Federal COBRA Premium Subsidy Extended Immediate Action Required

On December 19, 2009, President Obama signed the Fiscal Year 2010 Defense Appropriations Act (the “Act”). The Act includes provisions that extend the eligibility period for qualifying for the federal COBRA premium subsidy for an additional two months and the maximum period for receiving the premium subsidy from nine months to fifteen months. Not surprisingly, the Act also imposes new notification requirements on employers, who will need to take immediate action.

Original ARRA Subsidy

As a reminder (see our newsletter at http://hselaw.com/images/pdf/articles/Immediate%20Action%20Required%20COBRA%20Premium%20Subsidy.pdf), the 65% premium subsidy was enacted as part of the American Recovery and Reinvestment Act of 2009 (“ARRA”) in February 2009. The ARRA premium subsidy permits qualifying individuals (known as “assistance eligible individuals”) to pay 35% of the normally applicable COBRA premiums for a period of up to nine months. Employers recoup the remaining 65% by claiming a credit against their federal payroll taxes. Under original ARRA, an assistance eligible individual is someone who becomes eligible for COBRA continuation coverage as a result of an involuntary termination of employment during the period from September 1, 2008 through December 31, 2009 and who is not eligible for Medicare or other group health plan coverage. Under original ARRA, in most cases, the earliest date that an individual could qualify for the premium subsidy was for the COBRA premium due March 1, 2009. Individuals who qualified as of March 1, 2009 exhausted their nine month subsidy period November 30, 2009.

Extension of Involuntary Termination of Employment Period

The Act extends the period during which an individual who is involuntarily terminated from employment may qualify for the subsidy from December 31, 2009 to February 28, 2010 and makes an important change in the wording of the original ARRA provision. As interpreted by the Internal Revenue Service, the original ARRA provision required that the individual’s involuntary termination of employment occur on or before December 31, 2009 and that the individual’s COBRA coverage period start on or before that date. This meant that if an involuntarily terminated employee’s COBRA period didn’t begin before January 1, 2010 (for example, if the employer’s group health plan or severance plan or policy extends coverage through the end of the month in which an involuntary termination occurs), the individual would not qualify for the subsidy. This original ARRA rule caught many employers by surprise as they planned reductions in force late in 2009.

The Act, in an apparent attempt to prevent this result, changes the original ARRA provision so that, instead of requiring the individual to have been eligible for COBRA during the ARRA period, the individual instead simply has to be eligible for COBRA that relates to a qualifying event that occurs during the (now extended) ARRA period. In other words, under the Act, if the involuntary termination of employment occurs on February 28, 2010 and the individual doesn’t begin his or her COBRA period until March 1, 2010, the subsidy would be available. Unfortunately, even the wording of the provision in the Act could raise questions, particularly if an employer’s severance policy provides continued coverage for a significant period before the COBRA period starts (for example, an involuntary termination of employment February 28, 2010, with a six month coverage extension, with COBRA beginning September 1, 2010). Guidance from the Internal Revenue Service would be helpful.
Extension of Subsidy Period

The Act extends the maximum subsidy period from nine months to fifteen months. As a reminder, the premium subsidy period may end earlier than the maximum period (see our prior newsletter for details). The Act does not extend the subsidy period or “re-start” the subsidy for someone whose subsidy period ended for a reason other than expiration of the original nine month period. For example, an individual who qualified for the subsidy beginning March 1, 2009, but who ceased to qualify September 1, 2009 because he became eligible for coverage through his spouse’s employer group health plan would not become newly eligible for the subsidy as a result of the Act. As described below, an individual whose original ARRA nine month period expired (the earliest expiration would generally be November 30, 2009) would have the right to begin to receive the subsidy again, as long as the individual continues to meet the eligibility requirements. The Act provides a special transition rule to address individuals whose original ARRA nine month subsidy period expired before December 19, 2009.

Transition Rule

Individuals who qualified for the subsidy at the beginning of the original ARRA subsidy period—in most cases, the earliest date was March 1, 2009—reached the end of their original maximum nine month ARRA subsidy period on November 30, 2009. Some people in this group may have already paid the full unsubsidized COBRA premium for December COBRA coverage and, depending on the employer’s COBRA billing process and how quickly the individual makes payments, they may also have paid the full unsubsidized COBRA premium for January coverage. Other individuals in this situation may not have paid any COBRA premium for coverage after November and may still be in their grace period for payment. The Act addresses both situations by adding special rules that apply to an assistance eligible individual’s “transition period.”

The Act defines an assistance eligible individual’s “transition period” as any period of coverage that (i) begins before the date of enactment of the Act (December 19, 2009) and (ii) is eligible for the subsidy as a result of the Act. Because ARRA defines the term “period of coverage” as the monthly or shorter period with respect to which COBRA premiums are charged, the transition period for any individual will be very limited—in most cases, it would only mean coverage for December 2009 (assuming monthly billing).

The Act provides that an individual who has “overpaid” COBRA premiums for his transition period (for example, an individual whose original ARRA maximum subsidy period expired November 30, and who paid the full unsubsidized COBRA premium for December coverage) is to be provided either a refund or a credit toward the individual’s future COBRA premium payments in accordance with rules similar to the overpayment rules contained in original ARRA. An individual who has not yet paid his or her COBRA premiums for coverage in his transition period (for example, an individual whose original ARRA subsidy period expired November 30, 2009 and who decided he could not afford to pay the full unsubsidized COBRA premium for the month of December) is treated as if he has timely paid his COBRA premium if: (i) he was covered under the COBRA coverage for the period coverage immediately preceding the transition period (e.g., was covered for the month of November) and (ii) he pays the 35% subsidized premium for the transition period not later than 60 days after date of enactment of the Act (i.e., before February 18, 2010), or, if later, 30 days after the date the notice described below is provided to him.

Notice Requirements

The Act imposes two new notification requirements on plan administrators. The U.S. Department of Labor expects to publish model notices, but, given the timing of the publication of the original ARRA model notices, employers may want to take action before the new model notices are published.
One notice is a “general notice” and must be provided to anyone who either was an assistance eligible individual at any time on or after October 31, 2009 or experiences a termination of employment COBRA qualifying event on or after that date. These individuals must be provided with a notification regarding the amendments made by the Act. This notice must be provided within 60 days after the date of enactment (i.e., before February 18th) or, in the event of a termination of employment qualifying event that occurs after December 19, 2009, within the normal COBRA qualifying event notification period.

The second notice is designed for individuals who either did not timely pay for their COBRA coverage for their transition period (e.g., did not pay their December COBRA premium) or who “overpaid” for COBRA coverage for their transition period (e.g., whose original ARRA nine month subsidy period expired November 30, 2009 and who paid the full unsubsidized COBRA premium for December COBRA coverage). This notice must describe the amendments made by the Act, including information on the ability to make the premium payments described under the Transition Rule section above. Presumably, this notice would also describe the refund or credit process for individuals who “overpaid” for their transition period.

Employers who outsource their COBRA administration should talk to their service providers about how they plan to comply with the new notice requirements.

We would be happy to help you implement these new requirements. Please feel free to contact a member of the Employee Benefits and Executive Compensation Group Practice areas if we can be of any assistance. Also, stay tuned for more news on a second bill (the Jobs for Main Street Act, 2010) that may be enacted in January 2010 and further extend the ARRA premium subsidy.