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Briefly on Benefits (January 2010)

January 7, 2010

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COBRA Premium Subsidy Extended

Extension Signed

On Saturday, December 19, 2009, President Obama signed the Department of Defense Appropriations Act of 2009 (the "Act"). Attached to the Act was an expected extension of the COBRA premium subsidy for involuntary terminations. This subsidy was originally enacted on February 17, 2009 as part of the American Recovery and Reinvestment Act of 2009 ("ARRA"). There were other legislative proposals to extend the COBRA subsidy even further, so this may just be the first round of extensions.

Background

COBRA allows qualified beneficiaries in covered group health plans to elect and pay for continued group health plan coverage when coverage is lost due to a qualifying event, including a termination of employment. The amount charged for COBRA continuation coverage may not be more than 102% of the full cost of coverage (that is, the sum of the employer and employee contributions).

ARRA introduced a temporary subsidy that applied to Assistance Eligible Individuals ("AEIs"). An AEI was a qualified beneficiary who lost coverage because of a covered employee's involuntary termination from employment (other than for gross misconduct), was eligible for COBRA continuation coverage from September 1, 2008 through December 31, 2009 and elected COBRA coverage. The maximum period for the subsidy was nine months, but it could end earlier upon an AEI's eligibility for Medicare or eligibility for other group medical plan coverage. The subsidy was equal to 65% of the otherwise applicable charge for the COBRA coverage. Therefore, the AEI only paid 35% of the charged premium for COBRA continuation coverage.

Changes under the Act

Under the Act, the December 31, 2009 sunset is moved to February 28, 2010. Therefore, an AEI is now a qualified beneficiary who lost coverage due to a covered employee's involuntary termination of employment on or after September 1, 2008 through February 28, 2010. The changes also provide that the COBRA continuation coverage itself does not have to start before the sunset date. All that is required is for the involuntary termination of employment to occur on or before the sunset date. Thus, if an AEI is terminated during February, 2010, but continues to receive coverage through the end of February, then the AEI will still be eligible for the subsidy. This is different from the way ARRA was originally interpreted by the IRS.

The maximum period during which the subsidy may apply is also extended by six months, to a total of up to 15 months. This means that AEIs who were going to have to start paying the full COBRA charge in December 2009 or later will have an additional six months to pay only 35% of the otherwise charged COBRA premium for COBRA continuation coverage.

AEIs who let their COBRA coverage expire during a transition period may retroactively reinstate their coverage at the subsidized rate effective as of the beginning of the transition period. The transition period is the period of COBRA coverage that begins immediately after the end of the nine months of subsidized coverage that was available under the original COBRA subsidy provisions in ARRA, provided such nine months ended before December 19, 2009 (the date the Act was enacted).

AEIs who failed to timely pay COBRA coverage for the transition period will be able to retroactively pay the subsidized COBRA premium by the later of:

- 60 days after the enactment of the Act (that is, February 17, 2010); or
- 30 days after receiving the notice (see below) describing the rules for making a retroactive payment and the other aspects of the Act.

AEIs that paid the unsubsidized COBRA premium beginning with the transition period will be entitled to a refund or credit of the excess premium payment towards future COBRA payments. Unless it is reasonable to believe that a credit for the excess premium payment will be used within 180 days, the employer must refund the excess within 60 days of the date the overpayment was made.

The Act also includes a new notice requirement. The notice must describe the changes made by the Act, and must be provided as follows:

- An individual who was an AEI at any time on or after October 31, 2009 must be provided this notice by February 17, 2010 (that is, within 60 days of enactment of the Act).
- Qualified beneficiaries who experience a qualifying event consisting of a termination of employment on or after October 31, 2009 and on or before December 19, 2009 must be provided this notice by February 17, 2010 (that is, within 60 days of enactment of the Act). Qualified beneficiaries who experience a qualifying event consisting of a termination of employment after December 19, 2009 must be provided this notice under the ordinary COBRA timing rules (which is generally 44 days after the qualifying event that is a termination of employment - the employer has 30 days to notify the plan administrator and the plan administrator has 14 days to notify the qualified beneficiaries of their rights under COBRA). Note that the termination of employment giving rise to this notice requirement does not have to be an involuntary termination of employment. Under ARRA, the qualified beneficiary self-identifies a termination as involuntary, which can be countered by the employer. Ultimately, the individual claiming AEI status can appeal to the Department of Labor. The qualified beneficiaries in this category will require a second COBRA notice that includes a description of the changes made by the Act if they already received a notice without the new required description.
- AEIs who let their COBRA coverage lapse or who overpaid their COBRA premium during the transition period must receive the notice within the first 60 days of the transition period.

New Model Notices

The Act does not require the Department of Labor to publish model notices. Nonetheless, the Department of Labor is in the process of preparing updates to the existing model notices and preparing a new model notice for notification that must be sent by February 17, 2010. Additionally, the Department of Labor published a fact sheet providing some guidance on December 23, 2009.

Application to State Mini-COBRA Laws

The Act's extension of the premium subsidy may also apply to plans too small to be covered under the COBRA provisions of the tax Code and ERISA, but that are covered under state laws that require continuation coverage that is comparable to COBRA (so-called "mini-COBRA" laws). An analysis of ARRA's affect on these mini-COBRA laws can be found here.

Action Items

- Identify the group to whom notices must be provided. These are AEIs who failed to pay COBRA premiums in their transition period, AEIs who overpaid their COBRA premium during the transition period and qualified beneficiaries who incurred a qualifying event on or after October 31, 2009 and before March 1, 2010 consisting of a termination from employment.
- Determine how to address overpayments during the transition period.
- Review, make appropriate updates to and distribute COBRA notices.
- Review and consider updates to SPDs and plan documents.