

Employee Benefits E-news

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COBRA Premium Subsidy Program Extended Through March 31, 2010

For the second time, the Federal government has extended the COBRA premium subsidy program originally implemented under the American Recovery and Reinvestment Act of 2009 ("ARRA"). On March 2, 2010, President Obama signed into law the "Temporary Extension Act of 2010" ("Act") which extended the COBRA premium subsidy program for another month and made numerous other critical substantive and clarifying changes to the COBRA premium subsidy program.

As originally enacted, ARRA was intended to serve as a temporary program to make COBRA affordable to involuntarily terminated employees and their families. The program was designed to only apply to individuals whose COBRA qualifying events were an involuntary termination of employment that resulted in a loss of group health plan coverage on or after September 1, 2008 and on or before December 31, 2009 and who elected COBRA continuation coverage as a result. These individuals, known as "Assistance Eligible Individuals" ("AEIs"), were originally eligible to receive COBRA continuation coverage with 65% of the COBRA premium subsidized by the Federal government for up to 9 months. In December 2009, the Department of Defense Appropriations Act, 2010, ("2010 DOD Act") extended the availability of the subsidy from 9 months to up to 15 months. The 2010 DOD Act also extended eligibility to qualify for the subsidy to individuals whose qualifying events were an involuntary termination of employment occurring on or before February 28, 2010 and clarified that AEIs would be entitled to the premium subsidy regardless of whether their loss of group health plan coverage occurred before or after February 28, 2010.

Extension of COBRA Premium Subsidy Eligibility Period

The Act extends for one additional month the period in which an involuntary termination could occur entitling an individual to the COBRA premium subsidy, from February 28, 2010 to March 31, 2010. It is possible this date may be extended to the end of 2010, as key members of Congress have indicated that the Act is merely a stopgap measure.

Expanded Definition of Assistance Eligible Individual

The Act also expands the definition of AEI. Under the Act, an individual will be an AEI if:

- The individual has a reduction in hours of employment COBRA qualifying event (which in most cases does not entitle an individual to the COBRA premium subsidy) between September 1, 2008 and March 31, 2010; and

- The individual has an involuntary termination of employment on or after March 2, 2010.

This expanded definition of AEI applies for periods of coverage beginning after March 2, 2010.

New Election Period

The Act adds a new election period for certain individuals who are AEIs as a result of reduction of hours COBRA qualifying event followed by a termination of employment as described above. Under the Act, a group health plan is required to offer a new election period to individuals who:

- Had a reduction of hours of employment qualifying event between September 1, 2008 and March 31, 2010;
- Either did not make a COBRA election based on the reduction in hours of employment or made a COBRA election but let COBRA lapse; and
- Had an involuntary termination of employment on or after March 2, 2010 and on or before March 31, 2010.

The Act provides that these AEIs do not have to pay for COBRA continuation between the date of the reduction in hours of employment and the date of the involuntary termination of employment. Rather, these AEIs may elect and pay for COBRA starting with the month of coverage following the involuntary termination of employment and the premium subsidy would apply from that date forward. However, the maximum length of COBRA coverage for these AEIs (which has not been extended) will be measured from the date of the reduction in hours of employment, not the date of termination of employment. Group health plan administrators are required to provide an updated COBRA election notice with information regarding this expanded definition of qualifying event to affected individuals within 60 days of the date of the involuntary termination of employment. Employers should review their records for individuals who had reduction in hours of employment qualifying events on or after September 1, 2008 to determine who must receive the updated election notice.

Miscellaneous Revisions

Prior to the Act, the COBRA premium subsidy applied until the earliest of three events: (1) the first date an AEI becomes eligible for other group health plan or Medicare coverage; (2) the date that is 15 months after the first day of the first month for which the COBRA premium subsidy applied to the individual; or (3) the date the AEI ceased to be eligible for COBRA continuation coverage in general. Effective March 2, 2010, the Act provides that the second end date is to be measured from the first date the subsidy applies to an individual rather than from the first day of the first month the subsidy applies to an individual.

Effective March 2, 2010, the Department of Labor (or Department of Health and Human Services, as appropriate) can bring a civil action to enforce a DOL (or HHS) determination that an individual is entitled to the COBRA premium subsidy. Also, the DOL (or HHS) now has the authority to assess a civil penalty of up to \$110 per day (starting 10 days after the issuance of the determination) for each failure to comply with a determination that an individual was wrongfully denied the COBRA premium subsidy. This penalty is in addition to any existing penalties provided by law.

Finally, effective as if the provision was included in ARRA, an employer's determination that a termination of employment was involuntary will be deemed correct if the employer made the determination based on a reasonable interpretation of ARRA and related administrative guidance. The employer must maintain supporting documentation of its determination, **including** an attestation by the employer of involuntary termination with respect to the covered employee.

For more information about the COBRA subsidy program extension, or for questions regarding any employee benefits issue, contact your regular Butzel Long attorney, a member of the Butzel Long Employee Benefits Practice Group, or the authors of this e-news bulletin.

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