

December 24, 2009

Extension of the COBRA Premium Subsidy

On December 19, 2009, President Obama signed the Department of Defense Appropriations Act of 2010 (the Appropriations Act), that includes an extension of eligibility for the COBRA premium subsidy for an additional two months and extends the maximum period for receiving the subsidy for an additional six months. The Appropriations Act requires plan administrators to provide notice of the extension to eligible COBRA beneficiaries.

Under the American Recovery and Reinvestment Act of 2009 (ARRA), certain qualified beneficiaries who are eligible for COBRA continuation of health coverage may be eligible to pay 35% of the premium for a nine-month period following the date of a qualifying event, with the employer receiving a payroll tax credit equal to the remaining 65% of the premium. Under ARRA, a COBRA qualified beneficiary will be an assistance eligible individual (AEI) entitled to reduced premiums if:

- He or she is eligible for COBRA at any time during the period September 1, 2008, through December 31, 2009;
- His or her COBRA election opportunity is the result of an involuntary termination from employment during the period September 1, 2008, through December 31, 2009; and
- He or she is not eligible for Medicare or for coverage under any group health plan, such as a plan sponsored by a successor employer or a spouse's employer.

Extensions

Under the Appropriations Act, the eligibility period for this COBRA premium subsidy is extended through February 28, 2010, and the maximum period for an AEI to receive the subsidy is 15 months, rather than nine months. Additionally, the Appropriations Act eliminates the requirement that COBRA eligibility must occur between September 1, 2008, and February 28, 2010. Rather, an individual is an AEI if:

- He or she is involuntarily terminated between September 1, 2008, and February 28, 2010;
- He or she becomes eligible for COBRA as a result of that termination; and
- He or she is not eligible for Medicare or coverage under any group health plan.

This means that an individual may still be an AEI even if he or she maintains active medical coverage through February 28, 2010, so long as his or her involuntary termination occurs on or prior to February 28, 2010, and he or she becomes eligible for COBRA as a result of that termination.

AEIs who reached the end of the nine-month premium subsidy period prior to the enactment of the Appropriations Act and who dropped their COBRA coverage have an opportunity to resume COBRA and continue to receive the premium subsidy. Within 60 days of the date of enactment or, if later, 30 days after notice of the extension is provided, such an AEI must pay 35% of the COBRA premium for any month(s) between the end of the original subsidy period and the date of enactment. AEIs who maintained COBRA coverage after the nine-month premium subsidy period ended are entitled to a reimbursement for overpaid premiums between the original subsidy end date and the date of enactment. Employers may provide the reimbursement by issuing a refund or applying a credit toward future premium balances.

© 2009 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

Notice Requirements

Plan administrators must provide notice of the extensions within 60 days of the date of enactment to:

- Anyone who was an AEI after October 31, 2009; and
- Anyone who has a qualifying event of termination of employment (voluntary or involuntary) on or after October 31, 2009.

Additionally, notice describing the extensions and the right to pay back premiums and reinstate coverage must be provided to AEIs dropped from coverage for failure to pay premiums between the period of the original subsidy end date and the date of enactment. We understand that the Department of Labor intends to issue model notices but we do not know how quickly these notices will be available.

Proposed Legislation

Stay tuned for new legislation in the new year regarding the COBRA premium subsidy. The Jobs for Main Street Act of 2010 (the Jobs Act) also contains a proposed extension of the COBRA subsidy period, as well as other proposed modifications. The House of Representatives passed the Jobs Act on December 16, 2009, and it is expected that the Senate will vote on the Jobs Act in January 2010. The following are highlights of the current proposed legislation; these changes will be effective upon the enactment of the Jobs Act, unless otherwise specified:

- Expanding the eligibility period for the COBRA premium subsidy through June 30, 2010;
- Including in eligibility a loss of coverage due to a reduction in hours, followed by a later involuntary termination;
- Clarifying that retiree health coverage does not disqualify an individual from receiving the COBRA premium subsidy;
- Providing, retroactive to the enactment of ARRA, a safe harbor for employers for determining whether termination of employment was involuntary;
- Potential new enforcement authority for the Department of Labor and the Department of Health and Human Services against plan sponsors who have not provided premium subsidies as required; and
- Potential express right of action by the Secretary of Labor or an affected individual to enforce an individual's right to the premium subsidy.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com