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Economic Stimulus Plan Includes Major COBRA Revisions - Quick Action Required

The "American Recovery and Reinvestment Act of 2009" (the "Act") signed into law by President Barack H. Obama on February 17, 2009 includes major revisions to the group health plan continuation law known as COBRA. Under COBRA, employers and group health plans must allow employees and families to continue group health coverage -- at their own cost -- upon the occurrence of a qualifying event, such as termination of employment. The Act includes a new Federal subsidy to defray 65 percent of the cost of COBRA premiums for nine months for certain "assistance eligible individuals". Employers are required to notify these individuals of the new Federal subsidy. Because the term "assistance eligible individuals" includes people who lost coverage due to layoff or termination of employment after September 1, 2008, employers are also required to notify persons who may have already received a COBRA notice and made a COBRA election. The new requirements take effect immediately.

Assistance Eligible Individuals. The new subsidy is available to all "assistance eligible individuals". An "assistance eligible individual" means any COBRA qualified beneficiary who qualifies for COBRA continuation coverage between September 1, 2008 and December 31, 2009 by reason of involuntary termination of a covered employee's employment during this period.

How The Subsidy Works. For group health plans other than multiemployer plans and government plans, the employer may charge the assistance eligible individual no more than 35 percent of the cost of coverage for the first nine months of continuation coverage. The employer must pay the full cost of the coverage to its group health provider. The employer may treat the portion of the premium that it pays out of pocket as an additional Federal employment tax payment, and reduce its Federal employment tax deposits by a corresponding amount. COBRA also permits an employer or group health plan to charge an additional 2 percent in addition to the cost of premium to cover administrative costs. The Act does not specify how this 2 percent administrative charge is computed with respect to subsidized premiums. However, commentators have suggested that the administrative charge applies to the full amount of the premium (including the subsidized portion) and that the subsidy applies to the 2 percent administrative charge as well as the underlying premium. Thus, for example, if the monthly group health premium is \$100, the total charge for coverage before the application of the Federal subsidy cannot exceed \$102. Under the Act, the employer may not charge the assistance eligible individual more than \$35.70 (35% of \$102).

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New Notice Requirements. Current COBRA regulations require the employer to notify the “plan administrator” of the group health plan within 30 days after the occurrence of qualifying event, and that the “plan administrator” provide a COBRA notice to the qualifying COBRA beneficiaries within 14 days after it receives notice of the qualifying event from the employer. If the employer is also the plan administrator, the employer has 44 days from the date of the qualifying event to provide the COBRA notice to the qualifying COBRA beneficiaries.

In 2004, the U.S. Department of Labor (“DOL”) published a model COBRA notice for group health plan administrators. This model notice can no longer be used for any assistance eligible individual. Instead, the plan administrator must provide assistance eligible individuals a notice that includes an explanation of the Federal subsidy. The Act provides that a COBRA notice to an assistance eligible individual will not be treated as a COBRA notice unless it contains this explanation. Therefore, failure to provide the explanation will trigger the penalty on the employer for failure to provide the COBRA notice. Failure to include the explanation in a COBRA notice will also extend the qualified beneficiary’s COBRA election period.

The Act requires the DOL to publish an updated model notice within 30 days of enactment (i.e. by March 19, 2009).

Notifying Former Employees. The Act extends the COBRA subsidy to former employees whose employment was involuntarily terminated on or after September 1, 2008. Some of these employees may have declined COBRA coverage because they could not afford the continuation premiums. Accordingly, the Act requires employers to notify these former employees of the Federal subsidy. The Act also provides a new 60-day COBRA election period for these former employees.

Changing Coverage COBRA Election. Under the Act, an employer may allow an assistance eligible individuals to change coverage to a lower cost plan offered by the employer. The employer is not required to allow this election. If the employer offers this election, its COBRA notice must explain that any election to change coverage applies to the entire COBRA continuation period, notwithstanding that the Federal subsidy expires after nine months.

Hiscock & Barclay, LLP Recommendations. We recommend that employers begin compiling a list of assistance eligible individuals (former employees whose employment was involuntarily terminated since September 1, 2008 and their covered dependents). We recommend that employers wait for the DOL to release its updated model notice (expected within 30 days) unless waiting would result in missing the deadline to provide COBRA notices to the assistance eligible employee. If the employer provides COBRA notices to assistance eligible individuals before the DOL issues its updated model, the notices must incorporate the Act’s provisions.

The Act does not affect an employer’s obligations with respect to qualified COBRA beneficiaries who lose coverage by reason other than involuntary termination of employment. Therefore, we recommend that employers follow their current COBRA procedures with respect to these individuals. ■

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