

COBRA Subsidy Extended by Six Months

by Susan P. Serota and Mark C. Jones

On December 19, 2009, President Obama signed into law the Department of Defense Appropriations Act of 2010 (the “2010 DOD Act”), which extends the maximum period in which employees who were involuntarily terminated may receive a subsidy on premiums for continuation health care (“COBRA”) coverage from nine months to 15 months. The law also extends by two months, to February 28, 2010, the period in which the termination of employment may occur in order for the employee and his or her covered family member to be eligible for the subsidy. Employers are required to provide notice of the extension to eligible individuals, including those currently receiving COBRA coverage and those who allowed their COBRA coverage to lapse when their original subsidy period expired prior to the enactment of the new law.

Background – COBRA Premium Subsidy Under ARRA

The American Recovery and Reinvestment Act of 2009 (“ARRA”), discussed in our Client Alerts dated **February 24, 2009**, **March 24, 2009** and **April 10, 2009**, provides for a 65% subsidy towards health insurance continuation coverage premiums for certain employees involuntarily terminated on or after September 1, 2008. ARRA’s premium subsidy provisions apply to all group health plans sponsored by private-sector employers or unions subject to the federal COBRA rules under ERISA or to state laws comparable to COBRA, such as so-called “mini-COBRA” programs.

To be eligible to receive the COBRA premium subsidy, the employee must have had an involuntary termination, resulting in eligibility under federal COBRA or comparable state law, between September 1, 2008 and (prior to amendment) December 31, 2009, and the employee or covered family member must have timely elected to receive continuation health care coverage. During the subsidy period, eligible individuals who pay 35% of their COBRA premium are treated as having paid the full amount. The remaining 65% of the premium is reimbursable to the employer maintaining the plan (or, if the plan is not covered by federal COBRA, the insurer) as a credit against payroll taxes due by that party.

The premium subsidy applies to periods of coverage beginning on or after February 17, 2009, the date on which ARRA was signed into law, and ends on the earliest of the following: (a) the date on which the covered individual becomes eligible for other group health coverage; (b) the date on which the individual becomes ineligible for COBRA; or (c) prior to amendment, after nine months.

Under ARRA, plan administrators are required to provide, in addition to the standard COBRA notice, special notice of the premium subsidy to all individuals and family members of individuals whose employment was involuntarily terminated between September 1, 2008 and (prior to amendment) December 31, 2009. Earlier this year, the Department of Labor issued model notices for use in meeting this requirement, including a combined general COBRA notice and ARRA notice. The model notices are available on the Department of Labor's website at <http://www.dol.gov/ebsa/COBRA.html>.

Extensions Under the 2010 DOD Act

Under the 2010 DOD Act, the maximum period for receiving the COBRA subsidy was extended by an additional six months. The subsidy will now end on the earliest of the following: (a) the date on which the covered individual becomes eligible for other group health coverage; (b) the date on which the individual becomes ineligible for COBRA; or (c) after **15 months**.

In addition, the eligibility period for the subsidy was extended for two months, so that an employee or covered family member will be eligible for the subsidy if his or her employment was involuntarily terminated, resulting in eligibility under federal COBRA or comparable state law, between September 1, 2008 and **February 28, 2010**, and he or she timely elects continuation health care coverage.

In addition, individuals who had reached the end of the premium subsidy period before the six-month extension will be offered a grace period to make up their premium payments, until the later of (a) 30 days after the employer provides notice of the 2010 DOD Act amendments or (b) February 17, 2010.

Eligible individuals who lost the subsidy in December and continued COBRA at a higher premium may apply for a reimbursement of the overpayment from the employer or plan administrator or have it applied as a credit toward future months of coverage.

New Notice Requirements

Under the 2010 DOD Act, plan administrators must now provide the ARRA notice on premium subsidies to any individual or covered family member of an individual whose employment is terminated involuntarily during the period between September 1, 2008 and **February 28, 2010**. This notice must include notice of the changes to the premium subsidy provisions of ARRA implemented by the 2010 DOD Act.

Plan administrators must also provide notice of the 2010 DOD Act amendments to any individual eligible for the premium subsidy whose employment terminated involuntarily on or after October 31, 2009. This notice may be combined with the standard COBRA and ARRA notices and must be provided within ordinary deadlines for providing continuation coverage notices (typically, 30 days after the termination of employment or other qualifying event).

In addition, notice of the 2010 DOD Act amendments must be provided to any individuals whose COBRA subsidy period would have ended before December 19, 2009 without extension by the 2010 DOD Act and to whom the extended premium subsidy period otherwise applies. Plan administrators must provide this notice within 60 days after the end of the original subsidy period. As discussed above, individuals who

allowed their COBRA coverage to lapse after the original subsidy period expired will have 30 days after receipt of this notice (or, if later, until February 17, 2010) to elect retroactive coverage and make up any missed premiums.

Note that the model notices issued by the Department of Labor have not yet been updated for the amendments to ARRA implemented by the 2010 DOD Act.

If you would like assistance in drafting the new notices, or for further information on the COBRA changes, please contact:

New York

Susan P. Serota (bio)
+1.212.858.1125
susan.serota@pillsburylaw.com

Peter J. Hunt (bio)
+1.212.858.1139
peter.hunt@pillsburylaw.com

Scott E. Landau (bio)
+1.212.858.1598
scott.landau@pillsburylaw.com

John J. Battaglia (bio)
+1.212.858.1738
john.battaglia@pillsburylaw.com

Mark C. Jones (bio)
+1.212.858.1430
mark.jones@pillsburylaw.com

Kathleen D. Bardunias (bio)
+1.212.858.1905
kathleen.bardunias@pillsburylaw.com

Bradley A. Benedict (bio)
+1.212.858.1523
bradley.benedict@pillsburylaw.com

Washington, DC / Northern Virginia

Howard L. Clemons (bio)
+1.703.770.7997
howard.clemons@pillsburylaw.com

Keith R. Kost (bio)
+1.703.770.7799
keith.kost@pillsburylaw.com

San Diego—North County

Jan H. Webster (bio)
+1.858.509.4012
jan.webster@pillsburylaw.com

Daniel N. Riesenber (bio)
+1.858.847.4130
daniel.riesenber@pillsburylaw.com

Kenneth E. Bonus (bio)
+1.858.847.4206
kenneth.bonus@pillsburylaw.com

Lori Partrick (bio)
+1.858.509.4087
lori.partrick@pillsburylaw.com

San Francisco

Christine L. Richardson (bio)
+1.415.983.1826
crichardson@pillsburylaw.com

Silicon Valley

Cindy V. Schlaefter (bio)
+1.650.233.4023
cindy.schlaefter@pillsburylaw.com

Grace Chen (bio)
+1.650.233.4873
grace.chen@pillsburylaw.com

This material is not intended to constitute a complete analysis of all tax considerations. Internal Revenue Service regulations generally provide that, for the purpose of avoiding United States federal tax penalties, a taxpayer may rely only on formal written opinions meeting specific regulatory requirements. This material does not meet those requirements. Accordingly, this material was not intended or written to be used, and a taxpayer cannot use it, for the purpose of avoiding United States federal or other tax penalties or of promoting, marketing or recommending to another party any tax-related matters.

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.
© 2010 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.