

## Employee Benefits Alert:

### Congress Extends COBRA Premium Subsidy

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On December 19, 2009, President Obama signed the 2010 Department of Defense Appropriations Act (the “DOD Act”), which extended two significant features of the COBRA health care continuation coverage premium subsidy originally enacted in early 2009 by the American Recovery and Reinvestment Act (“ARRA”).

(1) To be an “assistance eligible individual” and qualify for the subsidy, a covered employee (and his or her spouse and dependent children, if applicable) must have a COBRA “qualifying event” that is the involuntary termination of the employee’s employment during a specified eligibility period. Previously, such involuntary termination had to take place during the period from September 1, 2008, through December 31, 2009. The DOD Act extends this eligibility period to February 28, 2010.

(2) In addition, the DOD Act extends the maximum period during which assistance eligible individuals may receive the subsidy to 15 months (previously, the maximum period was only 9 months).

#### **Assistance for Individuals who Previously Exhausted the COBRA Subsidy**

The original ARRA COBRA subsidy applied to periods of health care continuation coverage that began on or after February 15, 2009. Because the subsidy was only available for 9 months, this meant that many assistance eligible individuals used up their subsidy eligibility in November 2009, so that no subsidy was available starting with their December coverage.

- Some of these individuals did not elect COBRA coverage once the subsidy was used up because COBRA coverage is expensive. The DOD Act provides that such individuals will have a grace period to pay the reduced premium. In order to continue COBRA coverage, they must catch up

and pay the 35% reduced premium for the skipped period by February 17, 2010 (or, if their group health plan administrator is late providing the required COBRA subsidy extension notice, by 30 days after such notice is provided).

- Other individuals who lost their subsidy during or at the end of November 2009 may have paid the full premium for December. Those individuals are directed to contact the employer sponsoring the group health plan or the plan administrator to obtain a reimbursement of the overpayment, or a credit for future coverage.

#### **Notice Requirements**

ARRA already required group health plan administrators to provide a COBRA subsidy notice to all individuals who had a qualifying event from September 1, 2008 through December 31, 2009. Plan administrators must now provide this notice (updated to include information about the DOD Act extension) to all individuals who experience qualifying events through February 28, 2010.

#### **DOD Act Corrects Earlier ARRA Eligibility Problem**

Under ARRA, certain individuals who were involuntarily terminated in December, 2009 who should otherwise have been “assistance eligible individuals” failed to qualify for the COBRA subsidy, due to a glitch in the drafting of the statute. The original statute provided that in order for someone terminating employment in December, 2009 to be an assistance eligible individual, he or she must have been involuntarily terminated in December AND must also have actually lost health care coverage during December.

Some employer group health plans just provide coverage through the day an employee is terminated. So, for example, someone terminating employment on

December 15, 2009 would lose coverage on December 16. However, other group health plans provide that once coverage is purchased for an employee for a given month, such an employee is covered through the end of the month. In this example, someone who terminates employment on December 15, 2009, is covered through December 31, 2009, and does not actually LOSE coverage until January 1, 2010. This wording of the statute had the apparently unintended effect of making many employees who involuntarily terminated employment in December (but who did not actually lose coverage until January) ineligible for the subsidy in December.

The DOD Act has amended the language of ARRA to clarify that someone becomes an assistance eligible individual based on the date of their involuntary termination (i.e., their qualifying event) – NOT the date they actually lost coverage.

#### **DOL review of Premium Reduction Denials**

If the group health plan, the employer, or the group health plan insurer denies an individual's eligibility for the COBRA premium subsidy, such individual can ask the Department of Labor ("DOL") to perform an expedited review on the denial. The DOL must then make a determination within 15 business days after receiving a completed review request. The DOL provides an application form that can be filed online or submitted by fax or e-mail at [www.dol.gov/COBRA](http://www.dol.gov/COBRA).

#### **Additional Guidance**

The DOL is likely to issue model notices by mid-January, 2010, and may also issue additional guidance to help group health plans and employers comply with these requirements. In addition, legislation to extend the subsidy beyond February 28, 2010 is under consideration. Fenwick & West LLP will continue to post additional information to its website as it becomes available.

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For more information on this, or related matters, you may contact:

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