Stimulus Bill Includes Significant COBRA Changes

February 20, 2009

The American Recovery and Reinvestment Act of 2009 (the "Act"), signed by President Obama on February 17, 2009, temporarily modifies the continuation coverage provisions of the Consolidated Omnibus Business Reconciliation Act of 1985 ("COBRA") in significant ways.

Premium Subsidy. COBRA generally offers 18 months of continuation coverage to an employee who loses coverage under the group health plan of an employer with 20 or more employees. The terminated employee must pay premiums in order to receive coverage under COBRA. The Act will provide a government subsidy for nine months, which will cover 65 percent of the cost of COBRA coverage for employees whose employment was involuntarily terminated between September 1, 2008, and December 31, 2009, thereby allowing employees to continue their health coverage at 35 percent of the ordinary COBRA premium rate. Employers (in the case of uninsured group health plans) or insurers (in the case of insured group health plans) will subsidize the remaining 65 percent.

Reimbursement. The employer or insurer who pays the premium subsidy is entitled to reimbursement under the Act. The method of providing the reimbursement is for the reimbursement to be taken from the payroll taxes that the entity receiving the reimbursement owes. If the amount of the subsidy is greater than the payroll tax liability for that period, the additional amount due will be treated as a refund or a credit of payroll taxes as if it was an overpayment of payroll taxes.

Subsidy Period. The subsidy period begins with the first month of coverage after the Act is signed into law (*i.e.*, March 1, 2009) and lasts up to nine months, but may be shorter for some employees. This is due to the fact that the subsidy period ends upon the earliest to occur of: (1) the date that is nine months after the first day of the first month that the subsidy applies with respect to such individual, (2) the date following the expiration of the maximum period of continuation coverage required under COBRA, or (3) the date following the expiration of the extension period of continuation coverage. Therefore, the Act does not extend the maximum period of COBRA coverage (typically 18 months). For example, if an employee has seven months of COBRA coverage remaining, they will not receive two additional months under the Act. Coverage will terminate on the date that represents the maximum period of COBRA coverage.

Election Extension Period. In the case of an individual who does not have a COBRA election in effect upon the Act's enactment but who would be eligible for the premium subsidy if such election were in effect, that individual shall have a period of at least 60 days to elect COBRA continuation coverage. The coverage will be effective as of the first day of the month after the Act is signed into law (March 1, 2009) and shall not extend beyond the period of COBRA continuation coverage that would have been required if COBRA had been elected when initially offered.

Appeals. Where an individual is denied treatment by a group health plan, the Secretary of Labor shall provide for expedited review of such denial. The Secretary of Labor shall make a determination regarding the individual's eligibility within 15 business days after receipt of the individual's application for review under the Act.

Notice. The Act requires employers to modify COBRA election notices or provide separate, supplemental notices to all individuals who become entitled to elect COBRA continuation coverage between September 1, 2008, and December 31, 2009. These modified notices must describe the availability of premium subsidies with respect to that coverage and the option to enroll in different coverage if the employer permits individuals to elect enrollment in different coverage. The notice shall be provided within 60 days after the Act's February 17, 2009, enactment. However, a model notice will be published no later than 30 days after the Act's enactment.

Electing Different Coverage Options. Whereas COBRA generally does not allow employees to elect coverage other than the coverage they had immediately before the COBRA-qualifying event, the Act provides that an individual may elect to enroll in coverage under a plan offered by the employer that is different from coverage under the plan in which the individual was enrolled at the time the COBRA-qualifying event occurred, and that coverage shall be treated as COBRA continuation coverage. The election to change must be made within 90 days of receipt of the COBRA election notice. An individual may elect to enroll in different coverage only if: (1) the employer makes a determination that it will permit individuals to enroll in different coverage, (2) the premium for such different coverage does not exceed the premium for coverage in which the individual was enrolled at the time the COBRA-qualifying event occurred, and (3) the different coverage is also offered to the active employees of the employer at the time at which the election is made. This ability to change coverage options will also not allow an individual to elect into a flexible spending arrangement or coverage that provides only dental, vision, counseling or other referral services.

Penalties. An individual who does not notify a group health plan that they no longer qualify for the premium subsidy shall be subject to a penalty of 110 percent of the premium reduction. Individuals are no longer eligible for the premium subsidy if they become eligible for coverage under any other group health plan or flexible spending arrangement.

High-Income Individuals. Individuals with modified adjusted gross income that exceeds $250,000 for joint return filers or $125,000 for all other filers will not be eligible for the full premium subsidy. The premium subsidy will be fully phased out for those individuals with adjusted gross income of $290,000 or $145,000, respectively. In order to avoid these phase-out provisions, such high-income individuals may make a permanent election to waive the right to receive premium subsidies and thereby not be treated as an eligible individual.

Conclusion. The Act significantly amends COBRA and does so in a manner that is likely to require immediate action by employers. The Act's provisions are effective immediately and will impact COBRA administration beginning in March 2009. More employees may elect COBRA coverage as a result of the Act. However, as noted above, the Act does not permanently amend COBRA; rather, the Act applies only through 2009. Additional guidance is likely to be published on these complex issues, and we will provide updates accordingly.

For Further Information

If you have a question about this Alert or would like more information, please contact group chair W. Michael Gradisek, John A. Reade, Jr., Lawrence I. Davidson, any of the other attorneys in the Employee Benefits and Executive Compensation Practice Group or the attorney in the firm with whom you are regularly in contact.