

News from our Compensation & Benefits Group

## Domestic Partner's Right to Continued Health Coverage Under COBRA, Cal-COBRA and Analogous State Laws

It is increasingly common for employers, especially those based in California, to offer health benefits to domestic partners of their employees. In certain instances when access as an active employee to health benefits is lost (e.g., due to termination of employment for a reason other than "gross misconduct"), such former employees have a right under federal or state law to elect to continue health coverage for a period of time. However, whether an employee's domestic partner has a right to elect continued health coverage may depend on whether the employer plan providing the health coverage is subject to federal or state continuation coverage law. Domestic partners are not legally recognized for purposes of federal law due to the federal Defense of Marriage Act ("DOMA"), which provides that "'marriage' means only a legal union between one man and one woman as husband and wife." However, recent guidance from the San Francisco Regional Office of the U.S. Department of Labor (the "DOL") indicates that an employee's domestic partner may be eligible for continued health coverage under COBRA in certain circumstances and that, as a result, the DOMA would not preclude such coverage.

### Brief Overview of COBRA and Cal-COBRA

COBRA is a federal law that requires an employer with 20 or more employees that provides group health coverage to its employees to provide continued health coverage to any electing employee (and any covered spouse or dependent) who loses

health coverage due to a "qualifying event" (such as a reduction in hours of employment or termination of employment). Cal-COBRA is a state law that requires California employers with 2 to 19 employees that provide insured health coverage to provide continued health coverage to any electing individual who loses health coverage due to a qualifying event (the definition of which is nearly identical to the COBRA definition).<sup>1</sup> Cal-COBRA also requires that extended continuation coverage be provided under an insured plan sponsored by a California employer (regardless of the number of employees) for each electing individual who has exhausted his or her federal COBRA continuation coverage.

### Domestic Partner's Eligibility for Continued Health Coverage under COBRA

COBRA provides that only a "qualified beneficiary" (defined as a covered employee or the employee's spouse or dependent child) has a right to elect to continue health coverage. Since a domestic partner is not considered a spouse under the DOMA, a domestic partner will not be a "qualified beneficiary" with an individual right to elect to continue employer-provided health coverage. For this reason, it is often thought that a domestic partner will not be eligible for continued coverage under COBRA unless and until the covered employee elects such coverage during an open enrollment period.

However, the DOL's San Francisco Regional Office recently indicated otherwise in a

written response to a request for guidance on whether a domestic partner who was covered by an employer's health plan prior to a qualifying event will be eligible for continued health coverage under COBRA even though the domestic partner would not be a qualified beneficiary because of the DOMA. In its response, the DOL pointed to Q&A-1 of Treasury Regulations §54.4980B-5, which provides that "each qualified beneficiary must be offered an opportunity to elect to receive the group health plan coverage that is provided to similarly situated non-COBRA beneficiaries (ordinarily, the same coverage that the qualified beneficiary had on the day before the qualifying event)." Based on that provision, the DOL concluded that if active employees have a right to elect domestic partner coverage under an employer's health plan, COBRA requires that an employee who has lost coverage due to a qualifying event have the right initially to elect continued domestic partner coverage and need not wait to make

#### KEY ATTORNEY CONTACTS

Tom Reicher.....415/693-2381  
treicher@cooley.com

Lisette Sell .....415/693-2007  
lsell@cooley.com

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley Godward Kronish LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2009 Cooley Godward Kronish LLP, 3000 El Camino Real, Palo Alto, CA 94306. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley Godward Kronish LLP as the author. All other rights reserved.

such election during a later open enrollment period. Because a domestic partner is not a qualified beneficiary, the domestic partner does not have an independent right to elect COBRA coverage. Nevertheless, the domestic partner is eligible for continued coverage if the employee elects a level of COBRA coverage that extends to the domestic partner (e.g., “employee plus one”) either when the employee first elects COBRA coverage or during a subsequent open enrollment period.

### **Domestic Partner’s Eligibility for Continued Health Coverage under Cal-COBRA and Analogous State Laws**

As noted above, Cal-COBRA requires that continued health coverage be provided to an electing covered employee (and any other qualified beneficiary) by small employers in California that provide health coverage on an insured basis (but not a self-funded basis). Cal-COBRA defines “qualified beneficiary” as “any individual who, on the day before the qualifying event, is covered” under a group health plan; Cal-COBRA does not restrict such term to either the employee, the employee’s spouse or the employee’s dependent child. Accordingly, if the health plan that is subject to Cal-COBRA provides domestic partner coverage and a domestic partner is, in fact, covered on the day before a qualifying event, then that domestic partner is a “qualified beneficiary” with an independent right to elect continued health coverage under Cal-COBRA.

There are continuation coverage statutes in some (but certainly not all) states that, like Cal-COBRA, consider domestic partners to be qualified beneficiaries for purposes of state-mandated continuation coverage. Accordingly, it is important to identify any applicable state statute in order to determine what right, either individually or derivatively through the former employee, an employee’s domestic partner may have to continued health coverage.

With respect to “extended coverage” under Cal-COBRA, individuals who have exhausted their right to continuation coverage under COBRA are eligible for up to an additional 18 months of continuation coverage if the health coverage is provided by a California employer on an insured basis (regardless of the number of employees). Accordingly, a domestic partner who has had continued coverage for the maximum period allowed under COBRA (due to an election of such coverage by the covered employee) will be entitled to extended continuation coverage under Cal-COBRA once his or her COBRA coverage has ended.

### **Domestic Partner’s Eligibility for Subsidized Continuation Coverage**

As discussed in greater detail in a prior Cooley Alert [www.cooley.com/58941](http://www.cooley.com/58941), the American Recovery and Reinvestment Act of 2009 (“ARRA”) provides that certain employees (and their qualified beneficiaries) whose employment is involuntarily terminated between September 1, 2008 and December 31, 2009 will be able to continue health coverage under COBRA (or similar state laws such as Cal-COBRA) by paying only 35% of the premium for continued coverage for up to nine months. While a domestic partner may be eligible for COBRA or Cal-COBRA coverage as discussed above, a domestic partner’s continued coverage will not be eligible for subsidy because, under ARRA, only a “qualified beneficiary” will qualify as an “assistance eligible individual” (an individual whose continued coverage may be subsidized). As noted above, a domestic partner will not qualify as a “qualified beneficiary” for purposes of federal law (including ARRA) because of the DOMA. Thus, if either COBRA or Cal-COBRA continuation coverage includes domestic partner coverage, the total premium for such continuation coverage will have to be divided between the cost for domestic partner coverage and the cost for non-domestic partner coverage, with

only the latter portion eligible for a subsidy (assuming that all other requirements for the ARRA subsidy have been met). ■

### **NOTES**

1 Many other states have similar laws mandating that employees of employers within the state that are too small to be subject to COBRA but provide insured health benefits be offered continued health coverage when coverage is lost due to a COBRA-like qualifying event.

If you have questions about this *Alert*, please contact one of the attorneys listed above.

### **CIRCULAR 230 DISCLOSURE**

The following disclosure is provided in accordance with the Internal Revenue Service’s Circular 230 (21 CFR Part 10). Any tax advice contained in this Alert is intended to be preliminary, for discussion purposes only, and not final. Any such advice is not intended to be used for marketing, promoting or recommending any transaction or for the use of any person in connection with the preparation of any tax return. Accordingly, this advice is not intended or written to be used, and it cannot be used, by any person for the purpose of avoiding tax penalties that may be imposed on such person.