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Premium Assistance for COBRA Benefits Under the Recovery Act - Prompt Action Required

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"), which includes provisions to provide assistance for the payment of COBRA premiums to certain employees who have an involuntary termination of employment between September 1, 2008 and December 31, 2009. In brief, the Act provides a 65% federal subsidy for COBRA continuation premiums for up to 9 months for many workers whose employment has been involuntarily terminated, and for their families. The Act also imposes multiple administrative requirements on employers that must be implemented within a short period of time. An employer's failure to address these new requirements will likely be considered a COBRA violation, subject to penalties. Therefore, it is vital for employers to be aware of these changes to COBRA, as explained below, and take action as necessary.

The COBRA Basics

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") gives employees and their eligible family members who lose group health benefits under certain circumstances the right to continue their group health benefits provided by their employer for limited periods of time. Ordinarily, qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the applicable premium. Rules under COBRA outline how employees and family members may elect continuation coverage. It also requires employers and plans to provide notices within specific timeframes.

COBRA Premium Assistance

Section 3001 of the Act contains the relevant amendments to COBRA and the Internal Revenue Code of 1986, as amended (the "Code"). The Act provides that an "assistance eligible individual" will only be required to pay 35% of the applicable COBRA premium in order to receive COBRA continuation coverage from an employer's group health plan where employment has been terminated involuntarily between September 1, 2008 and December 31, 2009. The remaining 65% of the COBRA premium is subsidized under the Act by the Federal government. The subsidy will apply to COBRA premiums paid on or after March 1, 2009, and will be provided for a maximum of 9 months. The subsidy will not be available once the assistance eligible individual becomes eligible for coverage under another group health plan or Medicare or otherwise is no longer eligible

for COBRA. The subsidy period does not alter the date of the qualifying event (involuntary termination of employment), nor does it extend the period of COBRA coverage that would otherwise apply to that individual (generally 18 months after the qualifying event). However, if permitted by the employer, the Act does allow an assistance eligible individual to enroll in coverage under a plan that is different than the individual's initial coverage, so long as the coverage is offered to active employees and the coverage is not more expensive than the option in which the individual had been enrolled prior to the qualifying event.

Relief for Individuals Who Previously Declined COBRA Continuation Coverage

Since the applicable timeframe dates back to September 1, 2008, situations may have arisen where an otherwise assistance eligible individual declined COBRA continuation coverage prior to passage of the Act. For such individuals, the Act provides an extended election period that began on February 17, 2009 (the date of enactment) and ends no earlier than 60 days after an extended election notice has been provided to such individuals. If an assistance eligible individual who previously declined COBRA coverage now timely elects COBRA coverage during the extended election period, COBRA coverage will not be reinstated retroactive to the original loss of coverage prior to the date of enactment.

New Notice Requirements for Employers

The Act adds several new disclosures related to the COBRA premium subsidy that must be included in the notice of COBRA continuation coverage:

- The forms necessary for establishing eligibility for the premium subsidy;
- Contact information for the plan administrator;
- A description of the extended election period for those who previously declined COBRA continuation coverage;
- A description of the obligation of the qualified beneficiary to notify the plan if he or she becomes eligible for subsequent coverage under another group health plan or Medicare (thus terminating eligibility for COBRA and the subsidy) and the penalty for the failure to do so;
- A prominent description of the qualified beneficiary's right to the premium subsidy and any conditions on entitlement to such right; and
- A description of the option to enroll in different coverage under the health plan, if applicable.

In addition to providing the notice prospectively, employers are required to provide this new COBRA notice to any assistance eligible individual who had an involuntary termination of employment that occurred on or after September 1, 2008. *This notice must be provided by April 18, 2009 and*

failure to do so will be deemed to be a violation of COBRA. Under the Act, the Department of Labor has been directed to publish model notices for employers no later than March 19, 2009.

Process for Employers to Claim the Federal Subsidy

With respect to the remaining 65% of the COBRA premium, the Act provides that the Federal government will reimburse employers for the subsidy. The Act adds a new Code Section 6432, which details the process by which employers must claim the reimbursement. Essentially, employers are directed to reduce the amount of employment tax deposits by an amount equal to the premium subsidy, and these offsets, or credits, are to be reported on Form 941, Employer's Quarterly Federal Tax Return.

Tax Consequences to Assistance Eligible Individuals

The Act amends the Code to add Code Section 139C, which provides that the subsidy is not taxable gross income to an assistance eligible individual with modified adjusted gross income less than or equal to \$125,000 (\$250,000 in the case of a joint return). For an assistance eligible individual with modified adjusted gross income exceeding \$145,000 (\$290,000 in the case of a joint return) the COBRA premium subsidy must be repaid to the government by the individual (as an increase in the individual's tax liability for the year). For an assistance eligible individual with modified adjusted gross income between \$125,000 and \$145,000 (or between \$250,000 and \$290,000 in the case of a joint return), the amount of the premium subsidy for the year that must be repaid is reduced proportionately.

Next Steps for Employers

All employers should be aware of these changes to COBRA and should

- Update COBRA notices to include information about the subsidy and new enrollment rights, consistent with the to-be-released model notices from the Department of Labor; and
- Develop procedures to comply with the COBRA premium subsidy mechanism and to timely claim the employment tax offset from the Federal government.

In addition, for employers that have employees whose employment has been involuntarily terminated since September 1, 2008, these employers should identify assistance eligible individuals who had an involuntary termination of employment occurring on or after September 1, 2008 and issue a new COBRA notice about the subsidy and new enrollment opportunity.

Should you have any questions regarding the COBRA premium assistance, please do not hesitate to contact your regular Hall Render attorney or:

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