

COBRA Premium Subsidy Program Extended: Immediate Notification Required

On December 19, 2009, President Obama signed legislation which extends the availability of the government subsidy for continuation health coverage (referred to in this Alert as "COBRA"¹) in connection with an involuntary termination that occurred, or will occur, between September 1, 2008 and February 28, 2010 (the "Revised Program").

The COBRA subsidy program was initially authorized under the American Recovery and Reinvestment Tax Act of 2009, and provides assistance eligible individuals with a 65% reduction in the COBRA premium for up to 9 months (the "Original Program"). Following is a link to our March 2009 Client Alert² describing the Original Program: <http://www.pbwt.com/new-federal-cobra-subsidy-law-requires-prompt-employer-action/>.

Aspects of the Original Program Which Remain Unchanged

Two important aspects of the Original Program remain unchanged under the Revised Program. First, the subsidy continues to be a 65% reduction in the COBRA premium. Second, an individual must be involuntarily terminated in order to be eligible to receive the subsidy. Therefore, an individual who loses health coverage in connection with an involuntary reduction in hours will not be eligible for the subsidy.

Expansion of the Original Program

The Revised Program makes two significant expansions to the Original Program. First, the Revised Program expands the eligibility for the subsidy to individuals who are involuntarily terminated from January 1, 2010 through February 28, 2010 (provided they otherwise satisfy the Program's eligibility requirements). The Revised Program further provides that eligibility for the subsidy depends on when the involuntary termination occurs, not when the loss of active of employee health coverage occurs. By way of background, the subsidy under the Original Program was only available to individuals involuntarily terminated by December 31, 2009, provided the individuals also lost their eligibility for active employee health coverage by December 31, 2009. An individual who is involuntarily terminated on December 31, 2009 generally would not have been eligible for the subsidy under the Original Program because he or she would still have active employee health coverage on December 31, 2009 (i.e., his or her last day of employment). Under the Revised Program, if an involuntary termination occurs on February 28, 2010, the individual will be eligible for the subsidy (provided he or she otherwise satisfies the subsidy eligibility requirements), even though the individual may not lose his or her active employee health coverage until March 1, 2010 or later.

Second, the Revised Program expands the maximum period during which an individual is eligible for the subsidy. Under the Original Program, an assistance eligible individual was eligible to receive the subsidy for up to 9 months; the Revised Program expands this period to a maximum of 15 months. As a reminder, eligibility for the subsidy may end earlier (e.g., if the individual becomes eligible to be covered under a subsequent employer's group health plan). Please review our March 2009 Client Alert for an explanation of when eligibility for the subsidy will end earlier than the maximum subsidy period.

Retroactive Payment Opportunity

The Revised Program provides up to 6 additional months of the subsidy to individuals who exhausted the initial 9 months of the subsidy prior to enactment of the Revised Program ("Otherwise Exhausted Individuals"), provided the individuals otherwise remain eligible for the subsidy (e.g., they have not exhausted their maximum COBRA coverage and have not become eligible for other group health plan coverage). If an Otherwise Exhausted Individual did not timely pay his or her COBRA premium after exhausting the subsidy, and otherwise remains eligible for the COBRA subsidy, the Revised Program allows the individual to retroactively pay the COBRA premium (reduced by the amount of the subsidy) by February 17, 2010 or within 30 days after receiving the notification described below (if later). It appears that such retroactive payment would result in an individual being retroactively re-enrolled in COBRA if the individual had previously been dropped due to non-payment of the premium.

Similarly, if an Otherwise Exhausted Individual did pay the full COBRA premium following exhaustion of the subsidy, the Revised Program provides that the insurer or employer (as applicable) must either reimburse the individual for the excess amount, or credit the individual with respect to future premium payments.

New Notification Requirements

The Revised Program imposes two notice obligations on plan administrators or insurers, as applicable.³ First, the Revised Program requires a plan administrator or other entity to provide notification regarding the Revised Program to any individual who was an assistance eligible individual at any time on or after October 31, 2009 or who otherwise experiences a qualifying event, relating to termination of employment, on or after October 31, 2009. The notification must be provided, by February 17, 2010, to individuals who were assistance eligible individuals, or who otherwise had a qualifying event in connection with an employment termination (either voluntary or involuntary), between October 31, 2009 and December 19, 2009. Otherwise, the COBRA election notice (which already includes information on the COBRA subsidy) must include information on the Revised Program.

Similarly, the Revised Program requires the plan administrator (or other entity) to notify an Otherwise Exhausted Individual who either did not timely pay the premium for any period of coverage after exhausting the COBRA subsidy period or who paid the full COBRA premium (following exhaustion of the COBRA subsidy period). This notification should include information on the ability to make retroactive premium payments or receive credit for overpaid COBRA premiums. It must be provided within the first 60 days of the Otherwise Exhausted Individual exhausting the initial 9 months of the COBRA subsidy.

Immediate Action Required

The Revised Program notification obligations require immediate action:

1. Individuals who must receive the notifications required by the Revised Program should be identified.
2. Employers should coordinate with their insurers to determine whether the employer or the insurer will provide the required notifications.
3. COBRA election notices should be revised to reflect the Revised Program. ♦

Endnotes

- ¹ As discussed in our March 2009 Client Alert on the subsidy, certain individuals not entitled to Federal COBRA are eligible for the subsidy (such as those entitled to certain state continuation coverage). For ease of reference, all references in this Alert to "COBRA" generally also include other governmentally mandated continuation coverage and state continuation coverage which is comparable to COBRA. Please review our March 2009 Client Alert (available at <http://www.pbwt.com/new-federal-cobra-subsidy-law-requires-prompt-employer-action/>) to review the types of group health plan continuation coverage for which an individual is eligible to receive the subsidy.
- ² Please note our March 2009 Client Alert was drafted prior to the issuance of Internal Revenue Service ("IRS") and U.S. Department of Labor ("DOL") guidance on the Original Program. In particular, subsequent to the Client Alert's publication, the IRS issued guidance on topics such as the types of terminations which are considered to be "involuntary" and the means by which an employer could recover the subsidy amount from the government. We recommend you visit www.dol.gov/cobra to see further IRS and DOL guidance on the subject.
- ³ The statutory language for the Revised Program, unfortunately, is not explicit regarding which entity, the employer or insurer, is required to provide notices regarding the Revised Program, but the language is similar to the statutory language for the Original Program regarding responsibility for the notice requirement. The DOL previously advised that the notice required by the Original Program must be provided by insurers to individuals eligible for "mini-COBRA" under state law.

Members of the Employee Benefits and Executive Compensation Practice Group at Patterson Belknap Webb & Tyler LLP, listed below, are available to discuss any questions you may have regarding the Revised Program, and to assist you in preparing notices that comply with the Revised Program.

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