Cooley

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On March 2, 2010, President Obama signed into law the Temporary Extension Act of 2010 (the "Act"), provisions of which extend several assistance programs that are essential to the many persons currently unemployed in the U.S. In relevant part, the Act extended, for a second time, the program that subsidizes continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (and similar state continuation coverage laws) ("COBRA") for involuntarily terminated employees. That program, initially enacted as part of the American Recovery and Reinvestment Act of 2009 ("ARRA") and more fully described in a prior *Cooley Alert*, provides that certain employees whose employment is involuntarily terminated between September 1, 2008 and December 31, 2009 (resulting in COBRA continuation coverage eligibility during that period) can continue health coverage under COBRA by paying only 35% of the ordinary COBRA premiums for up to nine months. The insurer, the employer or the health plan pays the remaining 65%, which is recovered from the federal government through a credit against payroll tax liabilities or through direct reimbursement. In December 2009, that program was extended and expanded by the Department of Defense Appropriations Act, 2010 (the "Appropriations Act"), as described in a prior *Cooley Alert*.

On March 17, 2010, the Department of Labor ("DOL") released several new model COBRA notices and election forms, as well as several updated model forms, all reflecting changes made by the Act. Use of such model forms is discussed later in this *Alert,* where appropriate, with links to the forms.

Extension of the COBRA subsidy eligibility period

As described above, the COBRA subsidy was originally available to an employee who was involuntarily terminated between September 1, 2008 and December 31, 2009 and who then became eligible for COBRA continuation coverage during that period. The Appropriations Act contained a two-month extension to cover employees who were involuntarily terminated on or before February 28, 2010. The Act extends eligibility by one additional month, to cover employees who are involuntarily terminated on or before March 31, 2010 and who are eligible for COBRA continuation coverage as a result.

Expansion of the term "assistance eligible individual"

Prior to the Act, the COBRA subsidy was only available to employees who were involuntarily terminated during the eligibility period and were eligible to elect COBRA as a result of such involuntary termination ("assistance eligible individuals"). The Act expands the definition of an assistance eligible individual to include an employee who experiences a reduction in hours (which is a COBRA qualifying event if it causes loss of coverage) between September 1, 2008 and March 31, 2010 that is followed by an involuntary termination of employment during the period beginning March 2, 2010 and ending March 31, 2010. In other words, an employee who experiences a reduction in hours that results in a loss of health coverage will now be eligible for the COBRA subsidy if such employee is later involuntarily terminated during this time period. It is important to note that the subsequent involuntary termination must occur during the period beginning March 2, 2010 and ending March 31, 2010; a reduction in hours causing a loss of coverage does not qualify an individual for the subsidy if the later involuntary termination occurred before March 2, 2010. This is to be contrasted with the Act's general extension of the COBRA subsidy for involuntary terminations of employment on or before March 31, 2010 that result in eligibility for COBRA coverage. In the latter case, an involuntary employment termination occurring on March 1, 2010 does qualify the employee for the COBRA subsidy if coverage is lost as a result of the involuntary termination.

No expansion of the maximum subsidy period

The Appropriations Act expanded the maximum period of time for which an eligible individual may receive subsidized COBRA coverage to fifteen months. Under ARRA, the original maximum COBRA subsidy period was nine months. The Act did not further expand this maximum period.

It should be noted that in the case of an employee who qualifies for the COBRA subsidy due to a reduction in hours followed by an involuntary termination, such employee's 15-month maximum period of federal COBRA subsidy is measured from when the involuntary termination occurred. However, such employee's 18-month maximum period of federal COBRA coverage is measured from the date when the reduction in hours causing

loss of health coverage occurred. For example, if an individual's hours were reduced effective January 1, 2009 so as to cause loss of health coverage as of that date and the individual's employment was later involuntarily terminated on March 15, 2010, the individual's federal COBRA coverage period would end on July 1, 2010, even though the potential COBRA subsidy period would run until June 15, 2011. For those employers with health plans subject to California COBRA (or another state law version of COBRA), the COBRA coverage period might extend beyond the period provided under federal COBRA, allowing the individual greater opportunity to use the COBRA subsidy.

Provision of COBRA notices and election forms

An employee (and the employee's family members) eligible for the COBRA subsidy due to a loss of coverage on account of a termination of employment occurring during the period beginning March 1, 2010 and ending March 31, 2010 must be provided with a COBRA notice and election form that are updated for the Act. If such individuals already received a COBRA notice and election form that had not been updated for the Act and they either chose not to elect (or elected but discontinued) COBRA coverage, a Model Notice of Extended Election Period [MS Word] must be provided in accordance with COBRA's regular procedure for providing a notice and election form. If such individuals have not received any COBRA notice and election form to date (or if they received one that had not been updated for the Act and have not yet elected or waived COBRA coverage), a Model Updated General Notice [MS Word] must be provided in accordance with COBRA's regular procedure for providing a notice and election form.

