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EBEC (Employee Benefits / Executive Compensation) Law Update

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**NEW YORK HEALTH CONTINUATION COVERAGE EXTENDED
TO 36 MONTHS AND OTHER STATE MINI-COBRA RULES**

New York State recently passed a law that extends continuation health coverage to 36 months. Thus, group insurance plans that are subject to New York insurance law will have to offer continuation coverage for a total of 36 months, even though under the Federal COBRA law continuation coverage on termination of employment would only be required for 18 months.

COBRA 20-Employee Requirement. Under Federal COBRA continuation coverage rules, employers with 20 or more employees on a controlled group basis must offer employees and beneficiaries the election to continue group health plan coverage (at up to 102% of company cost) upon the occurrence of certain events such as termination of employment.¹

State Mini-COBRA Laws. About 40 states have continuation health coverage requirements for insured group health plans of small employers that would apply even to small employers (e.g., with two or more employees) who do not have the 20 employee threshold to trigger Federal COBRA. Some states provide for continuation coverage for the full 18 months, while others provide for continuation coverage for lesser periods.² These state statutes are sometimes referred to as mini-COBRA laws.

¹ See ERISA § 601(b) & Code § 4980B(d) regarding the 20-employee requirement.

² A handful of states extend the mini-COBRA coverage for the full 18 months that would be available under Federal COBRA on termination (Colorado, Connecticut, Florida, Kentucky, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Nevada, North Carolina, Rhode Island, West Virginia and Wisconsin). See below that California and New York offer more than 18 months. Some states extend the state-COBRA for only 12 months (Illinois, Louisiana, Maine, Mississippi, Ohio, South Dakota and Wyoming), some for nine months (Iowa, Missouri, North Dakota, Oregon, Pennsylvania and Virginia), some for six months (Kansas, New Mexico, Nebraska, South Carolina, Texas, Utah and Vermont), some for four months (Arkansas and Oklahoma) and some for three months (Georgia, Tennessee and the District of Columbia). About 10 states do not have mini-COBRA rules (as of 2009, Alabama, Alaska, Arizona, Delaware, Hawaii, Idaho, Indiana, Michigan, Montana and Washington). See, Hamburger, "Mandated Health Benefits - The COBRA Guide," ¶ 2020 (Thompson, updated Nov. 2009). See, also, "The Guide - Health Insurance for the Unemployed - 2009," at www.healthinsurancefinders.com/unemployed/guide. These state rules change often, so one should confirm for latest changes.

- ❖ State mini-COBRA laws are insurance laws and apply only to insured group health plans but not to self-insured plans, and in fact state laws cannot regulate self-insured plans because of the ERISA preemption rule, as discussed below.

New York Extension of Continuation Coverage to 36 Months. The NYS continuation coverage mini-COBRA law³ was expanded in June 2009 to require that insured group health plan continue coverage for a total of 36 months rather than just the 18 months available on termination of employment under COBRA.⁴ California has had this 36 month extension since 2003.⁵

- ❖ The NYS Insurance Dept. view is that the original NYS mini-COBRA continuation coverage election at the time of termination will suffice for the coverage to extend to 36 months, unless coverage is interrupted (e.g., because of failure to pay premiums). See bullet after next full paragraph.
- ❖ If continuation coverage has ended prior to July 1, 2009, there would be no entitlement to an additional 18 months. See below regarding special enrollment period for coverage that has ended between July 1 and November 1, 2009.

Extension Can be at End of 18 Month Federal COBRA. The NYS extended continuation coverage rule also provides that even if the participant was receiving Federal COBRA continuation coverage for 18 months (under an insured plan), the participant must be offered the opportunity to continue coverage for an additional 18 month (up to 36 months from termination) under the N.Y. mini-COBRA law.⁶

- ❖ If Federal COBRA coverage is in effect on or after November 1, 2009 (or the renewal date of the policy after June 30, 2009), it would appear from NYS Insurance Department FAQs that the state continuation coverage will continue automatically. NYS Insurance Law § 3221(m)(6), however, states that when COBRA ends the participant will be given the opportunity to continue NYS coverage, which implies that a new election at that time. Some practitioners are of the view that the NYS continuation coverage election must be made at the time of termination of employment, and cannot be elected at the expiration of the 18 month period (unless the special enrollment period is still in effect). It is likely that employers will tie the initial COBRA election together with a New York election, so that there is no question that the 36 months will be available and so that there is no risk

³ Under New York Insurance Law § 3221(m), an insurer's group health policy that is not covered under COBRA because the employer has less than 20 employees must still provide continuation coverage, which basically mirrors the Federal COBRA rules.

