

March 3, 2010

# Employee Benefits Briefing

## STOPGAP EXTENSION OF COBRA SUBSIDIES— *Further Extension Likely*

On March 2, 2010, President Obama signed into law the Temporary Extension Act of 2010 (H.R. 4691), which includes a stopgap extension from March 1, 2010 through March 31, 2010 of eligibility for the COBRA subsidies that were originally part of the American Recovery and Reinvestment Act of 2009 (“ARRA”).<sup>1</sup> The legislation also clarifies Congress’ intent that an employee who loses coverage as a result of a reduction in hours and later incurs an involuntary termination of employment is eligible to elect subsidized COBRA coverage.

### *Overview*

The legislation is intended to accomplish the following:

- Extend the ARRA COBRA subsidy eligibility period from March 1, 2010 through March 31, 2010;
- Clarify that employees who incur a COBRA qualifying event on or after September 1, 2008 that is a reduction in hours and who later incur an involuntary termination of employment on or after March 2, 2010 and on or before March 31, 2010 **are** eligible for the ARRA COBRA subsidies; and
- Require notification to individuals described above within 60 days of their date of termination that they may elect subsidized COBRA coverage, **regardless** of whether they previously declined or stopped paying for COBRA coverage.

### *Extension of Eligibility Period*

As has been widely reported, the eligibility period for the ARRA COBRA subsidy ended on February 28, 2010. The legislation extends the eligibility period retroactively from **March 1, 2010 through March 31, 2010**.

### *Reduction in Hours Followed by Involuntary Termination*

In addition, the new law clarifies Congress’ intent regarding the effect of a reduction in hours (triggering traditional COBRA rights) and a subsequent involuntary termination of employment. The law as originally enacted was interpreted by the U.S. Department of Labor and the Internal Revenue Service as not

<sup>1</sup> The original ARRA COBRA subsidies were discussed in the Vedder Price Employee Benefits Briefings dated February 17, 2009 [www.vedderprice.com/Benefits0209/](http://www.vedderprice.com/Benefits0209/), March 25, 2009 [www.vedderprice.com/Benefits0309/](http://www.vedderprice.com/Benefits0309/) and April 3, 2009 [www.vedderprice.com/Benefits0409/](http://www.vedderprice.com/Benefits0409/). The extension of the eligibility and coverage periods under the Department of Defense Appropriations Act, 2010 (H.R. 3326) was discussed in the Vedder Price Employee Benefits Briefings dated December 19, 2009 [www.vedderprice.com/Benefits1209/](http://www.vedderprice.com/Benefits1209/) and January 15, 2010 [www.vedderprice.com/Benefits0110/](http://www.vedderprice.com/Benefits0110/).

applying to individuals who first incurred a COBRA qualifying event due to reduction in hours, even if they later incurred an involuntary termination of employment. This is because the original COBRA qualifying event related to reduction in hours rather than an involuntary termination of employment.

This legislation reverses that administrative interpretation. Under the new law, individuals who incurred a COBRA qualifying event on or after September 1, 2008, consisting of a reduction in hours, followed by an involuntary termination of employment on or after March 2, 2010 and on or before March 31, 2010, will be eligible to elect subsidized COBRA coverage until the *earlier* of (i) the end of the original COBRA period (measured from the original qualifying event) or (ii) the end of the 15-month COBRA subsidy period.

Eligible individuals who previously lost coverage as the result of a reduction in hours, are involuntarily terminated on or after March 2, 2010 and on or before March 31, 2010, and who either did not make a COBRA election or made a COBRA election and later discontinued that election will have a special additional 60-day COBRA election period. The 60-day election period begins on the date that notice is provided to the eligible individual about the special election period. This special election period does not extend COBRA continuation coverage beyond the original COBRA period (measured from the original qualifying event), and any COBRA continuation coverage elected pursuant to this special election period is prospective only. However, the period of time following the original loss of coverage or subsequent dropping of coverage does not count as a gap in coverage that would permit the application of any pre-existing condition limitation provisions.

As before, we expect that the government will develop model notices for use by employers.

**Example:** an employee who originally lost coverage due to a reduction in hours on August 31, 2009, who did not elect COBRA coverage as a result of that loss of coverage, and who is involuntarily terminated on March 31, 2010, will be eligible for the ARRA COBRA subsidy beginning April 1, 2010, and may continue on COBRA through February 28, 2011 (i.e., 18 months from September 1, 2009).

### *Looking Forward*

While it is important to pay attention to this stopgap extension, it is widely expected that the ARRA COBRA subsidy provisions will be extended by future legislation through at least the end of 2010. In this regard, such an extension is currently part of a larger jobs bill that has been introduced in the U.S. Senate by Senator Reid (D. Nev.) and Senator Baucus (D. Mont.). This larger bill may also contain other benefits changes (e.g., pension funding relief) that will be of interest to Vedder Price's employee benefits clients. We will continue to monitor developments on this legislation and will provide Employee Benefits Briefings as events warrant.

In the meantime, if you have any questions regarding this stopgap COBRA subsidy extension, please contact **Philip L. Mowery** (312-609-7642), **Paul F. Russell** (312-609-7740), **Jessica L. Winski** (312-609-7678) or any other employee benefits attorney with whom you have worked.

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