



COBRA Subsidy Extended

By Chris Mills (New Jersey)

On December 19, 2009, President Obama signed the 2010 Defense Appropriations Bill, which included an extension of the 65% COBRA Subsidy provision originally enacted last February in the Stimulus Bill. The new law affects the COBRA subsidy as follows:

- extends from December 31, 2009 to February 28, 2010 the date which governs eligibility for involuntarily terminated individuals to be eligible for the subsidy;
- the maximum subsidy period from 9 months to 15 months;
- gives individuals whose subsidized COBRA coverage has already ended, 60 days from the date of enactment (or 30 days after the notice that is required and discussed in the next point is given, if that is later) to pay the 35% subsidized premium amount and obtain retroactive coverage under subsidized COBRA. If the full premium was already paid for any period after October 31, 2009, the “overpayment” amount can be refunded or credited towards future coverage; and
- requires administrators of group health plans to provide a notice describing the foregoing changes to individuals who were eligible for the subsidy or who experienced a COBRA qualifying event at any time on or after October 31, 2009.

If your company takes responsibility for COBRA compliance and issuing COBRA notices (as opposed to contracting it out to a third party or relying on an insurance company) you now have an action item to complete by February 19, 2010: you must send a notice describing the COBRA changes to all individuals who were eligible for the subsidy or who have

experienced or will experience a COBRA qualifying event at any time on or after October 31, 2009 and up until February 28, 2010. This notice should describe:

- the extension of the maximum COBRA subsidy period from 9 months to 15 months;
- the extension to February 28, 2010, of the qualifying date for an involuntary termination entitling the COBRA-qualified beneficiary to the COBRA subsidy as an “assistance-eligible individual”;
- the right of qualified beneficiaries whose COBRA terminated after October 31, 2009 (because of a failure to pay the higher, unsubsidized COBRA premium) to reinstate coverage retroactively by paying the subsidized premium (the 35% amount) by February 19, 2010, or by 30 days after the notice is given, whichever is later; and
- the right of assistance-eligible qualified beneficiaries who paid an unsubsidized premium for COBRA for periods after October 31, 2009, to receive a refund or obtain a credit of the overpaid amount. (The administrator can choose the option it prefers – refund or credit).

For model notices visit the U.S. Department of Labor website at www.dol.gov/cobra.

For more information contact the author at cmills@laborlawyers.com or 908.516.1050.

IRS Establishes Voluntary Correction Program

By Josh Norris (Atlanta)

Section 409A of the Internal Revenue Code generally provides that nonqualified deferred compensation plans must comply with certain complex rules regarding the timing of deferrals and distributions. Compliance must be in both form and operation. Failure to abide by section 409A’s requirements will result in all amounts deferred under the plan for the current year and all previous years becoming immediately taxable to the employee, plus an additional 20% excise tax and interest penalty. As a result, a failure to comply with the requirements of section 409A can have severe adverse tax consequences to the executive.

The IRS recently issued a Notice which will provide methods for employers to voluntarily correct many types of failures to comply with the plan document requirements. By taking advantage of this correction program, you may be able to avoid or reduce the current income inclusion and additional tax penalties under section 409A.

General Requirements

The correction program is intended to encourage taxpayers to review nonqualified deferred compensation plans to identify provisions that fail to comply with the requirements of section 409A and to promptly correct

those plan provisions in order to be in compliance and avoid tax penalty assessments. The Notice provides:

- clarification that certain language commonly included in plan documents will not cause a document failure;
- relief permitting correction of certain document failures without current income inclusion or additional taxes under section 409A, provided that the corrected plan provision does not affect the operation of the plan within one year following the date of correction;
- relief limiting the amount currently includible in income and the additional taxes under section 409A for certain document failures if correction of the failure affects the operation of the plan within one year following the date of correction;
- relief permitting correction of certain document failures without current income inclusion or additional taxes under section 409A if the plan is the employer’s first plan of that type (disregarding any plans not subject to section 409A or any plans under which all deferred amounts have previously been paid or forfeited) and the failure is corrected within a limited period following adoption of the plan;
- transition relief permitting corrections of certain document failures without current income inclusion or additional taxes

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- under section 409A if the document failure is corrected by December 31, 2010, and any operational failures resulting from the document are also corrected; and
- clarification of prior IRS guidance concerning correction of certain section 409A operational failures.

Recommendations

Take some time now to review your deferred compensation arrangements for compliance with Section 409A. If you identify errors, carefully consider correction alternatives to help reduce or avoid the significant section 409A penalties. If you'd like us to help, give us a call.

