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COBRA 101 FOR 2010: A GUIDE TO THE NEW RULES UNDER THE STIMULUS ACT

By Anne DeAcetis

2009 ushered in a sweeping stimulus plan from the US government—including changes to the Consolidated Omnibus Budget Reconciliation Act (COBRA). The changes, designed to be temporary, have already been extended once. It's possible that new extensions and revisions are on the way. But as in all areas of employment law, compliance is mandatory. Understanding the new rules and administering COBRA lawfully will be an employer priority through 2010.

HR professionals are well familiar with COBRA. This 1986 law enables workers who have health insurance through their employer to keep their insurance when they experience a “triggering event” that threatens their ability to stay covered. Workers pay their own full premiums for a time, reducing the risk of a lapse in insurance for themselves or their dependents.

as part of the American Economic Recovery and Reinvestment Act of 2009. ARRA (or as it's commonly known, “the Stimulus Act”) provides a subsidy, some flexibility and an extended timeline for COBRA coverage. The goal is to keep workers covered through the economic crisis. But for many employers, the new rules can lead to confusion.

Jed Marcus, Esq. visited TemPositions on January 28, 2010 to offer his insights into the new COBRA rules and requirements. A 30-year practitioner of employment law (currently serving as Chair of the Labor and Employment Law Practice Group at Bressler, Amery & Ross, PC), Marcus acknowledged that employment law can be challenging. There are constantly new laws and regulations going into effect, and staying compliant requires real effort.

The good news, Marcus said, is that anyone who understands the core

COBRA requires specific notifications. Within 10 days of a triggering event, the company must send the employee a letter inviting them to continue their current health insurance coverage under COBRA. (Employees are not entitled to receive more or better benefits than they enjoyed as an employee.) Workers then have 60 days to respond, either opting in or opting out.

Workers who elect COBRA pay up to 102% of their health care premiums to the company, covering the cost of their insurance plus a fee for administrative processing. Marcus noted that COBRA payments are really at the discretion of the employer. Some companies include partial or even full payment of health insurance premiums in severance packages. Others waive the 2% processing fee as a courtesy.

COBRA applies only to companies with a certain number of employees. But smaller companies that provide health insurance are not entirely exempt. Both New York and New Jersey have passed what Marcus called “mini-COBRA’s.” Modeled after COBRA these bills are designed specifically to apply to companies that don't fall under federal guidelines. Both states also passed laws mirroring the COBRA changes mandated in the Stimulus Act.

COBRA Under the Stimulus Act

In February 2009, the Stimulus Act made significant changes to COBRA. Marcus noted that this was the first time COBRA had been substantially revised since it was first passed.

Under the new rules, many terminated workers became eligible for a 65% subsidy on their premium payments. The subsidy is paid directly to the insurance company by the employer, who receives a tax credit. The subsidy can be applied to any form of health care coverage

Anyone who understands the core principles of COBRA can follow the new requirements under the Stimulus Act ...with a little patience.

For an increasingly transient workforce, COBRA brought some welcome stability. But rising health care costs eroded its effectiveness. NPR reported that as far back as 2006, only 10% of eligible workers enrolled in COBRA benefits, citing costly premiums.

With the US losing over seven million jobs in the current recession (per the New York Times), even more Americans faced the possibility of losing their coverage. So Congress acted again in 2009 to stabilize health insurance for workers and their dependents.

The result? New, detailed and potentially confusing guidelines for COBRA

principles of COBRA can follow the new requirements under the Stimulus Act...with a little patience. A commitment to compliance is the first step. “Start out right,” he advised, “and then stay current.”

Basic COBRA

As passed in 1986, COBRA enables workers and their dependents who are at risk of losing insurance (whether due to resignation, layoffs, reduction in hours, disability and other so-called triggering events) to remain covered for 18 months. Some workers are eligible for up to 36 months. Only those terminated for “gross misconduct” are ineligible.

(e.g., dental, vision, major medical) except Health Flexible Spending Accounts (HFSAs).

The subsidy was retroactive to September 2008. This sent employers scrambling to re-notify workers who had experienced triggering events since that date and who had declined COBRA coverage. Companies were required to give these employees a one-time opportunity—and 60 days—to revisit their election decision.

The Stimulus Act made another significant, temporary change: at the discretion of the employer, workers may now change their health insurance plan

tarily terminated. Those who resign or lose coverage due to reduction in hours are not eligible for the subsidy (though standard COBRA benefits apply), and those dismissed for gross misconduct remain ineligible.

