



TUCKER ELLIS & WEST LLP

ATTORNEYS AT LAW

CLIENT ALERT

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MAJOR CHANGES TO COBRA AS A RESULT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The American Recovery and Reinvestment Act of 2009 (the "Act"), signed into law by President Obama on February 17, 2009, dramatically impacts COBRA continuation coverage for individuals who lose health care coverage due to an involuntary termination from employment between September 1, 2008 and December 31, 2009. For the purposes of the Act, "COBRA continuation coverage" means continuation of group health coverage provided by private and governmental employers with at least 20 employees as well as continuation coverage required under state law for group health plans not subject to the federal COBRA requirements (e.g., small employer plans).

Assistance Eligible Individuals Pay Only 35% of Premiums for COBRA Continuation Coverage

The Act provides for a COBRA continuation coverage premium subsidy to "assistance eligible individuals" ("AEIs"). An AEI is any qualified beneficiary who is eligible for COBRA continuation coverage at any time from September 1, 2008 through December 31, 2009 due to the involuntary termination of a covered employee's employment during this period. AEIs are only required to pay 35% of the total COBRA continuation coverage premium (although eligibility to receive the subsidy phases out if the taxpayer has a modified adjusted gross income for the taxable year exceeding \$125,000 (\$250,000 for joint filers)). The remaining 65% of the premium is paid as a subsidy by the person to whom premiums are payable (e.g., the multiemployer group health plan, the employer maintaining the group health plan, or the insurer providing coverage under an insured plan). The amount of the subsidy is

reimbursed by taking a credit against payroll taxes. To the extent the credit is not sufficient to recover the subsidy, the IRS will reimburse the excess in the same manner as a tax refund.

When Do the Subsidies for an AEI End?

The maximum period for which the subsidy can be provided for an AEI is nine months and ends on the earlier of (1) the first date that the AEI is eligible for coverage under any other group health plan (other than a health reimbursement arrangement, a health flexible spending arrangement, or on-site medical facility maintained by the employer), (2) the first date that the AEI is eligible for Medicare benefits, (3) nine months after the first day of the first month in which the subsidy applies to the AEI, or (4) the expiration of the maximum period of COBRA continuation coverage.

Employers May Permit AEIs to Elect Other Coverage

Prior to the enactment of the Act, qualified individuals could generally only elect COBRA coverage that would continue the type of coverage they had immediately before the qualifying event. Under the Act, an AEI may elect different coverage at the time that COBRA is elected if (1) the employer permits AEIs to enroll in different coverage, (2) the election to change coverage is made within 90 days of receipt of the COBRA election notice, (3) the premium for the different coverage does not exceed the premium for coverage in which the AEI was enrolled at the time of the qualifying event, and (4) the coverage option is one that is offered to the employer's active employees.

Additional Notification Required for Employees Involuntarily Terminated between September 1, 2008 and February 17, 2009

AEIs who were involuntarily terminated between September 1, 2008 and February 17, 2009 and who initially failed to elect COBRA continuation coverage may now elect to receive that coverage and the subsidy during a notice period that commences on February 17, 2009 and ends 60 days after the date on which the required additional notice regarding the extended election period is provided to him or her. To avoid penalties, the notice must be provided no later than April 18, 2009. In addition, all COBRA notices provided through December 31, 2009 must include additional language (or attach a separate document) describing the availability of the premium reduction subsidy. Failure to include this language in a notice is treated as a failure to meet the COBRA notice requirements and is subject to penalties.

Impact on HIPAA's Pre-Existing Condition Limitations

If an AEI did not elect COBRA continuation coverage when originally offered and elects COBRA continuation coverage as a result of the Act, then the period beginning on the date of the involuntary termination from employment and ending February 16, 2009 is disregarded for purposes of the rules that limit a group health plan from imposing pre-existing condition limitations with respect to the AEI's coverage.

Action Items for Employers

Further guidance from the Internal Revenue Service and the Department of Labor will be issued soon to assist employers in implementing these new rules. Employers, however, cannot wait to act until that guidance is issued and should take the following steps immediately:

- (1) Determine whether any terminated employee qualifies as an AEI (including the spouses and beneficiaries of involuntarily terminated employees).

- (2) Decide whether different coverage options will be offered to AEIs.
- (3) Provide the additional COBRA notice to AEIs who were involuntarily terminated between September 1, 2008 and February 17, 2009 no later than April 18, 2009 and provide the additional COBRA notice to all COBRA beneficiaries through December 31, 2009.
- (4) If the group health plan is insured, discuss appropriate procedures with the insurance carrier regarding enrolling AEIs (and modifying coverage, if permitted by the employer).
- (5) Modify COBRA premium billings for AEIs to take into account the 65% subsidy.
- (6) Secure reimbursement of the COBRA premium subsidy through payroll tax credits.
- (7) Review impact of the COBRA premium subsidy on any severance package offered to involuntarily terminated employees.
- (8) Amend affected severance and health plans and summary plan descriptions.
- (9) Continue to monitor developments in the law. For instance, it is not clear whether an employee who terminates voluntarily and takes a severance package instead of waiting to be involuntarily terminated is considered to be "involuntarily terminated." The regulations issued interpreting the new COBRA rules will hopefully clarify these issues. Employers should use a uniform method for determining who is "involuntarily terminated" until that time.

This Client Alert is only an executive summary of the new COBRA rules. As with any law change that impacts employee benefits, employers should discuss these rules with their third party administrators and, to the extent they have questions about the law, their legal counsel.

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