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COBRA Subsidy Included in Stimulus Package By Attorney Emily L. Ruhsam

In This Issue

- Y COBRA Subsidy Included in Stimulus Package
- Y The Pro-Labor Executive Orders
- Y Are You Ready for the Employee Free Choice Act?
- Y I-9 and E-Verify Update



Seaton | Beck | Peters

The Lawyers for Employers

Alec J. Beck
Robin N. Kelleher
Brittany Mayer-Schuler
Michael L. McCain
Jon S. Olson
Gregory L. Peters
Thomas R. Revnew
Emily L. Ruhsam
Douglas P. Seaton
Bryan T. Symes
Corie J. Tarara
Robert L. Grossman,
of counsel
Linda C. Schwartz,
of counsel

7300 Metro Blvd, #500
Minneapolis, MN 55439
Tel 952.896.1700
Fax 952.896.1704
www.seatonlaw.com

The Upper Midwest's premier
management labor and
employment law firm

On Tuesday, February 17, 2009 President Obama signed the economic stimulus bill (totaling \$787 billion dollars) into law. Embedded in the more than one-thousand page bill was a 65% government subsidy that makes important administrative changes for employers and plans sponsoring COBRA and similar state-mandated continuation coverage.

COBRA benefits were originally enacted in 1985 to give workers who lost health benefits the ability to continue coverage for a limited period of time and under certain circumstances such as voluntary or involuntary job loss. Pre-stimulus package, COBRA generally required employers to give former employees the option to continue health insurance for up to 18 months after termination of employment. Each former employee was required to pay the entire cost of group health insurance coverage up to 102% of the health insurance premium. Post-stimulus package, former employees are still entitled to 18 months of COBRA coverage – nothing extends or shortens this period. However, 9 months of premiums under this period may now be subsidized at 65% of the cost of the premium.

The subsidy is available for COBRA as well as comparable state-mandated continuation coverage (however is not available for health flexible spending accounts). For employers subject to the change, here is how it will affect you.

Eligibility. An employee is eligible for the subsidy if:

The employee is **involuntarily** terminated between September 1, 2008 and January 1, 2010.

The employee's adjusted gross income is \$125,000 or less (or \$250,000 if the employee is married and files a joint tax return).

If an employee was terminated after September 1, 2008, and failed to elect COBRA coverage, that employee must be given another opportunity to elect coverage (see Notice Requirements below). The subsidy is effective March 1, 2009 and, although it applies to employees involuntarily terminated after September 1, 2008, it is not retroactive. Therefore, for employees involuntarily terminated between September 1, 2008 and February 28, 2009, the subsidy will only be paid for nine-month periods following March 1, 2009.

Subsidy. The subsidy is equal to 65% of the COBRA premium and is available for 9 months. The terminated employee must first pay the 35% of the premium to the former employer sponsoring the COBRA coverage. The employer must, in turn, pay the 65% of the premium. The employer will then recover the subsidy through a credit against the employer's liability for employment taxes. These taxes may include federal income tax withholding, as well as both the employee and employer shares of FICA. If this credit against employment taxes proves insufficient to recover the full premium subsidy, the employer will qualify for a direct payment from the federal government.

Notice Requirements. All COBRA election notices must now include the availability of the subsidy. In addition, for individuals who were involuntarily separated from employment after September 1, 2008 and declined COBRA coverage, the plan administrator is required to send a notice of the availability of the premium subsidy no later than April 17, 2009. (The bill directs the Department of Labor to create model notices by March 19, 2009.) The employee will be given 60 days from the date of the notice to decide whether to elect the coverage. Since the subsidy is not retroactive, coverage will be effective as of March 1, 2009.

If you have any questions about the recent changes to COBRA and similar state-mandated continuation coverages, please contact the author of this LawFax or any attorney at our firm.

Are you ready for the Employee Free Choice Act?

Just a reminder, that the Employee Free Choice Act ("Card Check") is labor's top priority for the new administration. If you need more information about how the EFCA would impact unionization in your workplace or want to plan training or communication for your employees, please contact the author of this LawFax or any attorney at our firm.

The Pro-Labor Executive Orders

On January 30, 2009, President Obama signed three Executive Orders that impact federal contractors. These Orders became effective immediately. The first order prohibits federal contractors from being reimbursed for expenses incurred during "any activities undertaken to persuade employees" to form a union or engage in collective bargaining. Examples of these prohibited expenses include: preparing and distributing materials; hiring or consulting legal counsel or consultants; holding meetings (including paying salaries of the attendees at meetings held for this purpose); and planning or conducting activities by managers, supervisors, or union representatives during work hours. The second order requires the posting of notices of employee's rights under federal labor law while the third order mandates successor contractors of service contracts to offer the right of first refusal of employment to the employees of the previous contractor. Depending on how it is administered, the first Order may violate the U.S. Supreme Court's decision in *U.S. Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008) and the third Order may also be subject to challenge under some circumstances.

If you have any questions about the recent changes in employment and labor laws and your rights as an employer or federal contractor, please contact the author of this LawFax or any attorney at our firm.

Effective Dates Delayed – I-9 and E-Verify!

ÿ I-9: The effective date for the use of the revised I-9 form has been delayed (from February 2) to April 3, 2009. Employers using the revised form prior to April 3 may be subject to monetary penalties and fines. Employers should continue to use the I-9 that is set to expire on June 30, 2009 (last updated on June 5, 2007) which can be found at: <http://www.uscis.gov/files/form/I-9.pdf>.

ÿ E-Verify: The requirement that federal contractors use E-Verify has been delayed to May 21, 2009.

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