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NEW FEDERAL LAWS AFFECT GROUP HEALTH PLANS

This bulletin provides a summary of two federal laws that will impact group health plans: The American Recovery and Reinvestment Act of 2009, which was signed into law on February 17, 2009, and the Children’s Health Insurance Program Reauthorization Act of 2009, which was signed into law on February 4, 2009.

The American Recovery and Reinvestment Act of 2009

Under the federal and state laws that are commonly referred to as COBRA laws, most employers are required to provide group health plan continuation coverage upon certain events. The American Recovery and Reinvestment Act of 2009 (“the Act”) affects how that coverage is offered to individuals who lose group health plan coverage due to an involuntary termination of employment during the period beginning September 1, 2008 and ending December 31, 2009.

The Act provides a subsidy for COBRA coverage and imposes a number of requirements on employers, administrators and insurers. This bulletin summarizes the subsidy as well as the enrollment provisions, notice requirements and employer filing requirements established by the Act.

APPLICABILITY

The Act’s provisions apply to coverage under both the federal COBRA law and any state “mini-COBRA” laws (*i.e.*, state continuation laws applicable to employers with fewer than 20 employees).

COBRA SUBSIDY

Eligibility. Any employee or dependent who loses coverage under a group health plan during the period beginning September 1, 2008 and ending December 31, 2009 (a “qualified beneficiary”) is eligible for a COBRA subsidy if he or she is entitled to COBRA as a result of the employee’s **involuntary** termination of employment.

- The Act does not explain how to determine whether a termination is “involuntary.” It is not clear whether terminations initiated by the employee for “good reason,” constructive terminations, voluntary terminations in anticipation of a layoff, or terminations in connection with an early retirement or other voluntary severance program will be considered “involuntary.”

Amount. Qualified beneficiaries will be required to pay only 35 percent of the required COBRA premium for up to nine months.

- The Act calculates the subsidized payment based on the COBRA premium that would have otherwise been required to be paid by the qualified beneficiary. Therefore, if an employer voluntarily agrees to pay for a portion of COBRA coverage, the employee would need to pay only 35 percent of the portion of the premium not paid by the employer.



Mechanism. Employers (for plans subject to the federal COBRA law and/or self-insured plans) or insurers (for insured plans not subject to the federal COBRA law) must cover the remaining 65 percent of the premium amount, but are entitled to a refundable credit toward payroll taxes. The credit is applied as though the employer or insurer had submitted an equivalent amount of payroll tax on the date the qualified beneficiary's payment is received.

- The Act provides that the payroll tax credit applies for COBRA premiums that are not paid by the qualified beneficiary **by reason of the Act**. Therefore, an employer should consider these provisions when determining whether to agree to pay for part or all of the cost of COBRA coverage. Employers should also review any separation agreements as well as communications or other agreements that reference an employee's right to continue benefits under the group health plan in light of this provision.

Duration. The subsidy will apply beginning with the qualified beneficiary's premium payment for the first period of coverage that begins on or after February 17, 2009 and will continue for up to nine months of coverage.

Transition Period. If a qualified beneficiary pays more than 35 percent of the applicable COBRA premium amount during the first two coverage periods that begin on or after February 17, 2009, the employer (or insurer, if applicable) may decide either to reimburse the qualified beneficiary for the overpayment and treat the reimbursement as a credit toward payroll tax or to credit the overpayment toward future premium payments. In order to credit the overpayment toward future payments, the employer (or insurer) must reasonably expect the overpayment to be exhausted within 180 days.

- This provision allows employers and insurers to continue to require qualified beneficiaries to pay the full COBRA premium for a short time while they establish the necessary procedures to administer the subsidy.

Disqualifying Coverage. The subsidy will not apply for any months that begin after the qualified beneficiary becomes eligible for coverage under another "group health plan" or Medicare. For this purpose, "group health plan" does not include a plan that provides only one or more of the following benefits: dental care, vision care, counseling or referral services, a flexible spending account, a health reimbursement account or an on-site medical clinic that consists primarily of first-aid services, prevention, wellness and/or similar care.

Notice Requirement. If a qualified beneficiary becomes eligible for another group health plan or Medicare during the subsidy period, the qualified beneficiary must provide notice of such eligibility to the plan. A qualified beneficiary who does not provide this notice will be liable for 110 percent of the improperly paid subsidy amount.

Income Limitation. A qualified beneficiary is not entitled to a COBRA subsidy during a year in which he or she is a taxpayer, or spouse or dependent of a taxpayer, whose federal modified adjusted gross income exceeds \$145,000 (or \$290,000 in the case of a taxpayer filing a joint return). The available COBRA subsidy is reduced for years in which gross income exceeds \$125,000 (or \$250,000 for joint returns).

- The income limitation is applied by increasing the qualified beneficiary's federal income tax by the amount of the COBRA subsidy overpayments made on his or her behalf. As a result, employers and insurers will not have to consider this income limitation when making COBRA subsidy payments or taking payroll tax credits.



Waiver. Qualified beneficiaries may make a one-time election to waive the COBRA subsidy. Details regarding the form and manner of this election are to be provided following enactment.

- The waiver may be an attractive option for high-income qualified beneficiaries who do not want an increase in federal income tax, but it will likely add a level of administrative difficulty to COBRA administration.

COBRA ENROLLMENT

New Election Period. Group health plans must offer an additional COBRA election period to any person who became a qualified beneficiary on or after September 1, 2008 and who would be eligible for a COBRA subsidy if he or she were enrolled in COBRA coverage as of February 17, 2009. The election period must be offered both to eligible qualified beneficiaries who originally declined COBRA coverage and to eligible qualified beneficiaries who elected and subsequently terminated COBRA coverage. The election period will begin on February 17, 2009 and end 60 days after the date the plan administrator provides the required notice (see below).

