

April 30, 2010

On April 15, President Obama signed into law the Continuing Extension Act of 2010 (the "Act"), thereby extending for a third 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 provides that certain employees whose employment is involuntarily terminated can continue health coverage under COBRA by paying only 35% of the ordinary COBRA premiums for up to fifteen 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.

Extension of the COBRA subsidy eligibility period

As originally enacted, the COBRA subsidy was available to an employee (and the employee's family members) if the employee was involuntarily terminated between September 1, 2008 and December 31, 2009. Two subsequent pieces of legislation extended eligibility for the subsidy, the first for employees who were involuntarily terminated on or before February 28, 2010 and the second for employees who were involuntarily terminated on or before March 31, 2010. The Act now extends eligibility to cover an employee (and the employee's family members) if the employee is involuntarily terminated on or before May 31, 2010 and is eligible for COBRA continuation coverage as a result. In addition, the Act extends eligibility to cover an employee (and the employee's family members) if the employee is involuntarily terminated between March 2, 2010 and May 31, 2010 following a reduction in hours that occurs between September 1, 2008 and May 31, 2010, if such reduction in hours resulted in a loss of health coverage for the employee (and the employee's family members).

No expansion of the maximum subsidy period

The maximum period of time for which an eligible individual may receive subsidized COBRA coverage remains at fifteen months. The Act did not further expand this maximum period.

As a reminder, 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 COBRA subsidy period 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

To reflect the Act, the Department of Labor ("DOL") has updated the model COBRA notices on its COBRA subsidy webpage. The model notices should be provided as described below.

Action steps for employers

To comply with the Act, an employer should proceed as follows:

- Provide the Model Updated General Notice to each individual who experiences a COBRA qualifying event at any time from September 1, 2008 through May 31, 2010 if such individual has not yet been provided with a COBRA election notice.
- Provide the Model Updated General Notice to each individual (1) who experienced a qualifying event that was a termination of employment at any time from April 15, 2010 through May 31, 2010, (2) who was provided with a COBRA notice that had

not been updated for the Act and (3) as to whom the COBRA election period has not expired.

- Within the required time period for providing a COBRA election notice,^{*} provide the Model Notice of Extended Election Period to each individual who (1) experienced a qualifying event that was a termination of employment at any time from April 1, 2010 through April 14, 2010, (2) was provided with a COBRA notice that had not been updated to explain the availability of the subsidy, as amended by the Act and (3) either waived COBRA or elected COBRA and then dropped it.
- Within 60 days following the termination of employment, provide the Model Notice of New Election Period to each individual who (1) experienced a qualifying event that was a reduction in hours at any time from September 1, 2008 through May 31, 2010 that was followed by a termination of the employee's employment at any time from March 2, 2010 through May 31, 2010 and (2) either waived COBRA or elected COBRA and then dropped it.
- Within the required time period for providing a COBRA election notice,^{*} provide the Model Supplemental Information Notice to each individual who (1) elected and continues to maintain COBRA coverage based on a qualifying event that was a termination of employment occurring at any time from March 1, 2010 through April 14, 2010 and (2) was provided with a COBRA notice that had not been updated to explain the availability of the subsidy.
- Within 60 days following the termination of employment, provide the Model Supplemental Information Notice to each individual who elected and continues to maintain COBRA coverage based on a reduction of hours occurring at any time from September 1, 2008 through May 31, 2010 that was followed by a termination of the employee's employment occurring at any time from March 2, 2010 through May 31, 2010.
- Establish a procedure to credit or refund COBRA premium amounts paid by individuals eligible for the subsidy in April 2010 and/or May 2010 who may have paid more than 35% of the COBRA premium for those months.

In certain instances, the time period specified above for providing a particular model notice may have passed; nevertheless, based on conversations with the DOL, the appropriate notice should be provided as soon as practicable. As used above, the term "individual" refers to an employee who had health coverage on the day prior to the COBRA qualifying event as well as the employee's spouse and/or dependents if they also had health coverage on the day prior to the COBRA qualifying event.

Further legislation possible

Other legislation is still pending in Congress that could further extend and expand the COBRA subsidy program, with at least one bill extending the COBRA subsidy period through December 31, 2010. If such legislation is passed, we will distribute an Alert describing any changes to the COBRA subsidy program or to COBRA itself.

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

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Notes

^{*} Under COBRA, the election notice must be given within 44 days following the qualifying event.

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