

# Hamilton News

## COBRA Premium Subsidy — Extended and Expanded

The COBRA Subsidy program, initially implemented as part of the February 2009 Stimulus Bill and extended in December 2009, was extended a second time as part of the Temporary Extension Act (TEA) on March 2, 2010. Eligible individuals continue to pay 35 percent of their COBRA premiums, with the remaining 65 percent reimbursed to plan sponsor through a tax credit. The premium reduction applies to periods of health coverage beginning on or after February 17, 2009, and lasting for up to 15 months. The two key changes in the TEA are:

- An extension of the eligibility period so that now to qualify for the subsidy, employees must experience a COBRA-qualifying event due to the involuntary loss of employment between September 1, 2008 and March 31, 2010 (extended from February 28); and
- A new group of subsidy-eligible employees was added. Employees who originally lost benefits coverage due to a reduction in hours and were later involuntarily terminated were previously ineligible for the subsidy because the COBRA-qualifying event was the reduction in hours, not an involun-

tary termination. Now, if an employee first loses his coverage because of a reduction in hours from September 1, 2008 through March 31, 2010, (the COBRA qualifying event) and subsequently is involuntarily terminated during the period March 2 through 31, 2010, he has now experienced a subsidy eligibility event, requiring another COBRA notice and election opportunity.

Please note that this does not extend their COBRA eligibility period, which began with the reduction in hours and typically extends for 18 months.

The TEA also minimizes the risk of payroll tax liability by providing a safe harbor for those employers that maintain proper documentation and attest to the involuntary nature of a termination as long as their actions are based on reasonable application of provisions under the legislation or related administrative guidance. While it does offer a safe harbor for these cases, it also created a civil penalty of \$110 per day when a subsidy is not provided within 10 days of receipt of an agency determination that a former employee is eligible for the subsidy.

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## 2010 Benefit Changes and Deadlines

2009 was an active legislative year for regulating group health plans, including a new responsibility for plan sponsors to self-report certain compliance failures (see page 3 for details). Here is a quick checklist for employers to review to ensure they are focused on the required changes taking effect in 2010:

- ✓ Mental Health Parity and Addiction Equity Act (for plan years beginning on or after October 1, 2009) requires that plans providing mental health or substance abuse benefits must provide coverage at the same level as that of medical / surgical benefits;
- ✓ Michelle's Law (plan years on or after October 8, 2009) requires plans to continue health coverage for up to one year for college students who take a medically-necessary leave of absence;
- ✓ The HITECH provision of HIPAA (effective February 17, 2010) expands the privacy and security requirements to covered entities and requires updated agreements between the plan sponsor and the business associate(s);
- ✓ The Genetic Information Nondiscrimination Act prohibits the use of genetic information for health insurance or employment purposes (effective for plan years beginning on or after May 21, 2009); and
- ✓ CHIP Reauthorization Act adds a requirement for an annual notice for the special enrollment period and benefits of employees and dependents who have a change in eligibility under Medicaid or a state children's health program.

These regulatory changes require employers and plan sponsors to modify plan benefits, documentation, notices to employees, and contractual arrangements with business associates.

## Employee Handbook Updates for 2010

A company's employee handbook is only as valuable as it is current and, in this business and economic climate, it is essential to review and update your company's handbook. In particular, be sure your company has complete and appropriate policies for the areas shown below.

- **Benefits:** Discussion of changes in benefit plans, eligibility, enrollment rules, provisions, or costs, if they are covered in any detail in your handbook should be aligned with your benefits materials.
- **Personal Computer Usage:** Companies need a clear policy that addresses what is allowed and prohibited as far as the personal use of the internet, email, social networking sites (such as Facebook or MySpace), blogging, Twitter, and other similar tools on company computers and networks. It should also cover any messages that reference the company, its confidential information, or its employees written from any computer or network.
- **Text Messaging:** Employees should know what the company allows regarding text messaging about work, particularly in an effort to avoid harassment or retaliation. It should include any restrictions about texting while driving company vehicles or while driving a personal vehicle for company business.
- **Union Organizing:** Companies should include a specific policy related to the use of company bulletin boards, solicitation of co-workers, distribution of non-work related materials on company property, and outside visitors in preparation for any potential changes in union organizing tactics and procedures (especially under the proposed Employee Free Choice Act).
- **Workplace Closings:** An emergency closings policy should address standard items, such as inclement weather or power outages, but also discuss more unusual circumstances such as

a flu outbreak or other epidemic. The policy should include a plan for workplace shutdowns, working remotely, cross-training and backup plans, and return to work concerns.

