



# HR & BENEFITS UPDATE

## **Congress Considering Extending & Expanding Group Health Plan COBRA Subsidy Mandates On Heels of Enactment of Expanded Military Leave-Related Family Leave Mandates**

*November 5, 2009*

Senator Sherrod Brown (D-Ohio) and Robert P. Casey (D-PA) are asking Congress to extend and expand the “COBRA Premium Subsidy” rules for group health plans enacted by Congress on February 17, 2009 as part of the American Recovery and Reinvestment Act of 2009 (ARRA) beyond their currently scheduled December 31, 2009 expiration date and further to restrict the amount that group health plans can charge former employees and their dependents covered by the COBRA Premium Subsidy rules to maintain coverage under the coverage continuation mandates of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (“COBRA”).

COBRA generally allows employee and dependents who otherwise would lose eligibility for group health benefits under union or employer sponsored plans temporarily to continue enrollment in the group health plan by paying up to 102 percent of the full cost of that coverage (the “COBRA premium”) and fulfilling certain other conditions set forth in COBRA. Under ARRA’s COBRA Premium Subsidy Rules, Congress among other things amended COBRA through December 31, 2009 to require that employers “subsidize” 65% of the otherwise applicable COBRA premium for employees or dependents electing COBRA coverage following a loss of eligibility due to the involuntary employment termination between September 15, 2008 and December 31, 2009 who otherwise qualify as “assistance eligible individuals” under ARRA. The COBRA Premium Subsidy rules created a mechanism through which employers providing the required COBRA Premium Subsidy can claim a payroll tax credit for COBRA Premium Subsidy amounts paid with respect to assistance eligible individuals in accordance with ARRA’s mandates.

Senator Sherrod Brown (D-Ohio) and Robert P. Casey (D-PA) now are proposing that Congress extend and expand ARRA COBRA Premium Subsidy requirements applicable to group health plans as proposed by the “COBRA Subsidy Extension and Enhancement Act” (S. 2730). Introduced on November 5, 2009, the Government Printing Office had not published the text of S. 2730 as of the release of this publication. However, It is expected that the official text of S. 2730 will be made available for review soon [here](#). In the meanwhile, the reading of S. 2730 into the record when introduced in the Senate on November 4, 2009 and its sponsors’ news releases, the “COBRA Subsidy Extension and Enhancement Act” (S. 2730) proposes that Congress:

- Extend the COBRA Premium Subsidy requirements an extra six months to 15 months;

- Increase the required subsidy amount during the extended COBRA Premium Subsidy period from 65 percent to 75 percent of the COBRA premium; and
- Clarify that the employees and dependents eligible to qualify as assistance eligible individuals under ARRA includes those losing group health plan eligibility due to an employment loss, whether from an actual employment termination or a decline in hours of employment.

### **Expanded FMLA Military Leave Related Mandates Added Under Defense Appropriations Laws Already Require Immediate Action**

The proposal in S. 2730 to extend the ARRA COBRA Premium Subsidy mandates is the latest in a series of recently enacted and proposed federal laws and implementing regulations imposing an ever-expanding list of federal eligibility mandates on employment based group health plans. These include not only an expanding list of federal mandates that group health plans make available continued coverage to individuals whose eligibility for coverage otherwise would end on account of an employment decline or loss such as those enacted as part of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84 (“2010 NDAA”), signed into law by President Obama on October 28, 2009 and the National Defense Authorization Act for Fiscal Year 2008 the (“2008 NDAA”) signed into law by President Bush in January, 2008. These FMLA military leave-related mandates are in addition to separate group health coverage continuation mandates separately imposed upon employers and group health plans under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

For instance, the 2008 NDAA amended the Family and Medical Leave Act (“FMLA”) to add new family military-leave provisions, which were further expanded by the 2010 NDAA. The 2008 NDAA adds two new qualifying circumstances under which eligible employees must be allowed to take FMLA leave and to continue group health plan coverage during that FMLA:

- “Qualifying exigency leave;” and
- “Military caregiver leave” also referred to as “leave to care for a covered servicemember.”

Final regulations implementing the 2008 NDAA FMLA mandates and other FMLA requirements took effect on January 16, 2009. The NDAA for 2010 further amended these family military-leave mandates to expand the circumstances under which the FMLA leave mandates employers and their group health plans extend FMLA leave rights in relation to military members.

Beyond these military-leave related group health plan mandates, group health plans also are required to comply with a host of other recently-expanded federal eligibility and other mandates such as new mandates to offer up to 12-months coverage continuation for dependents whose coverage otherwise would terminate due to a medically required break in school enrollment, expanded group health plan special enrollment and nondiscrimination rules imposed under ARRA, the Genetic Information and Nondiscrimination Act (“GINA”) and the Health Insurance Portability & Accountability Act (“HIPAA”) and various others. Congress is considering further amendments to these and other federal mandates under proposals included in the various health care bills being heavily debated in Congress, as well as others included in legislation proposed separately from these broader health care reform proposals.

In addition to monitoring and sharing their input with Congress about S. 2730 and other proposed legislation impacting their group health plans, group health plans, their sponsoring employers or unions, insurers, fiduciaries and administrative service providers also should take prompt action to ensure that their group health plan documents, notices and other communications, processes and procedures have been properly updated in response to the statutory regulatory changes to federal group health plan eligibility and other mandates.

If you have questions about or need assistance reviewing or sharing your input with Congress about S. 2730 or other proposed legislation, evaluating and updating, administering or defending your group health plan in light of these or other federal regulations, or with other employee benefit, employment, compensation, workplace health and safety, corporate ethics and compliance practices, concerns or claims, please contact the author of this article, Curran Tomko Tarski LLP Labor & Employment Practice Group Chair Cynthia Marcotte Stamer. Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Group and past chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer has more than 20 years experience advising and representing employee benefit plans, employers, plan sponsors and fiduciaries, administrative services providers, insurers and others about these and other related matters. Ms. Stamer also speaks and writes extensively on these and other related matters. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly. For additional information about the experience and services of Ms. Stamer and other members of the Curran Tomko Tarski LLP team, see [here](#).

### **Other Information & Resources**

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- [\*\*November 15, 2009 Is Deadline To Send Required Group Health Plan Medicare Part D “Creditable Coverage” Notice\*\*](#)
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