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# GENERAL COUNSEL NOTE

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The American Recovery and Reinvestment Act of 2009 (“Stimulus Package”) enacted on February 17, 2009 contains provisions affecting employers and employees in regard to COBRA coverage. The following is a basic explanation of COBRA followed by revisions effected by the Stimulus Package.

## What is COBRA?

Federal legislation entitled “The Consolidated Omnibus Budget Reconciliation Act<sup>1</sup>” better known as “COBRA” allows employees under certain circumstances to maintain employer-based healthcare coverage upon loss of employment. More specifically, COBRA requires certain “group health plans” to offer “qualified beneficiaries” an opportunity to select and pay for continued healthcare coverage under the plan benefit package (“continuation coverage”) after the occurrence of a “qualifying event.”

## Definition of Group Health Plan.

A group health plan is defined as an employee benefit plan providing medical care to participants and/or dependents directly or through insurance or other type of reimbursement. Plans that are self-insured through an employer are included in the definition. However, plans where substantially all of the coverage is for long-term care services do not have to follow COBRA rules. The following types of group health plans are exempt from COBRA regulation:

- church plans
- plans maintained for federal employees
- plans maintained for state and local governmental agencies not receiving funds from the Public Health Service Act<sup>2</sup>
- small employer plans, i.e., where the employer’s total number of employees is fewer than twenty on a typical business day during the preceding calendar year

## Definition of Qualified Beneficiary.

A qualified beneficiary is an individual who, on the day before the qualifying event, participated in the group health plan. This includes:

- the covered employee
- the spouse of the covered employee
- the dependent child of the employee (including children born or adopted during the COBRA period)

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<sup>1</sup> 29 USCA § 1161 *et seq.*

<sup>2</sup> Note that most state and federal employees are entitled to continue health insurance coverage upon termination through alternative legislation, like the Public Health Services Act (Chapter 6A of Title 42 of the United States Code).

- retirees entitled to benefits under the plan (including their covered spouses and dependent children)

### **Definition of Qualifying Events.**

Certain events that cause the loss of health care coverage from a group health plan are considered “qualifying events.” The type of event determines who is entitled to continuation of coverage and the minimum amount of time for which the plan must offer continued coverage.

Qualifying events for employees, spouses, and dependent children:

- termination of employment for reasons other than gross misconduct
- reduction in number of hours of employment

Additional qualifying events for spouses and dependent children:

- death of the employee
- eligibility of the employee for Medicare benefits
- divorce or legal separation from employee

Additional qualifying event for dependent children:

- termination of status as a dependent child under plan requirements

Where the qualifying event is the employee’s termination or reduction in hours, the employee/beneficiary may generally purchase continuing coverage for 18 months from the date of the qualifying event. Most other circumstances, including a second qualifying event that occurs during the initial period of COBRA coverage, will enable the employee’s beneficiary to continue coverage for up to 36 months. Coverage may be terminated earlier than this maximum limit where: 1) the employer terminates the group health plan and no replacement plan is obtained; 2) the individual fails to make timely premium payments; 3) the employee or beneficiary is enrolled in another group health plan (that has no limitation in regard to pre-existing conditions); or 4) the individual is eligible for Medicare.

### **Coverage Offered.**

The healthcare coverage offered by the employer/health plan must be identical to the coverage provided under the plan to similarly situated employees and beneficiaries who have not had a qualifying event. Any modification of coverage for active employees (and beneficiaries) in the employer’s health plan must be offered to similarly situated COBRA- qualified beneficiaries; this includes replacement health plans, where the employer terminates one health plan and obtains new coverage.

### **Notice and Election of Continuation Coverage.**

The group health plan must provide specific written COBRA notices to qualified beneficiaries. The first is provided when coverage in the health plan begins; this notice advises the employee of

his/her rights. Upon the occurrence of a qualifying event, the employer must notify its plan administrator within 30 days of termination of employment, Medicare eligibility, or death. The qualified beneficiary must notify the plan administrator within sixty days of a divorce or legal separation (from the employee) or termination of dependent status. The plan administrator in turn has fourteen days to inform the employee and each qualified beneficiary of his/her right to elect to continue coverage under COBRA. Qualified beneficiaries have a minimum of 60 days to elect coverage. The election period is measured from the later of: a) the date of the qualifying event; or b) the date the COBRA election notice is provided by the employer/ plan administrator. Each employee or beneficiary may independently elect continuation of coverage.