- **Family and Medical Leave Act (FMLA):** This legislation was amended in 2009 and new regulations were issued late that year. Employers need to reflect these changes in their policies and update their posters throughout the workplace.
- **Genetic Information:** The Genetic Information Nondiscrimination Act (GINA) went into effect in November 2009 and should be included in the list of protected classes in nondiscrimination and anti-harassment policies. Companies also need to review any wellness programs to ensure they avoid collecting any genetic information from employees.
- **Workplace Violence:** In 2009, workplace violence increased 18% and workplace suicides rose 28% and is not anticipated to dramatically decrease given the current business climate. Handbook policies cannot prevent the full risk of workplace violence, but can provide employees with reporting outlets, counseling options, and guidelines for how to react if violence is threatened or suspected.
- **For Charities and Tax-Exempt Organizations:** Not-for-profit organizations that file IRS Form 990 should ensure that their handbook includes Whistleblower, Conflict of Interest, and Document Retention and Destruction policies because the Form 990 now asks whether the organization has these policies. It also requests information about executive compensation and the procedures used to approve it.

The employee handbook is a critical tool in both communicating expectations to employees and protecting the employer in litigation and its benefits are fully available when it is current, complete, and understood.

## Social Networking Sites and Recruiting

As companies seek ways to cut recruiting costs and avoid the over-abundance of resumes now generated by job postings, many are utilizing social and professional networking sites for candidate sourcing. Not surprisingly, there are potential hazards that should be considered.

**Candidate Sourcing:** Sourcing from these sites, such as Facebook, MySpace, LinkedIn, or Twitter, can quickly exclude entire subsets of the workforce because users tend to be of a limited racial and age range. There may be an unplanned negative impact on the under-represented parts of the labor pool who are not then considered in the recruiting process.

**Recordkeeping:** Maintaining legally-required applicant records is very difficult when the source of applicants is not controlled by the employer and data may be

unavailable to produce if needed.

**Candidate Information:** There are concerns about the accuracy and reliability of the information available on these sites (similar to the concerns about the truth of information included in resumes).

**Discrimination in Decision-Making:** Even if the employer effectively avoids the sourcing concerns about social networking sites, care must be taken if these are used to help evaluate candidates in the selection process or do background checks through a Google or Bing search. One of the key concerns is the access to information that would not normally be available from the application/interview process, such as religion, pregnancy, age, leisure activities, or sexual orientation. Once it has been viewed, it is nearly impossible to prove that this information was not used in the decision-making process.

Best practices for the use of this on-line information include:

1. Developing and using a standardized process, including limiting who has access to the information;
2. Using these sources only as part of an employee-referral program, and utilizing broader general sourcing methods;
3. Treating each possible candidate consistently;
4. Actively looking for any possible adverse impact and modifying processes as needed;
5. Notifying job seekers that you may use these sources as part of the selection process; and
6. Maintaining complete and centralized records of what was viewed.

