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COBRA PREMIUM SUBSIDY AGAIN EXTENDED AND EXPANDED

Through the Temporary Extension Act of 2010 ("2010 Extension Act"), Congress has once again extended and expanded the COBRA premium subsidy initially enacted under the American Recovery and Reinvestment Act of 2009 (ARRA). Under ARRA, "assistance eligible individuals" or AEIs (individuals experiencing an involuntary termination and a loss of health coverage between September 1, 2008 and December 31, 2009) were eligible for a 65 percent subsidy of COBRA premiums for up to nine months. The Department of Defense Appropriations Act of 2010 ("DOD Act") extended the eligibility date through February 28, 2010 and expanded the subsidy period to fifteen months. The 2010 Extension Act once again extends the eligibility period, and makes other important changes to the COBRA subsidy program.

Eligibility Period Extended

The 2010 Extension Act extends the COBRA subsidy eligibility period from February 28, 2010 to March 31, 2010. Thus, individuals who experience an involuntary termination of employment on or before March 31, 2010, and lose health coverage as a result of the termination, will qualify for the subsidy.

New Eligibility Category

Previously, the COBRA subsidy was available only to individuals who lost health coverage as a result of an involuntary termination of employment. Under the 2010 Extension Act, an individual (or eligible family member) who (1) loses health coverage due to a reduction in hours during the COBRA subsidy period (now September 1, 2008 to March 31, 2010); and (2) thereafter, is involuntarily terminated from employment on or after March 2, 2010 but before the end of the COBRA subsidy period (currently March 31, 2010), is eligible for the subsidy. (Note: the Act is ambiguous regarding whether the subsequent termination must occur during the COBRA subsidy eligibility period. However, the Department of Labor's website states that the termination must occur during the COBRA subsidy period.) Individuals will be eligible for the subsidy whether or not they elected COBRA upon the loss of coverage. Other key points regarding this new eligibility category include:

- Individuals who elected COBRA when coverage was lost are entitled to the subsidized COBRA rate beginning with the first period of coverage on or after the date of termination. Plans should provide notice of the change in premium cost as soon as possible, but no later than 60 days after termination. Currently, it is not clear whether the 15-month subsidy period begins to run from the initial COBRA event or from the first period of coverage following termination. Further clarification is expected.
- Individuals who either did not elect COBRA when coverage was lost or who elected but later dropped coverage (before termination) have a second opportunity to elect COBRA upon involuntary termination. Plans must provide notice of the second election right and subsidy rights within 60 days after termination.
- If COBRA is reinstated or elected following the second qualifying event (termination), the individual need not pay for COBRA coverage for periods before termination. Nor can a pre-existing condition exclusion be applied because of a gap in coverage.

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- While the subsequent termination is treated as a second qualifying event, the involuntary termination does not appear to extend the maximum COBRA eligibility period, which continues to be measured from the initial loss of coverage due to a reduction in hours. Thus, the maximum COBRA period for an individual who loses coverage on December 1, 2009 and is subsequently involuntarily terminated on March 15, 2010, will continue to run from December 1, 2009, even though COBRA coverage actually began later.

Fifteen-Month Subsidy Period Measured from First Day Subsidy Applies

ARRA and the DOD Act provided that the subsidy period ran from the first day of the first month in which the individual received the subsidy. Under the 2010 Extension Act, the subsidy period is measured from the first date that the individual receives the subsidy. Thus, plans that begin coverage on dates other than the first date of month, or that require weekly COBRA payments, will need to monitor carefully applicable subsidy periods.

New Penalty for Non-Compliance with DOL's Appeal Determinations

Under ARRA, individuals who are refused the subsidy may file an expedited appeal with the Department of Labor (DOL). The 2010 Enforcement Act provides that if the plan sponsor (or health insurance company with respect to state mini-COBRA) does not implement a DOL appeal determination in favor of an individual within ten days of receipt, the Secretary of Labor can impose penalties of up to \$110 per day. Affected individuals or the Secretaries of the Treasury, Labor or Health and Human Services may bring suit against plan sponsors (or health insurance companies) for failure to implement DOL appeal determinations.

Supporting Involuntary Termination Decisions

The 2010 Enforcement Act provides that an employer's decision as to whether an individual was involuntarily terminated will be accepted so long as the determination was reasonable and based on applicable law and guidance, and is supported by documentation and an attestation by the employer.

Updated Notices

Employers will need to update their COBRA subsidy notices to reflect the extended date (March 31, 2010) and the second election opportunity provided to those who lose coverage as a result of a loss in hours and are subsequently terminated.

Further Extensions Likely

Congress is currently considering bills that will further extend the subsidy, potentially through December 31, 2010. Stay tuned for further information.

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