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EXTENSION OF COBRA SUBSIDY RULES REQUIRES QUICK ACTION BY EMPLOYERS

On December 19, 2009, Congress enacted and President Obama signed into law certain extensions and changes to the COBRA subsidy, which was created earlier in February 2009 by the Stimulus Bill. The new COBRA modifications make important changes to the COBRA rules that are *effective immediately*.

COBRA is the law that requires employers that have 20 or more employees to offer employees and dependents under group health insurance plans “continuation coverage” for at least 18 months after coverage is lost due to a termination of employment (and other “qualifying events”). Generally, employers have been allowed to charge up to 102% of the cost of the coverage to terminated employees. However, this general rule was modified by the Stimulus Bill in 2009. Beginning in February 2009, and for a limited time, employees who experienced an involuntary termination anytime between September 1, 2008, and December 31, 2009, were eligible to pay substantially less for their COBRA coverage (35% of premium) for a period of up to nine months of coverage. The remaining 65% of premium was temporarily paid by the employer and eventually reimbursed by the government through a credit on the employer’s withholding taxes. This temporary COBRA subsidy was set to expire on December 31, 2009.

Now, as a result of the legislation enacted in December 2009, the COBRA subsidy adopted in the Stimulus Bill has been *extended* through **February 28, 2010**. The legislation also modified the COBRA subsidy rules in other significant respects, including eligibility, subsidy termination, and required notifications by employers (see below). Therefore, employers will wish to contact their benefits counsel and/or COBRA administrators *immediately* to ensure compliance with the new rules.

Below is a summary of the key aspects of the new COBRA subsidy rules enacted in December 2009.

Who’s Now Eligible for a Subsidy?

“Assistance Eligible Individuals” or “AEIs” are entitled to a COBRA subsidy. An AEI is a former employee (or his eligible dependent) who meets both of the following conditions: (1) the qualifying event triggering coverage was involuntary termination occurring during the period from September 1, 2008 through **February 28, 2010** (formerly December 31, 2009) (employees terminated for “gross misconduct” are probably not AEIs); and (2) the individual is eligible for and elects continuation coverage. The law is now specific that only the qualifying event must occur between September 1, 2008 and February 28, 2010. The actual COBRA coverage can begin *later* than February 28, 2010.

What Amount Must AEIs Pay for Subsidized COBRA Coverage?

An AEI must pay only 35% of the premium for the coverage. (This is consistent with the temporary COBRA rules passed in the Stimulus Bill.)

Employers will pay the remaining 65% of premium (i.e., the 65% not paid by the AEI) amount initially. However, employers are entitled to a credit for amounts paid against payroll taxes. The government ultimately pays the subsidy through the employer’s reduced taxes. (There are additional rules for employers whose COBRA subsidy amounts exceed payroll taxes.) (This is consistent with the temporary COBRA rules passed in the Stimulus Bill.)

When Does the Subsidy End for Each Individual?

An individual’s subsidy ends on the first to occur of the following events:

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- The first date that the individual is *eligible* for coverage under any other group health plan. (Note: this differs from the traditional COBRA coverage rule where an individual loses eligibility for COBRA coverage when he *enrolls* in another plan); or
- The first date the individual is *eligible* for benefits under Title XVIII of the Social Security Act; or
- *Fifteen months* after the first day of the first month that he is eligible for the subsidy; or
- The last date of the applicable COBRA period.

The subsidy will now last *fifteen months* at most. (Under the COBRA rules modified by the Stimulus Bill, the maximum subsidy period was only nine months.)

What Are the Notification Obligations for Employers Under the New COBRA Laws?

Employers must notify terminated workers of their rights to the COBRA continuation benefits subsidy, as amended in December 2009. ***This obligation requires special review of existing COBRA notices and requires new subsidy notices to be sent even though some individuals may have already received COBRA notices.*** New notices must be sent to:

- Any individual who was an AEI at any time on or after October 31, 2009. This includes individuals who were receiving a COBRA subsidy on or after October 31, 2009, even if they are not under COBRA coverage now.
- Any individual who experiences a termination of employment on or after October 31, 2009. Employers should inform all terminated employees about the COBRA subsidy (including those who the employer has determined are not AEIs), so that the former employees can request a review with the Department of Labor if they so choose.
- Any individual who has received a nine-month subsidy (pursuant to the Stimulus Bill) and either stopped paying thereafter or paid the full COBRA premium (“Transition Individuals”). These individuals may be in their “transition period,” which is the period of time after

the first nine months ended if that period starts *before* December 19, 2009.

Example: Person A is terminated February 15, 2009, and starts COBRA on March 1, 2009. Under the COBRA subsidy effective on March 1, 2009, Person A was entitled to a nine-month subsidy. That subsidy terminated December 1, 2009. December 1, 2009 starts the “transition period” under the new law.

Transition individuals are entitled to extend their nine months of subsidized coverage to fifteen months. If an individual continued COBRA by paying the full premium following the expiration of the nine-month subsidy, he can get a refund or credit of the 65% that he has “overpaid” under the subsidy extension. If someone who elected the nine-month subsidy and then terminated COBRA, he can re-enroll in COBRA, with the subsidy effective back to when he stopped paying for COBRA. To reinstate COBRA, the individual must pay 35% of premium costs by February 17, 2010 or, if later, 30 days after notification described below.

Failure by employers to supply the required new notices can lead to substantial fines (up to \$110 per day under ERISA and up to \$100 per day under the Internal Revenue Code).

What Are the Deadlines for Notification?

<u>Person to be Notified</u>	<u>Deadline</u>
Any person who was an AEI anytime on or after October 31, 2009 but before December 19, 2009	February 17, 2010 unless the person is a Transition Individual
Any person terminated on or after October 31, 2009 but before December 19, 2009	February 17, 2010
Any person Terminated on or after December 19, 2009	Traditional COBRA timeless apply
Transition Individuals	Within 60 days of the start of the Transition Period (within 60 days of the first nine months of coverage ending—as early as February 1, 2010)

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What Must the Notices Contain?

The new notices must include the following information:

- Forms necessary for the individual to establish that he is eligible for the subsidy;
- A description of the obligation of the individual to notify the plan when he becomes eligible for coverage under another group health plan;
- A prominent description of the individual's right to the reduced premium, and rights to re-enroll in COBRA with the subsidy if applicable, and any conditions on entitlement to the reduced premium;
- A description of the individual's option to enroll in different coverage (if such different coverage is offered by the employer); and
- The name, address, and telephone number for the plan administrator and/or anyone else that should be contacted concerning the premium reduction.

The Department of Labor just issued updated notices for employer use. There is a new "Model General Notice" for terminations through February 28, 2010. A shorter "Model Premium Extension Notice" is available for use with Transition Individuals and also with persons who were an AEI on or after October 31, 2009, but only if they already received a proper "General Notice" drafted under prior law. Note that some employees terminated in December 2009 may have been thought to be ineligible for the subsidy because of the regulations under prior law and may have received a notice that did not discuss the subsidy at all. These individuals should get the updated General Notice and be given 60 days from the date of the updated notice to make a COBRA election.

Conclusion

The new COBRA rules enacted in December 2009 impose new, highly technical rules upon employers. ***They are effective immediately.*** Further extensions to the subsidy are currently floating within pending legislation. Future alerts will advise of these changes.

If you have questions or would like further information, please contact Howard Williams, Allison Grimm, or Phillip Long at (336) 373-8850.

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