For more information contact the author at jnorris@laborlawyers.com, 404.231.1400 or call any member of the Employee Benefits Practice Group.

New HIPAA Rules Effective February 17

By February 17, 2010, "business associates," such as insurance brokers, certified public accounts, medical plan actuaries, consultants and other group health plan vendors must bring their entities into compliance with the Privacy and Security Rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as required under the American Recovery and Reinvestment Act of 2009.

HIPAA is intended to protect the privacy of protected health information (PHI). In furtherance of that objective, HIPAA regulates the manner in which covered entities (health plans, healthcare providers that transmit health information in electronic format and healthcare clearinghouses) and business associates create, store, access and disclose PHI. In order to comply with HIPAA's Security Rule, each business associate must adopt a

security policy, appoint a security officer and train its workforce on how to safeguard electronic PHI.

Similarly, in order to comply with HIPAA's Privacy Rule, each business associate must adopt a privacy policy and appoint a privacy officer. For both the Security and Privacy Rule, the policies and officers must be in place by February 17, 2010 in order to be in legal compliance.

Fisher & Phillips has developed a HIPAA Privacy and Security Compliance Package to help business associates bring their entities into HIPAA Privacy and Security Rule compliance with a minimum of hype, legal expense and distraction before the compliance deadline. For more information, please contact a member of the Employee Benefits Practice Group.

EFAST2 Filing System Now In Place

By Patricia Harris (Atlanta)

The Form 5500 is changing! Forms in the 5500 series (including the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return Report of Small Employee Benefit Plan) are used annually to report information concerning a welfare benefit or retirement plan's funding, size, operations and other characteristics.

The U.S. Department of Labor (DOL) has created a new web-based electronic filing system called "EFAST2." Under the EFAST2 system, Forms 5500 filed for plan years beginning on or after January 1, 2009, may no longer be filed in paper format (e.g., mail, fax, private delivery service), but instead must be filed electronically.

The Particulars

Anyone can register by visiting www.efast.dol.gov and clicking on "register" on the left-hand side of the web page. Here are some things that plan administrators and plan sponsors of welfare benefit or retirement plans should know about the new EFAST2 system:

- Forms 5500 for the 2008 Plan Year that are timely filed can still be filed in paper format.
- Amended Forms 5500 for 2008 or prior plan years must be submitted electronically on and after January 1, 2010.
- Filers who utilize approved third-party software to prepare a Form 5500 series return may continue to do so.
- The EFAST2 system now also provides a free internet-based filing tool called IFILE that can be used to electronically prepare and submit a Form 5500 series return.
- The Form 5500-EZ cannot be filed electronically. "One-participant plans" that would generally file a Form 5500-EZ may qualify to file a Form 5500-SF electronically through EFAST2. If a filer does not meet all requirements specified in the Form 5500-SF instructions to be a "one participant plan," the filer must continue to file a paper copy of Form 5500-EZ.

- Beginning with the 2009 Plan Year, retirement plans will no longer be required to complete a Schedule SSA as part of the Form 5500 Series. Instead, SSA information will now be collected by the IRS using Form 8955-SSA. You can visit the IRS website at www.irs.gov for more information regarding your obligations for filing of a Schedule SSA for 2009 and future plan years.
- Company officials who are responsible for signing the Form 5500 series return will be required to register on the DOL's EFAST2 system and obtain "Filing Signer" credentials.

There are six steps to registering on EFAST2. To begin, click on "register" on the left-hand side of the web page at www.efast.dol.gov. First, read and accept the privacy statement. Once accepted, you will be asked to provide contact information and select your user type (i.e., Filing Signer). Next, you will be asked to answer certain challenge questions as part of the set-up of your profile. You will then be asked to verify your registration. It is crucial that you make sure your e-mail address is correct before hitting "next."

Within 5 minutes after EFAST2 accepts your registration, you should receive a secure e-mail notification from EFAST2 that contains your PIN and user ID. Follow the links in the e-mail to retrieve your credentials and make sure to write down your PIN, as it will only appear once during this process. Next, you will be prompted to answer your challenge question and will be asked to review and finalize a PIN Agreement and Signature Agreement. The EFAST2 system will then provide you with a final registration page that lists all credentials. Print this page and keep it in a secure location. The final step in the process is to establish a password, which you will be prompted for when visiting the EFAST2 webpage in the future.

We encourage any company officials who intend to sign Form 5500 series returns to register now on the EFAST2 system.

For more information contact any member of the Employee Benefits Practice Group