

Anne E. Moran
202.429.6449
amoran@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

December 21, 2009

TO: Interested Clients

FROM: Anne E. Moran
Rhonda M. Bolton

RE: Update – Extension of COBRA Subsidies Established by the
American Recovery and Reinvestment Act of 2009 (ARRA”)

Overview

With legislation passed by Congress on Saturday, December 19, 2009, the COBRA subsidy program that was created by the ARRA has been extended another two months. In that legislation, Congress also (1) extends the maximum duration of subsidy payments from nine months to fifteen months; (2) requires a new round of notices in connection with the extensions; and (3) clarifies a troublesome technical question as to when a person becomes eligible for the subsidy.

The ARRA originally provided that eligibility would end on December 31, 2009 for COBRA premium subsidies made available under the ARRA to certain individuals who experienced involuntary termination of employment. The subsidy eligibility period will now be extended to February 28, 2010. This means that persons who become eligible for COBRA due to involuntary termination occurring through February 28, 2010 may be eligible for the subsidy.

The reason for a two month extension, rather than the six months that had been contemplated by legislators, is reportedly that the House and Senate could not reach agreement on a more extensive set of proposed changes before the December 31, 2009 expiration of the COBRA subsidies, and simply ran out of time. Consequently, a two-month extension along with a limited number of changes to the subsidy law were appended to a must-pass bill, the Department of Defense appropriations measure (which ended up being a vehicle for temporary extensions of numerous other programs as well) (*see* Department of Defense Appropriations Act 2010, H.R. 3326, 111th Cong. § 1010 (2009) (available [here](#)) (hereinafter, “DoD Act”). Health plans, employers, and any others involved in benefits administration should, therefore, be aware that there are more changes on the horizon for the subsidy provision, including probable extension of the program to June 30, 2010.

The other significant change made by the extension measure is an increase of the maximum COBRA subsidy duration from nine months to fifteen months, which is made retroactive for those already receiving the subsidy.

Pertinent details of the COBRA subsidy extension legislation are provided below.

Extensions

The first major change to the subsidy law is an extension to February 28, 2010 (*see* DoD Act §1010 (a)). As noted above, this means the program will not end on December 31, and those who become eligible for COBRA due to involuntary termination occurring through February 28, 2010 can be eligible for the subsidy.

The bill also clarifies that eligibility for the subsidies is based on the date of the involuntary termination and not on the date coverage is lost (*see* DoD Act §1010 (d)). This should alleviate the confusion that had been created by wording in the ARRA, which was

recently addressed in guidance from the U.S. Department of Labor (“DOL”), that could result in persons losing the opportunity to obtain the subsidy because they were laid off by the law’s deadline but did not lose their coverage until after the deadline (*see [here](#)*). Going forward, so long as a person experiences a qualifying event by the law’s deadline – now February 28, 2010 – that person can be eligible for the subsidy (assuming all other necessary criteria are met) even if the person’s health coverage does not also end by February 28, 2010.

The second major change to the COBRA subsidy law is the increase in the maximum duration of the subsidy, from nine months to fifteen months (*see DoD Act §1010 (b)*). Significantly, this extended subsidy period is made retroactive so that those who are already receiving the subsidy, and even those whose nine month subsidy period has already ended, can receive the extra six months of subsidy. Thus, if an individual’s subsidy ended in November, he can pay the premium in January and, presumably, receive the subsidized COBRA coverage for December.

To take advantage of the retroactivity provision, the law will require affected individuals to start paying their 35% share of COBRA premiums again by the later of 60 days after the law’s enactment i.e., February 17, 2010, or within 30 days of receiving a notice regarding the extension law (discussed below) (*see DoD Act §1010 (c)*). The text of the statute is unclear as to whether the person must make up any premiums not paid during the time after the person’s subsidy period ran out, or whether they need only pay their share of premiums going forward to maintain their COBRA coverage. The DOL and the Internal Revenue Service (“IRS”) may publish guidance on the retroactivity provision to clarify its application. Finally, the statute also provides that refunds may be obtained by assistance-eligible individuals who began paying 100% of their

COBRA premiums after their subsidy ended, providing such individuals with the benefit of the extended subsidy period.

New Notices Required

The third significant aspect of the COBRA subsidy extension is that it will trigger a round of special notifications that must be distributed by “the administrator of the group health plan (or other entity) involved,” to inform two categories of assistance-eligible individuals about the COBRA subsidy extensions (*see* DoD Act §1010 (c)). Note that a DOL official has informally advised that DOL intends to publish model notices to assist plans and issuers with compliance with these new notice requirements. However, a timetable for publication of the new model notices has not been provided.

The first category of notices need to be made to those who were assistance-eligible individuals on or after October 31, 2009, or who “experience[] a qualifying event (consisting of termination of employment)” on or after that date. Note that it appears that this category of recipients is not limited to those involuntarily terminated after October 31, 2009 although this seems inconsistent with the requirement that the law was initially designed to provide coverage for those whose healthcare coverage was involuntarily terminated. This group of persons will need to be notified of the extension provisions in the new law, within 60 days of the law’s enactment (i.e., by February 17, 2010). In the case of qualifying events after December 19, 2009 (the law’s date of enactment), notice must be provided consistent with ARRA’s existing notification requirements, updated, of course, to include information concerning extension of the subsidy law.

The second category of notices must be sent to assistance-eligible individuals who had COBRA continuation coverage but did not timely pay their premiums (and so they lost

coverage), and assistance-eligible individuals who paid 100% of their COBRA premiums. A notice must be sent to these persons informing them of the extension law's provisions, including the opportunity to make retroactive premium payments to maintain their COBRA coverage. The legislation provides that such notices must be sent within the first 60 days of the person's "transition period," a term defined as any period of COBRA subsidy coverage that starts before the law's enactment (i.e., December 19, 2009) and is extended by the law. Given this confusing formulation, it may be prudent to prepare to send out these notices as quickly as possible and no later than February 17, 2010 (60 days after the law's enactment), although DOL may provide guidance that sheds some light on the meaning of "transition period." In any case, monitoring for DOL announcements about the COBRA subsidy program is strongly recommended.

Possible Future Changes to the COBRA Subsidy Law

As mentioned, there were other changes to the COBRA extension law that were contemplated by Congress, and may still be adopted in early 2010 as part of the Jobs for Main Street Act 2010 (currently part of H.R. 2847) that was passed by the House on December 16, 2009 and is still pending before the Senate. In addition to extending the COBRA subsidy program to June 30, 2010, these changes would:

- clarify that a reduction in hours that precedes involuntary termination can be a qualifying event for purposes of the COBRA subsidy, and provide a new COBRA election period for those who did not make a COBRA election (or made one and stopped paying premiums) after a reduction in hours;
- clarify that eligibility for retiree health benefits does not preclude eligibility for the COBRA subsidy;
- clarify that the period of COBRA premium assistance will start on the first day after the qualifying event, rather than the first day of the first month after the qualifying event;
- apply current COBRA enforcement provisions to the premium assistance program, and specify that the Department of Health and Human Services or Treasury Department may impose a \$110/day fine on plan sponsors or health

insurance issuers who do not comply with the agencies' eligibility determinations within 10 days of receipt of the determination; and,

- codify existing regulatory guidance that provides a “reasonable interpretation” standard for employer determinations of “involuntary termination.”

* * *