Involuntary termination may come in many forms. Marcus cited early retirement, unpaid leave, furlough programs and layoffs with recall rights. Interestingly, loss of benefits due to reduction of hours does not automatically trigger the subsidy. Marcus explained that an employee could make the case that they were involuntarily terminated under such circumstances, but only if the

may come into question, with particular urgency. In anticipation, the US Department of Labor (DOL) has pledged to expedite the review of all COBRA subsidy eligibility matters. If a worker files an appeal, a determination will be made within 15 business days.

Compliance Confusion

Employers often become confused when they're unsure about the income ceiling. At the time of termination, it may be impossible for the company (or the individual) to know what they will earn by year's end. Marcus explained that most companies extend the subsidy rather than risk being fined by the DOL. If a worker collects a subsidy for which they later become ineligible, he noted, the IRS will tax them for a portion of that income when they file for 2010.

Companies must also review their severance agreements carefully. Often, companies agree to make COBRA payments—especially if there is a

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when they elect COBRA coverage. The plan must be one that is offered to current employees (companies can't create new plans for subsidy-eligible workers) and the premium must be equal or less than the worker's current premium. Employees have 90 days to choose this Special Plan Enrollment option.

There are limitations to Special Plan Enrollment. Employees can change the level of coverage, but they can't change the type. For example, an employee who has not enrolled in dental or vision coverage cannot newly join the dental and vision plans. But a worker may switch from a medical plan with a high deductible to one with a lower deductible.

Notification rules also changed. As of February 17, 2009, all COBRA election notices must include a full rundown of Stimulus Act changes and eligibility requirements. Workers must complete forms that certify their eligibility for Special Plan Enrollments and/or the subsidy.

Eligibility for Stimulus Act Benefits

Marcus described eligibility for Stimulus Act COBRA benefits with care. To be an "Assistance Eligible Individual" (AEI), a beneficiary must first meet the basic standards for coverage under COBRA. The first major difference is that workers must be involun-

tedly terminated. Those who resign or lose coverage due to reduction in hours are not eligible for the subsidy (though standard COBRA benefits apply), and those dismissed for gross misconduct remain ineligible.

There are income limits for AEIs. An employee's modified adjusted gross income must be less than \$145K if they file taxes as an individual, and less than \$290K if they file jointly.

Some eligible employees will be taxed on their subsidy income at the end of the year. Those who earn less than \$125K (single) or \$250K (joint) receive a full subsidy, while those who make \$125-145K (single) or \$250-290K (joint) receive a partial subsidy. It should be noted that this variance does not affect the employer, who pays the full 65% subsidy for all eligible workers.

Originally, the COBRA subsidy was scheduled to expire on December 31, 2009. But it has since been extended (under the COBRA Continuation Protection Act of 2009) until June 2010. Until then, workers will only become ineligible for the subsidy if they become eligible for Medicare or another group health insurance plan (through a new employer). Workers can waive their right to the subsidy at any time, but once they've done so, they can't reverse that decision.

It's likely that the new rules will lead to new litigation. Definitions of gross misconduct and involuntary termination

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non-compete agreement in place. If the company has already agreed to make COBRA payments, they cannot receive a tax credit for administering a COBRA subsidy.

Lastly, Marcus took pains to distinguish COBRA from the subsidy. The availability of the subsidy does not affect or extend a worker's eligibility for basic COBRA coverage. For example, a worker who is laid off in May 2010 may be eligible for COBRA for the standard 18 months, but they will only receive one month's subsidy since it is scheduled to expire in June. And while eligibility for a new health plan brings an end to the subsidy, it does not bring an end to COBRA.

Risks of Non-Compliance

Companies must be diligent in reporting all COBRA and subsidy-related activities. Employers already use IRS Form 941 to report involuntary terminations. But the company will also need to detail how much was paid out in subsidies and payroll tax offsets for the reporting period, and provide information on employees' health care plans (individual vs. family, etc.).

There will be consequences for those employees who are (or become) ineligible for the subsidy, but collect it anyway. An employee who fails to disclose their eligibility for a new insurance plan will be penalized at 110% of the COBRA subsidy received.

The key to avoiding penalties, Marcus stressed, is staying alert. Congress will likely revive a debate about extending the COBRA subsidy and other related benefits as June 2010 nears. Depending on the effectiveness of the current rules, Congress may choose to make more changes—further complicating the processes in HR and payroll.

But companies will be ready if their understanding of basic COBRA, plus the Stimulus Act changes as they currently stand, is solid. Marcus directed attendees to regularly consult the DOL web site, which offers a wealth of up-to-date information. “Keep up with the changes,” he urged. “When I say I practice employment law, I really mean practice. Because in employment law, change is constant.”

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