⁴ NYS Insurance Law § 3221(m)(4) as amended by Chapter 236 of Laws of NY 2009, S.5471 (July 29, 2009), codes.lp.findlaw.com/nycode/ISC/32/3221.

⁵ California has a state mini-COBRA law for employers with two or more employees but without the 20 employees needed for Federal COBRA coverage. California amended its mini-COBRA rule effective Jan. 1, 2003 to require (like New York has done in 2009) that group health plans provide for 36 months of continuation health coverage for any COBRA qualifying event. California Insurance Code § 10128.27. In addition, if the Federal 18 months of COBRA on termination are used up, the law requires the group health plan to offer an additional 18 months of continuation health coverage. *Id.* Up to 110% of the premium cost may be charged. This rule would apply only to insured plans. Self-funded plans would not be subject to state insurance law, and also have ERISA preemption.

⁶ N.Y. Insurance Law § 3221(m)(6) as amended.

that the election has been made too late. Absent further guidance from the NYS Insurance Department, those who are on COBRA during the special enrollment period discussed below would be wise to specifically communicate their intention to the plan administrator to be continued in the additional New York 18 months extension. The interaction of the Federal COBRA election and the NYS continuation coverage election is not clear and will likely be addressed by the NYS Insurance Dept.

- ❖ This state wrap-around benefit for Federal COBRA for disability (which is 29 months, but with up to a 150% premium), would be extended an additional 7 months at the 102% premium rate.⁷

NY Continuation Coverage Extension Effective Earlier of 11/1/09 or Amendment to Policy on or after 7/1/09. The NYS extended continuation coverage law from June 2009 was originally effective for all policies issued, renewed or amended on or after July 1, 2009.⁸ However, an amendment to that law in November of 2009 accelerated the effective date of the NYS extended continuation coverage to no later than November 1, 2009 regardless of date of renewal of contract.⁹

Special One-Time Enrollment Period for 60 Days From Notice of New Rule. The November 2009 amendment provides that for those whose COBRA or New York continuation coverage ended between July 1, 2009 and Nov. 1, 2009, there is a 60 day special enrollment period from the date notice of this new rule is provided to participants, during which the New York extension can be elected.¹⁰ If no notice is provided, the special enrollment period will end on May 19, 2010. Elections would be effective within 30 days of election and payment and would apply prospectively.¹¹

NY Mini-COBRA (Like Other State Mini-COBRA Rules) Not Applicable to Self-Insured Plans Even if Have Stop-Loss Coverage. The New York law regulates insurance companies, and in the case of self-insured plans the N.Y. statute would not apply.¹² Also, ERISA would generally preempt state laws (even if they purport to regulate insurance) with respect to self-insured plans.¹³ Most courts apply this ERISA preemption even where the self-insured plan has stop-loss coverage.¹⁴

⁷ NYS Insurance Dept. Circular Letter No. 23 (Sept. 30, 2009) - www.ins.state.ny.us/circltr/2009/cl2009_22.htm.

⁸ Chapter 236 of Laws of NY 2009 (July 29, 2009), www.ins.state.ny.us/cobra/S5471_36_ext_final.pdf.

⁹ Chapter 498 of Laws of NY 2009 (Nov. 19, 2009), open.nysenate.gov/legislation/api/html/bill/S66006.

¹⁰ N.Y. Insurance Law § 3221(m)(8), added by November amendment.

¹¹ Id.

¹² N.Y. Insurance Department FAQs - State Continuation Coverage Extension to 36 Months, www.ins.state.ny.us/cobra/cobra_ext_36.htm.

¹³ Although the “savings clause” of ERISA § 514(b)(2)(B) provides that laws regulating insurance are not preempted by ERISA, with regard to self-funded plans there would be preemption because under ERISA § 514(b)(2)(B) (the “deemer clause”) states may not “deem” self-funded plans to be insurers.

Even with regard to insured plans, state laws that purport to regulate conduct with respect to the employer rather than the insurance company, or laws that are overbroad and apply to insured and self-insured plans, may be preempted by ERISA. See, *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (for a state law to regulate insurance and not be preempted, the law must be specifically directed to entities engaged in insurance, and the state law must substantially affect the risk pooling arrangement with the insurance company). See, also, *Duclos v. General Dynamics Corp.*, 12 E.B.C. (BNA) 2648 (D.R.I. 1990) (Rhode Island statute

- ❖ The New York mini-COBRA would not apply to a dental-only, vision-only or prescription-only plan.¹⁵
- ❖ The NYS continuation extension law applies to insurance contracts delivered in NYS (e.g., employer in NYS), and would presumably apply even to out of state employees.
- ❖ Employers with different types of plans may desire to have parity among all its plans and may offer the additional 18 months even for their self-insured plans.

requiring certain divorced spouses to be granted continuation health coverage without additional premiums was preempted by ERISA and the “savings clause” would not apply because the law does not regulate the business of insurance or the benefits under the policy, but rather the conduct with respect to the employer; also the statute as it purported to apply to insured and self-insured plans was invalid); *Thompson v. Bridgeport Hospital*, 2001 WL 823130 (Super. Ct. Conn. 2001) (claims against employer under a Connecticut continuation health coverage law was preempted by Federal law; Federal and not state courts have exclusive jurisdiction over COBRA notice penalty claims); DOL Adv. Op. 96-04A (Feb. 22, 1996) (that a Connecticut COBRA statute’s requirement that the employer must give notice before canceling a policy would be preempted by ERISA since that part of the rule did not regulate insurance).

