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LABOR & EMPLOYMENT DEPARTMENT
ALERT

COBRA Subsidies Extended

By Steven K. Ludwig and Keith R. McMurdy

Congress has extended the federal subsidy for COBRA health insurance premiums for employees who are involuntarily terminated. The nine-month, 65 percent premium subsidy is extended by six months to a total of 15 months. The subsidy now is available to those who involuntarily lose their jobs through Feb. 28, 2010. The legislation also provides an additional six months of subsidized coverage for beneficiaries whose initial nine month COBRA premium subsidy has run out. In addition, the legislation gives beneficiaries whose subsidy ran out and who did not pay the full premium a second chance to opt for coverage. For example, a beneficiary whose nine months of subsidized coverage ran out Nov. 30 and who did not pay the regular unsubsidized December 2009 premium can pay the 35 percent premium share in January 2010 and receive coverage for December. The legislation requires employers to notify current COBRA beneficiaries and future beneficiaries of the new 15-month premium subsidy.

The legislation applies to coverage under the federal COBRA law and Public Health Act and any state continuation laws ("mini-COBRA"). The law provides a subsidy for continuation coverage for any employee or dependent who loses or has lost coverage under a group health plan during the period beginning Sept. 1, 2008, and now ending on Feb. 28, 2010. If an employee or dependent meets the definition of "qualified beneficiary" under COBRA, that person is eligible for a subsidy if he or she is entitled to COBRA as a result of the employee's **involuntary** termination of employment.

Qualified beneficiaries are required to pay only 35 percent of the required continuation premium for up to 15 months, while the employer is required to pay the remaining 65 percent of the premium. The respective portions of the premiums are based on the continuation premium that would have otherwise been required to be paid by the qualified beneficiary. If the employer has already agreed to pay a portion of the COBRA premium as part of a severance agreement or other shut-down arrangement, the employee would need to pay only 35 percent of the portion of the premium not paid by the employer.

For plans subject to federal COBRA (insured, self-insured or self-funded), employers must cover the remaining 65 percent of the premium but are entitled to a refundable credit taken toward payment of payroll taxes. The credit is applied as though the employer had submitted an equivalent amount of payroll tax on the date the qualified beneficiary's payment is received. This payroll tax credit only applies to COBRA premiums paid by the employer by reason of the law, so employers that voluntarily agree to pay portions of COBRA premiums as a result of any other arrangement would not be entitled to the payroll tax credit.

The subsidy is not available to all former employees and their dependents. The subsidy does not apply for any months that begin after the qualified beneficiary becomes eligible for coverage under another "group health plan" or Medicare. So the subsidy ends when the COBRA period would normally end. If a qualified beneficiary becomes eligible for another group health plan or

Medicare during the subsidy period, the qualified beneficiary must provide notice of such eligibility to the plan. A qualified beneficiary who does not provide this notice is liable for 110 percent of the improperly paid subsidy amount.

There is an income limitation that applies to qualified beneficiaries, but the employer is not required to administer or account for the income of the beneficiary when providing the subsidy. A qualified beneficiary is not entitled to a COBRA subsidy during a year in which he or she is a taxpayer, or spouse or dependent of a taxpayer, whose federal modified adjusted gross income exceeds $145,000 (or $290,000 in the case of a taxpayer filing a joint return). The available COBRA subsidy is reduced for years in which gross income exceeds $125,000 (or $250,000 for joint returns). Qualified beneficiaries will be required to account for the subsidy on their own tax return so the employer will not be required to make any adjustment to its payment of the subsidy. As a result of the income limitation and other requirements for eligibility, qualified beneficiaries must make an election to receive the COBRA subsidy following notice of potential eligibility.

What Is Required?

- Immediately change COBRA election notices to incorporate this new law by advising newly potentially eligible former employees and beneficiaries that the COBRA subsidy is available for **15 months** (changed from nine months) relating to an involuntary termination of employment occurring on or before **Feb. 28, 2010** (changed from Dec. 31, 2009).
- Advise currently eligible beneficiaries who have elected the COBRA subsidy that eligibility has been extended from nine to 15 months. This notice is required to be issued within 60 days from enactment (which is expected this week) to anyone who was receiving the subsidy on or after Oct. 31, 2009. The U.S. Department of Labor is expected to issue model notices.
- Provide special notice to those individuals who lost assistance of the ability to make retroactive premium payments. Payment of the premium must be made within 60 days of enactment of the law or 30 days from notice, whichever is later.

We are anticipating that additional guidance, model notices and regulatory explanations will follow over the next several weeks. In the interim, employers should prepare for immediate implementation of the COBRA subsidy extension and consider its impact in any decisions involving force reductions. For more information or for assistance in compliance, please contact Steven K. Ludwig at 215.299.2164 or sludwig@foxrothschild.com, Keith R. McMurdy at 212.878.7919 or kmcmurdy@foxrothschild.com or any other member of the firm's Labor & Employment Department.

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