An employee (and the employee's family members) eligible for the COBRA subsidy due to a loss of coverage on account of a reduction in hours and a subsequent involuntary termination (each within the appropriate timeframe or "timely") must receive an updated COBRA notice (including a discussion of the subsidy as amended by the Act) and an election form. Specifically,

- An employee who had a timely reduction in hours that caused a loss of coverage, who then had a subsequent involuntary termination during the period beginning March 2, 2010 and ending March 31, 2010 and who has not yet had an opportunity to elect COBRA coverage (and such employee's family members) must be provided with a Model Updated General Notice [MS Word] in accordance with COBRA's regular procedures for providing such notice and election form.
- An employee who had a timely reduction in hours that caused a loss of coverage, who elected (and has continued) COBRA coverage and who is subsequently involuntarily terminated during the period beginning March 2, 2010 and ending March 31, 2010 (and such employee's family members) must be provided with a Model Supplemental Information Notice [MS Word] within 60 days following termination of employment.
- An employee who had a timely reduction in hours that caused a loss of coverage, who chose not to elect (or who elected but discontinued) COBRA coverage, and who is subsequently involuntarily terminated during the period beginning March 2, 2010 and ending March 31, 2010 (and such employee's family members) must be provided with a Model Notice of New Election Period [MS Word] within 60 days following termination of employment since the Act provides a second opportunity to elect COBRA coverage.

Under the Act, an individual in the last category above may not be required to elect or pay for COBRA coverage for the period between the reduction in hours and the involuntary termination. Furthermore, any period (between the reduction in hours and involuntary termination) during which such individual did not have COBRA coverage may not be treated as a break in coverage under the Health Insurance Portability and Accountability Act ("HIPAA") portability rules, meaning that such period may not be counted toward the 63-day gap in coverage that might subject the employee to a pre-existing condition limitation or exclusion once COBRA coverage begins.

Other changes made by the Act

Employer Determination of Involuntary Termination. For the first time, the Act provides protection for employers that make a determination that an employee's termination was involuntary if (1) based on a reasonable interpretation of the law and related administrative guidance, the employer determines that the employee was involuntarily terminated and (2) the employer maintains supporting documentation for the determination, including an attestation by the employer of the involuntary termination determination made with respect to the employee. If these requirements are met, the employee's termination will be deemed to be involuntary.

This should bring relief to employers that are making determinations about a terminated employee's eligibility for the COBRA subsidy by reducing the risk that the employer could later be found to have improperly claimed a

payroll tax credit (and hence underpaid its payroll taxes). This provision is retroactively effective to February 17, 2009, the date of enactment of the original COBRA subsidy in the ARRA.

New Penalties for Employers. If a terminated employee appeals to the DOL or, if the health plan is subject to state continuation coverage law, to the Department of Health and Human Services ("HHS") with respect to an employer's determination that such employee is not eligible for the COBRA subsidy[1] and if DOL or HHS, as applicable, reverses the employer's determination, the Act provides that such employee or the relevant agency may bring suit to enforce the agency's decision and for appropriate relief. The Act also grants the agency the authority to penalize an employer that fails to follow the agency's decision (after a 10-day grace period following the employer's receipt of the agency's decision) at a rate of not more than $110 per day for each failure. These enforcement provisions became effective March 2, 2010.

Action steps for employers

In light of the changes made by the Act, employers should proceed as follows:

- Update (or coordinate with the insurance carrier to update) COBRA notices and election forms to indicate the changes made by the Act using the Model Updated General Notice [MSWord] as a template.
- Review personnel records for employees who are involuntarily terminated on or after March 1, 2010 (and who did not experience a prior reduction in hours resulting in a loss of coverage) to determine whether they have been provided with a COBRA notice and election form (or whether they were provided with such form but have not submitted an election for or a waiver of COBRA coverage). If they have not been provided with such form (or were provided with such form but have not yet elected or waived COBRA coverage), they (and their family members) should be provided with a Model Updated General Notice [MS Word]. If they have been provided with such a form and have already waived (or elected but discontinued) COBRA coverage, they (and their family members) must be provided with a Model Notice of Extended Election Period [MS Word].
- Review personnel records for employees who are involuntarily terminated on or after March 2, 2010 and on or before March 31, 2010 to determine if they previously lost coverage because of a reduction in hours. If so and if they elected and (have continued) COBRA coverage, they (and their family members) must be provided with a Model Supplemental Information Notice [MS Word] within 60 days following the involuntary termination. If so and if they chose not to elect (or elected but discontinued) COBRA coverage, they (and their family members) must be provided with a Model Notice of New Election Period [MS Word] within 60 days following the involuntary termination.
- Review the personnel records for each employee who was determined to be involuntarily terminated for purposes of the COBRA subsidy to be certain that such records contain supporting documentation that such determination was based on a reasonable interpretation of the law and administrative guidance as well as an attestation by the employer of the involuntary termination determination (and continue to maintain personnel records in that way).

Further legislation possible

Other legislation is still pending in Congress that could further extend and expand the COBRA subsidy program. One bill would extend the COBRA subsidy eligibility period through April 30, 2010, another through June 30, 2010 and yet another through December 31, 2010. In addition, another bill contains a proposal to extend the maximum period for underlying COBRA coverage to the time when an individual is able to obtain other employer-sponsored health coverage. If any such legislation is passed, we will distribute a further *Alert*.

If you have questions about this *Alert,* please contact one of the attorneys in the Compensation & Benefits Group listed above.

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Notes

1 For information on the process of appealing such a determination, the DOL has created a webpage that describes the process and contains the necessary application forms.

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