



ATTORNEYS AT LAW

ADVISORY BULLETIN – January 4, 2010

## CONGRESS AND THE PRESIDENT EXTEND AND EXPAND THE COBRA SUBSIDY

Employer action is required as early as January 29, 2010 to comply with the [Fiscal Year 2010 Defense Appropriations Act](#) (the “2010 Act”) which extended and expanded the COBRA subsidy described in our [February 19, 2009](#) and [April 2, 2009](#) Advisory Bulletins. The 2010 Act, signed by the President on December 19, 2009, extends the COBRA subsidy eligibility period by two months (through February 28, 2010), expands the maximum subsidy period from nine months to fifteen months, provides a transition period for certain former subsidy recipients, and requires additional notices. This bulletin provides general information about the subsidy changes. We will provide additional information when it becomes available.

### Eligibility Period

The 2010 Act extends the COBRA subsidy eligibility period by two months so that it now expires on February 28, 2010 rather than December 31, 2009. Therefore, employees who are involuntarily terminated after December 31, 2009, but on or before February 28, 2010, will be eligible for the subsidy if they otherwise qualify for COBRA. The 2010 Act also clarifies that only the termination from employment, not the loss of coverage, must occur on or before February 28, 2010. For example, an individual who is involuntarily terminated on January 31, 2010, but who does not lose coverage until March 5, 2010, will be eligible for the subsidy even though the loss of coverage occurred after the expiration of the eligibility period.

### Coverage Period

The 2010 Act also expands the maximum period of subsidized COBRA coverage by six months. Therefore, the subsidy is now available for fifteen months rather than nine months. The existing early termination rules for Medicare, other group health eligibility, etc. remain.

### Transition Period

The 2010 Act also makes the six month subsidy extension retroactive to individuals who were receiving the subsidy previously and are still eligible for COBRA, but who exhausted the original nine month subsidy period on November 30, 2009. If such individuals failed to pay the full COBRA premium for December (the “transition period”) after their original subsidy expired on November 30, 2009, then they may opt back in to the subsidy by making a retroactive subsidy premium payment for December by the later of February 17, 2010 (i.e. sixty days after the enactment date) or thirty days after their receipt of the second notice described below. If such

individuals paid the full, unsubsidized premium for December after their original subsidy expired, then they are entitled to a refund/credit per the existing subsidy refund rules.

Although the notice deadlines (see below) will likely result in missed January payments, the 2010 Act does not address retroactive January payments. Further guidance is necessary. Note: The 2010 Act does not extend the regular maximum COBRA coverage period.

### **Additional Notices**

The 2010 Act also requires plan administrators to provide two additional notices.

By February 17, 2010, notice regarding the subsidy extension and expansion must be provided to anyone who is eligible for the subsidy and to anyone who became COBRA-eligible via a voluntary or an involuntary termination on or after October 31, 2009 and before December 19, 2009. Those who become COBRA-eligible via a voluntary or an involuntary termination after December 19, 2009 (i.e. are potentially eligible for the subsidy) must receive their notice consistent with the regular COBRA notice deadlines. Although notices must be sent to those voluntarily and involuntarily terminated, the subsidy still is only available to those who are involuntarily terminated.

Second, individuals who, after having exhausted the original subsidy period, failed to pay their December premium, or paid their December premium in full, must receive a notice by January 29, 2010 (i.e. within sixty days of December 1, 2009, the beginning of their “transition period”). The notice must describe the option of making retroactive subsidy premium payments to maintain COBRA coverage and receiving refunds/credits for full premium payments.

### **Conclusion**

**Employers should be prepared to provide notice of the expansion and extension of the subsidy or coordinate with their third party COBRA administrators to make sure that they are providing the notices. Action is generally required by February 17, 2010 and could be required as early as January 29, 2010 if an employee exhausted the original subsidy period.** We anticipate that the U.S. Department of Labor will issue additional guidance and model notices regarding the 2010 Act sometime soon. We will publish a follow-up bulletin when that information becomes available.

Please contact either Ken Johnson [(336) 271-5264] or David Bury [(336) 271-5266] if you have any questions concerning the COBRA subsidy or the 2010 Act.

© 2010 Tuggle Duggins & Meschan, P.A. All Rights Reserved. The purpose of this bulletin is to provide a general summary of significant legal developments. It is not intended to constitute legal advice or a recommended course of action in any given situation. It is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature. Moreover, information contained in this bulletin may have changed subsequent to its publication. This bulletin does not create an attorney-client relationship between Tuggle Duggins & Meschan, P.A. and the recipient. Therefore, please consult legal counsel before making any decisions or taking any action concerning the issues discussed herein.

### **INTERNAL REVENUE SERVICE - CIRCULAR 230 DISCLOSURE:**

As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this bulletin (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing, or recommending to another party any plan or arrangement addressed herein.