November 5, 2007

HOUSE PASSES BILL REVISING 2002 TRADE ACT'S HEALTH PROVISIONS ON COBRA AND HEALTH CARE TAX CREDIT

On October 31, 2007, the House passed H.R. 3920, the Trade and Globalization Assistance Act of 2007, which amends certain health provisions of the Trade Act of 2002. The 2002 Trade Act created a health care tax credit of 65% of the cost of qualified health insurance coverage for certain workers who were terminated due to foreign competition. The Act also gave these workers a second COBRA election period.

The House-passed bill combined two earlier trade bills that had been reported out of the Education and Labor Committee and Ways and Means Committee. As discussed more fully below, the bill expands the types of workers that are eligible for health benefits to include service workers, lengthens the COBRA coverage period for some of these workers, and increases the health care tax credit percentage amount.

Eligibility

Current Law

The 2002 Trade Act provides a variety of benefits and reemployment services to certain workers who are receiving a trade adjustment allowance because they terminated employment due to increased importation of foreign products ("Eligible TAA Recipients"). With respect to health care, these benefits include a second COBRA election right and a health care tax credit equal to 65% of the cost of qualified health insurance coverage. The 2002 Trade Act generally limits these workers to those in the manufacturing industry where there has been a "shift in production" of articles to a foreign country.

The 2002 Trade Act also provides the health care tax credit (but not the second COBRA election right) to certain recipients of pension benefits from the Pension Benefit Guaranty Corporation who are at least 55 years old ("Eligible PBGC Recipients").

H.R. 3920

The House-passed bill would expand the type of worker eligible for TAA benefits in general (not just health benefits) to include both those in the manufacturing industry and in the services industry, where production of articles *or services* has been shifted to a foreign country. The bill also would provide benefits to certain workers in public agencies who have lost their jobs due to the agency obtaining services from a foreign country.

In addition, the bill extends additional COBRA benefits to Eligible PBGC Recipients, as well as Eligible TAA Recipients.

COBRA Provisions

Current Law

The 2002 Trade Act provides a second COBRA election for Eligible TAA Recipients who did not elect COBRA coverage when they terminated employment. The new COBRA election period begins on the first day of the month in which the individual becomes eligible for the trade adjustment allowance, as long as the individual elects COBRA within six months of termination. Coverage elected during the second election period commences as of the beginning of the new election period and may extend 18 months (or 36 months for qualified dependents who experience a second COBRA qualifying event). This right to a second COBRA election does not apply to Eligible PBGC Recipients.

H.R. 3920

H.R. 3920 would not change an Eligible TAA Recipient's right to a second COBRA election, but would, in some cases, extend the maximum COBRA coverage period. The bill also extends the maximum COBRA coverage period for Eligible PBGC Recipients.

The bill allows Eligible TAA Recipients overall to continue COBRA coverage until the later of 18 months from their termination or until they no longer meet the definition of an Eligible TAA Recipient.

The bill provides that Eligible TAA Recipients who are either age 55 or have attained 10 years of service would be allowed to continue COBRA coverage until they are eligible for Medicare. In order to qualify for this extension, these individuals must: (1) be either age 55 or had 10 years of service at the date of termination of employment; and (2) be TAA-qualified at the date COBRA normally would end (generally, after 18 months of COBRA coverage). There is no requirement that TAA qualification be ongoing (although we understand that this may be a drafting error).

The bill also extends the COBRA period otherwise available to Eligible PBGC Recipients (although still does not give them a second right to elect COBRA). Eligible PBGC Recipients would be able to continue COBRA to their date of death. Their surviving spouses would be able to continue COBRA until 36 months from the date of the Eligible PBGC Recipient's death.

For all of these groups, COBRA coverage also could be terminated if they become enrolled in another group health plan or fail to pay premiums. In addition, even though these individuals may have an extended right to COBRA, this does not necessarily mean an extended right to the health care tax credit (the bill did not change the time period related to the tax credit, just the percentage amount).

HIPAA Break in Coverage Rule

Current Law

The 2002 Trade Act provides that, for individuals who elect COBRA coverage during the new election period, the period between the date the individual lost health coverage and the beginning of the new election period should be disregarded for purposes of determining whether the individual has experienced a 63-day break in coverage for HIPAA purposes.

H.R. 3920

H.R. 3920 would revise this provision so that a break in coverage for Eligible TAA Recipients cannot be counted during the period starting from the date the individual loses health coverage through five days after the postmark of the notice by the Secretary that the individual is eligible for qualified health insurance.

Health Care Tax Credit

Current Law

The 2002 Trade Act provides a tax credit equal to 65% of the cost of "qualified health insurance" for Eligible TAA Recipients and Eligible PBGC Recipients.

"Qualified health insurance" includes COBRA continuation coverage, certain state-based coverage, and certain employer-sponsored coverage available to the worker's spouse. The 2002 Act allows the credit to be "advanced" to providers of qualified health coverage upon certification by the Department of Labor or PBGC that the coverage is "qualified health insurance."

H.R. 3920

H.R. 3920 would increase the health care tax credit percentage to 85%. The bill also would allow Eligible TAA Recipients to receive the tax credit retroactively to their date of separation from employment, beginning January 1, 2008.

In addition, the bill would allow a qualifying family member to continue to receive the tax credit even after the worker or family member has stopped being eligible for the tax credit due to the worker's entitlement to Medicare, divorce, or death. The qualifying family member would be entitled to the health care tax credit for up to an additional 36 months, counted from the date of Medicare entitlement, divorce, or death. For divorce or death, the credit only would be available with respect to individuals who were qualifying family members immediately before the divorce or death.

Qualified Health Insurance

Current Law

One type of "qualified health insurance" that is eligible for the tax credit under the 2002 Trade Act is coverage provided by a state, such as state continuation coverage, a state-operated plan, or coverage under an arrangement between a state and a health insurance issuer or employer. The 2002 Act requires that this state coverage be guaranteed issue, nondiscriminatory, and not impose preexisting condition exclusions.

The 2002 Act provides that, to qualify for state-based coverage, an individual must have at least 3 months of creditable coverage, as defined by HIPAA.

H.R. 3920

With regard to state arrangements with health insurance issuers for state-based coverage, the bill would add a new rating requirement. Specifically, the maximum rate that may be charged for premiums must be based on a community rating system or must be based on a rate-band system where the maximum rate cannot exceed 150% of the standard rate.

The bill also would remove the requirement that individuals have at least 3 months of creditable coverage in order to qualify for state-based coverage. Under the bill, Eligible TAA Recipients only would need "a period of creditable coverage," with no minimum time period. Eligible PBGC Recipients simply must enroll for coverage within 90 days of the last day of the first month the individual is eligible to be a PBGC pension recipient (with no creditable coverage requirement).

Effective Date / Sunset

- *COBRA* - The COBRA provisions would apply to periods of coverage that end on or after January 1, 2008.

- *Health Care Tax Credit* - The tax credit provisions generally would take effect for taxable years beginning on or after January 1, 2008.

- *Rating Requirements* - The new rating requirements would apply to taxable years beginning on or after April 1, 2008.

- *Sunset Provision* - The bill also includes a sunset provision of December 31, 2009, except for individuals who have qualified as eligible individuals for a continuous period of months prior to this date.