

CLIENT ALERT: Stimulus Bill Modifies Provisions of COBRA By Providing Subsidy to Employees

On February 17, 2009, President Barack Obama signed into law the economic stimulus bill, which is formally titled the American Recovery and Reinvestment Act of 2009 (the "Act"). Among the Act's many provisions are several amendments to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") which, among other things, governs the requirements for continued health care coverage of individuals following various qualifying events such as an involuntary loss of employment or reduction of work hours.

The major effect of the Act on COBRA is the creation of a temporary federal subsidy for continuation premiums which affects employer notice requirements and payroll tax administration. This enactment has immediate implications for employers, requiring them to implement the Act's requirements as of February 17, 2009.

The Act is mandatory for all employers who sponsor a group health plan covered under COBRA or a state "mini-COBRA" law which is comparable to that of COBRA. Under the state's "mini-COBRA law, Massachusetts employers with 2-19 employees may be impacted by the Act.

Federal COBRA Subsidy

The Act creates a federal subsidy for COBRA continuation premiums ("COBRA subsidy") whereby eligible individuals will be required to pay just 35% of the COBRA premiums for continuation coverage. Employers sponsoring group health plans will be required to pay the remaining 65% for the premiums until they obtain reimbursement from the federal government. The 2% administrative costs associated with COBRA are not addressed by the Act.

The subsidy is available to eligible individuals for nine months or the remaining maximum continuation coverage period under COBRA, whichever is less. The subsidy would cease to be available if an individual becomes eligible for coverage under any other group health plan, Medicare, or Medicaid. For purposes of the Act, subsequent group health plans do not include (1) coverage under a flexible spending arrangement; (2) coverage for dental, vision, counseling, or referral services; or (3) coverage of treatment that is furnished by an employer through certain on-site medical facilities.

If an individual receiving the COBRA subsidy becomes eligible for subsequent coverage which would cause the subsidy to cease, he or she must provide notice of such eligibility to the group health plan providing continuation coverage. Failure to do so may subject the individual to a penalty equal to 110% of the COBRA subsidy improperly paid after termination of eligibility.

Eligibility of Individuals

Individuals are eligible for the Act's COBRA subsidy if they are otherwise eligible for COBRA

continuation coverage, have elected the coverage, and have involuntarily lost their jobs between September 1, 2008 and December 31, 2009. The Act does not provide guidance on how to determine whether an employment action is involuntary.

The Act also mandates that employers provide an extended COBRA election period to individuals who gained eligibility at some point following September 1, 2008 and would have been eligible for the COBRA subsidy if enrolled on February 17, 2009. For these individuals who had either declined to elect coverage or who had elected and subsequently terminated coverage, employers are required to grant them an additional 60-day period in which to elect or re-elect coverage. This 60-day period runs from the date on which an individual receives an extended election notice. *Note:* This extended election period has no effect on the determination of individual's maximum COBRA coverage period, which is still calculated from the individual's "qualifying event."

Eligibility is also affected by the individuals' income, with the subsidy beginning to phase out for single taxpayers with an annual modified adjusted gross income of \$125,000 (\$250,000 for joint filers) and being eliminated entirely at \$145,000 (\$290,000 for joint filers).

Where eligible individuals who had elected COBRA coverage have already paid the full COBRA premium, employers must either reimburse them for the amount of such premium paid in excess of the amount required to be paid or provide credit to them for such amount towards future COBRA payments. An employer may only provide credit in lieu of a reimbursement if it is reasonable to believe that the credit will be used by the individual within 180 days of the full premium payment.

Flexible Plan Selection for Continuation Coverage

Where employers provide different coverage options to employees, the Act allows eligible individuals to enroll in continuation coverage under a plan other than the one he or she was enrolled in at the time of a qualifying event. This is a departure from ordinary COBRA regulations which only allow individuals to elect continuation coverage from the plan in which they were previously enrolled.

According to the Act, in order to enroll in different coverage, (1) the eligible individual must elect to do so within 90 days of receiving a COBRA election notice; (2) the premium for the elected coverage must not be higher than that of the premiums for the individual's previous plan; and (3) the employer must also offer different coverage options to active employees.

Employer Notice Requirements

The Act requires that employers revise their COBRA election notices to include information regarding the COBRA subsidy. The Act directs the Secretary of Labor to issue a model notice within 30 days of its enactment, but until this model is released, any notices issued by employers must include the following information:

- The forms necessary for establishing eligibility for the COBRA subsidy;
- The name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with the COBRA subsidy;

- A description of the extended election period for individuals who either declined to elect coverage or who had elected and subsequently terminated coverage;
- A description of an individual's obligation to provide notice to his or her group health plan providing continuation coverage of eligibility for subsequent coverage under another group health plan, Medicare, or Medicaid, and the penalty for failing to do so;
- A description, displayed in a prominent manner, of the individual's right to a COBRA subsidy and any conditions on entitlement to the reduced premium; and
- A description of the option of the individual to enroll in different coverage if the employer does permit such a beneficiary to do so.

Employers are further required to provide extended election notices to former employees who had either declined or terminated COBRA continuation coverage, if they became eligible for COBRA continuation coverage after September 1, 2008 and would have been eligible for the COBRA subsidy if enrolled on February 17, 2009. These extended election notices must include the information listed above.

Employer Reimbursement

Employers are reimbursed for the COBRA subsidy through a credit towards federal payroll taxes. If an employer's total reimbursement exceeds the employer's liability for federal payroll taxes, the employer will be reimbursed directly through a program established by the Department of Treasury.

In order for employers to be reimbursed for subsidy payments, the Act requires that they provide the following information: (1) attestations of involuntary termination of employment for each covered employee receiving a subsidy; (2) the amount of payroll taxes offset for the reporting period and the estimated offsets of such taxes for the subsequent reporting period in connection with reimbursements; and (3) the amount of subsidy reimbursed with respect to each covered employee and qualified beneficiaries, identifying whether the subsidy was for one or more individuals.

Effect on Severance Agreements

It remains unclear how the Act's subsidy provision will affect situations where employers have a severance agreement through which they agree to pay a portion of an employee's COBRA continuation coverage premiums. The Act does not address severance agreements directly and its use of the word "premium," without further definition, has left no clear consensus on the Act's proper application to them.

There are several ways to interpret the amount of the premium from which the subsidy is to be calculated. One interpretation is that the applicable premium is the amount of the total premium required for COBRA continuation coverage, regardless of an employer's agreement to pay for a set amount. For example, if the total premium of continuation coverage for an employee was \$10,000 and the employer agreed in a severance package to pay 80%, the employee would ordinarily be left

to cover the remaining \$2,000. Under this interpretation, the applicable premium for determining the subsidy would be \$10,000.

A second interpretation of the applicable premium for the subsidy is the amount of a premium that an employee would otherwise be responsible to pay in lieu of the Act. With the example above, this interpretation would provide that the subsidy would be calculated from the \$2,000, as the employee would only have had to pay for this amount under the severance agreement.

Employers should be aware of these potential differences in the Act's interpretation and their resulting effects upon the subsidies and severance agreements. It is hoped that this uncertainty will be resolved when Department of Treasury issues its guidance on the law.

DOL Review of Denials

Where eligible individuals are denied treatment by group health plans, the Act provides that the Department of Labor shall, upon an individual's application, provide an expedited review and make a final determination within 15 business days.

It is anticipated that the Secretary of Treasury may issue regulations on these provisions of the Act. Please check our website for updates, or contact your MBJ attorney for the most up-to-date information.

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