

MINIMIZING COBRA'S BITE

Subsidy makes it easier for ex-employees to keep health coverage

The Consolidated Omnibus Budget Reconciliation Act of 1985, or what we all commonly call Cobra, has always represented the health care insurance coverage of last resort for former employees. Until now.

The American Recovery and Reinvestment Act of 2009 provides premium assistance for some individuals receiving Cobra continuation coverage. Under the act, eligible individuals now are required to pay only 35% of their Cobra premiums; the federal government, by means of an advance from employers, will pay 65% of Cobra's up-front costs.

While the full impact of this new legislation is not yet known, it's critical that both employees and employers understand exactly who qualifies under the act and how it works.

Because so many people depend on group health plans at work, the loss of employment generally means the loss of health care coverage as well.

When someone loses their job, Cobra gives former employees the chance to keep their insurance coverage for up to 18 months. But Cobra coverage generally has been expensive, with premiums averaging almost \$700 per month for a family and \$250 for an individual. As a result, just 7% of unemployed workers say they can afford Cobra insurance. The stimulus act is intended to address this problem.

The act applies to "assistance-eligible individuals," meaning people who were "involuntarily terminated" between Sept. 1, 2008, and Dec. 31, 2009. The premium assistance applies to health coverage beginning on or after Feb. 17 and can last up to nine months. The act is silent, however, on the definition of "involuntarily terminated." To sort out this definition, the act includes an expedited appeals process for employees



EMPLOYMENT LAW

John T. Palter

when an employer denies benefits. The current provision expires on Dec. 31, but the benefit possibly could be extended for another calendar year.

How does it work?

The American Recovery and Reinvestment Act requires that written notice explaining the availability and terms of the reduced premium and the extended election period be sent to all assistance-eligible individuals. An additional notice must also be sent to active, current employees.

Employees electing to continue their coverage will then pay 35% of Cobra coverage. The employer will recoup its 65% contribution through an offset to federal payroll taxes, which is creating a logistical problem in connection with the employer's reimbursement. Employees typically send their payments directly to the insurer. As a result, employers don't know when the money has been paid. The problem is that employers can't seek their credit under the federal payroll tax until they know the employee has made the payment. As a result, employers are advised to require that both their former employees and their insurer transmit a payment acknowledgment, thus giving the employer the information needed to apply for the tax credit.

It also remains unclear whether ARRA will override existing severance agreements.

Some employers give terminated employees a severance package that includes partial or full funding for Cobra. That agreement may provide for more or less than the 65% statutory subsidy — and it remains unseen whether employers may recover part or all of these contractual agreements. If, for example, an employer agrees to pay 100% of the Cobra premium, is the employer still entitled to a 65% credit? Alternatively, if a company commits to paying only 50%, must it still subsidize 65%? If an employee gets a new job, and the 65% subsidy provides a greater benefit than that offered under the new employer's plan, must the initial employer continue to subsidize the health care coverage?

Wait for the Department of Labor to provide guidance on these issues. Given this new, 65% cost reduction, employers should expect more employees will request Cobra benefits.

Beyond that, employers should:

- Move now to provide the required notice to both current and qualifying former employees.
- Require eligible employees to send you a timely acknowledgement of their payment.
- Promptly apply for the payroll offset.
- Keep a watchful eye on both the Department of Labor and the Texas Department of Insurance for regulations and changes on these issues.

The scope and breadth of the ARRA is still being determined, and some of the logistical problems with this change in Cobra rules likely have yet to be identified. That said, the act is a solid, well-timed effort aimed at fixing a problem suffered by innocent constituents.

PALTER is a trial lawyer and managing member of Riney Palter PLLC (www.rineypalter.com). Contact him at jtpalter@rineypalter.com