

New Law Extends, Makes Significant Changes to COBRA 65% Assistance Payment Rules; Requires New and Revised Notices

March 5, 2010

On March 2, President Obama signed the Temporary Extension Act of 2010 (the Act). The Act extends eligibility for COBRA 65% assistance payments through the end of March 2010, and also makes a number of significant changes to the COBRA 65% assistance payment rules.

As may be expected from past legislation, the Act requires revised COBRA 65% assistance payment notices for future COBRA events and an entirely new “second chance” opportunity notice for a small group of individuals.

The Act also contains new enforcement powers for the government, a private right of action for individuals, and greater assurances for employers that their determination that a former employee experienced an involuntary termination of employment will not be second-guessed by federal payroll tax auditors.

The Act also corrects past drafting mistakes and codifies prior agency interpretations of the Department of Defense Appropriations Act, 2010 (DOD Act) legislation.

However, Congress is not yet done with the COBRA 65% assistance payment. Most observers expect Congress to further extend eligibility for the COBRA 65% assistance payment, believing that this extension will likely run through December 31, 2010. It remains unclear as to when such an extension will land on President Obama’s desk.

The Extension

The Act extends eligibility for the COBRA 65% assistance payment to involuntary terminations of employment that occur through March 31, 2010. As a result, all COBRA 65% assistance payment notices should be immediately revised to reflect the extended date. Employers should also consider holding any March 1 and beyond COBRA enrollment packages until the notices are revised, or they risk a subsequent resolicitation with revised notices. We understand that the Department of Labor (DOL) plans to quickly release updated model notices and other supporting material.

Reduction in Hours Followed by an Involuntary Termination of Employment

The Act overturns prior Internal Revenue Service (IRS) interpretations by extending the COBRA 65% assistance payment provisions to an individual whose COBRA began with a reduction in hours on or after September 1, 2008, and who then suffers an involuntary termination of employment on or after March 2 and by March 31, 2010. By way of example, an individual who became eligible for and elected COBRA due to a reduction in hours occurring in September 2008, but who subsequently suffers an involuntary termination of employment on March 12, 2010, will be able to receive the COBRA 65% assistance payment beginning with the next period of coverage (typically April 1). Further, it is our understanding (based on unofficial comments from the DOL) that the COBRA 65% assistance payment provisions will apply for up to 15 months beginning with the involuntary termination of employment—not with the earlier reduction in hours.

(Another) Second Chance

The Act extends the right of individuals to receive the COBRA 65% assistance payment even if they did not make (or made and discontinued) a COBRA election as a result of an initial reduction in hours occurring on or after September 1, 2008, if those individuals experience an involuntary termination of employment on or after March 2 (and on or before March 31, 2010). Employers will have to identify these individuals and resolicit them for prospective COBRA benefits for the remainder of their original 18 months of COBRA. Since most COBRA administration systems do not treat a subsequent termination of employment as a COBRA qualifying event, it will be administratively challenging to identify the correct individuals and send the necessary enrollment material—particularly in the case of individuals who do not currently have any medical coverage. This task will be even more complicated if their prior medical coverage is no longer offered due to an interim plan design change.

New Right of Action

The Act creates new rights for the “appropriate Secretary” or an affected individual to bring a civil action (and obtain appropriate relief) to enforce a determination that an individual is entitled to the COBRA 65% assistance payment.

New Enforcement Powers

The Act also creates a new \$110 per day penalty, imposed by the “appropriate Secretary,” upon employers or insurers that do not comply with a “determination of the Secretary” that an individual is entitled to the COBRA 65% assistance payment. This, in other words, puts financial teeth into a determination by the DOL or Department of Health and Human Services (HHS) that an individual is entitled to the COBRA 65% assistance payment.

New Certainty for Employers

The Act modifies the Internal Revenue Code language addressing employer reimbursement of the COBRA 65% assistance payment. Now, as long as the employer determines that a termination of employment was involuntary and also maintains appropriate supporting documentation, the termination will be treated as an involuntary termination for payroll audit purposes. While this is a welcome

additional protection for employers, it reemphasizes the necessity for employers to keep appropriate documentation of the involuntary termination and of eligibility for the COBRA 65% assistance payment.

The Future

It appears that Congress will make additional changes to the COBRA 65% assistance payment provisions. These changes will, at the very least, likely extend the duration of eligibility for the COBRA 65% assistance payments through December 31, 2010. Morgan Lewis will continue to monitor these legislative developments and keep our clients and contacts informed of any subsequent changes.

For additional information about the COBRA 65% assistance payment provisions, please see the material from our January 5, 2010 webcast, “COBRA ARRA Extension: Better Late Than Never!”¹ as well as the Morgan Lewis LawFlashes, “COBRA ARRA 65% Assistance Payment Eligibility, Duration Extended” (December 22, 2009),² and “DOL Releases Revised Model COBRA Notices, Additional Material” (January 14, 2010).³

The revised and new DOL model notices, when available, can be found (along with supporting material and updated FAQs) at <http://www.dol.gov/ebsa/COBRA.html>.

If you have any questions or would like more information on integrating the new Act provisions into your COBRA administration process, please contact any of the following Morgan Lewis attorneys:

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¹ Available online at http://www.morganlewis.com/pubs/EBWebcast_COBRA-ARRA-Extension_5jan10.pdf.

² Available online at http://www.morganlewis.com/pubs/EBLF_COBRA-ARRA65Extended_22dec09.pdf.

³ Available online at http://www.morganlewis.com/pubs/EB_RevisedModelCOBRANotices_LF_14jan10.pdf.

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