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New COBRA Subsidy Available Under the Stimulus Package

March 4, 2009

Overview

- ★ American Recovery and Reinvestment Act of 2009 (the "Act")
 - > Signed by President Obama on February 17, 2009
- ★ Provides for three (3) new COBRA rights for certain qualified beneficiaries
- ★ Eligibility limited to *qualified beneficiaries* who
 - > Become eligible for COBRA Coverage following an involuntary termination; and
 - > The involuntary termination must occur any time during the period from September 1, 2008 through December 31, 2009

Overview

- ★ The Three (3) New Rights Are:
 - > (1) A 65% subsidy of COBRA premiums for up to 9 months
 - > (2) at the discretion of the plan sponsor, the right to enroll in a less expensive health plan option
 - > (3) A second COBRA election period for subsidy-eligible individuals who did not elect COBRA when initially eligible or who elected and no longer have coverage

Overview

★ Effective Date

- > The assistance is for COBRA premiums for a period of coverage beginning on or after February 17, 2009
 - Generally, for most plans, this is March 1, 2009
 - For some plans, it will be earlier. For instance, if a plan charges premiums on less than a monthly basis or cuts-off coverage at the time of the qualifying event, instead of at the end of the month
- > The Future?
 - It is possible that this law will be extended. This is currently being considered, but there is no guidance on any extension at this time.

The Federal Subsidy

- ✦ The federal subsidy is available for COBRA continuation coverage
- ✦ COBRA continuation coverage defined as:
 - > Federal COBRA laws under ERISA and the Internal Revenue Code
 - This includes medical-only, dental-only, vision-only, EAP, or any combination thereof
 - Exclusion for COBRA coverage under a Health FSA
 - > Public Health Services Act (applies to government plans)
 - > Comparable State Law
 - For example, in California Cal-COBRA applies to insurers that provide coverage on behalf of small employers

Responsibility to Administer

- ★ The responsibility to administer the subsidy belongs to:
 - > Multiemployer plans – the plan
 - > Single employer plans – the employer
 - > Insurance Companies
 - i.e., administration of state continuation coverage

Who Is Eligible for These New COBRA Rights?

- ✦ Qualified Beneficiaries- this includes the employee, the spouse and dependent children
 - > It does not include a domestic partner, unless that person is a section 152 dependent
 - Guidance may be issued which clarify the rights of domestic partners
- ✦ Qualified Beneficiary must have become eligible for COBRA coverage as a result of an Involuntary Termination of Employment
 - > Involuntary termination must have occurred at any time between September 1, 2008 through December 31, 2009
- ✦ Qualified Beneficiary may not be eligible for coverage under another group health plan or for Medicare

Involuntary Termination

- ✦ The Act does not define the term “Involuntary Termination”
 - > If a person is terminated for “gross misconduct”, under federal COBRA laws, the plan sponsor is not obligated to offer that participant COBRA coverage
- ✦ Presumably, the term “Involuntary Termination” would include:
 - > A lay-off
 - > Plant shutdown
 - > An employee who is simply terminated by the employer
 - > Termination due to death or disability? Unknown.

Involuntary Termination

- ◆ Subsidy not available with respect to other COBRA qualifying events
 - > Voluntary termination
 - > A reduction in hours
 - > Divorce, legal separation
 - > Loss of dependent status
- ◆ Question on how multiemployer plans administer this
 - > Does the plan receive reports from employers which specify whether an employee was involuntarily terminated?
 - > Does the plan need to set up a new process?

Is the subsidy available to “qualified beneficiaries” even if the employee fails to elect COBRA?

- ★ Yes – because the Act states that “qualified beneficiaries” are eligible for the subsidy, a covered family member may take advantage of the subsidy even if the employee does not

Enrollment In A Less Costly Plan

- ✦ A plan sponsor is permitted (but not required) to allow eligible employees to switch medical plan options or enroll in a medical plan option other than the option the individual was enrolled in on the day before the qualifying event. However, the option must be:
 - > Less expensive than the option in which the individual was enrolled on the day before the qualifying event; and
 - > Available to all other active employees

Enrollment In A Less Costly Plan--Continued

- ★ The option may NOT be:
 - > Dental, vision or counseling-only coverage;
 - > A health flexible spending account; or
 - > An onsite medical facility that primarily furnishes first-aid services, prevention and wellness care or similar care

- ★ If this option is provided, the eligible individual must be given at least 90 days to change options
 - > The 90-day period runs from the date the plan provides notice of this enrollment right

Extended Election Period

- ✦ A “second” COBRA election period is available to eligible individuals whose coverage ended following an involuntary termination that occurred on or after September 1, 2008, and
 - > Who may not have elected COBRA coverage; or
 - > Whose COBRA coverage terminated before March 1, 2009

