IVINS, PHILLIPS & BARKER
CHARTERED

EMPLOYEE BENEFITS INSIDER

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COBRA Subsidy Extension: What Does This Mean For Employers?

As you no doubt are aware, recent legislation extended the COBRA subsidy until February 28, 2010. What do employers need to do?

Background: The COBRA subsidy was originally enacted by Congress via the American Recovery and Reinvestment Act of 2009 (ARRA). Its purpose was to reduce COBRA premiums by 65% for certain individuals who were involuntarily terminated during a defined period. (The employer could claim a credit equal to this 65% subsidy, on its quarterly Form 941.) The eligibility period for these assistance-eligible individuals began September 1, 2008 and was scheduled to expire on December 31, 2009.

Just before the expiration date, Congress enacted additional legislation to *extend the eligibility period* by two months (until February 28, 2010). This new legislation (the Department of Defense Appropriations Act of 2010, enacted December 19, 2009) also *extended the maximum period* that an individual could receive the COBRA subsidy by another six months (from 9 months to 15 months).

- ***Notice Requirements***: The extension introduces a new set of notice requirements.

A detailed notice generally will be required by February 17, 2010 for all assistance-eligible individuals. We advise against rushing out this notice prematurely, for two reasons. First, the Department of Labor is developing new model notices for this purpose. Second, there may be additional legislation coming down the pike (see Jobs Bill below).

However, an earlier notice may be required for certain groups who are at risk for dropping coverage. These include individuals whose subsidy ran out before December 19, 2009, as well as individuals who are involuntarily terminated on or after October 31, 2009.

For these groups, we recommend issuing a targeted notice to alert them to the COBRA subsidy extension. Its purpose would be to reduce the number of people who drop coverage, and who would later seek to reinstate it retroactively after learning of the extended subsidy. Although the statute certainly permits retroactive reinstatement (and premium adjustment), it

would lighten your administrative load to avoid this extra step. By providing a heads-up early, you might encourage eligible assistance individuals not to drop coverage at all.

- ***Mid-month layoffs***: Many employers have expressed concern about individuals who were terminated in mid-December, but who retained medical coverage through December 31st. Under the IRS and DOL interpretation of the original COBRA subsidy rules, these individuals were not eligible for the subsidy because they did not become "assistance-eligible individuals" until January 1st, when COBRA applied.

  The Act fixes this glitch, in two ways. First, it extends the eligibility period to include involuntary terminations through February 28, 2010. Second, the Act *drops the requirement* that an individual actually become COBRA-eligible during this period. Involuntary termination during this period is sufficient to become assistance-eligible, if it will lead to COBRA eligibility at a future date. This should prevent the same problem from arising for layoffs occurring in February 2010

- ***More Legislation – Jobs Bill***: The House has already approved the Jobs for Main Street Act of 2010 (H.R. 2847, "Jobs Bill"), and it will likely be picked up by the Senate this month. This bill could expand the COBRA subsidy through June 30, 2010 – and add a host of additional rules – which could impact the legal notice that will ultimately be required.

  For example, the Jobs Bill would address lingering questions about the impact of retiree health coverage, and the impact of a reduction in hours that leads to a loss of coverage.

  The Jobs Bill also would establish a "deemed" involuntary termination standard that would apply r*etroactively to September 1, 2008*.

- ***Taking the Credit – Timing***: Lastly, employers should note that the IRS has changed its tune on the mechanics for claiming the credit for the 65% COBRA subsidy. An employer can claim the credit no earlier than the calendar quarter in which the employer receives the individual's premium payment (35%). Where the individual pays his or her premium in 2010, the employer can only claim the credit in 2010, even if the period of coverage began in 2009.

New SEC Proxy Disclosure Rules

New proxy disclosure rules issued by the SEC will require companies to make additional disclosures regarding their compensation and corporate governance practices. A brief overview of the new requirements appears below.

The Ivins benefits team has extensive experience with proxy disclosures, particularly the Section 280G calculations which appear in the Compensation Discussion and Analysis. Feel free to contact us to discuss the new requirements.

- ***Effective Date***: The changes generally are effective for fiscal years ending

on or after December 20, 2009, unless the company's definitive proxy statement is issued before February 28, 2010. If the definitive proxy statement is subject to the new rules, the preliminary proxy statement also must comply with the new rules, regardless of when it is issued.

- ***Compensation***: Companies must now disclose:

    - Compensation practices for all employees (not just executive officers), if the company's compensation practice is, in the aggregate, "reasonably likely" to have a "material adverse effect" on the company. Companies will need to assess the risks that employees may be inclined to take in order to maximize their performance-based compensation. The SEC has provided examples of situations where disclosure would be appropriate.

    - The Summary Compensation Table must include the aggregate "fair value" of stock options and other equity awards as of the grant date, determined using FASB ASC Topic 718 (formerly FASB Statement 123R), instead of the dollar amount recognized for financial reporting purposes. The value of prior awards may need to be restated as well. In addition, substantial one-time equity awards may require the Summary Compensation Table to include more than five "named executive officers."

    - Fees paid to compensation consultants and their affiliates. Exceptions may apply where management and the Board retain separate consultants, or for non-customized services

.- ***Corporate Governance***: Required disclosures include (i) the experience, attributes and skills that led to the selection of each director and director nominee, (ii) an explanation of the company's leadership structure and why that structure is appropriate for the company, (iii) a description of the board of directors' role in the company's risk oversight, and (iv) disclosure of how the nominating committee considered diversity in its selection of director nominees. Boilerplate language may be utilized for some of these items.

- ***Voting Results***: Companies will be required to report the results of shareholder votes on Form 8-K within four business days, instead of waiting until the next Form 10-K or 10-Q.