Client Alert

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Important News For Employers And Other Health Plan Sponsors

President Obama just signed the American Recovery and Reinvestment Act, which includes COBRA assistance for certain unemployed individuals. Earlier this month, Obama signed the Children's Health Insurance Program Reauthorization Act, which extends and maintains health coverage for uninsured children.

The American Recovery and Reinvestment Act – COBRA Revisions

Last week Congress passed the American Recovery and Reinvestment Act of 2009 (the "Act"), designed to provide an economic stimulus to the ailing economy. The President signed the Act on Tuesday, February 17, 2009.

The main focus of the Act is to provide a mix of new government spending and tax cuts. Of interest to employers and other health plan sponsors, the Act includes important changes to the continuation coverage provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"). While not all of the COBRA provisions that appeared in prior versions of the bill are included in the final version of the Act (e.g., an extended coverage period for older and long-term employees), the Act imposes a number of new requirements that employers, plan administrators and insurers must address very quickly.

Current Law

Under current law, employers with 20 or more employees must offer continuation coverage to employees and dependents who lose coverage under the employer's group health plan due to a termination of employment, reduction in hours of service or other "qualifying event." COBRA coverage generally is available for 18 months from the date coverage is lost, but is extended in certain circumstances and can terminate for, among other things, non-payment of premiums. Importantly, under COBRA, employers are not required to pay any portion of the COBRA premium and, thus, employees and dependents electing continuation coverage generally pay the entire COBRA premium (and may also be assessed a 2% administrative fee) to continue coverage, unless the particular employer decides to pay some amount on their behalf.

COBRA Under the Act

The Act revises COBRA in a very significant way: for the first time in its 20+ year history, COBRA has been revised to alleviate some of the financial burden on employees. In short, the Act provides a COBRA subsidy (which, as discussed below, is reimbursed to employers, other plan sponsors and insurers through reduction of their payroll tax liability) for taxpayers with adjusted gross income below a maximum threshold. As discussed below, this significant change in federal law requires sponsors of single-employer and multiemployer group health plans, group health insurers and third party administrators to act quickly to implement these changes.

Details of the Subsidy

The Act provides for a subsidy of 65 percent of the required COBRA premium for eligible individuals for a maximum of 9 months, or if earlier, until the individual becomes eligible for coverage under a group health plan (a person is not considered eligible if he or she is subject to a waiting period under the other group health plan). Under the Act, the employee is required to notify the group health plan in writing of subsequent eligibility for group health coverage, and may be subject to a penalty of 110% of the subsidy amount if he or she fails to do so.

The subsidy will be credited against the payroll taxes of the entity receiving the 35% payment from the COBRA participant. For multiemployer group health plans, the plan will receive this credit. For a group health plan that is not a multiemployer plan and is self-insured, the employer will be entitled to the credit. For a group health plan that is not a multiemployer plan and where some or all of the coverage is provided by insurance, the insurance company providing the insurance will be entitled to the credit.

If the amount of the premium subsidy is greater than the payroll tax liability for that period, the additional amount due will be treated as a refund or a credit of payroll taxes as if it was an overpayment of payroll taxes. Under the Act, the U.S. Treasury is required to provide further guidance on reporting by plan sponsors with regard to the subsidy. Further guidance will have to be provided regarding the verification of reimbursements and other aspects of the Act.

Who is Eligible

An individual is eligible for the COBRA premium subsidy if he or she is involuntarily terminated from employment during the period beginning September 1, 2008 and ending December 31, 2009 and is or was eligible to elect COBRA during that time. (Note: the Act applies to any entity subject to continuation coverage requirements, whether under the federal COBRA law or through a state mini-COBRA law.) Dependents are also eligible for the premium subsidy if the COBRA qualifying event was the employee's involuntary termination during the time period described above.

Individuals who elected COBRA due to an involuntary termination on or after September 1, 2008 but prior to the date the Act was enacted are eligible to receive the subsidy on a prospective basis only, beginning as of the first coverage period following the date of enactment.

Individuals who were eligible to elect COBRA during that time period due to an involuntary termination but did not elect COBRA must be given a special enrollment opportunity to elect COBRA now, on a prospective basis, with the maximum coverage period measured from the earliest date that COBRA coverage could have been elected.

The Act is designed to provide a subsidy only to those individuals who appear to need it the most. The premium subsidy is phased out for individuals with adjusted gross income of between $125,000 and $145,000 (for single filers), and $250,000 to $290,000 (for joint filers). Subsidy amounts received by an *in*eligible individual results in imputed income, and are to be reported on the individual's annual income tax return. Employees who do not want to receive the subsidy may notify the plan sponsor or the insurer as such.

The Act provides that an employer or other plan sponsor (such as the board of trustees of a multiemployer plan) may allow a COBRA recipient eligible for the subsidy to change his or her health insurance coverage option when making a COBRA election under the Act. The alternative option must have the same or lower premiums and must be available to active employees under the plan as well. The election to change must be made within 90 days of receipt of the COBRA election notice. If these requirements are satisfied, the new coverage option will be treated as COBRA coverage. (Note: this is a limited option; it does not change the rules with respect to making changes under flexible spending arrangements or other programs.)

