EmployeeBenefit news

http://ebn.benefitnews.com

« Back to Article

Will it ever end?

One COBRA extension after another leaves benefit professionals wondering whether, and when, they'll see a sunset on the subsidy

By Kathleen Koster

June 15, 2010

Benefit professionals must be starting to feel a bit like Charlie Brown to congressional lawmakers' Lucy. Just as Charlie never got to kick the football because Lucy would always pull it away as he got close, every time benefits managers see an end to the federal COBRA subsidy, Congress extends it again.

At press time, employees laid off between Sept. 1, 2008 and May 31, 2010, were eligible for the subsidy, paying just 35% of the COBRA premium for a paperiod of 15 months. The subsidy clearly is an attractive benefit to involuntarily terminated workers.

As of the end of last year, average monthly enrollment rates in COBRA health care plans among subsidy-eligible employees have increased by 20% since the COBRA subsidy was enacted in March 2009, finds Hewitt Associates.

"They have it, they love it and they are using it," says Ouida Peterson, vice president of education at Conexis. The subsidy itself and the many extensions translate into greater expense and burden for employers.

Even before the subsidy was enacted, costs of individuals and dependents on COBRA tended to be about twice the costs of employers' active employees, says Mike Thompson, principal and head of the N.Y.-metro health care practice in PricewaterhouseCoopers' human resource services practice.

Not to mention, a lot of the subsidy costs can't be quantified, such as the human capital costs to HR/benefits staff who've had to send out a plethora of notices, bogging down already time- and resource-crunched departments.

"The expense of COBRA administration has gone up and up because you've had to send out one letter, then another, then another," Peterson recently told attendees at EBN's Compliance Summit. "This stuff is getting too wild."

Indeed, as the subsidy's goalposts keep moving, benefits professionals surely have had a wild ride - one they're wondering if they'll ever be able to get off of. However, administering the subsidy for longer than anticipated has helped professionals get the hang of it.

Karen McLeese, vice president of Employee Benefit Regulatory Affairs for CBIZ B&I., jokes that "when you're on the third time doing it, I think it gets easier."

Nevertheless, "it's the little tweaks that employers are not paying attention to" that can come back to bite them, warns Peterson.

One such adjustment came with the March 2 extension, which determined that a person who experienced a reduction in hours between September 1, 2008 and May 31, 2010, followed by an involuntary termination or if they quit as a result of the reduction, on or after March 2, 2010, would be eligible for the premium subsidy.

Karli Dunkelberger, national vice president of regional sales at OptumHealth Financial Services, believes "the confusion drives the increased expense; it's really investing the time to stay current on the legislation and investing the time to update all the notices and having that double checked by in-house or outside legal counsel."

Staying compliant

Joshua Zuckerberg, a partner with Pryor Cashman, estimates that hundreds of employers, mostly mom-and-pop operations, aren't in compliance with the subsidy - a dangerous predicament, as the penalties are steep.

If a COBRA notice is not accurate or not sent out on a timely basis, the Department of Labor can impose a penalty of up to $110 per day per notice.An additional $110 per day penalty can apply to a failure to comply with the DOL's determination of an appealregardingsubsidy eligibility.

IRS rules provide for an excise tax of $100 per day perviolation(not to exceed $200 per day if there is more than one qualified beneficiary regarding the same qualifying event).

Further, for plan years beginning on or after January 1, 2010, employers need to self-report to the government any mistakes made and pay an excise tax for failure to comply with COBRA.

But the individual has some responsibilities as well. If they are not eligible to receive the subsidy, but do so, then this is considered tax fraud, which comes with a 110% penalty on personal income tax.

"We've got some teeth in this law, and the teeth are pointed in the right direction: to the individual," says Peterson. "This is the start of the government regulating personal responsibility."

However, employers need to prepare for appeals, which are rampant with 10,000 applications for decisions so far, which DOL is turning around in 15 days. Fortunately, 73% of those appeals are siding with the employer.

McLeese strongly suggests employers put in place a COBRA procedure that they follow to a "T" and can prove they do so in case they are ever challenged. After all, it is the plan's responsibility to make sure employees know about COBRA and the subsidy because it's their right if eligible.

The initial notice, which is required when an individual first becomes covered by the health plan, is very important and oft-forgotten, as is the notice on ineligibility if the employee asks for COBRA, but is not eligible.

"A good COBRA procedure is very critical. It's a highly litigated area, and a lot of [cases] have to do with whether the individual was properly notified about their COBRA rights," says McLeese.

Zuckerberg stresses that "employers have to stay on top of [the changing legislation and regulations] and stay closely connected to their labor employment counsel or their accountant or whoever is walking them through these obligations because it really is in flux, and you don't want to be ignorant of recent developments."

In New York, there are 36 months of health care benefits continuation under NY COBRA, 15 months of which are covered by the federal subsidy. In California, there is an additional 18 months on top of federal COBRA, and Texas has an additional six more months.

While some states "stack" their state continuation mandates on top of federal COBRA obligations, in most states, only small employers (less than 20 employees) are involved with state continuation requirements.

"I think one of the things employers have struggled with is the on-again, off-again nature of subsidies. From a compliance standpoint, it's difficult for employers to keep up with the continuous 'Will they extend it, won't they extend it?' environment," says Thompson.

Which is why some experts wish legislators would extend the subsidy through the end of year, or even until 2014, instead of reviving it from month to month, forcing employers to deal with the ever-changing notices.

But they probably won't for political and economic reasons, **says Paul Hamburger**, a partner in the D.C. office of the Proskauer law firm, and head of its employee benefits and executive compensation practice center. "That's just how these things grind their way through Congress."

Even more frustrating, as the end of one extension approaches, employers can't do much to prepare. "Not a lot you can do from a planning perspective in terms of writing your notices that is going to help you out until they actually do extend it," Hamburger says.

Even though there are two bills in Congress to extend the COBRA subsidy another month and one to extend it until the end of the year, experts are unsure how long the subsidy will last.

One expert explains that it will certainly last until after the election, or perhaps there's a possibility of grandfathering people in on COBRA, but stopping short of allowing new participants to obtain the subsidy. This expert also admits that extending it until 2014 is also a viable possibility, as part of a "bridge strategy" until the exchanges are set in place.

Zuckerberg emphasizes that as long as there is a struggling economy and unemployment, the subsidy will most likely continue, and he speculates that the subsidy extensions will continue at least until the end of the year.

McLeese explains that "conceptually, I don't think there's any opposition. To the extent that we continue to have high unemployment, philosophically, lawmakers will be supportive of continuing to help people get health coverage."