



GROUP HEALTH PLAN CONTINUATION COVERAGE: FAST ACTION REQUIRED TO COMPLY WITH NEW COBRA PREMIUM ASSISTANCE REQUIREMENTS

The American Recovery and Reinvestment Act of 2009 (referred to in this *Commentary* as the “Stimulus Act”) was signed into law by President Obama on February 17, 2009 (the “Enactment Date”). The Stimulus Act provides new COBRA premium assistance benefits to certain individuals who lose their jobs between September 1, 2008, and December 31, 2009. Implementation is required quickly after the Enactment Date. Therefore, employers will need to take immediate steps to coordinate with their COBRA administrators and their payroll providers to ensure compliance.

OVERVIEW OF COBRA AND ELIGIBILITY FOR PREMIUM ASSISTANCE

Since its enactment in the mid-1980s, the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) has given qualified beneficiaries (*i.e.*, covered employees and their eligible dependents) the right to continue group health plan benefits for a

limited period of time (generally 18 months) if coverage is lost for certain reasons, including termination of employment. Under COBRA, group health plans generally can charge qualified beneficiaries an amount equal to 100 percent of the full premium for group health plan coverage (*i.e.*, the full cost of coverage), plus a 2 percent administrative fee. Thus, the COBRA premium that the typical group health plan would charge qualified beneficiaries is 102 percent of the regular group health plan premium.

The Stimulus Act reduces the maximum COBRA premium that can be charged to an assistance eligible individual. An “assistance eligible individual” is a qualified beneficiary who becomes eligible for COBRA continuation coverage because of an involuntary termination of employment between September 1, 2008, and December 31, 2009. The Stimulus Act reduces the maximum COBRA premium that the assistance eligible individual must pay for COBRA continuation coverage to 35 percent of the regular COBRA premium

for a period of up to nine months. After nine months of paying the reduced COBRA premium, an assistance eligible individual is required to pay the full COBRA premium to retain coverage for the remainder of the COBRA continuation coverage period.

The COBRA premium assistance benefits will end before the end of the nine-month period if the assistance eligible individual becomes eligible for coverage under another group health plan or Medicare. An assistance eligible individual who becomes eligible for coverage under another group health plan or Medicare is required to notify the group health plan that he or she is eligible for such other coverage. Failure to provide notice will result in the individual being required to pay a penalty of 110 percent of the COBRA premium assistance benefits provided to the individual after he or she ceased to be an assistance eligible individual.

An assistance eligible individual who qualified for COBRA continuation coverage as a result of an involuntary termination between September 1, 2008, and the Enactment Date and who is currently receiving COBRA continuation coverage is not entitled to lower COBRA premiums for periods of COBRA continuation coverage that began prior to the Enactment Date. The COBRA premium assistance benefits only apply for periods of COBRA continuation coverage that begin on or after the Enactment Date or continue after the Enactment Date.

Each assistance eligible individual who does not have a COBRA election in effect on the Enactment Date but who qualified for COBRA continuation coverage as an assistance eligible individual on the Enactment Date must be given a special opportunity to elect COBRA continuation coverage. As a result, employers will need to revisit each employee termination that occurred since September 1, 2008, to determine if the termination was involuntary and if the employee was eligible for COBRA continuation coverage at the time of termination. The special election period will be available until 60 days after the date the assistance eligible individual receives a new special COBRA notice (discussed below) that is required by the Stimulus Act. Any coverage elected as a result of this special election opportunity is required to be retroactive to the first period of coverage following the Enactment Date.

In workforce reductions, many employers ask for volunteers and often provide incentives for employees to voluntarily terminate employment or retire. Under the terms of the Stimulus Act, an individual is only entitled to COBRA premium assistance benefits if the individual incurred an *involuntary* termination of employment. “Involuntary” is not defined in the legislation, but it appears that COBRA premium assistance benefits will not be available to employees who participate in voluntary buyouts or other voluntary severance programs. A special provision of the Stimulus Act, however, provides that the Secretaries of Labor and Health and Human Services are required to provide expedited reviews of any denials for COBRA premium assistance benefits. Presumably, this expedited review provision could be used by a terminated employee who requests (and is denied) COBRA premium assistance benefits in connection with a termination of employment in such circumstances that the employee regards as involuntary.

A qualified beneficiary who is eligible for COBRA in connection with an involuntary termination of employment is generally eligible for COBRA continuation coverage for up to 18 months after the qualified beneficiary's termination. The Stimulus Act does not lengthen the regular COBRA continuation coverage period for an assistance eligible individual. Therefore, a group health plan can terminate COBRA continuation coverage for an assistance eligible individual when such coverage could otherwise be terminated under the regular COBRA rules.

