

In This Issue:

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The COBRA subsidy provisions of the ARRA have been extended through March 2010 and expanded to cover additional individuals.

COBRA Subsidy Extended and Expanded

By Steven J. Friedman

On March 2, 2010, President Obama signed into law further amendments to the Consolidated Omnibus Budget Reconciliation Act (COBRA) subsidy provision of the American Recovery and Reinvestment Act (ARRA). These amendments not only expand the time that the subsidy is available, but also contain an extension of the subsidy to certain individuals whose reduced hours prior to their involuntary termination may have previously rendered them ineligible for the subsidy.

Extension of Subsidy

The bill extends the COBRA subsidy, which covers 65% of an individual's portion of the premium, for involuntary terminations occurring on or prior to March 31, 2010. The subsidy had expired for post-February 28 terminations and was revived through this month under this legislation. For more information about the mechanics of the subsidy, see Littler's February 2009 ASAP, *Stimulus Package: An In-Depth Look at the New COBRA Subsidy in the ARRA*. As with other rules relating to the COBRA subsidy, the subsidy is only available to someone who was involuntarily terminated from employment prior to the end date of the legislation (now March 31, 2010) and who was covered under their employer's health plan.

For those who are eligible for the subsidy, the subsidy may be received for up to fifteen months. The subsidy is not available for participants who have other group health coverage available to them or those who are Medicare-eligible. The subsidy is not available for any portion of the COBRA premium that is subsidized by an employer.

Expansion of Subsidy to Certain Individuals With Reduced Hours

The legislation creates a new class of individuals eligible for the government's 65% subsidy. They are individuals who triggered an entitlement to COBRA on account of a reduction in their hours. Prior to this legislation, if COBRA was triggered by the reduction

in hours, and not an involuntary termination of employment, a subsequent involuntary termination of employment would generally not trigger the subsidy (except in certain cases where the reduction in hours could be classified as a material adverse change in the working relationship).

The legislation now expands the definition of “assistance eligible individual” to include employees who first had a COBRA qualifying event that was a reduction in hours followed by an involuntary termination. Such former employees are covered regardless of whether they elected COBRA after the reduction in hours.

This expansion is currently only available to employees who: (1) incurred a reduction in hours between September 1, 2008 and March 2, 2010; (2) experienced a COBRA-qualifying event on account of the reduction of hours; and (3) are involuntarily terminated between March 2, 2010 and the subsidy end date, which is currently March 31, 2010. The period of COBRA coverage for these individuals is measured from the date of the reduction of hours that initially triggered COBRA, even if COBRA was not elected until after termination of employment or elected and then stopped prior to such time. However, the length of the COBRA subsidy is measured from the time of the involuntary termination of employment.

The following example illustrates how this new COBRA provision operates:

On January 15, 2010, an employee has a reduction of hours that constituted a COBRA qualifying event. On March 15, 2010, the employee is involuntarily terminated. The employee did not elect COBRA when the reduction of hours occurred. The employee can elect COBRA in connection with the March 15 involuntary termination and take advantage of the COBRA subsidy, if he is eligible, for up to 15 months, as long as he continues to be eligible for COBRA and the COBRA subsidy. The employee does not have to pay for COBRA for February. The employee’s 18-month COBRA coverage period will end on July 31, 2011, which is 18 months after February 1, 2010. The employee may be eligible for the COBRA subsidy until June 30, 2011, which is 15 months after April 1, 2010.

Notice Requirements

In addition to the requirement to provide general COBRA notices, which must be revised to reflect the March 31 end date of the subsidy, a new notice obligation is provided with respect to an eligible individual who had a COBRA qualifying event due to a reduction of hours, followed by an involuntary termination of employment between March 2, 2010 and March 31, 2010. This additional notice must be provided within 60 days of the date of the involuntary termination date. It is expected that the Department of Labor will issue a model notice to be used to satisfy this obligation.

New Penalty Provisions

An individual who believes he or she has been wrongly denied the COBRA subsidy has, since the inception of the subsidy, been able to appeal the denial to the Department of Labor (DOL). The new law provides that if the DOL makes a determination that the subsidy is due and the employer does not comply with this determination within 10 days of its receipt of the decision, the employer may face penalties of up to \$110 per day for failure to comply. In this regard, the new law provides that a determination made by an employer of whether a termination was involuntary will be respected so long as the determination is reasonable, based on current applicable guidance and provided the employer maintains documentation supporting its determination.

Further Extensions Possible

Both the House and the Senate are considering legislation that would further extend the COBRA subsidy either through the middle or end of 2010. Littler will continue to provide updates as legislation is passed.

Next Steps For Employers

- Identify employees whose hours were reduced, and such reduction was a COBRA qualifying event, and whose employment was later involuntarily terminated
- Revise COBRA notices for newly terminated employees to reflect the March 31 end date of the subsidy. Employers will also need to provide an additional notice for employees who have a reduction in hours and are later involuntarily terminated. The DOL is expected to provide a model notice for this purpose.

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