GROOM LAW GROUP

MEMORANDUM TO CLIENTS

December 7, 2009

RE: <u>DOL Issues Two New FAQs Related to COBRA Premium Subsidy</u>

The American Recovery and Reinvestment Act of 2009 ("ARRA"), enacted on February 17, 2009, provides a federal subsidy for COBRA premiums for certain employees and covered family members who lost or will lose coverage under a group health plan due to involuntary termination of employment from September 1, 2008 through December 31, 2009. ARRA requires that group health plans provide certain notices to plan participants who may be eligible for this COBRA subsidy.

Previously, the Department of Labor ("DOL") and the Internal Revenue Service ("IRS") have issued Frequently Asked Questions ("FAQs") providing guidance on the COBRA subsidy. On December 2, 2009, DOL released two new FAQs that provide additional guidance on the COBRA subsidy. These FAQs address the circumstances under which individuals who are involuntarily terminated from employment on or before December 31, 2009 are eligible for the COBRA premium subsidy. The first FAQ states that individuals who are involuntarily terminated on or before December 31, 2009 but who do not lose coverage under the group health plan until on or after January 1, 2010 are not eligible for the COBRA premium subsidy. The second FAQ makes clear that assistance eligible individuals (i.e., individuals who lose coverage due to involuntary termination of employment on or before December 31, 2009) are entitled to the full 9 months of COBRA premium subsidy as long as they remain eligible, even if some of the subsidy period occurs after December 31, 2009. The FAQs are available at http://www.dol.gov/ebsa/faqs/faq-cobra-arra.html#.

Many employer-sponsored group health plans provide coverage through the end of the month during which a termination of employment or other event resulting in a loss of coverage occurs and offer COBRA continuation coverage effective on the first day of the following month. The DOL FAQ makes clear that, if a plan has such a provision, employees who are involuntarily terminated in December 2009 (and covered family members) will not be eligible for the subsidy. The Q&A notes that it is possible that the subsidy period will be extended by Congress.

Legislation to extend the COBRA subsidy premium has been introduced in both the U.S. Senate and the U.S. House of Representatives. Senators Sherrod Brown (D-OH) and Robert Casey (D-PA) introduced the "COBRA Subsidy Extension and Enhancement Act of 2009" (S. 2730) which would: (1) extend the eligibility date from before December 31, 2009 to June 30, 2010; (2) increase the subsidy period from 9 months from the to 15 months (but in no event will the subsidy apply after December 31, 2010); (3) increase the subsidy amount from 65% to 75% of the COBRA premium; and (4) expand eligibility for the subsidy to individuals who lost coverage due to an involuntary reduction in hours. Representative Joe Sestak (D-PA) introduced the "Extended COBRA Continuation Protection Act of 2009" (H.R. 3930) which would also

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extend the eligibility date from December 31, 2009 to June 30, 2010 and increase the subsidy period to 15 months, but it would not increase the subsidy amount or expand the eligibility criteria. In addition, H.R. 3930 would extend the maximum COBRA continuation period from 18 to 24 months for individuals who lose coverage due to a termination of employment or reduction of hours that occurred on or after April 1, 2008, and before January 1, 2010. A provision in the House-passed health care reform bill (H.R. 3962, the "Affordable Health Care for America Act") would extend the period for COBRA coverage for individuals who would otherwise lose COBRA coverage because their coverage period expired (the individual reached the statutory maximum period of coverage) until the individual was eligible for acceptable coverage or an Exchange plan. However, there is no similar provision in the health reform legislation currently under consideration in the Senate.

It is unclear whether either of these bills can be added to legislation that will be enacted prior to the end of the year. It is similarly unclear whether either of the bills has enough support to be enacted as an independent piece of legislation. If not, it is possible that the COBRA subsidy could be reinstated retroactively in 2010 (i.e., as part of health care reform), which would cause administrative difficulties for plans and administrators.

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We will provide updates on further developments. In the meantime, if you have any questions, please contact your regular Groom attorney or any of the Health and Welfare Practice Group attorneys listed below:

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