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HR AND BENEFITS UPDATE

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LEGISLATIVE CHANGES REQUIRE ACTION

For the last few months, one of the major issues facing employers has been compliance with the new COBRA provisions under the American Recovery and Reinvestment Act of 2009 (ARRA). However, in the shadow of COBRA are several other laws that affect employers and require you to act now to be in compliance.

CHIP REAUTHORIZATION ACT OF 2009

On Feb. 4, 2009, President Obama signed into law the Children's Health Insurance Program (CHIP) Reauthorization Act of 2009. The law adds two additional events related to Medicaid and CHIP eligibility to HIPAA's Special Enrollment Rights. An employee or dependent who a) loses eligibility of coverage under Medicaid or CHIP or b) becomes eligible for a premium assistance subsidy under Medicaid or CHIP, is eligible to enroll in the group health plan mid year. The employee must notify the plan within 60 days of the event.

An employer should permit the new special enrollments as of April 1, 2009. You should also revise your plan documents to reflect the new rights, including the Notice of Special Enrollment Rights that is to be given to newly eligible participants.

SECTION 111 MEDICARE MANDATORY REPORTING

Effective Jan. 1, 2009, group health plans have a new federal reporting requirement as part of the Medicare, Medicaid and SCHIP Extension Act of 2007. Plans are required to file an electronic report with the Centers for Medicare and Medicaid Services (CMS) to assist CMS in determining Medicare's coordination of benefit responsibilities. Health Reimbursement Arrangements (HRAs) do not need to comply until fourth quarter 2010. Health Flexible Spending Arrangements (FSAs) and Health Savings Accounts (HSAs) do not need to report.

If the plan is self insured and the plan self-administers its claims, the plan administrator or fiduciary is responsible for reporting. Otherwise, the third party administrator (TPA) for a self-insured plan is responsible for filing. For a fully insured plan, the insurer or TPA is responsible for reporting. To assist the insurer or TPA in filing, many are now requesting that employer groups submit social security numbers on certain covered participants.

REVISED FORM I-9

Effective April 3, 2009, employers must use the Revised Form I-9. Previous versions of Form I-9 will not be valid after that date. Changes to the form include:

- No expired documents may be accepted as valid verification.
- A temporary I-551 printed notation on a machine-readable immigrant visa accompanied by a foreign passport is acceptable under List A. Also acceptable under List A is a passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating non-immigrant admission under the Compact of Free Association between the U.S. and the FSM or RMI.
- Forms I-688, I-688A, and I-688B have been removed from List A.

If you would like additional information on any of these topics, please contact your advisor.

CAUSE AND EFFECT: PARTIAL PLAN TERMINATIONS

As a result of the current economic climate, many employers have been forced to reduce their work forces. Employers must be aware of the potential impact that downsizing may have on a company's qualified plan. If certain elements exist as a result of a layoff (or multiple reductions), a plan may experience a partial plan termination. Simply put, a partial plan termination exists if a "significant reduction" in plan participation results from employer action. The determination of a partial termination is a facts and circumstances test, but there are a few factors which serve as good indicators.

The first factor is the population of affected participants. If a class or group of participants who previously were covered by the plan are affected, either by reason of a plan amendment or severance by the employer, there is a chance of the reduction being viewed as a partial termination. More commonly the percentage of participants being affected will be scrutinized. Per internal IRS guidelines, a 20 percent reduction is generally considered "significant." Some ERISA attorneys state that a more conservative threshold is a 15 percent reduction in force. The percentage is determined by looking at all terminated participants versus all vested and non-vested participants. Voluntary terminations, terminations occurring in the normal course of business, and terminations due to death, disability, or retirement are not to be included in determining the percentage reduction.

Another factor to consider is the period over which the terminations occur. The partial termination rule prevents plan sponsors from trying to avoid the 100 percent vesting requirement of a full plan termination by terminating a plan slowly over time and ensures that participants who are terminated in a partial termination get the benefits of 100 percent vesting. As such, the IRS generally includes all employer terminations within a rolling window unless the terminations can be proven to be unrelated to one another. In other words, the IRS will consider all terminations to be in accordance with a single downsizing plan unless proven otherwise when determining whether or not a 20 percent reduction has occurred.

In the event that a partial termination has taken place, all "affected participants" (those that can no longer participate in the plan) must become 100 percent fully vested in their accounts on the effective date of the partial termination. All other "non-affected" participants continue to participate in the plan in accordance with the plan's vesting provisions. If an absolutely definitive determination of a partial termination is desired, a plan sponsor may file a Form 5300 with the IRS, though this action is not required.

It is important to understand these rules in advance of any layoffs. The Employee Plans Team Audit (EPTA) Program of the Internal Revenue Service has listed "Termination or Partial Termination Issues" as the first item in their "Top Ten Issues Found in EPTA Audits" list[1]. If your company is considering employee reductions, please contact your advisor.

1: Internal Revenue Service www.irs.gov

BENEFITS COMPLIANCE FAQ

Question: When our company has a lay off or reduction in force, we usually offer a severance package to those employees who have been with us for over a year, which includes our company paying 100 percent of their COBRA premiums for the first three months. When does their COBRA period begin and are we and the former employees still eligible for the premium subsidy offered in the American Recovery and Reinvestment Act of 2009 (ARRA)?

Answer: In this case, the employer considers the COBRA continuation coverage effective date to begin the day after the involuntary termination/qualifying event and loss of coverage. Therefore, this will be the first day under their severance agreement provisions. As stated in the guidelines at IRS Notice 2009-27 Q&A-14 (www.irs.gov/pub/irs-drop/n-09-27.pdf), "the loss of coverage will be considered to have occurred as of the date for which the employer begins making the provision of such COBRA continuation coverage."

The guidelines further explain in IRS Notice 2009-27, Q&A-20, Example 4, that if the employer pays 100 percent of the COBRA premium, neither the employer nor the employee may claim their subsidy until the employee pays a portion of the premium. Therefore, as soon as the employee pays their 35 percent portion of the premium (in this case, in the fourth month), and the employer pays their 65 percent, the employer may claim the subsidy on their next payroll tax report.

However, the employee's maximum subsidy period (up to 9-months) begins either on March 1 or the first month in which the employee is enrolled in COBRA, whichever is later. The employer's decision to pay the employee's premiums for the first three months does not delay the start of the nine month subsidy period. Thus, in our example, the employee would pay zero percent of the COBRA premium for months one through three, 35 percent for months four through nine, and the full COBRA premium for the remaining months of COBRA coverage. The employer would not be entitled to a subsidy reimbursement for months one through three, would be entitled to a 65 percent subsidy reimbursement for months four through nine, and would not be entitled to a subsidy reimbursement for any remaining months of COBRA coverage.

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