

Akerman Practice Update

EMPLOYEE BENEFITS

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IRS Releases Important Guidance on COBRA Subsidy

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The IRS recently issued Notice 2009-27, which includes 58 questions and answers on the COBRA subsidy provided for in the American Recovery and Reinvestment Act of 2009 (the “Stimulus Bill”). The COBRA subsidy was originally described in our Practice Update dated February 2009, and the procedure by which employers are to be reimbursed by the government for the subsidy was outlined in our Practice Update dated March 2009. Additional guidance on the COBRA subsidy had been desperately needed, given this portion of the Stimulus Bill’s immediate effective date, and the large number of pressing administrative questions raised by group health plan sponsors across the country.

This summary will highlight a few of the more noteworthy provisions of the Notice.

Defining “Involuntary Termination”. One of the requirements to receive the COBRA subsidy is an involuntary termination from employment between September 1, 2008 and December 31, 2009. Employers have been struggling with determining what types of terminations would meet this definition. The Notice clarifies that the determination will be based on all the facts and circumstances. Any separation due to “the independent exercise of the unilateral authority of the employer” will generally suffice. For example, the Notice explicitly provides that an involuntary termination will include a “voluntary” termination or retirement that is solicited from the employee in return for a buy-out package, where the employer has indicated that a certain number of employees in a particular group will be terminated after the offer period expires.

Insurance Company Obligations. In fully insured health plans that are subject to federal COBRA, it is possible for the insurer and the employer to agree that the insur-

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er will collect the COBRA premiums directly from qualified beneficiaries. In this case, the insurer must treat the 35% premium payment by an assistance eligible individual as payment of the full premium, even if they have not yet received the remaining 65% from the employer. This is interesting, as most insurance policies grant the insurer the ability to cancel the contract in the absence of full payment.

Early Termination of COBRA Subsidy. The Notice confirms that an assistance eligible individual will no longer be eligible for the subsidized COBRA rate on the first day he is eligible for another group health plan or Medicare, even if he does not enroll in that other coverage.

Severance Arrangements’ Impact on Subsidy. The COBRA subsidy will not be available unless the COBRA-triggering loss of coverage occurs during the specified period, ending on December 31, 2009. Certain severance plans provide that departing employees may stay on some type of non-COBRA continuation coverage for a certain amount of time, after which COBRA may be elected. Companies with such severance plans will need to evaluate whether to revise their plans, as, without modification, employees who are involuntarily terminated late in 2009 would not be eligible for the subsidy if their COBRA periods do not begin until on or after January 1, 2010.

Lack of Subsidy for Domestic Partners. Domestic partners are not considered qualified beneficiaries under federal COBRA guidelines. While it was already clear that domestic partners would not be eligible for the subsidy under federal COBRA, many companies wondered whether a subsidy could be offered if state continuation coverage was provided pursuant to state law. The Notice clarifies that, regardless of state law or plan terms to the contrary, no domestic partner or other non-qualified beneficiary under federal law is eligible to receive the COBRA subsidy.

Please call any of the following with any additional questions related to the COBRA subsidy: **Beth Alcalde** at (561) 653-5000, **Peter Salomon** at (305) 374-5600, **Rick Hurt** or **Nadine Schaal** at (407) 423-4000, or your relationship attorney at Akerman.

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