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CONGRESS EXPANDS COBRA COVERAGE

By: Matt W. Zeigler, Esq.

Assume that you have steadily employed a store manager for a period of years, continuously covering this person under your medical insurance even though the employee contracted an on-going health problem that has resulted in additional costs to your program due to underwriting considerations. As an employer, it was felt that continuation of this person's employment was to the benefit of your store. Consequently, incurring the additional health insurance costs seemed to be justified.

Now assume that this person gives notice that they are going to work for your competitor in the same town. Even though you regret the loss, this person will now be removed from your health insurance coverage because of the fact that your competitor likewise offers a similar plan that should cover your soon-to-be former employee. The terminated employee then advises you that continuation coverage is sought under your health plan based on COBRA. What result?

As you may well guess, Congress in dealing with such a fact situation, has decided that it is best that the former employer, who no longer has the services of the employee, must in any event burden its underwriting experience by being required to carry on the insurance coverage of the former employee if the employee would not qualify for insurance with the new employer because a pre-existing condition clause. While the principals of continuation coverage still apply, i.e. the employee is required to pay the cost of the continuation coverage, at 102 percent of the group rate, the fact that this is the maximum amount of cost that can be charged to the former employee, and the fact that the former employee's adverse experience will negatively affect the former employer's rates vis-à-vis the new employer did not seem to bother Congress.

As a refresher, the Consolidated Omnibus Budget Reconciliation Act of 1985 provided that employers must provide continuation health insurance coverage that is terminated because of a termination of employment, reduced work hours or termination of dependency status due to death, divorce, Medicare eligibility or legal emancipation as to children.

Upon the happening of a qualified event, the employer is required to notify the insured of rights to continuation coverage and, upon election by the insured to continued coverage, collect and remit to the insurer premiums for such coverage. Failure of the employer to notify employees of their rights after a qualifying event and to make arrangements for the continuation coverage if the employee so elects will produce penalties to the former employer and may become substantial.

Congress has slowly but surely utilized the COBRA wedge to emasculate the basic requirements of the 1985 Act to now expand COBRA coverage to employees when employers file for protection under the Bankruptcy Code. Now in the Omnibus Reconciliation Act of 1989, effective for plan years after January 1, 1990, Congress has acted to cover among other areas, cases

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where an employee, leaving the employment of one employer for the employment with another, will be deprived of health insurance coverage in the second employer's plan because of a pre-existing condition.

The 1989 legislation also provides that employees who are disabled at the time of termination of employment or reduction of hours of employment will be entitled to extended continuation coverage from 18-29 months, provided that the qualified beneficiary under COBRA gives notice to the employer of the disability before the end of the initial 18 months of COBRA coverage. In this case, while the employer can only charge 102 percent of the group premium rate for the first 18 months, the employer can increase the charge to 150 percent of the premium for the same coverage for the additional 11 months the employer is required to provide coverage under this disability continuation extension. In such cases, the qualified beneficiary must notify the plan administrator within 60 days after it has been determined that they are disabled if after the time of the qualifying event.

An additional provision of the 1989 Act provides that if the qualifying act giving rise to continuation coverage is the entitlement of the insured to Medicare, all qualified beneficiaries (dependants) will be entitled to COBRA coverage under the employers health insurance policy for an additional 36 months from the date the covered employee became so entitled to Medicare.

Another provision of the Act states that for plan years beginning December 31, 1989, employers must offer continuation coverage to individuals who are provided with coverage under a group health plan by virtue of performance of services for one or more persons maintaining the plan. In other words, the store owner retaining individuals as independent contractors will be required to provide continued coverage to these people if they are otherwise provided health coverage under an employee group plan.

Returning to our example, starting January 1, 1990, and retroactive to January 1, 1989, you may only terminate the employee in question without offering COBRA coverage if the employee will be covered under another group health plan that does not contain any exclusion or limitation with respect to any pre-existing condition of such individual. You as the former employer will be required to provide COBRA coverage to the terminated employee until such time that either the 18-month period ends or the employee is qualified for coverage to the same extent under the new employer's health insurance package.

Without being too cynical, it appears that the new employer will be able to retain the services of your former employee by making sure that his pre-existing conditions health insurance clause is sufficiently tight to exclude coverage for this new employee who will be able to continue coverage (perhaps the new employer paying the premium to the employee in the form of a bonus) while you must continue coverage of this person bringing in a premium which most likely is deficient of the actual cost of coverage for this person which will have an actuarial effect of driving your medical insurance costs up to your competitor's double advantage.

Stay tuned for further Congressional action in this area. It should be interesting.

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