

January 4, 2010

EBS-RMSCO NEWSLETTER
COBRA PREMIUM SUBSIDY EXTENSION

The American Recovery and Reinvestment Act of 2009 (“ARRA”) provided a temporary COBRA premium subsidy for certain individuals and imposed related notice and reporting requirements for employer-sponsored group health plans. *On December 19, 2009, President Obama signed the Department of Defense Appropriations Act for Fiscal Year 2010 (“2010 Defense Act”), which expands the period during which persons may qualify for the COBRA premium subsidy, retroactively extends the period during which the subsidy is available, and imposes new notice requirements.* This Client Newsletter summarizes these changes and should be read in conjunction with the last Client Newsletter on the ARRA (dated April 6, 2009). *Except as noted in this Client Newsletter, the rules discussed in that prior Newsletter still apply.*

Eligibility for COBRA Premium Subsidy

Under the ARRA, to be eligible for the COBRA premium subsidy (i.e., to be an “assistance eligible individual” or an “AEI”), a person had to satisfy two requirements.

1. He must have been: (i) an employee who had an involuntary termination of his employment between September 1, 2008 and December 31, 2009 and became eligible for COBRA coverage during that same time period due to the termination; or (ii) the spouse or dependent child of such an employee who became eligible for COBRA coverage during that time period due to the employee’s involuntary termination.

2. He must have elected COBRA coverage during his original COBRA election period (or, if he was eligible to elect COBRA coverage before February 17, 2009 and did not have COBRA coverage in effect on that date, he must have elected COBRA coverage during an extended election period starting on that date and ending on the date 60 days after he received a new COBRA notice).

The 2010 Defense Act changes the first requirement above. Now, to be an AEI a person must be (i) an employee who had (or has) an involuntary termination of his employment between September 1, 2008 and February 28, 2010 and became (or becomes) eligible for COBRA coverage due to the termination; or (ii) the spouse or dependent child of such an employee who became (or becomes) eligible for COBRA coverage due to the employee’s involuntary termination. Note that, under the 2010 Defense Act, only the termination of employment must occur during the specified period and the date the person actually becomes eligible for COBRA coverage is now irrelevant. For example, an employee will be an AEI if he is involuntarily terminated on February 28, 2010 even if his regular health coverage is extended through March 2010 and he is not eligible for COBRA coverage until April 1, 2010.

Retroactive Extension of COBRA Premium Subsidy

Under the ARRA, the COBRA premium subsidy could not continue more than nine months following the first day of the first month the AEI became eligible for the subsidy. The 2010 Defense Act retroactively extends the period the subsidy is available by an additional six months (for a total of fifteen months). However, as before, the subsidy still ends when the AEI's maximum COBRA coverage period ends or when he is eligible for Medicare or coverage under another group health plan (even if not actually covered), other than: (i) a plan providing only dental, vision, or counseling coverage; (ii) a health flexible spending plan (including an HRA that qualifies as a flexible spending account under Internal Revenue Code §106(c)); or (iii) an employer maintained limited care on-site medical clinic.

If an AEI's COBRA coverage ended after nine months of subsidized coverage and before the maximum subsidy period was extended because he failed to pay his COBRA premiums during the extended subsidy period, he must be given the opportunity to reinstate his COBRA coverage retroactively by paying premiums at the subsidized rate for the period he would have been entitled to the subsidized coverage had the maximum subsidy period originally been fifteen months. He must make this payment by February 17, 2010 or, if later, 30 days after he receives notice of the extended subsidy period from the plan administrator.¹ (See Notice Requirements below). If an AEI has paid more than the subsidized premium for COBRA coverage during the extended subsidy period, he must receive a refund or a credit against future premiums.

Notice Requirements

The ARRA required that plan administrators send special COBRA notices to employees, spouses and dependents who became eligible to elect COBRA coverage during the period originally required to qualify for the COBRA premium subsidy. These notices will have to be updated to reflect the change to the subsidy eligibility requirement and the subsidy extension discussed above.

The 2010 Defense Act specifically requires plan administrators to notify the following persons of the subsidy extension: (i) individuals eligible for the COBRA subsidy on or after October 31, 2009; (ii) individuals who have a COBRA qualifying event consisting of a voluntary or involuntary termination of employment on or after October 31, 2009; (iii) individuals whose COBRA coverage ended after nine months of subsidized coverage and before the maximum subsidy period was extended because they failed to pay their COBRA premiums during the extended subsidy period; and (iv) individuals who have paid more than the subsidized premium for COBRA coverage during the extended subsidy period. The notices to individuals in these last two groups must advise them of their right to make retroactive payments, or to a refund of (or credit for) overpayments. This notice must be given by February 17, 2010 or, for an

¹ The employer is the plan administrator for most employer-sponsored plans, and this Newsletter assumes the employer is responsible for satisfying the notice requirements.

individual with a COBRA qualifying event occurring after December 19, 2009, by the normal COBRA notice deadline.

The DOL may issue new model notices incorporating information on the 2010 Defense Act changes.

What should employers do about these changes?

Employers should continue to monitor guidance published on the DOL and Treasury web sites (www.irs.gov and www.dol.gov), and be prepared to send the new notices when required.² However, you should be aware that there is more legislation pending which, if passed, will extend the eligibility period for the COBRA premium subsidy even further and change the notice requirements again. Employers should discuss with their legal counsel the best time to send new notices in order to minimize the complexity of these communications and confusion.

This Client Newsletter is for general informational purposes only, does not cover all issues and details concerning the COBRA subsidy and should not be considered or relied upon as legal advice.

² You can subscribe to e-mail updates on the COBRA subsidy requirements at www.dol.gov/ebsa/COBRA.html.