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## Employer Compliance Alert

### COBRA PREMIUM SUBSIDY EXTENDED TO 15 MONTHS

The Senate has now joined the House of Representatives in passing legislation to extend the federal governments 65% COBRA premium subsidy. President Obama signed the bill into law on December 21, 2009. This date will therefore constitute the bills enactment date, to which many of the deadlines specified in the bill are tied.

#### Whats Changed? What Hasnt?

This extension preserves the 65% premium subsidy, and it continues to limit the subsidy to involuntary terminations of employment. Earlier extension bills had reflected subsidies ranging from 50% to 75%, and some bills had proposed expanding the subsidy to include COBRA coverage attributable to reductions in work hours.

The key *changes* made by this bill are (1) an extension of the maximum subsidy period from 9 months to 15 months, and (2) a postponement of the subsidy programs expiration date. The final date on which an involuntary termination of employment may trigger the subsidy is now February 28, 2010, rather than December 31, 2009.

Note that these changes are *retroactively* applicable to individuals whose subsidy expired in November (i.e., the ninth month after the subsidy first became available in February of 2009). As explained below, this retroactive reinstatement of the subsidy program will require further notices by employers some as soon as January 16, 2010 and will allow affected individuals an extended period of time to pay for December coverage.

In what the bill terms a clarification, Congress has adopted a different way of describing the programs expiration date. So long as a COBRA qualifying event occurs by the programs extended expiration date of February 28, 2010, the subsidy will be available even if an individuals regular coverage continues beyond that date. When the subsidy was slated to expire on December 31, 2009, the Department of Labor had interpreted the statutory language as denying the subsidy to any individual whose COBRA coverage did not begin before January 1, 2010.

#### Employer Notice Obligations

From the standpoint of a health plan sponsor or COBRA administrator, this extension will impose at least two new notification obligations. Work should begin immediately on drafting and issuing the first of these two notices, while it might be prudent to await further guidance before drafting the second notice.

### **Notice of Retroactive COBRA Rights**

The first notice should go to any assistance eligible individual (i.e., an individual who met the earlier requirements for taking advantage of the subsidy) who did not pay the premium for any period of COBRA coverage that began before the enactment date of this extension (December 21, 2009) and for which the subsidy would not be available but for the extension. (Because the individual must also be *eligible* for COBRA coverage during this extended period, he or she must have maintained COBRA coverage through the end of the original subsidy period.) This notice should also go to any assistance eligible individual who *overpaid* the premium for an extended coverage period e.g., by paying the full premium amount.

Individuals who failed to pay the 35% premium needed to maintain their COBRA coverage under this extension provision will have 60 days after the bills enactment date (or, if later, 30 days after receipt of the notice) in which to make the retroactive premium payments. If individuals overpaid a premium for this period, their employer must follow procedures similar to those that applied when the subsidy was first enacted. Thus, those overpayments should either be credited to future months of COBRA coverage or refunded to the individuals in cash.

Note that this notice of retroactive rights will likely apply to only a single month of coverage. Because President Obama has already signed the extension bill, any plan that offers COBRA coverage on a calendar-month basis would have to notify only those assistance eligible individuals who did not pay (or overpaid) for December COBRA coverage. This is the only month that *both* began before the extension was enacted *and* may not have been subject to the subsidy prior to the extension (i.e., for those individuals who were eligible for the extension as early as March 1, 2009).

The picture is slightly more complicated for plans that measure monthly COBRA coverage periods from the precise date on which regular coverage was lost. Under such a plan, this retroactive notice could apply to coverage periods beginning as early as November 17, 2009 (i.e., nine months after the subsidy first took effect). Thus, if COBRA coverage under such a plan began on the 17th through 20th of a month, this notice could apply to *two* months of COBRA coverage the coverage periods beginning in both November and December.

In either event, affected individuals must be notified of their retroactive rights under this extension bill within 60 days of the date they either let their COBRA coverage *lapse* (due to nonpayment of premiums) or *overpaid* the premium for such coverage. This deadline would be January 29, 2010, for calendar-month plans, but could be as early as January 16, 2010, for plans

that measure coverage periods on some other basis. Affected individuals would then have at least 30 days after receipt of that notice to make the retroactive premium payment. Note that this extended deadline could be well after the close of the grace period for paying *January* COBRA premiums.

### **Notice of Prospective COBRA Rights**

Once this retroactive notice has been provided, plan sponsors and COBRA administrators should turn their attention to the second notice required by this extension bill. This prospective notice must be provided within 60 days after the bills enactment date (approximately February 19, 2010), and it must go to all individuals who were assistance eligible individuals on or after October 31, 2009. The notice must explain the changes made by the extension bill, particularly the fact that the 9-month subsidy period referenced in their original COBRA notice has now been extended to 15 months. Nothing in this bill extends the maximum period of COBRA coverage. Accordingly, an individual whose involuntary termination of employment led to COBRA coverage commencing on October 1, 2008 and whose premium subsidy thus began on March 1, 2009 would still exhaust his or her 18 months of COBRA coverage on March 31, 2010. This is true even though such an individual would have received only 13 months of subsidized coverage.

This same prospective notice should be provided to all employees who experience a termination of employment on or after October 31, 2009, (assuming that termination also causes a loss of coverage, and is therefore a COBRA qualifying event). As with the notices required when the premium subsidy was first enacted, this notice should go to *all* terminated employees, regardless of whether the termination was voluntary or involuntary.

The federal agencies charged with administering this program will likely issue guidance on the extensions provisions. Unlike the earlier subsidy statute, however, this extension legislation contains no directive for the agencies to draft model notices. Employers and their advisors may thus be forced to draft appropriate language. Spencer Fanes Employee Benefits Group can assist in that process.

Given the tighter deadline for issuing the retroactive notices to individuals who failed to pay (or overpaid) for December coverage, it may be prudent to defer action on drafting the prospective notice. On the other hand, any COBRA notices that are currently in use should immediately be revised to refer to the 15-month maximum subsidy period. Doing so could reduce the number of corrective notices that must be provided in the future.

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