# Employers Offering Subsidized COBRA to Employees Should be Aware of the Subsidy's Impact on an Employee's Ability to Enroll in Marketplace Coverage When the Subsidy Ends

Unfortunately, in response to the COVID-19 pandemic and associated economic downturn, many employers may be forced to reduce the hours of, or terminate, large segments of their workforces. In these circumstances, an employer typically will be required to offer continuation coverage under its group health plan to qualified beneficiaries under COBRA, due to a loss of eligibility under the terms of the plan.

To soften the impact of an employee's termination, an employer may wish to subsidize the employee's cost of COBRA coverage on a pre-tax basis by directly paying all, or a portion of, the applicable premium (or premium equivalent for self-funded plans) for a period of time.

An employee who is offered subsidized coverage may determine that it makes financial sense to take advantage of the subsidized COBRA coverage offer, rather than obtaining coverage on the Marketplace established pursuant to the Affordable Care Act (ACA) or through another source (e.g., a spouse's plan) at the time coverage is lost. However, when the employer subsidy ends, the employee's calculus may change, and the employee may wish to obtain Marketplace coverage at that time, rather than continuing with the COBRA coverage.

**Employers wishing to provide subsidized COBRA coverage on a pre-tax basis should be aware that, absent additional guidance, COBRA beneficiaries likely will not be able to switch to Marketplace coverage upon the termination of the employer subsidy.**

In general, Marketplace coverage operates similar to most employer-based group health plans and individuals may only enroll in such coverage during specified open enrollment and special enrollment periods. While the HealthCare.gov website, which provides information regarding the federal Marketplace, indicates that the change of COBRA costs due to the loss of a former employer's subsidy **does** trigger a special enrollment period, the weight of the authority indicates otherwise. Notably, the applicable federal regulation provides that the failure to pay COBRA premiums on a timely basis prior to the expiration of COBRA coverage **does not** trigger a special enrollment period. Furthermore, the website for the New York State Marketplace specifically states that voluntarily dropping other health coverage or being terminated for not paying premiums are not events that would allow special enrollment.

In the absence of clear guidance, we recommend employers operate under the assumption that the expiration of a period of employer-subsidized COBRA coverage will not trigger a Marketplace special enrollment period. Accordingly, employees who elect subsidized COBRA offered by an employer would generally not be able to enroll in Marketplace coverage until the next open enrollment period (in New York, November 1 - January 31).

We note that New York recently authorized a separate special enrollment period for individuals who do not have health insurance coverage for the period from March 16 - April 15, 2020. Several other states have done the same. This may be a sign that New York and other states may further relax special enrollment rules to specifically cover situations where an employer COBRA subsidy is lost. However, as of the date this memorandum was issued, there has been no additional guidance regarding this issue.

Employers who wish to provide employee flexibility to enroll in Marketplace coverage may still soften the impact of a loss of health coverage by providing financial assistance for health insurance without jeopardizing the employee's ability to acquire Marketplace coverage. An employer may do so by offering the employee a "post-tax" payment for the employee to use for health insurance. The taxable payment (which could be grossed-up by the employer to account for the taxes) would provide the employee the option to either use the payment towards Marketplace coverage or enroll in COBRA coverage, if that option was preferable.

If the employer chooses to offer such a post-tax payment, the employer should communicate why the payment is being made (for the cost of health insurance), but make sure the employee is aware that the employee is not limited to using the payment to pay for such costs. The terms of the payment should be in writing (e.g., duration and amount), and should contain a statement that the payments are discretionary and can be discontinued by the employer at any time. Additionally, employers should educate employees on the Marketplace special enrollment rules that are in place at the time of the COBRA offer.

---

Bond will continue to monitor COVID-19 legal issues and is hosting weekly webinars to update employers and businesses on the latest federal and state developments. You can register for the complimentary weekly webinar here.

If you have any questions about this memorandum, please contact the attorney at the firm with whom you are regularly in contact or any attorney in our Employee Benefits and Executive Compensation Practice Group.

BOND SCHOENECK & KING ATTORNEYS