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Latest Extension of COBRA Premium Subsidy Comes With a Twist

As widely reported in the news media, the recent extension of unemployment insurance benefits included a one-month extension of the 65% COBRA premium subsidy. Under the “Temporary Extensions Act of 2010,” the subsidy will now apply to involuntary terminations occurring on or before March 31, 2010 (rather than February 28, 2010).

Less widely reported, however, is the fact that the *scope* of the subsidy has now been expanded. Certain individuals who experienced a reduction in work hours before the Extension Act’s March 2 enactment date, and who are involuntarily terminated *on or after* that date, will now qualify for the subsidy.

Not surprisingly, this change prompts a number of questions. Although some are answered in the text of the Extension Act, others will require further guidance from the agencies charged with administering the subsidy. Before addressing the details of the new provision, some background may be in order.

As created by the American Recovery and Reinvestment Act of 2009 (“ARRA”), the premium subsidy was available only upon an employee’s “involuntary termination of employment.” The IRS later explained that a reduction in work hours, although also a COBRA qualifying event, would not constitute an involuntary termination of employment for this purpose -- *unless* the reduction in hours was a “material negative change in the employment relationship” *and* this caused the employee to resign.

Accordingly, an employee who chose to continue working on a reduced schedule might be offered COBRA coverage (assuming he or she then fell below the hours threshold required for eligibility under the plan), but he or she would not be entitled to

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the premium subsidy. Moreover, if that employee should *later* terminate employment -- even *involuntarily* -- the subsidy would still not be available. This is because that termination of employment would not cause a loss of coverage, and would therefore not be a COBRA qualifying event.

The Extension Act was apparently designed to change this result. It does so, however, only for employees meeting *all* of the following requirements:

1. The employee must have incurred a reduction in work hours between September 1, 2008, and March 2, 2010;
2. That reduction in hours must have been a COBRA qualifying event (i.e., it must have caused a loss of eligibility for regular coverage); and
3. The employee must then be involuntarily terminated on or after March 2, 2010 (but before the subsidy's expiration date).

Note that such an employee need not have elected COBRA coverage in connection with the reduction in work hours. And even if COBRA coverage was elected, the employee need not have maintained that coverage. The later involuntary termination will be treated as a COBRA qualifying event, entitling the employee to elect COBRA coverage at that time.

On the other hand, such an employee's maximum period of COBRA coverage will still be capped at 18 months -- measured from the reduction in work hours, rather than the termination of employment. Accordingly, an employee whose hours were reduced in late 2008 might be entitled to only a few months of COBRA coverage upon a future involuntary termination of employment. Nothing in the Extension Act modifies this result.

The Act also makes clear that an individual in this situation may not be required to elect or pay for COBRA coverage for the period between the reduction in work hours and the involuntary termination. Rather, COBRA coverage would commence with the termination of employment. Moreover, any period during which such an individual did not have COBRA coverage may not be counted toward a 63-day gap in coverage that might subject the individual to a pre-existing condition limitation or exclusion once the COBRA coverage begins.

The Extension Act did not change the maximum period for which an individual may claim the premium subsidy. This remains 15 months. In the case of an individual who becomes entitled to a new COBRA election due to an involuntary termination of employment after an earlier reduction in work hours, the 15-month subsidy period is measured from the termination of employment. This is true even though the 18-month period of COBRA coverage is measured from the reduction in work hours.

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Employers and plan administrators should promptly revise their COBRA election notices to refer to the March 31 date. In the case of any part-time employee who is involuntarily terminated after March 2, 2010, the Extension Act requires that an explanation of these new rules be provided within 60 days after the termination of employment. Presumably, the usual timing rules would then apply to the individual's election of subsidized COBRA coverage.

This is almost certainly not the final extension of the COBRA premium subsidy. Legislation currently pending in Congress would extend the subsidy through the end of 2010. Another proposal in the health care reform debate would also extend the period of COBRA coverage, itself – through the date on which an individual is able to obtain other employer-provided coverage. Whether that proposal will be enacted is much less certain.

Kenneth A. Mason, Partner
Spencer Fane Britt & Browne LLP

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