous in advising the prospective employee of the non-compete before the offer is made.

Assuming the non-compete is signed, a Minnesota court will enforce the non-compete only if it is reasonable in duration (normally a year or less) and geographic area (normally the area that the new employee will be servicing).

Employment contracts don't always work out. It is a fairly common occurrence for an employee who has signed a non-compete to leave a company intending to utilize the job skills and contacts that they acquired while subject to the non-compete. This has resulted in numerous trips to the judicial system by the companies which required the non-compete to protect its interest.

One nagging question which arises periodically regarding non-competes is whether an employer can enforce it against a terminated employee.

Not surprisingly, there is no simple answer to that question. A company which seeks to enforce a non-competition agreement in a Minnesota court is asking the court to do justice with an equitable remedy. There are numerous cases in Minnesota which say that non-competition agreements are enforceable, but disfavored under Minnesota law because they prevent an individual from working and earning a living.

When an employer fires someone who signed a non-compete, courts are reluctant to enforce the non-compete agreement against an ex-employee who is now looking for work because the employer decided it did not need him/her anymore. As the Minnesota Supreme Court said 50 years ago, courts are reluctant to enforce a non-competition contract against an employee who was fired because the employer determined the employee no longer provided a competitive value to that company. As the court stated, if the employer which obtained the non-competition agreement has already concluded that the employee is providing it with no competitive value, the court should be reluctant to assume that an individual who was not able to provide benefits can do damage.

There always are situations where non-competition agreements have been enforced when an employee is fired. If the employee who is fired is still being paid a salary, because the employee stole from the company or is giving away company assets (like customers or trade secrets), Minnesota courts are willing to consider enforcing a non-compete. However, Minnesota courts generally are reluctant to say that an employer had the right to throw an

employee away and still prevent the employee from working for himself or someone else.

If you have any questions, please contact Bob Bach or Terry Cullen at our Minneapolis Office.

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ED BOHRER RETIRES

Our long-time partner and friend Ed Bohrer is retiring from private practice. Ed has practiced management labor law for 45 years, and has been recognized as one of the premier labor contract negotiators in the upper Midwest. Ed has been a terrific teacher, mentor and friend to the firm's lawyers.

Ed may be leaving law practice, but he will be anything but retired. He already has embarked upon his new career as an Interim Parish Life Administrator for the Catholic Archdiocese of St. Paul and Minneapolis. We wish Ed the very best in this new direction.

BUSINESS SECTION OVERVIEW

Taking Care of Business – A Collaborative Approach

The attorneys engaged in Felhaber, Larson, Fenlon & Vogt's business law and corporate group work with a broad range of clients, from small, emerging businesses to well-established entities to major corporations. Our attorneys will become acquainted with your business and understand your objectives. Regardless of the size of the business or the sophistication of the client, we examine each situation objectively and strive to present each client with viable options.

Attorneys in this group take an interdisciplinary approach to client service, drawing on legal expertise from all firm practice areas as needed. Each client can expect a personal, one-on-one relationship with an attorney in this group, backed by the experience and expertise of a full-service firm.

Our business law attorneys advise boards of directors and management of companies on virtually every aspect of business law, both as general counsel and on an individual transaction basis. Whether we are asked to serve as general corporate counsel, to supplement in-house counsel or to advise on a particular transaction, we endeavor to assist our clients succeed in the complex, volatile and demanding world of modern business.

Our experience and expertise include:

- Banking
- Bankruptcy and business reorganizations
- Business formation and entity selection
- Buy-sell agreements
- Compliance with federal & state securities law
- Cooperative organizations
- Equipment leasing
- Insurance and risk management
- Internet, domain names and e-commerce
- Mergers and acquisitions
- Negotiation, preparation and interpretation of commercial contracts
- Nonprofit organizations,
- Organization governance
- Securities offerings, public and private
- Secured transactions
- Software and technology licensing and intellectual property protection
- Tax law and planning

For more information on Felhaber attorneys in the Business Section, log on to www.felhaber.com.

