

Akerman Practice Update

EMPLOYEE BENEFITS

February 2009

COBRA Changes Included in Stimulus Act: Immediate Action Required

By **Beth Alcalde**
beth.alcalde@akerman.com

The American Recovery and Reinvestment Act of 2009 (the “Stimulus Act”) includes significant changes to the COBRA continuation coverage rules and to similar coverage rules under state laws applicable to small employers. Once President Obama signs the Stimulus Act into law, group health plan sponsors and insurers will need to quickly take action. Specifically, COBRA continuation coverage will be altered for certain individuals whose employment is involuntarily terminated during a specified period of time. This alert provides a very cursory overview of the Stimulus Act’s COBRA implications.

Who is an “Assistance Eligible Individual”?

In general, under the Stimulus Act, an “assistance eligible individual” (AEI) is any COBRA qualified beneficiary who was or is involuntarily terminated from employment (for any reason other than gross misconduct) at any time between September 1, 2008 and December 31, 2009. A covered dependent or spouse of an AEI can independently receive a subsidy under the Stimulus Act, since any qualified beneficiary has independent COBRA rights. AEIs, as well as their dependents or spouses, are referred to below as “Individuals”.

DENVER
FT. LAUDERDALE
JACKSONVILLE
LOS ANGELES
MADISON
MIAMI
NEW YORK
ORLANDO
TALLAHASSEE
TAMPA
TYSONS CORNER
WASHINGTON, D.C.
WEST PALM BEACH

akerman.com



ADVERTISEMENT

“It is important to note that the Stimulus Act contains additional COBRA changes, and that some of these changes are permissive (rather than mandatory).”

What is the Subsidy?

A subsidy is provided by the federal government for 65% of the COBRA premium actually charged to Individuals. A few general notes regarding the scope and mechanics of the subsidy are useful at this point:

- The subsidy does not apply to COBRA premiums for health care flexible spending accounts.
- Employers that do not charge the full COBRA premium to their COBRA qualified beneficiaries will need to calculate if a government subsidy is available.
- Any Individuals who are “high income individuals” will be required to repay the subsidy in the form of an additional income tax or waive this subsidy to avoid such repayment. In general, the available COBRA subsidy is reduced for years in which Individuals’ modified adjusted gross income (“MAGI”) exceeds \$125,000 (or \$250,000 for jointly filed returns); the subsidy is phased out over the next \$20,000 of MAGI for individuals or \$40,000 for joint filers.
- The reimbursement to the employer/plan sponsor for paying the 65% portion of the COBRA premium generally will be a credit against the employer’s liability for payroll taxes.
- In general, the Stimulus Act’s COBRA provisions do not change the length of the COBRA continuation period of coverage to which Individuals are entitled, though in some situations COBRA coverage will terminate early (such as when Individuals first become eligible for coverage under another group health plan or Medicare).

When Does the Subsidy Begin and End?

The subsidy applies to periods of COBRA coverage after the enactment of the Stimulus Act. Based on an expected date of enactment during this calendar month, then, all group health plans using calendar months as the COBRA period of coverage would be required to offer the subsidy beginning March 1, 2009. The maximum period for which the subsidy is available is 9 months, or, if shorter, the period ending on the date that COBRA would otherwise expire.

What is the Special Election Period?

Individuals who are not currently on COBRA must be given a second opportunity to elect COBRA. This special election period begins on the date the Stimulus Act is enacted and ends 60 days after the required notice of the special election period is sent to the individuals.

If Individuals choose to elect COBRA during this special election period, the cover-

“Apart from the administration of the subsidy, there are significant notice and plan document changes that must be immediately undertaken.”

age is not retroactive to the date they originally lost coverage. Rather, we expect that coverage will begin no earlier than March 1, 2009.

What Other COBRA Changes are in the Stimulus Act?

This is only a very brief summary of some of the key COBRA changes in the Stimulus Act. It is important to note that the Stimulus Act contains additional COBRA changes, and that some of these changes are permissive (rather than mandatory). For example, the Stimulus Act permits an employer to allow Individuals to elect a less expensive coverage option, even if it is different from the health care option originally offered to the Individuals under COBRA.

What Are a Plan Sponsor's Next Steps?

Group health plans must take steps to provide the 65% subsidy beginning on March 1, 2009. This means that beginning on that date, COBRA qualified beneficiaries should only be charged 35% of the cost of the COBRA premium. Fortunately, there is a transition period provision: If Individuals pay the full COBRA premium for a month or two after this initial deadline passes, then the plan administrator may either refund the subsidized portion within 60 days, or, in some cases, reasonably credit the subsidized portion of the premium against future premiums.

Apart from the administration of the subsidy, there are significant notice and plan document changes that must be immediately undertaken. For example, within 60 days after President Obama's enactment of the Stimulus Act, two separate notices must be provided:

- A notice must be sent to all Individuals who currently have COBRA coverage to describe the subsidy.
- A notice must be sent to all Individuals who had been eligible to elect COBRA during this period, but who either previously declined coverage altogether or who terminated COBRA prior to the statutory maximum period of time (for example, due to nonpayment of premiums). The notice to this group must describe the subsidy as well as the special election period.

The Department of Labor is to provide models for both notices within 30 days of the enactment of the Stimulus Act.

We are happy to assist you in ensuring that your group health plans comply with these new COBRA mandates. Certain issues regarding the COBRA subsidy are not adequately addressed by the Stimulus Act, and so additional guidance should be forthcoming. We can update you with important developments. Please contact **Beth Alcalde** at (561) 653-5000, **Rick Hurt** at (407) 423-4000, or **Peter Salomon** at (305) 374-5600 with any questions.

Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal NLJ 250* (2008) in number of lawyers and is one of the largest law firms in Florida. Our team serves clients worldwide from the major commercial centers in Florida and international business centers in the United States, including Los Angeles, Miami, New York, and Washington, D.C. Akerman is a member of Lex Mundi, the world's leading association of independent law firms with a presence in more than 100 countries.

For more information, please contact a member of our Employee Benefits practice group.

Denver

511 Sixteenth Street, Suite 420
Denver, CO 80202
303.260.7712

Ft. Lauderdale

Las Olas Centre II
350 East Las Olas Boulevard
Suite 1600
Ft. Lauderdale, FL 33301-2229
954.463.2700

Jacksonville

50 North Laura Street, Suite 2500
Jacksonville, FL 32202-3646
904.798.3700

Los Angeles

725 South Figueroa Street, 38th Floor
Los Angeles, CA 90017-5438
213.688.9500

Madison

222 West Washington Avenue, Suite 380
Madison, WI 53703
608.257.5335

Miami

One Southeast Third Avenue
25th Floor
Miami, FL 33131-1714
305.374.5600

New York

335 Madison Avenue, Suite 2600
New York, NY 10017-4636
212.880.3800

Orlando

CNL Center II at City Commons
420 South Orange Avenue, Suite 1200
Orlando, FL 32801-3336
407.423.4000

Tallahassee

Highpoint Center, 12th Floor
106 East College Avenue
Tallahassee, FL 32301
850.224.9634

Tampa

SunTrust Financial Centre
401 East Jackson Street, Suite 1700
Tampa, FL 33602-5250
813.223.7333

Tysons Corner

8100 Boone Boulevard, Suite 700
Vienna, VA 22182-2683
703.790.8750

Washington, D.C.

801 Pennsylvania Avenue N.W., Suite 600
Washington, DC 20004
202.393.6222

West Palm Beach

Esperante Building
222 Lakeview Avenue, Suite 400
West Palm Beach, FL 33401-6183
561.653.500

akerman.com