- Employers should closely review their insurance contracts and stop-loss policies and obtain assurances from carriers that individuals who elect COBRA during the new election period will be covered.

Effective Dates of Coverage. Coverage elected during this new election period will commence with the first coverage period beginning on or after February 17, 2009. Such coverage will end on the date coverage would otherwise have ended if the qualified beneficiary had timely elected COBRA coverage following the former employee's termination of employment.

- Employers should carefully review their insurance policies and administrative contracts to determine whether the addition of these qualified beneficiaries will permit the carrier to adjust premium rates.

Effect on Pre-Existing Condition Limitations. Under the rules applicable to pre-existing condition limitations, a plan may refuse to cover pre-existing conditions for a certain period of time for an individual who has a 63-day break in coverage. In the case of a qualified beneficiary who elects COBRA coverage during this new election period, the period of time beginning with the qualifying event and ending on the effective date of the newly elected COBRA coverage will **not** be counted as a break in coverage for purposes of this 63-day rule.

Optional Coverage Offerings. An employer may allow a subsidy-eligible qualified beneficiary to elect coverage under the benefit option in which he or she is enrolled on the date of the qualifying event, or to elect coverage under any lower-cost benefit option offered to active employees.

- Even prior to the Act, employers could offer coverage options to qualified beneficiaries. The Act gives employers comfort to offer this choice only to qualified beneficiaries who are eligible for the subsidy and to offer a choice only between current coverage and lower-cost coverage.

PLAN ADMINISTRATOR'S NOTICE REQUIREMENT

Additional Substance With COBRA Notice. Plan administrators are required to provide additional information with the COBRA election notices that are sent to certain qualified beneficiaries. Employers may choose to



revise their current notices or include the new information as a separate document. The Act requires the applicable government agencies to issue a model notice by March 19, 2009.

- Plan administrators should coordinate with their COBRA vendors to ensure that notices and forms are updated appropriately.

Affected Recipients. Notices with the additional information must be sent to any person who becomes a qualified beneficiary during the period beginning September 1, 2008 and ending December 31, 2009.

Timing. Notices that are required to be sent to subsidy-eligible persons who became qualified beneficiaries before February 17, 2009 must be sent by April 18, 2009.

- The Act does not affect the timing of notices sent to individuals who become qualified beneficiaries on or after February 17, 2009, so such notices need to be provided to employees no later than 44 days after a qualifying event. Assuming the agencies issue the model notice within the required 30 days, plan administrators will have time to wait for that model.

EMPLOYER'S FILING REQUIREMENT

Employers (or insurers, if applicable) will be required to file reports relating to the subsidy. Although the specific types of reports and applicable deadlines will be determined in the future by the Treasury Department, three types of reports are specified in the Act. First, the employer (or insurer) must attest that each employee receiving the subsidy was involuntarily terminated. Second, the employer (or insurer) must file an accounting to report the payroll tax credit taken for the reporting period and the estimated credits to be taken during the following reporting period. Third, the employer (or insurer) must file a report of all covered employees, the amount of subsidy treated as a payroll tax credit for each employee and a designation as to whether the subsidy is for coverage of one individual or two or more individuals.

The Children's Health Insurance Program Reauthorization Act of 2009

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requires group health plans to provide special enrollment periods for eligible persons who gain dependents through birth, marriage or adoption, or who lose coverage from another employer. The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA") requires group health plans to offer a new type of special enrollment period and to provide certain notices to employees.

New Special Enrollment Events. A group health plan must allow employees and their dependents (if they are otherwise eligible for the plan) to enroll in the plan if either the employee or dependent loses coverage under the State Children's Health Insurance Program or Medicaid, or the employee or dependent becomes eligible for premium assistance (described below).

Longer Enrollment Period. Unlike the other HIPAA special enrollment events, which require an enrollment period of at least 30 days, the new special enrollment events require an enrollment period of at least 60 days.

- Employers should ensure that HR personnel and/or third-party administrators responsible for administering enrollment in the group health plan and cafeteria plan are aware of these new enrollment rights.



Premium Assistance. As a way to encourage enrollment in employer-sponsored health plans, CHIPRA permits states to offer a premium assistance subsidy. The state may choose to pay the subsidy directly to an employer unless the employer has elected not to receive the subsidy. In that event, the state would pay the subsidy to the employee as a reimbursement.

Required Notice. Employers must provide a notice about the potential opportunity for premium assistance to each employee who lives in a state that provides such assistance. CHIPRA requires the Department of Health and Human Services to provide state-specific model notices by February 4, 2010.

Effective Dates. The special enrollment period must be offered no later than April 1, 2009. However, the notices are not required to be provided until the first plan year that begins after the state-specific model notices are issued.

- Health and cafeteria plans may need to be amended by April 1, 2009 to reflect the new HIPAA special enrollment rights and enrollment period. Although summary plan descriptions (“SPDs”) generally do not need to be updated in advance of a change, an SPD may need to be updated by April 1, 2009 if it is used as (or if its HIPAA terms are incorporated by reference in) the plan document.
- Communications and plan information disseminated after April 1, 2009 should be updated to reflect these new special enrollment rights.

FOR MORE INFORMATION

If you would like more information about the COBRA provisions of the American Recovery and Reinvestment Act of 2009 or the Children’s Health Insurance Program Reauthorization Act of 2009, please contact your primary Thompson Hine Employee Benefits & Executive Compensation lawyer or email us at AskUs@ThompsonHine.com. For a list of our Employee Benefits & Executive Compensation lawyers, please go to www.ThompsonHine.com/practices/Employee_Benefits_Executive_Compensation/lawyers/.

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