

March 4, 2010

## MEMORANDUM TO CLIENTS

**Re: One-Month Extension to COBRA Subsidy Signed into Law on March 2, 2010**

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. The Department of Defense Appropriations Act for Fiscal Year 2010 ("DOD Act") extended the COBRA subsidy premium program for two months, through February 28, 2010 and increases the subsidy period from 9 months to 15 months. On March 2, the President signed the Temporary Extension Act of 2010 (H.R. 4691), which extends the subsidy for involuntary terminations occurring before March 31, 2010 and makes certain other changes and clarifications. The bill has an immediate effective date, with most provisions effective prospectively. However, the extension to March 31, 2010 applies as if originally included in ARRA and clarifications to the DOD Act are included as if originally included in the DOD Act. Key provisions are highlighted below, as well as a summary of possible future COBRA subsidy legislation.

- **Extended Expiration Date.** The COBRA subsidy premium program will be available for a loss of group health coverage due to involuntary termination through March 31.
- **Clarification of Who Is Eligible for Subsidy.** The COBRA subsidy will be available to individuals who experience a reduction in hours which triggers a loss of coverage followed by involuntary termination. If an individual experienced a loss of coverage due to a reduction in hours, and did not elect (or elected and then stopped) COBRA coverage, and was then involuntarily terminated after March 2, 2010, the termination is also considered a qualifying event and the individual has another opportunity to elect COBRA coverage.
- **New Election Period.** Individuals who are eligible for COBRA subsidy assistance because they experienced a reduction in hours (and did not elect, or elected and then stopped, COBRA coverage) followed by an involuntary termination are provided with a new election period if they are subsequently involuntarily terminated. Under this rule, the COBRA continuation period begins as of the loss of coverage due to the reduction in hours. However, individuals are not required to elect COBRA for this period.
- **New Notice Requirements.** Plans must provide additional notification to the individuals who are eligible for COBRA subsidy assistance because they experienced a reduction in hours followed by an involuntary termination. The notice must be provided during the 60-day period beginning on the date that individual is involuntarily terminated. Presumably, the Department of Labor will timely issue a model notice that plans can use.

- **New Penalties.** If an individual requests treatment as a COBRA subsidy-eligible individual and the group health plan denies the individual's request, that individual may appeal to the Secretary of Labor or Health and Human Services for a determination decision. The Act clarifies that individuals or the Secretaries may bring suit to enforce a Secretarial determination decision and grants the Secretaries the authority to penalize plan sponsors or insurers who fail to comply with the Secretary's determination at a rate of not more than \$110 per day for each failure (after a 10-day grace period after plan sponsor or insurer receives the decision). Note that these penalties would be in addition to existing penalties for failure to comply with COBRA under ERISA and the Code.
- **Deemed" involuntary termination.** If an employer's determination of a qualifying event is based on a reasonable interpretation of ARRA and administrative guidance, and if the employer maintains supporting documentation of the determination, the qualifying event for the individual shall be deemed to be an involuntary termination of the covered employee's employment. This change helps minimize risk of payroll tax liability for incorrect determinations regarding whether a termination of employment is involuntary.
- **DOD Act Clarifications.** The definition of individuals who were covered by the "transition period" under the DOD Act has been clarified. Transition period for purposes of the DOD Act now means, with respect to any assistance eligible individual, any period of coverage if such assistance eligible individual experienced an involuntary termination that was a qualifying event prior to December 19, 2009. In addition, a clarification regarding the due date for premium payments for these individuals was made to reflect that the grace period under the COBRA rules applies.

The text of the bill can be found (beginning on page 4) here:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4691pcs.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4691pcs.txt.pdf)

### **Possible Future legislation**

The Jobs for Main Street Act (H.R. 2847), passed by the House last December, would extend the COBRA subsidy program through June 30, 2010. That bill also contains many of the changes that were made in this Act, as described above. The Senate is currently considering the American Workers, State, and Business Relief Act of 2010 (H.R. 4213), which would extend the COBRA subsidy program through December 31, 2010.

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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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