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Re: New COBRA Subsidy Effective March 1, 2009

Dear Clients and Other Friends:

As many of you may know already, President Obama signed a temporary COBRA subsidy into law on February 17, 2009. This subsidy will drastically affect the administration of group medical plans and requires immediate attention.

The new law provides that certain employees who have an involuntary termination of employment can only be required to pay 35% of the currently charged COBRA premium for up to nine months. Employers will have to provide an initial subsidy for the remaining 65%, but can recapture this amount through payroll tax credits.

The COBRA subsidy applies to "qualified beneficiaries" who became or become eligible for COBRA on or after September 1, 2008 through December 31, 2009 due to an involuntary termination of employment (other than for gross misconduct). Qualified beneficiaries who were previously eligible to elect COBRA coverage but did not do so, and those who did elect COBRA coverage but whose COBRA coverage has since lapsed (e.g., for non-payment) must be given a second chance to elect subsidized COBRA coverage. Therefore, the subsidy will apply to the following individuals:

1. Current employees who become eligible for COBRA coverage due to an involuntary termination of employment on or before December 31, 2009;
2. Any former employee who had an involuntary termination on or after September 1, 2008 and is currently covered by COBRA (or is currently in the COBRA election period);
3. Former employees who had an involuntary termination of employment on or after September 1, 2008 but did not elect COBRA even though they were eligible; and
4. Former employees who had an involuntary termination of employment on or after September 1, 2008 and elected COBRA but are no longer covered as of February 17, 2009. For example, an individual who lost COBRA coverage because they failed to pay the required premium.

For medical plans that charge COBRA premiums on a monthly basis, the subsidy will begin as of March 1, 2009. Accordingly, employers have an extremely short time to establish administrative systems to identify employees who terminated involuntarily (other than for gross misconduct) on or after September 1, 2008. In addition, plan administrators must determine which of these employees already have COBRA coverage, establish billing systems to charge the reduced 35% COBRA premium, establish a method to claim the payroll tax credit for the subsidy and identify involuntarily terminated employees who are not covered by COBRA.

Since it will be virtually impossible for most employers to accomplish all of these tasks by March 1, plan sponsors may charge eligible individuals the full COBRA premium for the first two months of the subsidy (i.e., March and April of 2009). The individual entitled to the subsidy must, however, be given a credit towards future COBRA premiums or must receive a refund of the subsidized amount. The credit approach may only be used if it is reasonable to believe that it can be used up within 180 days. Any refunds must be made within 60 days.

Individuals who had an involuntary termination of employment on or after September 1, 2008, but are not currently covered by COBRA must be given a second chance to elect COBRA. The election can be made any time during the period ending 60 days following the date the eligible employee receives a COBRA subsidy notice and election form. The coverage commences as of the effective date of the subsidy, which will usually be March 1, 2009. Pursuant to current COBRA rules, the former employee would have 45 days from the date of his or her election to make the required premium payment.

Aside from gathering the information described above, employers (or other parties responsible for COBRA administration) must develop and distribute new COBRA notices to involuntarily terminated employees who became or become eligible for COBRA coverage during the September 1, 2008 – December 31, 2009 eligibility period. The notices must be distributed by April 18, 2009. These notices must include:

1. How the COBRA subsidy works and how to apply for it.
2. The second chance to elect COBRA coverage.
3. The fact that the individual must notify the plan sponsor if they are eligible for other medical coverage or Medicare (in which case they are not eligible for the COBRA subsidy).

In addition, if an employer wishes to provide an option for less expensive coverage than the normal COBRA coverage, that option must be described in the notice.

It appears that all qualified beneficiaries, not just those who are identified as having had an involuntary termination of employment, must be given the notice. If an individual, whom the employer believes was not involuntarily terminated, elects coverage, the employer can refuse to treat the individual as being eligible for the subsidized COBRA coverage. In that case, the individual can appeal to the Department of Labor for an eligibility determination.

Although the Department of Labor (“DOL”) has been directed to prepare a model notice by March 17, 2009, employers may want to prepare their own notices in the meantime rather than wait for the DOL notice.

The subsidy can last for up to nine months. The nine-month period will be shortened if the individual’s COBRA coverage ends first or the individual becomes eligible for core coverage under any other group medical plan or is eligible for Medicare. In the case of an eligible individual who is not covered by COBRA on February 17, 2009 and gets a second chance to elect COBRA, the maximum COBRA coverage period is determined as if the eligible individual had elected COBRA as of the date he or she was first eligible, not as of the date on which COBRA coverage actually begins. The subsidy, however, will not be more than nine months.

This is a short summary of the new rules and is not intended to be a comprehensive guide to the COBRA subsidy. There are many unanswered questions, not the least of which is what constitutes an “involuntary termination of employment.” There also appear to be untoward (and perhaps unintended) results for employers who already partially subsidize COBRA premiums. Presumably, guidance will be forthcoming soon to help employers implement the new rules. In the meantime, if you have any questions regarding the details of the new law or need assistance in implementing new COBRA procedures or otherwise complying with the new law, please contact one of us.

Very truly yours,

Anthony R. Battles

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