

NEW COBRA SUBSIDY RULES

Employee Benefits Alert
March 19, 2010

The Temporary Extension Act of 2010 (TEA), signed into law by President Obama on March 2, 2010, includes a number of important changes to the COBRA premium subsidy provisions enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA). Among other things, TEA:

- Extends the last day of the premium subsidy eligibility period from February 28 through March 31, 2010.
- Extends COBRA premium assistance to qualified beneficiaries who experience a qualifying event that is a *reduction in hours of employment* if the reduction in hours is followed by an involuntary termination of employment.
- Requires that deference be given to an employer's determination that an individual was involuntarily terminated (and, therefore, eligible for the premium reduction) if certain requirements are met.

Each of these changes is discussed in greater detail below.

Extension of Premium Subsidy Eligibility Period

TEA extends the close of the premium subsidy eligibility period during which a qualifying event that is an involuntary termination of employment must occur from February 28 through March 31, 2010. This represents the second extension of the premium subsidy eligibility period. The first extension was included in the Department of Defense Appropriations Act of 2010, which extended the close of the eligibility period enacted as part of ARRA from December 31, 2009, to February 28, 2010.

Reduction in Hours as a COBRA Premium Reduction Qualifying Event

Before TEA, an individual who became entitled to COBRA as a result of a qualifying event that was not an involuntary termination of employment (i.e., a reduction in hours of employment) would not have qualified as an assistance eligible individual (AEI). Under TEA, a qualified beneficiary will qualify as an AEI if:

Attorneys

Michael Flanagan

Richard Kaiser

Practices & Industries

Employee Benefits

NEW COBRA SUBSIDY RULES

- The qualified beneficiary experiences a qualifying event that is a reduction in hours of employment,
- The qualifying event (i.e., reduction in hours) occurs between September 1, 2008 and March 2, 2010, and
- The individual is involuntarily terminated on or after March 2, 2010, but before the end of the subsidy eligibility period (currently, March 31, 2010).

In effect, TEA treats the involuntary termination of employment as the qualifying event for purposes of determining eligibility for the COBRA premium reduction.

The COBRA premium reduction will be available for up to 15 months from the involuntary termination of employment but not beyond the end of the maximum COBRA coverage period (measured from the date of the reduction in hours).

This change applies to COBRA coverage periods that begin after March 2, 2010. For plans that have calendar month coverage periods, the April 1 coverage period is the first premium reduction period for individuals who qualify under this new rule.

Example

On November 15, 2009, employee Smith suffers a reduction in hours and loses health plan coverage under his employer's medical plan effective November 30, 2009. Under the law in effect at the time, Smith was not an AEI because his qualifying event was not an involuntary termination of employment. On March 2, 2010, Smith's employment is involuntarily terminated.

Here is how the new rules apply to Smith if he elected COBRA effective December 1, 2009:

- Smith's 18-month COBRA period runs from December 1, 2009, through May 31, 2011. The new rules do not extend Smith's maximum COBRA coverage period of 18 months from the date of the COBRA coverage qualifying event.
- For *purposes of the premium reduction only*, TEA treats Smith's subsequent involuntary termination as the qualifying event.
- Smith will be eligible for the premium reduction for up to 14 months (April 2010 through May 2011) assuming he is not eligible for other health coverage.
- Notice of the new rules must be furnished to Smith within 60 days of the date his employment is terminated.

Here is how the new rules apply to Smith if he *did not* elect COBRA at the time he suffered the reduction in hours:

- TEA treats Smith's subsequent involuntary termination as a COBRA qualifying event; *therefore, Smith must be given a new COBRA election notice.*
- The new COBRA election notice must be furnished within 60 days of the date Smith's employment is terminated.
- If Smith elects COBRA, subsidized coverage will begin April 1, 2010, and will end May 31, 2011 (18 months from the date COBRA would have started if Smith elected it upon loss of coverage due to his reduction in hours).

Deference to Employer Determination

Under TEA, an employer's determination that an employee's termination was involuntary will be given deference if (a) the employer's determination is based on a reasonable interpretation of the law and agency guidance and (b) the employer maintains supporting documentation of the determination, including an attestation by the employer of involuntary termination with respect to the employee. If these requirements are met, the qualifying event for an individual will be deemed to be involuntary termination of the covered employee's employment.

Action Steps

COBRA notice and election forms and procedures should be modified to reflect the TEA provisions discussed in this alert. In addition, employers should identify qualified beneficiaries who experienced a qualifying event during the subsidy window period (September 1, 2008 - March 2, 2010) that was a reduction in hours if that reduction in hours is followed by an involuntary termination of employment that occurs on or after March 2, 2010, and by the close of the eligibility window period (March 31, 2010). These individuals should be notified of the TEA changes. Individuals in this group who did not elect COBRA as a result of the reduction in hours qualifying event must be offered another opportunity to elect COBRA following the termination of employment qualifying event.

Breaking News

As this alert went to press, we learned that the House of Representatives passed the Continuing Extension Act of 2010, which would extend until April 30 the premium subsidy eligibility period. The bill now goes to the Senate for action.