

March 12, 2010

## COBRA Subsidy Extension – Déjà vu, but much more...

Once again, Congress has extended the period during which an individual must be involuntarily terminated (as defined for purposes of the COBRA subsidy, an “Invol Term”) to be eligible for the COBRA subsidy. Invol Terms occurring through March 31, 2010 will be eligible for the COBRA subsidy. This change is effective retroactively, so that those persons with an Invol Term on March 1, 2010 are still eligible for the COBRA Subsidy. In addition, the new law:

### **Provides Protections for Employer Determinations of Invol Terms**

Under the new law, a qualifying event will be deemed to be an Invol Term (and eligible for the COBRA subsidy) if (i) the employer’s determination that it was an Invol Term was based on a reasonable interpretation of the law and the administrative guidance issued, and (ii) the employer maintains supporting documentation regarding its determination. The documents must include an attestation of the employer of the Invol Term determination with respect to the covered employee. This applies to all determinations made by an employer regarding the COBRA subsidy since the original enactment of the COBRA subsidy, provided that the employer maintained the supporting documentation for its determination that included the required attestation. There is no explanation of what must be included in the attestation or when it must be made. Employers may want to review their files on prior determinations regarding Invol Term status and verify that they have the appropriate documentation.

### **Provides a New COBRA Election for Certain Invol Terms**

If an individual suffered a reduction in hours that triggered a COBRA election between September 1, 2008 and prior to March 2, 2010, did not elect COBRA and then incurred an Invol Term on or after March 2, 2010, this individual is now entitled to a new COBRA election and notice even though they did not elect COBRA and were not covered at the time of the subsequent Invol Term.

- The employer must treat the subsequent Invol Term as a qualifying event, and if these individuals elect COBRA for the Invol Term, the employer cannot apply a preexisting condition exclusion for the period between the loss of coverage due to the reduction in hours and the time coverage commences under COBRA.
- The maximum COBRA period will be 18 months, but it will be measured from the reduction in hours qualifying event (not from the date COBRA coverage starts as a result of the Invol. Term). The maximum COBRA subsidy period will be through the date that is 15 months from the date the COBRA coverage starts as a result of the Invol. Term or, if earlier, the date the COBRA coverage period expires.
- Individuals cannot be charged a premium for the period between the reduction in hours qualifying event, and the Invol Term qualifying event, when they did not receive coverage.

- Employers must provide an updated COBRA general notice and election to any of these individuals within 60 days of the date of the individual's Invol Term. Such notice must include information on the extension and the special treatment and rights of the individuals who lost coverage due to a reduction in hours prior to March 2, 2010 and then suffered an Invol Term on or after March 2, 2010. There was no mandate requiring the U.S. Department of Labor ("DOL") to update the model COBRA notice forms for the subsidy.

### **Provides Additional Guidance for Retroactive Premium Payments**

For individuals whose nine-month COBRA subsidy period expired before it was extended to 15 months by the prior COBRA subsidy extension, the new law clarifies that retroactive premiums are due by the later of: (1) 60 days after December 19, 2009, (2) 30 days after the individual received the notice required by the previous COBRA subsidy extension, and (3) within the 30 day COBRA grace period for premium payments. This change is retroactively effective as of December 19, 2009.

### **Applies a \$110 Penalty to Violations of the COBRA Subsidy Provisions**

The new law also adds penalties for plan sponsors and insurers that fail to comply with the DOL or Department of Health and Human Service's ("HHS") determination on appeal that an individual is or is not entitled to the premium subsidy. Effective March 2, 2010, if a group health plan does not comply with the DOL or HHS determination, (1) an affected individual or the relevant government agency may bring a civil action to enforce the Secretary's determination, and (2) the Secretary may assess a penalty against a plan sponsor or insurer up to \$110 for each day after 10 days from the date that the plan sponsor or insurer receives the determination.

For more information, please feel free to contact any [lawyer](#) in the [Employee Benefits Group](#).