### **Premiums.**

The employee or beneficiary can be required to pay premiums in an amount up to 102% of the plan premium for similarly situated non-COBRA members. The premium can include both the portion paid by the employee and the portion paid by the employer before the qualifying event plus 2% for administrative costs. Since COBRA premiums must generally be fixed at the beginning of each 12-month premium cycle, increases in plan costs cannot increase the premiums during that cycle. The health plan can require premiums throughout the entire continuing coverage period. The employee or beneficiary can elect to pay premiums in monthly installments. The initial premium must cover the period starting with the date of the qualifying event through the date of election and is due within 45 days after the date of election. Subsequent payments are due on the date stated in the health plan with a 30-day grace period. During the COBRA continuation of coverage period, health plan co-pays, deductibles and plan limits continue to apply.

### **Stimulus Package.**

The Stimulus Package attempts to make COBRA premiums more affordable for the unemployed and their families by reducing the amount the employee/beneficiary has to pay. Under the provisions, the employee/beneficiary will become responsible for paying 35% of the COBRA premium for the period of coverage. The remaining 65% is reimbursed to the employer/plan administrator through a payroll tax credit. For individuals receiving public benefits, the premium assistance is not considered income or resources for the purpose of determining eligibility for federal, state, or local governmental programs. For individuals with income over \$125,000 (or \$250,000 for those filing a joint federal tax return) this may have income tax liability that may make the program less inviting. Note that the premium reductions provisions of the Stimulus Package are available to federal and state employees who participate in programs like the Health Services Act and/or the Federal Employees Health Benefits Program.

In order for an individual to take advantage of this program, the qualifying event (termination or "lay off") must have occurred between September 1, 2008 and December 31, 2009. Individuals who declined coverage or elected COBRA coverage and later discontinued it have a new opportunity to elect continuation coverage and pay the reduced premium. Premiums due on or after 2/17/09 (the effective date of the Stimulus Package) can be reduced for up to nine months (12/31/09). The Stimulus Package does not extend the COBRA period, therefore, eligibility ends when the individual's COBRA period ends even if that is prior to 12/21/09.

Employers/health plans must provide notices, by April 18, 2009, to any qualified beneficiary who had a qualifying event September 1, 2008 or later (whether or not they are participating in COBRA continuation coverage). The notice must be provided within 60 days of the qualifying event and where this event has already occurred, within 60 days of February 17, 2009. The notice must include: a) the form the individual must use to establish eligibility for the premium reduction; b) the contact information for the plan administrator; c) a description of the extended election period for individuals whose qualifying event preceded the notice; d) the qualified beneficiary's requirements to notify the health plan of obtaining subsequent coverage under another health plan or eligibility for Medicare; e) a description of the reduced premium; and f) information explaining the option to enroll in different coverage if the employer permits as long as premiums are comparable. The employer/health plan can amend its existing COBRA forms to include this information.

Denied applications for the premium reduction can be appealed through the U.S. Department of Labor (USDOL). USDOL must provide an expedited *de novo* review providing a final eligibility determination within 15 days of receipt of the individual's application for review. A reviewing court will give the USDOL determination deference.

Note that where the Stimulus Package does not provide revisions, the COBRA rules remain intact. Premium reduction is not available for limited plans like those that provide: a) solely dental, vision, counseling or referral services; b) flexible spending arrangements; or c) employer clinics providing only first aid services. In regard to health plans where the employer is offering different coverage to working employees, COBRA eligibles will be entitled to the reduced premium, as long as the premiums for the coverage are no greater than premiums for the coverage available at time of the qualifying event. Stimulus payments are not available for individuals who have reduced employment hours.

The Stimulus Package has varying effects on employers and employees. For employers/health plans, the requirements are mandatory and immediate. Employers have additional administrative responsibilities to send notices, set up procedures to obtain reimbursement from, and file reports with, the federal government, thereby incurring some additional cost. For qualified beneficiaries, while there is an expanded opportunity to maintain healthcare coverage, the ability to pay the reduced premium must be met. The long-term impact of the Stimulus Package will most likely not be determined until late in 2010.

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