REIMBURSEMENT FOR REDUCED COBRA PREMIUM

The federal government will reimburse 65 percent of the COBRA premium. The employer, the plan (in the case of a multiemployer plan), or the insurer (in some circumstances) will be entitled to receive a payroll tax credit equal to 65 percent of the COBRA premium for each assistance eligible individual who pays the reduced COBRA premiums under the terms of the Stimulus Act. If the amount of the subsidized COBRA premiums exceeds the payroll tax liability of the employer, plan, or insurer, as applicable, a credit or a refund will be made as if the employer, plan, or insurer were owed an overpayment of payroll taxes.

In all cases, reimbursements from the federal government will only be made after an assistance eligible individual pays his or her 35 percent portion of the COBRA premium. Each employer, plan, or insurer requesting reimbursements will be required to submit detailed reports to the Treasury Secretary demonstrating compliance with the rules.

HIGH-INCOME PHASEOUT

An assistance eligible individual will be subject to additional taxes if his or her modified adjusted gross income exceeds certain levels for a taxable year in which COBRA premium assistance benefits are received. If an individual who would otherwise be eligible for COBRA premium assistance benefits has a modified adjusted gross income over \$125,000 (\$250,000 for joint filers), the tax imposed on the individual for his or her taxable year is to be increased (at a phased-in rate) to recapture the portion of the COBRA premium subsidized by the federal government. Alternatively, a high-income individual may opt to waive COBRA premium assistance benefits to avoid imposition of the increased tax.

PLAN ENROLLMENT OPTION

Generally, under COBRA, each qualified beneficiary is offered the opportunity to enroll for regular COBRA continuation coverage under the same group health plan coverage option in which the qualified beneficiary was enrolled at the time of his or her qualifying event. Under the Stimulus Act, however, an employer *may* provide each assistance eligible individual who is eligible for COBRA premium assistance benefits with the opportunity to elect to receive COBRA continuation coverage under a lower-cost group health plan option that is part of the employer's group health plan. If an employer provides the opportunity for an assistance eligible individual to elect a lower-cost option, the assistance eligible individual has 90 days after receiving notice of the election opportunity to elect a lower-cost option. This 90-day time frame is a longer period than the 60-day time frame that is available for the assistance eligible individual to make his or her initial election to continue coverage under COBRA. Apparently, the

regular 60-day time period will continue to apply to the initial COBRA continuation coverage election, but the assistance eligible individual will have additional time to determine whether to change group health plan options. (Assistance eligible individuals will continue to be able to change group health plan options during open enrollment periods to the same extent that similarly situated active employees are able to change options, as generally provided under COBRA.)

NOTICE REQUIREMENTS

Each qualified beneficiary who becomes entitled to elect COBRA continuation coverage between September 1, 2008, and December 31, 2009, must receive an additional notice describing the COBRA premium assistance benefits. This notice must include:

- A description of the COBRA premium assistance benefits and the conditions for eligibility.
- The forms necessary for establishing the assistance eligible individual's eligibility for the COBRA premium assistance benefits.
- The name, address, and telephone number necessary to contact the plan administrator or other person with information relevant to the COBRA premium assistance benefits.
- A description of the special opportunity to elect COBRA continuation coverage for each assistance eligible individual who qualified for COBRA continuation coverage between September 1, 2008, and the Enactment Date but who had not elected COBRA continuation coverage as of the Enactment Date.
- A description of the assistance eligible individual's obligation to notify the plan providing COBRA continuation coverage if the assistance eligible individual becomes eligible for coverage under another group health plan or becomes eligible for coverage under Medicare and of the related penalty under the Stimulus Act for failing to notify the plan.
- A description of the assistance eligible individual's option to enroll in a lower-cost group health plan option, *if* the employer decides to permit this change.

Each assistance eligible individual with a qualifying event occurring on or after September 1, 2008, but prior to the Enactment Date must be provided with this additional notice within 60 days after the Enactment Date. Further, the additional notice provisions must be included with regular COBRA notices given to qualified beneficiaries with respect to qualifying events occurring on and after the Enactment Date. The Department of Labor is required to provide model notices for these additional requirements within 30 days after the Enactment Date.

CONCLUSION

The new COBRA premium assistance benefits will provide relief to terminated employees who continue their group health plan benefits after an involuntary termination of employment. The new provisions, however, could cause some employers to rethink or redesign certain otherwise voluntary employment termination programs. In addition, the new COBRA premium assistance benefits will create new administrative burdens for employers, requiring additional coordination among employers, COBRA administrators, and payroll providers in order to provide the COBRA premium assistance benefits to qualified beneficiaries and to ensure compliance with the new law.

Jones Day is available to assist employers with the new requirements applicable to COBRA premium assistance benefits and to provide advice with planning for reductions in force and layoffs. As always, Jones Day continues to monitor and analyze the ever-changing landscape of employee benefits.

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