401K VS SEP – WHICH PLAN IS BETTER?

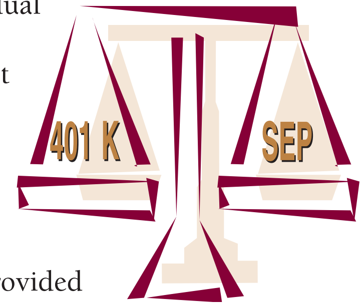
One of the questions that arises occasionally with our clients is whether it is better for a business to offer its employees a retirement benefit through a 401(k) Plan ("Plan") or a Simplified Employee Pension ("SEP"). (A SEP is a vehicle for an employer to contribute to its employees' individual IRAs). Of particular interest in analyzing this question is whether a profit sharing plan or a SEP puts the Plan participants at greater risk to creditors of the company or to the participant's own creditors should either become a judgment creditor.

There are two certainties in this area. The first is that the funds which are deposited into the company's Plan are not available to creditors of the company. These funds are held in a separate trust under ERISA and a creditor of the company cannot claim any money from that Trust in order to satisfy a claim against the company.

The second certainty is what will happen if one of the Plan participants subsequently has a judgment entered against that participant. The answer to this question is that the funds allocated to an individual account within the Plan cannot be seized by a creditor (other than the IRS or a spouse in a family law proceeding) under ERISA. Creditors of employees with accounts in ERISA plans have attempted to seize funds allocated to a participant's account out of a Plan. However, there are a number of judicial decisions which have held that the creditor has no right to seize those funds from the Plan until after they are paid to the participant.

While a creditor can wait and attempt to seize those funds once they have been withdrawn from the Plan, the creditor cannot force either the Plan or the Trust to compel a distribution under ERISA. As a result, those funds are only subject to attachment by a creditor once they have been distributed to the Participant and are held outside of the Trust.

Our experience in this area is that creditors generally are not interested in waiting to collect the debt until a participant elects to make a withdrawal. Usually, this means that the creditor negotiates with the participant.



However, an individual IRA account that is held by a participant with money from a company SEP is subject to attachment by his creditors. The only protection that is provided for an individual IRA/SEP account is provided by state law. There is no non-bankruptcy federal law protecting the IRA from judgment creditors.

At the present time, the starting amount under Minnesota law that can be protected from creditors in an IRA is $57,000 per individual. This amount is adjusted periodically.

A participant can assert that a greater amount should be protected due to the participant's circumstances, but that would have to be determined by a court. If a participant has an IRA account worth $300,000, what this means is that all of the dollar value in that IRA in excess of $57,000 may, unless the participant convinces a court to order otherwise, be seized by a creditor of that participant.

An additional protection for an IRA from creditors was added under the recent amendments to the federal bankruptcy statute. Under those amendments, it is likely that a participant's IRA account may be protected in a bankruptcy proceeding for up to $1 million dollars. However, this protection will not be available unless the participant actually files for bankruptcy. If a bankruptcy filing does not occur, the maximum amount that can be protected if a participant has a judgment entered against him or her is presently the general $57,000 exemption under Minnesota law.

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BRAD HENDRIKSON, ATTORNEY JOINS THE ST. PAUL OFFICE

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The law firm of Felhaber, Larson, Fenlon and Vogt, P.A. is pleased to announce that Bradley D. Hendrikson has joined the firm's St. Paul office. Mr. Hendrikson practices in the areas of construction, real estate, lending, landlord/tenants, and estate planning. He has also advised clients on general business and employment matters.

Mr. Hendrikson graduated with a B.A. from Gustavus Adolphus College in 1992. He received his J.D. cum laude from William Mitchell College of Law in 1998.

Mr. Hendrikson was named a "Rising Star" by *Law & Politics* and *Minneapolis-St. Paul* magazine in October 2005.

Business Report

The Business Report is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.

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