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EBEC Law Update

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**DOL ISSUES MODEL COBRA SUBSIDY NOTICES
AND REVISED FAQs UNDER THE STIMULUS ACT**

The Department of Labor issued today model COBRA notices with respect to the COBRA premium subsidy provided in the American Recovery and Reinvestment Act of 2009 (the “Stimulus Act” or the “Act”).

COBRA Subsidy Rules

As discussed in our March 6 memo, as part of the Stimulus Act, enacted February 17, 2009, a temporary governmental COBRA premium subsidy was provided. Any employee or beneficiary who is eligible for COBRA continuation health coverage rights on account of an involuntarily termination of employment at any time between September 1, 2008 and December 31, 2009 will be entitled to a nine months government subsidy of 65% of the COBRA premiums beginning with the first period on or after February 17, 2009 (the enactment of the Act), which generally would be the period beginning March 1, 2009. Act § 3001.

As also discussed in our previous memo, there is a special enrollment opportunity whereby former employees who terminated on or after September 1, 2008 and did not elect COBRA coverage (or ceased paying premiums for COBR) will have a second opportunity to elect COBRA coverage within 60 days of receipt of the COBRA subsidy notice, with COBRA coverage extending for the remainder of the 18 month COBRA period measured from the original date of termination, and with the 65% government subsidy extending for nine months beginning at the first coverage period beginning on or after February 17, 2008 (usually March 1). Act § 3001(a)(4). The DOL was instructed to issue model notices within 30 days of enactment of the Stimulus Act, which is today, March 19, 2009. Act § 3001(a)(7)(D). The notices must be distributed no later than 60 days after enactment of the Act, which is April 18, 2009.

Under the Act, a special election may be made within 90 days of enactment of the Act to change into different health coverage (as long as it is not more expensive than the health coverage that the individual had before; e.g., if wants to downgrade from a PPO to an HMO). Act § 3001(a)(4).

See the March 6 memo for additional details regarding the COBRA subsidy rule.

Model COBRA Subsidy Notices

On March 19, 2009 (the 30th day after enactment of the Stimulus Act), the Department of Labor (“DOL”) issued on its web site (www.dol.gov/cobra) four model COBRA notices, as follows.

1. Full General Notice. The first model is a general COBRA notice, which contains general COBRA provisions as well as the Stimulus Act COBRA premium subsidy provisions, and should be sent to all former employees and beneficiaries who experienced or will experience any COBRA qualifying event (not limited to those who had an involuntary termination) from September 1, 2008 to December 31, 2009. Note that those already on COBRA can receive the abbreviated notice (described below) instead, and those who didn’t elect COBRA can receive the alternative notice. Thus the full general notice would only be necessary where the beneficiary had not been furnished with a COBRA notice. The notice is substantially different than the previous general model COBRA notices last issued in 2004 as Appendices to DOL Reg. § 2590.606.

2. Abbreviated General Notice. The second model is an abbreviated general COBRA notice, which includes information regarding the COBRA premium subsidy but does not include general COBRA election notice provisions. This abbreviated version may be sent instead of the full general notice to those individuals who terminated on or after September 1, 2008 and are already on COBRA. They only require additional information regarding the COBRA subsidy rules.

3. Alternative Notice. The third model notice is for individuals who are eligible under a state’s mini-COBRA rules.

4. Extended Election Notice. The fourth model notice is for those who had a qualifying event prior to enactment of the Stimulus Act on or after September 1, 2008, and they would have been receiving COBRA benefits, except that they did not elect COBRA or did not pay premiums to continue COBRA.

Revised FAQs Regarding the COBRA Subsidy Rules

On March 19, the DOL also posted on its website (www.dol.gov/cobra) revised COBRA premium reduction FAQs (one for employers and one for employees), which are more expansive than earlier FAQs. Some of the newly added FAQs provide some clarification of the COBRA subsidy requirements. For example:

- Application – The premium subsidy applies to private group health plans, to governmental plans, and to group health insurance required by a state that imposes a mini-COBRA rules (e.g., in NY for employers with less than 20 employees). (Q2 of the FAQs)
- Disqualifies from Health Coverage Tax Credit – Electing COBRA with premium subsidies disqualifies the individual from the health coverage tax credit under Internal Revenue Code § 35. (Q3 of the FAQs)
- Involuntary Termination – “Involuntary termination” includes layoffs but does not include terminations for gross misconduct. (Q3 of both FAQs and Q16 of the Employee FAQs)
- 35% of 102% Where Charged for Administrative Fees – The 35% participant portion is 35% of what would otherwise be charged by the company, which may include the 2% administrative fee allowed under the COBRA rules. (Q11 of Employee FAQs)
- General Notices – The new general notices are required for all eligible individuals, whether currently on COBRA or not, whose COBRA qualifying event is between Sept. 1, 2008 and Dec. 31, 2009 (see full general notice model discussed above, and abbreviated general notice where the individual is already on COBRA). (Q13 of Employee FAQs and Q5 of Employer FAQs)
- Contents of Notices – The notices must include: (i) forms needed to establish eligibility; (ii) plan administrator contact information; (iii) description of second election period (if applicable); (iv) requirement that eligible individuals must notify the plan when becoming eligible for other group health coverage or Medicare and the penalty for not complying; (v) description of the right to premium reduction and conditions for entitlement; and (vi) if offered, a description of different coverage option that does not cost more than current coverage. (Q14 of Employee FAQs and Q6 of Employer FAQs)
- Second Election – The second election applies to those involuntarily terminated in the period from September 1, 2008 through February 16, 2009 who are not currently on COBRA. If they elect coverage (which must be within 60 days after the COBRA notice is given), COBRA will be retroactive to the date of termination, and the COBRA premium subsidy will be retroactive to first period of coverage beginning on or after February 17, 2009, which in the case of COBRA coverage paid for on a calendar month basis is March 1, 2009. (Q6 of Employee FAQs and Q4 of Employer FAQs).
- If Employer Group No Longer Has Health Plan, COBRA Subsidy Would Cease – There is no right to the COBRA subsidy, or to COBRA itself, if the employer and its affiliates no longer maintain any health plan. (Q17 of Employee FAQs)

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- Second Election Not Required for State Mini-COBRA. The special second election period is not required to be provided for State mini-COBRA purposes. (Q4 of Employer FAQs)