

LABOR
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EMPLOYMENT

Laurence B. Oppenheimer, Chair
716.566.1575

loppenhe@hblaw.com

Stuart H. Brody

Susan M. Curtin

James P. Domagalski

Anne Burak Dotzler

James P. Evans

Thomas J. Hanifin

Christopher J. Harrigan

Robert P. Heary

Todd V. Lamb

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Scott P. Rogoff

Margaret Surowka Rossi

Brian E. Whiteley

February 17 Deadline Looms for COBRA Subsidy Extension Notice

Health plan sponsors are required to provide notices to certain individuals regarding the recent extension of the Federal COBRA subsidy by February 17, 2010. February 17 is also the deadline for some assistance eligible individuals who discontinued COBRA coverage upon expiration of the original nine month subsidy period to re-elect COBRA continuation. However, the February 17 deadline for assistance eligible individuals is extended if it falls before the later of (a) 30 days after the employer provides notice of the extension, or (b) the last day of the election period that would otherwise apply under COBRA.

The U.S. Department of Labor has posted updated model notices to its website. The available notices include an updated general COBRA continuation notice that references the extended subsidy provisions (the "General Notice"), a notice for those currently receiving the subsidy advising of the extension (the "Extension Notice"), and an updated "alternative" notice for use by employers that are subject to State law "mini-COBRA" statutes rather than the Federal COBRA statute. The forms are available at <http://www.dol.gov/ebsa/COBRAModelNotice.html>.

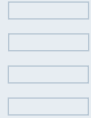
Background. The American Recovery and Reinvestment Act ("ARRA") introduced a temporary Federal subsidy to defray 65 percent of the cost of COBRA premiums for nine-months for persons who lose health coverage due to layoff or involuntary termination of employment of a covered employee between September 1, 2008 and December 31, 2009 ("assistance eligible individuals"). Under the subsidy program, the employer charges the assistance eligible individual only 35 percent of the individual's COBRA premium for a period of up to nine months. The employer pays the balance of the individual's COBRA premium and recoups its cost by claiming a credit on its Federal employment tax return (IRS Form 941). The subsidy was scheduled to be discontinued for individuals who lost their jobs after December 31, 2009.

The Department of Defense Appropriations Act of 2010 (the "Appropriations Act") was signed into law on December 19, 2009. The Appropriations Act extended the subsidy to include individuals who are laid off or whose employment is involuntarily terminated on or before February 28, 2010. In addition, the Appropriations Act extended the subsidy period from nine months to 15 months.

Because New York State has implemented the subsidy program with respect to employers who are not subject to the Federal COBRA statute, the subsidy extension applies to employers subject to New York's mini-COBRA statute.

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Who Gets What Notice? The ARRA, as amended by the Appropriations Act, requires health plans to provide some form of notice to all health plan participants and beneficiaries who experienced a qualifying event at any time between September 1, 2008 through February 28, 2010. What form of notice depends upon the particular circumstances of the participant or beneficiary.

The health plan sponsor should provide the Extension Notice to any assistance-eligible individual who is currently receiving the COBRA subsidy. The Extension Notice informs the individual that his or her subsidy has been extended from nine months to 15 months. No election forms or applications are included with the Extension Notice because the individual does not have to take any action to qualify for the six additional months of subsidy.

The health plan sponsor should provide the General Notice to any covered individual (either a participant or beneficiary) who incurred a COBRA qualifying event (not limited to layoff or involuntary termination of employment) between December 19, 2009 (the date the Appropriations Act was enacted) and February 28, 2010. The plan sponsor should also provide the General Notice to any COBRA eligible person who has not already received a COBRA election notice containing subsidy language. The General Notice includes an explanation of COBRA and the subsidy, a COBRA election form and a subsidy application.

Certain assistance eligible individuals may have exhausted their nine month COBRA subsidy before the subsidy was extended to 15 months. The health plan sponsor should provide the Extension Notice to any assistance eligible individual who remained on COBRA and paid the full unsubsidized premium before the subsidy was extended. If the assistance eligible individual dropped COBRA coverage when the nine month subsidy ended, the health plan sponsor should provide that individual the General Notice. Those individuals may retroactively re-elect COBRA continuation until the later of (a) February 17, 2010, (b) 30 days after the employer provides the General Notice, or (c) the last day of the election period that would otherwise apply under COBRA .

Other Guidance. In a Department of Labor web conference on January 22, the IRS noted that some assistance eligible individuals whose nine month subsidy period had expired in November had paid an unsubsidized COBRA insurance premium for the month of December. These individuals are now eligible for the six month extension of the subsidy under the Appropriations Act. The IRS representative noted that many employers in this situation are applying 35% of the individual's COBRA premium payment to December 2009, 35% to January 2010, and the remaining 30% to February 2010. The IRS representative advised that employers in this situation may claim a credit on their Form 941 based on 65% of the December premium, and claim the remaining subsidy amounts (for January and February 2010) as credits on the employer's employment tax return for the first quarter of 2010. The IRS representative cautioned that the subsidy credit for January and February 2010 depends on the assistance eligible individual remaining eligible for the subsidy and paying the additional 5% health insurance premium due for February. ■

The principal drafter of this Alert is Raymond N. McCabe of the Labor and Employment Practice Area. Questions regarding this Alert may be directed to Mr. McCabe or any member of the Labor and Employment Practice Area.