

L a b o r & E m p l o y m e n t  
A L E R T

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C O N G R E S S E X T E N D S C O B R A S U B S I D Y

Just in time for the year-end holidays, Congress enacted the Department of Defense Appropriations Act, 2010 (the “2010 Act”) tucked into which is an extension of the COBRA subsidy that was set to expire on December 31, 2009. The new law:

- Extends eligibility for the COBRA subsidy to employment terminations that occur through February 28, 2010 – a two month extension;
- Extends the premium reimbursement period from 9 months to 15 months and is retroactive to March 1, 2009; and
- Allows those who stopped paying COBRA coverage because their subsidy ran out to re-enroll for COBRA coverage without any gaps in coverage.

**COBRA Prior to the American Recovery and Reinvestment Act**

COBRA generally applies to all group health plans maintained by private-sector employers having 20 or more employees and by state and local governments. COBRA generally requires continuation coverage of 18 months – and 36 months if the covered employee is disabled – to be offered to covered employees, their spouses, their former spouses and their dependent children, when group health coverage otherwise would be lost by the occurrence of certain events. One of these events is the termination (or a reduction in hours) of a covered employee’s employment for reasons other than gross misconduct. Employers may and generally do require persons who lose their job and elect COBRA continuation coverage to pay the full cost of that coverage, plus a 2% administrative charge. Thus, employees electing COBRA continuation coverage could be required to pay up to 102% of the COBRA continuation premiums to retain health insurance.

**The ARRA as Amended**

Certain terminated employees were afforded COBRA premium assistance under the February 2009 American Recovery and Reinvestment Act (the “ARRA”). The ARRA, as amended by the 2010 Act, provides for COBRA premium assistance of 65% of premium cost to employees who lost or lose their job (other than for gross misconduct) between September 1, 2008 and February 28, 2010 and elect COBRA continuation coverage (“Assistance Eligible Individuals”).

Assistance Eligible Individuals are entitled to the 65% subsidy for up to 15 months, or until they become eligible for (as opposed to covered under) other group health coverage or Medicare benefits. For this purpose, “other group health coverage” does not include: (i) coverage consisting only of dental, vision, counseling or referral services (or a combination); (ii) treatment furnished at the employer’s on-site medical facility that is primarily first-aid, prevention or wellness care (or a combination); or (iii) coverage under a Health Reimbursement Arrangement or a Health Flexible Spending Arrangement.

Generally, premium subsidies are excludable from gross income of Assistance Eligible Individuals; however, those who generally earn more than \$145,000 (\$290,000 for joint returns) must report as income the full amount of the subsidy, and those who earn between \$125,000 and \$144,999 (or, more than \$250,000 but less than \$289,999 for joint returns) must report as income a percentage of the subsidy received in that year.

COBRA continuation coverage may expire upon the first to occur of:

- Failure to timely pay premiums in full;

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- Cessation of the employer's maintenance of any group health plan;
- Commencement of coverage under another group health plan of a qualified beneficiary after electing COBRA continuation coverage; or
- Entitlement of a qualified beneficiary to Medicare benefits after electing continuation coverage.

### **The 2010 Act**

Under the 2010 Act, Assistance Eligible Individuals who had reached the end of the premium subsidy period before this legislation extended it to 15 months will have an extension of their grace period to pay the reduced premium. To continue their coverage they must pay their 35% of premium costs by February 17, 2010, or, if later, within 30 days after notice of the extension is provided by their plan administrator. Individuals who lost their subsidy and paid the full 100% premium in December 2009 should contact their plan administrator or employer sponsoring the plan to discuss a credit for future months of coverage or a reimbursement of the overpayment.

### **Actions Required of Employers**

The ARRA, as amended by the 2010 Act, requires that plan administrators provide certain notices. As part of the COBRA election notice, plan administrators must provide information about the premium reduction to all employees who have COBRA qualifying events from September 1, 2008 through February 28, 2010.

Plan administrators must also provide notice of the changes made to the premium reduction provisions of ARRA by the 2010 Act to those who already have been provided a COBRA election notice (unless the election notice included the updated premium reduction information).

- Assistance Eligible Individuals must be provided this notice by February 17, 2010;
- Assistance Eligible Individuals who are in a "transition period" must be provided this notice within 60 days of the first day of the transition period. The transition period is the period that began

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immediately at the end of the 9-month premium subsidy period in effect under ARRA before the 2010 Act amendment, provided the 9-month period ended before December 19, 2009 for those individuals who are eligible for an extension of the premium subsidy for an additional 6 months; and

- Those who experience a termination of employment on or after October 31, 2009 and lose health coverage must be provided this notice within the normal timeframes for providing continuation coverage notices.

While we counsel our clients on COBRA related issues as a matter of course, every client is unique and solutions must be specifically tailored. We look forward to the opportunity to assist with the new aspects of COBRA. ♦

*If you would like more information about the issues discussed in this alert, please contact any of the following attorneys in Schnader's Labor and Employment Practices Group:*

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