SUBSIDY EXTENSION APPROVED

On March 2, 2010, the President signed into law the *Temporary Extension Act of 2010* (the Act) providing for an extension of unemployment benefits. A copy of the Act is available at http://www.dol.gov/ebsa/pdf/HR4691.pdf.

Among other things, the Act amends the COBRA subsidy provisions to include:

- A one month extension to qualify for the COBRA subsidy;
- An expansion of the subsidy and a special election opportunity for individuals who experience a reduction in hours followed by an involuntary termination;
- Additional enforcement mechanisms, including a $110 per day penalty on plan sponsors (and insurers) for non-compliance with a DOL or HHS appeal determination; and
- Language that affords deference to an employer's determination that a termination was "involuntary."

These changes are discussed in greater detail below.

Changes to the definition of Assistance Eligible Individual

As we have previously reported, the COBRA subsidy was included in the American Recovery and Reinvestment Act of 2009 (ARRA - as amended by the Department of Defense Appropriations Act of 2010). The subsidy is a 65% tax-payer funded reduction in COBRA premiums available to *assistance eligible individuals* (AEI). The subsidy is available for a period of no more than 15 months and may expire earlier should, among other things, the AEI become eligible for other group health plan coverage or Medicare.

The Act provides a one month extension (to **March 31, 2010**) of the eligibility period for the subsidy, and changes "who" may receive the premium discount.

Under the Act, an AEI includes the employee (or a spouse or dependent child of the employee) who:

- Experiences a qualifying event that is the employee's involuntary termination of employment at any point from September 1, 2008 through **March 31, 2010** and elects COBRA continuation of coverage (or state mini-COBRA coverage); or

- Experiences a qualifying event that is the **employee's reduction in hours from September 1, 2008 through March 31, 2010, followed by the employee's involuntary termination of employment on or after March 2, 2010.**

Special election of COBRA coverage

The Act provides a special COBRA election opportunity for an AEI who:

- Is the employee (or the employee's spouse or dependent child) who initially became COBRA eligible due to a reduction in hours that occurred from September 1, 2008 through March 31, 2010;
- Did not make (or made and discontinued) a COBRA election due to the employee's reduction in hours; and
- Experiences the employee's involuntary termination of employment on or after March 2, 2010.

Individuals who satisfy these conditions are given the opportunity to make a COBRA election and receive subsidized COBRA coverage on a prospective basis.

There is no requirement to offer retroactive coverage for the period between the reduction in hours and the involuntary termination. Moreover, the plan is prohibited from imposing a pre-existing condition exclusion on the AEI if he or she did not have health plan coverage during this period prior to the COBRA election.

The duration of COBRA coverage (generally 18 months) is measured from the original qualifying event date (the reduction in hours), and not from the date of the involuntary termination. This may result in a shorter timeframe for some individuals to receive subsidized COBRA coverage, as the original 18-month COBRA period may expire before the full subsidy benefit is exhausted.

Plan administrators will be required to provide notice of the new COBRA election rights within 60 days following the involuntary termination. It is expected that the DOL will revise the current model notices to incorporate these changes.

Increased penalties

The Departments of Labor (DOL) and Heath and Human Services (HHS), and affected individuals may bring a civil action to enforce subsidy provisions.

ARRA provides a process for individuals to challenge a denial of the subsidy (whether by the employer or the insurer in a mini-COBRA jurisdiction). The Act makes clear that when the DOL rules in favor of the individual on appeal, plan sponsors and insurers are required to comply within 10 days of receiving the agency's determination. A failure to comply with the determination may result in a penalty of up to $110 per day per individual.

Employer's determination that a qualifying event is an involuntary termination

Employers will be deemed to properly classify a termination as "involuntary" when:

- Based on a reasonable interpretation of the law and administrative guidance, an employer determines that the qualifying event for an individual was the employee's involuntary termination of employment; and
- The employer maintains supporting documentation of the determination, including an attestation by the employer of the involuntary termination with respect to the covered employee.

The subsidy's future

This is not likely to be the last extension of the COBRA subsidy. The President's proposed budget and a recent Senate bill both suggest extending the subsidy's eligibility provisions through December 31, 2010.

Conclusion

More guidance is needed on these provisions, particularly around the expanded definition of an AEI to include certain reductions in hours. We anticipate that the DOL will release guidance in the coming days and weeks, including revised fact sheets and notices. The DOL maintains a dedicated COBRA website where information on the subsidy is posted (see www.dol.gov/cobra).

We will keep you updated as information develops.