Extended Election Period

- ★ Eligible individuals must be given the right to elect COBRA any time within 60 days after the date the individual is notified of the subsidy and the right to the extended election period
- ★ If COBRA coverage is elected, coverage must begin on or after February 17, 2009 (March 1, 2009 for most plans)
 - > The Act does not require retroactive coverage
 - > The Act does not extend the maximum COBRA coverage period available
 - The maximum COBRA coverage period available to such individual runs from the date the individual's coverage was initially lost

HIPAA Break In Coverage Rules

- ✦ Under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), a group health plan may impose preexisting condition limitations (“PCE”), subject to several strict limitations
 - > A PCE may be imposed if the enrollee’s most recent coverage ended more than 63 days before his/her enrollment in the plan
- ✦ If an eligible individual enrolls during the Act’s extended election period, the 63-day break in creditable coverage rule may not be applied against the individual
 - > i.e., the period between the date of the individual’s qualifying event and the date of enrollment must be disregarded

The Required Notices

- ★ The Act requires plans to provide ALL individuals who become entitled to elect COBRA between September 1, 2008 and December 31, 2009 with an “Enhanced” notice of these new COBRA rights.
 - > The Act says ALL
 - > It is not limited to just those employees who were involuntarily terminated

Enhanced Notice - Deadline

- ★ The Act does not specify a time limit for notifying those qualified beneficiaries who already received a COBRA election notice and have COBRA as of March 1, 2009
- ★ But, there is a time limit for those qualified beneficiaries who failed to elect COBRA or who lost COBRA coverage before March 1, 2009
 - > Notice must be provided within 60 days of February 17, 2009 – i.e., by April 18, 2009 (60th day falls on a Saturday)

Enhanced Notice - Deadline

- ★ For those who have not yet received a COBRA election notice (e.g., those who will be involuntarily terminated from now until December 31, 2009), presumably this enhanced notice must be provided within the regular deadlines for COBRA election notices

Enhanced Notice – Contents

- ✦ This notice must include the following information:
 - > A description of the availability of the subsidy;
 - > The forms necessary for establishing eligibility for the premium reduction;
 - > Contact information for the plan administrator and any other person maintaining relevant information in connection with the subsidy;
 - > A description of the second election period;
 - > A description of the obligation to notify the plan of the individual's eligibility for coverage under another group health plan or Medicare; and
 - > A description of the right to enroll in a less expensive option (if applicable)

Model Enhanced Notice

- ★ The Act directs the Secretary of Labor to prescribe model notices no later than 30 days after the enactment of the Act
 - > This should be on or around March 19, 2009
- ★ Plan sponsors can satisfy the notice requirements by amending existing COBRA notices or including an addendum to existing COBRA notices
 - > Our firm has drafted model notices

Appeal Procedure

- ★ If the plan determines that the individual does not qualify for the subsidy, the Act permits such individual to bypass the plan's appeal procedures and seek an expedited review of the denial by the Secretary of Labor.
 - > The Act directs the Secretary of Labor to determine such appeals within 15 days after receiving such a request for review
 - > Appeals must be submitted on a DOL-prescribed application form that will be available at www.dol.gov/COBRA
 - > Individuals may call EBSA at 1.866.444.3272

The Subsidy

- ♦ A plan must treat an eligible qualified beneficiary as having paid the entire COBRA premium due if the plan receives 35% of such premium from or on behalf of that qualified beneficiary.

The Subsidy

- ★ Grace Period: For the first two (2) months during which the subsidy is available (generally, March and April of 2009), the Act provides a grace period during which plans may continue to receive the full COBRA premium due from eligible individuals.
 - > For these months, the plan must reimburse eligible individuals for the amounts paid in excess of the amount required to be paid or credit the amount of the excess for the premiums due in subsequent months
 - A plan must refund the excess unless the credit can be used within 180 days

The Subsidy and “High Income Individuals”

- ✦ The subsidy will be recaptured from taxpayers whose modified adjusted gross income for the applicable taxable year exceeds \$145,000 (or \$290,000 in the case of taxpayers who file joint returns)
- ✦ If a high-income individual takes advantage of the subsidy, his tax liability will increase by the amount of the subsidy and will be recaptured by the IRS dollar-for-dollar

The Subsidy and “High Income Individuals”

- ✦ A limited subsidy is available to a taxpayer whose modified adjusted gross income is between \$125,000 and \$145,000 (between \$250,000 and \$290,000 for joint returns)
 - > Instead of a dollar-for-dollar recapture, there is a partial repayment obligation
- ✦ A high-income individual may avoid recapture by making a permanent election to waive the right to the subsidy in the form and manner prescribed by the Secretary of Treasury and notifying the plan of the waiver

Amount Of The Subsidy

- ★ The subsidy is 65% of the premium for a period of coverage
 - > If the COBRA premium is 102% of the plan cost, then the federal subsidy is 65% of the 102% (and the individual must pay 35% of the 102%)
- ★ The subsidy is excluded from the individual's income and wages

