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Implementing the Wind Down of the “COBRA Subsidy”

The Federal COBRA premium subsidy program, that requires employers to pay a portion of the COBRA premium for laid off or involuntarily terminated employees, is scheduled to expire on December 31, 2009. The Employee Benefits Security Administration (“EBSA”), the division of the U.S. Department of Labor that regulates the COBRA subsidy statute, has posted new guidance to its website explaining how employers should implement the subsidy wind down.

Background: The COBRA subsidy is part of the “American Recovery and Reinvestment Act of 2009” (“ARRA”) signed into law in February 2009. The ARRA included a 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 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).

New York State has implemented the subsidy program with respect to employers who are not subject to the Federal COBRA statute.

New Guidance: The new guidance from EBSA addresses two questions relating to the year-end termination of the subsidy program.

I. Impact on persons who lose coverage due to job loss in December 2009. The new guidance provides that, to be eligible for the COBRA subsidy, the assistance-eligible individual must become COBRA eligible on or before December 31, 2009. Thus, an assistance-eligible individual who loses coverage due to involuntary termination or layoff occurring in December 2009 would NOT be eligible for the subsidy unless COBRA continuation coverage actually begins in December. If the covered employee remains covered by the employer’s health plan as a non-COBRA participant through December and becomes COBRA eligible in January 2010, that participant would not be eligible for the subsidy.

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II. Impact on persons currently receiving the subsidy. The guidance clarifies that the December 31, 2009 expiration of the subsidy does not shorten the nine month subsidy period for those individuals eligible for the subsidy. The notice provides that assistance-eligible individuals are entitled to receive the full nine months of premium assistance as long as they remain eligible. For example, if an assistance-eligible individual started COBRA on November 1, 2009, he or she would be entitled to the subsidy for nine months from November 1, 2009 through July 31, 2010 as long as he or she remained eligible.

Hiscock & Barclay, LLP Note: An assistance-eligible individual receiving the subsidy ceases to be subsidy eligible if he or she becomes eligible to participate in the group health plan of another employer or becomes eligible for Medicare. The assistance-eligible individual is required to notify the employer should either event occur.

Notice of Pending Legislation: The EBSA notes that its guidance is based on the current subsidy statute and that there is pending legislation that could extend the subsidy. We will provide further guidance should the subsidy law change.

Link to EBSA Guidance: The full text of the new guidance can be found at <http://www.dol.gov/ebsa/faqs/faq-cobra-arra.html> ■

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