*More information on recruiting best practices and services is available from HR Business Solutions.*

## Reporting & Excise Taxes for Health Plan Non-Compliance

Employers who sponsor group health plans now have a duty to self-report certain regulatory plan failures and pay excise taxes if the failures are not corrected in a timely fashion once they are discovered. The Internal Revenue Code imposes excise taxes for the failure to comply with COBRA, HIPAA and other federal group health plan mandates, but the IRS has historically been inactive in examining plans for compliance. Recently-issued IRS regulations now require employers to self-report these rule violations. Taxes on the violations can be steep, such as a penalty of \$100 per day per individual affected for violation of the Genetic Information Nondiscrimination Act (GINA). The new reporting obligations, effective January 1, 2010, include violations of:

- ◆ Federal health care continuation requirements;
- ◆ Health plan portability and nondiscrimination requirements;
- ◆ Mental health parity;
- ◆ Minimum hospital stays for newborns and mothers;
- ◆ Coverage of dependent students on medically necessary leaves of absence; and
- ◆ Health savings account (HSAs) and Archer medical savings

account (Archer MSA) contribution comparability requirements.

The reporting of violations on IRS Form 8928 and payment of excise taxes is, in most cases, due on or before the liable party's income tax return filing due date and a tax filing extension does not modify the filing date for Form 8928. Taxes are not due if (1) the employer did not know or, exercising reasonable diligence would not have known, a plan failure existed and (2) once a failure is discovered, it was due to a reasonable cause and "corrected." Corrections typically must be completed within 30 days of identification of the problem and impacted individuals are in at least the same financial position they would have been in if the failure had not occurred. The IRS also may waive all or part of any excise taxes due if the amount of the tax is deemed excessive relative to the failure involved or if it was due to reasonable cause and not willful neglect.

Please note that even if there are no excise taxes associated with a plan failure because it was due to reasonable cause and promptly corrected, it still must be reported to the IRS on Form 8928.



## Be Ready for Employee Questions on State Taxes

The Military Spouses Residency Relief Act, signed into law November 11, 2009, ensures that spouses of military personnel who move because their spouse is posted for military duty will be treated as not having moved for tax purposes. This provides that any income earned by the spouse for services in that state will be exempt from state withholding. This also means that the spouse will not need to file a state income tax return in the worked-in state because prior residency applies. It applies

whether the military personnel is present or absent from the jurisdiction as long as their location is in compliance with their military orders.

This bill was passed to affirm treatment for military personnel under the Service Members Civil Relief Act because jointly-titled property was not being exempted from certain state or local property taxes or filing requirements as intended.

Check your state's withholding forms to be sure your company is using the most current version.

## Are You Spending Incentive Dollars Effectively?

Employers often spend a significant portion of their payroll expenses on incentive plans, particularly for their sales representatives. All incentives are not created equal and a company needs to know if it is getting its money's worth... these simple indicators may help identify weaknesses in plan effectiveness and design:

- Do the costs of the plan, both at a macro and individual level, align with the business results they are paying for? If the incentive costs are not reflective of actual results, it is a red flag that there is a potential design flaw in the program.
- Going back to your college Econ 101 days, ask if the plan costs are inelastic. Inelastic plan costs do not respond to the degree expected to changes in the action being rewarded. For example, a company may see some alignment with business results (i.e., decrease in incentive awards in times of slow sales), but an inelastic plan may see a reduction in incentive payouts of 3% when sales are down 15%.
- Does the plan effectively differentiate between exceptional and weak performers? If not, the employer is probably spending too much for the results of lower performers and not incenting the stars to stretch their efforts (which is where the profit margin is maximized).
- Are there requests for exceptions, manual modifications to results or incentive calculations, or any other "work arounds" on a regular basis? Exceptions should be very rare. Be careful not to "fix" the extra manual work by automating the symptom—treat the problem by correcting weak plan design.

In today's economy and regulatory environment, it is critical that compensation programs are financially and operationally effective.

## CMS Delays Medicare Reporting Requirement

The Department of Health and Human Services' Centers for Medicare and Medicaid Services reported a delay in the Medicare Secondary Payer mandatory reporting, originally slated to become effective April 1, 2010. Required reporting has now been delayed until January 1, 2011. The reporting requirements are to ensure that Medicare remains the secondary payer when a beneficiary has medical expenses that should be paid primarily by a liability, no-fault, or workers compensation plan. The reporting requirement was included in 2007 legislation but has been delayed due to a lack of guidance on requirements.



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