The Subsidy and Employer-Subsidized COBRA

- ★ Many employers subsidize a qualified beneficiary's COBRA premiums. Federal regulators are suggesting that this practice will adversely effect those employers.
 - > For example, assume that the health plan charges \$1000 for COBRA. However, the employer pays \$500 of the COBRA premium and the employee is only charged \$500. In order for the COBRA subsidy to apply, the qualified beneficiary must pay 35% of the \$500 (or \$175) and the subsidy for the employer is 65% of that \$500 (or \$325)

Cut-Off Of The Subsidy

- ★ The subsidy is available to an eligible individual until the earliest to occur of the following:
 - > Nine (9) months after the date the individual becomes eligible for the subsidy; or
 - > The date COBRA expires; or
 - > The date the individual becomes eligible for Medicare; or
 - > The date the individual fails to remit at least 35% of the premium due; or

Cut-Off of the Subsidy, cont'd.

- > The date the individual is ELIGIBLE (not enrolled, but eligible) for coverage under any other group health plan, other than
 - Coverage under a dental, vision or counseling-only plan (or a combination thereof); or
 - Coverage under a health flexible spending account; or
 - Coverage through an onsite medical facility that primarily furnishes first-aid services, prevention and wellness care or similar care.

Cut-Off Of The Subsidy

- ✦ If an eligible individual becomes eligible for coverage under another group health plan or for Medicare, the individual must provide written notice of such eligibility to the plan
- ✦ A penalty of 110% of the premium reduction may be imposed on individuals who fail to timely notify the plan of their eligibility for such coverage

Mechanics of the Subsidy

- ★ The reimbursement is structured as an offset against an employer's payroll tax liability
 - > That is, whenever an employer receives an eligible individual's 35% premium payment, the employer will be treated as having paid payroll taxes in an amount equal to the portion of the reimbursement that relates to such premium paid
- ★ If the amount of the reimbursements owed to the employer is greater than the employer's payroll tax liability, the employer will be entitled to a credit or refund of the excess and will be treated as though it made an overpayment of payroll taxes

Mechanics Of The Subsidy

- ✦ It is unclear how this will work for a multiemployer plan
 - > Will the plan complete a dummy payroll tax form?
 - > When will it receive the reimbursement from the government?

Mechanics Of The Subsidy

- ★ The COBRA subsidy amount is reimbursed by being claimed on the Form 941. The Form 941 has been revised to allow for this credit.
- ★ The credit is claimed on Line 12a of the revised Form 941.
- ★ No additional information relating to the COBRA subsidy must be submitted with the Form 941.
- ★ The Form 941 is filed on a quarterly basis.

Mechanics Of The Subsidy

- ✦ If a plan sponsor is claiming the credit, the plan sponsor must maintain supporting documentation for the credit claimed. Such documentation includes, but is not limited to:
 - > Information on the receipt, including dates and amounts, of the assistance eligible individual's 35% share of the premium;
 - > In the case of an insured plan, copy of supporting documentation from the insurance carrier of timely payment of the full premium to the insurance carrier;
 - > In the case of a self-funded plan, proof of the premium amount and proof of coverage provided to the assistance eligible individuals;

Mechanics Of The Subsidy

- > Attestation of involuntary termination for each covered employee, including the date of the involuntary termination;
- > Proof of each assistance eligible individuals eligibility for COBRA coverage at any time during the period from September 1, 2008 through December 31, 2009, and election of COBRA coverage;
- > A record of the SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for 1 individual or 2 or more individuals; and
- > Other documents necessary to verify the correct amount of the reimbursement

Mechanics Of The Subsidy

- ✦ The premium subsidy and related credit apply ONLY after the individual has paid his or her 35% of the premium
- ✦ An employer can decide to either offset its payroll tax deposits or claim the subsidy was an overpayment at the end of the quarter
- ✦ If the plan sponsor receives the 35% payment for an individual who is eligible for the subsidy, the plan sponsor is REQUIRED to make the remaining 65% payment

Enforcement

- ✦ A participant may file a lawsuit under ERISA Section 502 if a plan fails to administer the subsidy in accordance with the Act
- ✦ Failure to provide the notices may lead to \$110 a day civil penalty

Immediate Actions To Take

- ✦ Determine all qualified beneficiaries who become (or became) eligible for COBRA coverage between September 1, 2008 and December 31, 2009
- ✦ Determine all individuals who are eligible for the subsidy
- ✦ Determine whether to offer the lower cost coverage option
- ✦ Develop notices and distribute the notices on a timely basis

Resources

- ★ Call us if you have any questions
- ★ There is a dedicated DOL website
www.dol.gov/ebsa/COBRA.html
- ★ IRS guidance for employers and employees:
<http://www.irs.gov/newsroom/article/0,,id=204505,00.html>
- ★ New Form 941 posted on IRS website
 - > Form 941 www.irs.gov/pub/irs-pdf/f941.pdf
 - > Instructions www.irs.gov/pub/irs-pdf/i941.pdf

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