COBRA Subsidy Amended and Extended—Revised Notification Deadline Approaches

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The Department of Defense Appropriations Act, 2010 (DDA), signed into law by President Obama on December 19, 2009, amended the COBRA subsidy in several important ways. The new law:

- Offers subsidized coverage to those workers involuntarily terminated through February 28, 2010, two months beyond the original expiration date of December 31, 2009.
- Extends the maximum subsidy period to 15 months (from 9 months) for all those eligible for the subsidy.
- Clarifies that the relevant event for determining subsidy eligibility is the date of termination, not the date of the loss of health coverage.
  Notification of the new subsidy rules is generally required no later than February 17, 2010 but may be required before the end of January 2010 for certain individuals whose subsidized COBRA coverage expired prior to the DDA amendment.

Background

As originally enacted, the American Recovery and Reinvestment Act of 2009 (ARRA) generally provided a 65% government subsidy for up to 9 months of the premiums paid for COBRA continuation coverage. To be an "assistance eligible individual" (AEI) and receive the 65% subsidy, an individual was required to (1) be an employee (or the qualified beneficiary of an employee) whose employment was involuntarily terminated between September 1, 2008, and December 31, 2009; (2) be eligible for COBRA continuation coverage; and (3) have elected COBRA coverage under the normal or special ARRA election rules (detailed in our February 20, 2009 Email Alert). Guidance from the Department of Labor (DOL) subsequently clarified that both the termination and the eligibility for COBRA coverage was required to occur between (and including) September 1, 2008, and December 31, 2009, in order for an AEI to qualify for the subsidy. Our prior email alerts on the COBRA subsidy are COBRA Subsidy Under ARRA and COBRA Subsidy Update: Notice Requirements and Other Recent Guidance.

Changes to the COBRA Subsidy

The law as revised by the DDA now provides that an individual who is eligible for COBRA continuation coverage due to an involuntary termination between September 1, 2008 and February 28, 2010 (but does not necessarily lose health care coverage during that time) and timely elects COBRA coverage under the normal COBRA election procedure is eligible for the subsidy in the payment of COBRA premiums for a period of up to 15 months.

For those individuals who had received the subsidy for the maximum number of months before ARRA was amended, the law provides an extended grace period in which they may pay the 35% premium and retain their coverage. Such individuals have until February 17, 2010 or, if later, 30 days after they receive notice of the amendments, to make their premium payments. Individuals who paid 100% of the premium in December 2009 are eligible for a credit for future months of coverage or a reimbursement of the overpayment.

Notice Requirements

In addition to ARRA's existing notification requirements, certain new notices are required by the amended law. The DOL has stated that although some individuals may be entitled to multiple notices they may be provided with a single notice that includes all the required information so long as it is provided by the earliest day required. Updated model notices are available on the DOL website here.

- Generally, individuals who were AEIs on or after October 31, 2009 or experienced an involuntary termination from employment between October 31, 2009 and December 19, 2009 must be provided with a notification of the extended coverage amendments by February 17, 2010. Note that the DOL advises that employees who experienced an involuntary termination at any time in December 2009 but who were not eligible for COBRA coverage until January 2010 likely did not receive proper notice and should be provided with an updated General Notice and be given the full 60-day period from the date of the updated notice to make a COBRA election.

- However, individuals who were AEIs on or after October 31, 2009 and whose subsidized COBRA coverage expired before enactment of the DDA must receive the extended coverage notice within 60 days of the first day of their "transition period" (for more detail on calculating this period see below).

- Individuals who experienced an involuntary termination from employment on or after December 19, 2009 may be provided the additional notice as part of the general notification they are required to receive under ARRA's pre-existing general notification requirements.

Transition Period

Individuals who exhausted the maximum number of months during which they could claim the subsidy prior to ARRA's amendment and either did not timely pay the premium for coverage thereafter or paid the full premium amount must be provided notice of the amendments within the first 60 days of their "transition period." An AEI's transition period begins on the first day of the first period of coverage that the AEI would be eligible for the subsidy as a result of the DDA amendments. For example, if an AEI experienced an involuntary termination before the enactment of ARRA, the first period of coverage for which she could receive the subsidy began on March 1, 2009 and she remained eligible to receive the subsidy for the then maximum nine-month period, then her eligibility for the subsidy would have ended on November 30, 2009. Therefore, December 1, 2009 would be the first day of the first period of coverage that she would be eligible to receive the subsidy due to the DDA extension (*i.e.* December 1, 2009 is the first day of her transition period). Such an individual must receive notice of the extension within 60 days of December 1, 2009 and has until the later of February 17, 2010 or 30 days after she receives the notice to make premium payments for any period of coverage during her transition period.

Claiming Credit for Prior-Year COBRA Subsidy

In response to the amendments made by the DDA, on January 6, the Internal Revenue Service (the Service) stated that if an employer receives an AEI's premium payment in 2010 for a period of coverage in 2009, the employer may claim its 65% subsidy on Form 941, Employer's Quarterly Federal Tax Return for either the quarter in 2010 in which the premium payment was received or a later quarter in 2010 but not for the quarter in 2009 in which the coverage occurred. The Service had previously required employers to use the Form 941 for the year of the coverage period to claim subsidy amounts. This change relieves employers of the obligation to amend prior year Form 941s to claim a credit for subsidizing prior-year coverage. The rule that an employer that chooses to reduce its payroll tax deposits during a quarter based on the receipt of the individual's 35% premium payment must claim the credit for the related subsidy amount on Form 941 for the quarter during which its payroll tax deposits were reduced remains in effect.

For more information on this or other tax matters, contact Amy A. Null or Linda K. Sherman.

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