Effective Date and Penalties for Noncompliance

The subsidy will apply to periods of COBRA continuation coverage beginning on or after the date of the Act's enactment (i.e., February 17, 2009). Under most plans, this will mean March 1, 2009. A failure to

comply with the Act's notice requirements will be treated as a failure to provide adequate COBRA notification under the existing COBRA penalty provisions under ERISA and the Internal Revenue Code.

Conclusion

Under the Act, plan sponsors and third party administrators will have to modify their existing initial COBRA notices and qualifying event/election notices, or provide separate, supplemental notices to all individuals who become (or became) entitled to elect COBRA continuation coverage during the period beginning on September 1, 2008 and ending on December 31, 2009. Among other things, the notice must describe the subsidy and, if applicable, the right to change coverage. The Act requires the federal agencies to develop a model notice within 30 days of its enactment.

The Children's Health Insurance Program Reauthorization Act of 2009

On February 4, 2009, President Obama signed into law The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIP"). CHIP extends and maintains coverage for nearly 11 million uninsured children, funded by an increase in federal excise taxes on tobacco products. The law also imposes certain disclosure and notification requirements on employers, insurers, group plans and plan administrators, and provides additional special enrollment rights, through amendments to the Internal Revenue Code, ERISA, and the Public Health Service Act. These requirements are more fully described below. Plan sponsors should note that, while many of the obligations become effective some time in the future, the new special enrollment requirements are effective April 1, 2009.

Additional Special Enrollment Rights

Effective April 1, 2009, in two circumstances, group health plans must permit non-enrolled employees and dependents who are eligible for coverage to enroll outside the normal open enrollment period for coverage under the plan. First, enrollment must be permitted if either the employee's or dependent's coverage under Medicaid or CHIP is terminated as a result of loss of eligibility, and the employee requests coverage under the plan within 60 days after such termination. Second, enrollment must be permitted if the employee or dependent becomes eligible for a Medicaid or CHIP premium assistance subsidy and the employee requests coverage under the plan within 60 days after eligibility is determined.

Note: Under ERISA, plan participants generally must notify the plan sponsor within 30 days of an event giving rise to a special enrollment right under an ERISA-governed health plan. This notice period is expanded to 60 days for the CHIP special enrollment rights.

Disclosure to States on Request

CHIP requires plan administrators of group health plans that have participants or beneficiaries covered under a state Medicaid or child health plan to disclose to the state, upon the state's request, sufficiently specific information about the benefits available under the plan. The purpose of this disclosure requirement is to enable the state to determine how cost-effective it is for the state to provide both premium assistance for the purchase of coverage under the plan and any possible supplemental benefits.

Pursuant to CHIP, within 60 days of its enactment, the Secretary of Health and Human Services and the Secretary of Labor must jointly establish a working group to develop the necessary model coverage coordination disclosure form that plan administrators must use to provide the necessary information. The disclosure form must provide the following information, in addition to any other information that the working group determines relevant: a determination of whether an employee is eligible for coverage under the group health plan, the name and contact information of the plan administrator of the group health plan, the benefits offered under the plan, the premiums and cost-sharing required under the plan, and any other information relevant to coverage under the plan. States cannot request the form until the first plan year beginning after the date on which the form is first issued.

Any plan administrator that fails to timely provide a state with the information required to be disclosed can be assessed a penalty of up to $100 a day from the date of the plan administrator's failure to provide such information. Each violation regarding a single participant or beneficiary is treated as a separate violation.

Notice to Employees

Any employer that maintains a group health plan in a state that provides premium assistance under a state Medicaid plan, or child assistance under a state child health plan, must notify each employee, in writing, of the potential opportunities for premium assistance for health coverage for both employees and their dependents in the states in which they reside. CHIP directs the Secretary of Health and Human Services to develop both national and state-specific model notices for this purpose by February 4, 2010. More specifically, these notices will inform employees who to contact and how to apply for premium assistance. Employers can use any state-specific model notice, and can provide these notices to their employees together with plan materials notifying their employees of their health plan eligibility, or open enrollment materials, or along with the summary plan description. This requirement is effective for plan years beginning after the date on which model notices are first issued.

Any employer that fails to timely provide the required notice can be assessed a penalty of up to $100 a day from the date of the plan administrator's failure to provide such information. Each violation regarding a single employee is treated as a separate violation.

Premium Assistance Subsidy

Pursuant to CHIP, states may elect to offer a premium assistance subsidy to eligible low-income children under age 19 for "qualified employer-sponsored coverage," in the form of a reimbursement to the employee, or as a direct payment to the employer. The Act defines "qualified employer sponsored coverage" as group health plan or health plan insurance (other than health FSAs or HDHPs), offered through an employer, that qualifies as creditable coverage under the PHSA, for which the employer contribution toward any premium is at least 40 percent, and which is offered to all participants in a nondiscriminatory manner. Health Flexible Spending Account and high-deductible health plan benefits are specifically excluded from this definition. An employer can notify a state that it elects to opt out of receiving the direct payment; if an employer chooses this option, the employer will withhold the amount of the employee contribution required to enroll the employee and the employee's child, and the state will pay the premium assistance subsidy directly to the employee.

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