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New COBRA Legislation Requires Immediate Action

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the "Act"). The Act provides a U.S.-government-funded, 65% COBRA premium subsidy for up to 9 months for certain individuals who lose group health plan coverage due to an involuntary termination of employment. This extraordinary COBRA subsidy will apply to the first month of COBRA coverage following the date of enactment, which for most plans will be March 2009.

Plan administrators of group health plans subject to COBRA will need to act promptly to comply with the Act. Among other actions, plan administrators will be required to (i) develop procedures for implementing the subsidy mechanism, (ii) issue updated COBRA notices, and (iii) provide a special election option to certain qualified beneficiaries.

COBRA Subsidy

Eligible Individuals. The Act provides that subsidized COBRA benefits are available for qualified beneficiaries eligible for COBRA continuation coverage after the covered employee's involuntary termination (other than for gross misconduct) between September 1, 2008 and December 31, 2009. Individuals with adjusted gross income ("AGI") of more than $145,000 during the year of the subsidy, and couples with AGI exceeding $290,000, may receive the subsidy, but will need to repay the entire subsidy when they file their tax returns. Individuals earning more than $125,000 but less than $145,000 (or more than $250,000 but less than $290,000 for couples) will need to repay a certain percentage of the subsidy.

How the Subsidy Works. The amount of the subsidy is 65% of the COBRA premium. The subsidy is structured as a premium reduction, meaning that qualified beneficiaries will be required to pay only 35% of the required COBRA premium amount. The remaining 65% of the premium amount generally will be paid by the employer. After receiving the 35% premium payment from the qualified beneficiary, the employer will then recover the 65% premium payment amount though a payroll tax credit. If the amount of the premium payment is greater than the payroll tax liability for a period, the employer will be eligible for a refund or a credit of payroll taxes equal to the excess amount (as if the employer made an overpayment of payroll taxes in that amount).

Effective Date. For most plans, the subsidy will become effective almost immediately, on March 1, 2009. Fortunately, there is a provision that allows employers and insurers to continue to require qualified beneficiaries to pay the full COBRA premium for a 2-month period (through April 30, 2009) while the necessary procedures to administer the subsidy are established. If a qualified beneficiary pays more than 35% of the applicable COBRA premium amount during March and/or April, an employer may reimburse the qualified beneficiary for the overpayment or apply the overpayments to reduce the qualified beneficiary's future premium payments.

Updated COBRA Notice Requirement

All individuals who experience a COBRA qualifying event on or after February 17, 2009 but before December 31, 2009, must receive a revised standard COBRA election notice with various additional information including, but not limited to, a description of the qualified beneficiary's right to the COBRA premium subsidy. This notice must be provided in accordance with the regular COBRA election notice requirements.

Any subsidy-eligible employees, who involuntarily terminated between September 1, 2008 and February 16, 2009, and who would have been eligible for the subsidy but are not currently receiving COBRA coverage, must be given notice of the opportunity to elect COBRA subsidy coverage by April 18, 2009.

The Department of Labor is set to issue model notices by March 19, 2009.

VCG Consultants LLC

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Duration. The new law subsidizes COBRA coverage for up to 9 months. However, the subsidy may terminate at an earlier time if:

- The individual becomes eligible for coverage under any other group health plan;
- The individual becomes eligible for Medicare; or
- COBRA eligibility otherwise ends (*i.e.*, expiration of the maximum coverage period from the qualifying event or nonpayment of premiums).

Individuals must notify the group health plan providing the COBRA continuation coverage when they are no longer eligible for the subsidy or face a penalty of 110% of any subsidy received after they became ineligible.

Impact of Existing Employer Subsidy. Many severance plans already provide partially subsidized COBRA for employees who are involuntarily terminated. In most cases, if there is an existing subsidy, it appears that the employer would be able to receive some or all of the subsidy under the Act, but it is unclear how this subsidy would be calculated. However, if the employer is paying the entire COBRA premium, it would not be able to recover any of its costs, since recovery under the Act requires that the qualified beneficiary pay at least part of the COBRA premium.

Special Election Requirement

Special Election Period. The new law requires that group health plan administrators give individuals, who were involuntarily terminated between September 1, 2008 and February 16, 2009, but who are not currently receiving COBRA coverage, a 60-day period in which to elect subsidized COBRA coverage. This special election must be offered both to eligible qualified beneficiaries who originally declined COBRA coverage and to eligible qualified beneficiaries who elected and subsequently terminated COBRA coverage.

- ***Duration of Coverage Elected under Special Election Period*.** The 60-day election period will begin on the date the plan administrator provides the notice of the special election period to the individual. For individuals who elect it, the subsidy and coverage will not be retroactive to the date of the loss of regular coverage. Instead, coverage will generally begin on March 1, 2009. However, coverage will end on the date coverage would otherwise have ended if the qualified beneficiary had timely elected COBRA coverage following the former employee's involuntary termination of employment (*e.g.*, 18 months after the involuntary termination).

- ***Pre-Existing Conditions*.** In the case of a qualified beneficiary who elects COBRA coverage during this new election period, the period of time beginning with the qualifying event and ending on the effective date of the newly elected COBRA coverage will not be counted as a break in coverage for purposes of pre-existing condition limitations.

- ***Optional Coverage Offerings.*** An employer may, in its discretion, allow a subsidy-eligible qualified beneficiary to elect coverage under a different group health benefit option than the one he or she had been enrolled in at the time of involuntary termination of employment, provided the coverage elected is not more expensive than the benefit option under which the individual had previously been enrolled.

Contact Information. For additional information or for questions regarding this new Act, please contact Nicole Bogard (404.888.8830) or Brian Coursey (404.888.8842).