¹⁴ See, e.g., *Bill Gray Enterprises Employee Health and Welfare Plan v. Gourley*, 248 F.3d 206 (3d Cir. 2001) (purchase of stop-loss coverage does not cause self-insured plan to be an insurance company under savings clause; stop-loss insurance not designed to insure individual participants but to reimburse plan after plan makes benefit payments); *Bank of Louisiana v. Aetna U.S. Healthcare Inc.*, 459 F.3d 610 (5th Cir. 2006), superseded on other grounds, 468 F.3d 237, cert. denied, 127 S. Ct. 1826 (2007) (employer's claim against insurer which was also stop-loss insurer not preempted by ERISA); *American Medical Security, Inc. v. Bartlett*, 111 F.3d 358 (4th Cir. 1997) (Maryland insurance law requiring certain mandated benefits and defined stop-loss policies to exclude policies that had specific or aggregate attachment points below certain minimum levels; court held that state effort to regulate content of self-funded plans through the regulation of stop-loss contracts was preempted by ERISA); *Bergin v. Wausau Insurance Companies*, 863 F. Supp. 34 (D. Mass. 1994) (Massachusetts law requiring that divorced spouse have continuation coverage was preempted with respect to self-funded plans, and stop-loss coverage did not cause it to be like insured plan since no single claim exceeded its retained obligation); *Thompson v. Talquin Bldg. Products Co.*, 928 F.2d 649 (4th Cir. 1991) (health plan was self-funded even though it purchased stop-loss insurance, emphasizing that plan remained directly liable to participants and insurance did not cover employees directly); *United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga*, 801 F.2d 1157 (9th Cir. 1986) (ERISA preempts state anti-subrogation law for self-insured plan even though it had stop-loss coverage, since the policy proceeds were payable only to the plan); DOL Adv. Op. 91-05A (Jan. 14, 1991) (stop-loss coverage does not make a self-funded plan insured, and therefore is still preempted by ERISA). But see *Northern Kare Facilities/Kingdom Kare, LLC v. Benefirst, LLC*, 344 F. Supp. 2d 283, (D. Mass. 2004) (claim that stop-loss insurers breached their contract with health plan sponsor by refusing to make stop-loss payments to plan was not preempted by ERISA since there judicial enforcement of stop-loss insurance contract would not be an alternative enforcement mechanism to ERISA).

¹⁵ N.Y. Insurance Department FAQs - State Continuation Coverage Extension to 36 Months, www.ins.state.ny.us/cobra/cobra_ext_36.htm.

COBRA Temporary 65% Subsidy Applicable to State Mini-COBRA Rules. The February 2009 stimulus act as amended in December 2009¹⁶ includes a 15 month government subsidy of 65% of the COBRA continuation health coverage premiums for employees who were involuntarily terminated between Sept. 1, 2008 and February 28, 2010. The subsidy applies not just to Federal COBRA but also to state mini-COBRA laws.¹⁷

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¹⁶ American Recovery and Reinvestment Act of 2009, (the “Stimulus Act”), enacted on Feb. 17, 2009, § 3001, www.dol.gov/ebsa/pdf/COBRAPremiumReductionProvision.pdf, as amended by the Department of Defense Appropriations Act for Fiscal Year 2010, Dec. 19, 2009 (the “DOD Act”), § 1010, www.dol.gov/ebsa/cobra/COBRAPremiumReductionProvisionExtension.html. See EB/EC Law Update – Extension of Federal COBRA Subsidy (Dec. 27, 2009).

¹⁷ Some states have provisions that specifically apply the Federal COBRA subsidy to state continuation coverage (e.g., California, Colorado, Connecticut, Georgia, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Wisconsin and District of Columbia). Also, certain state insurance departments provide guidance that specifies that the Federal COBRA ARRA subsidy applies to the state continuation coverage (e.g., Kentucky, New Hampshire, New Jersey and South Dakota). See Hamburger, “Mandated Health Benefits – The COBRA Guide” ¶ 2040 (Thompson, updated Nov. 2009).