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LABOR AND EMPLOYMENT ALERT

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COBRA Health Care Continuation Coverage Provisions in the Economic Stimulus Act

The American Recovery and Reinvestment Act of 2009, better known as the Economic Stimulus Act (Act), includes provisions related to COBRA health care continuation coverage which are effective immediately.

Overview

The COBRA law changes relate to covered employees who had, or will have, an *involuntary* termination of employment (other than for gross misconduct) from September 1, 2008 through December 31, 2009. The covered employee, and any spouse or dependents of that employee who are COBRA-qualified beneficiaries, are considered "assistance eligible individuals."

Assistance eligible individuals are entitled to elect COBRA coverage by paying only 35 percent of any COBRA premium (the reduced premium). It appears that if an assistance eligible individual is being required to pay less than the full COBRA premium, the assistance eligible individual is only required to pay 35 percent of the lesser premium amount that was being charged to that person.

The employer sponsoring the health plan can claim an offsetting credit against its payroll taxes for the reduction in the amount of premium that must be paid by an assistance eligible individual. This subsidy is based on only what the employee is being charged. Thus, if the employer agrees to charge the employee less than 102 percent of the applicable premium, it cannot receive the full offsetting credit. The law applies to both private sector and public sector employers.

Effective Date

The new COBRA rules are effective for the first COBRA "coverage period" that begins on or after February 17,

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2009 (the effective date of the Act). For many plans, that will be March 1, 2009. However, that will not be the case if the plan measures COBRA coverage periods from the date coverage is lost.

Employers are required to offer COBRA at the reduced premium to all assistance eligible individuals, irrespective of whether they previously elected COBRA coverage. If an assistance eligible individual did not previously elect coverage, or allowed previously elected coverage to lapse, any coverage elected under the Act will not be retroactive to periods before the effective date of the Act.

The Act also provides that a gap in the coverage of an assistance eligible individual is disregarded for purposes of determining whether pre-existing condition limitations may be applied to that individual. Thus, it is likely that an assistance eligible individual who did not previously elect coverage will have to be covered by the plan without regard to any pre-existing conditions.

Cessation of COBRA Rights Under the Act

If an assistance eligible individual does elect COBRA coverage at the reduced premium, that person's entitlement to do so will expire at the earliest of:

- eligibility for coverage under another group health plan;
- eligibility for Medicare;
- nine months after the first date the reduced premium applies; or
- the end of the usual COBRA continuation coverage period.

If a covered employee's involuntary termination of employment occurred prior to February 17, 2009 the maximum COBRA coverage period (usually 18 months) is still measured from the date of the involuntary termination of employment. Assistance eligible individuals are required to notify the plan when they are no longer eligible and can be penalized for failure to do so.

Notices

The law requires that COBRA notices be modified to advise qualified beneficiaries of their rights and obligations under the Act if they elect to receive COBRA coverage at the reduced premium.

In addition, a notice must be provided by April 18, 2009 to existing assistance eligible individuals, including those who did not previously elect coverage or allowed elected coverage to lapse. That notice must provide a 60-day election period from the date it is provided, during which an assistance eligible individual may elect coverage at the reduced premium, retroactive to the first coverage period on or after February 17, 2009 (e.g., March 1, 2009). The Department of Labor is supposed to prepare

model notices by March 17, 2009.

We would expect that, for most employers, the required notices can be sent out by their insurers or third-party administrators. However, employers will have to contact their insurers and third-party administrators to identify the assistance eligible individuals and make certain that appropriate notices will be sent in a timely manner.

Resolving Disputes

Employers must promptly identify all assistance eligible individuals, including persons who were involuntarily terminated prior to the effective date of the Act. This may become difficult for some employers since the term "involuntary termination" is not defined by the Act. This raises questions as to whether, under the Act, the term involuntary termination will encompass situations where there is a voluntary termination program, a mutual severance agreement or a "layoff."

The Act requires the Department of Labor and other governmental agencies to set up a procedure to promptly resolve any disputes between employers and former employees as to eligibility for the reduced premium. This procedure is to apply in lieu of the usual claims administration procedures in the health care plan.

Tax Issues

An employer can claim its tax credit for the 65-percent reduction in COBRA premiums against amounts that it must pay for income tax withholding or the employee or employer shares of FICA taxes (i.e., Social Security and Medicare taxes). The IRS is to establish procedures to claim the credit in relation to Form 941 series filings of an employer. Employers who claim the credit will be required to attest to the termination of employment as being involuntary, and to file information identifying the covered employees.

Certain high income assistance eligible individuals will have to increase the income tax reported on their tax return by the amount of reduced premium. Thus, the law allows them to waive receipt of the subsidy. It does not appear that employers will have to treat any taxable reduced premium amounts as employee wages that are subject to tax withholding. It is not yet certain whether employers will be required to otherwise report all of the reduced premium amounts on a Form W-2 or Form 1099.

To determine whether a particular circumstance should be considered an involuntary termination for purposes of the Act or for further information regarding changes to the COBRA health care continuation coverage laws that were enacted by the Act, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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