

Recently Enacted Trade Adjustment Assistance Extension Act of 2011 Affects Health Coverage Tax Credit and COBRA Continuation Coverage

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On October 21, 2011, the President signed the Trade Adjustment Assistance Extension Act of 2011, Pub. L. No. 112-40 (the “2011 Act”) into law. Of note to employers, the 2011 Act modifies the health coverage tax credit (“HCTC”), as codified in section 35 of the Internal Revenue Code (“Code”), as well as the rules governing health care continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272 (“COBRA”). These modifications are discussed below.

Health Coverage Tax Credit

The HCTC was established as part of the Trade Act of 2002, Pub. L. No. 107-210. Generally, per the HCTC, qualifying individuals may receive a refundable tax credit that can be used to reduce premium costs for the purchase of certain qualifying post-employment medical coverage.¹

Under current law, the following individuals (and in some cases their family members) may be eligible for the HCTC if they satisfy certain criteria:²

- Pension Benefit Guaranty Corporation payees who are at least 55 years old (“PBGC Payees”);
- TAA-eligible individuals, i.e., those who receive a trade readjustment allowance under the TAA program and attend TAA-approved training (“TAA-Eligible Individuals”); and
- Individuals receiving a wage subsidy under an Alternative TAA Program (“ATAA-Eligible Individual”) or a Reemployment TAA Program (“RTAA-Eligible Individual”) for older workers.

Prior to the enactment of the 2011 Act, the HCTC was equal to 65% of the qualified health insurance premiums for eligible individuals and their families.³ The 2011 Act retroactively

¹ Eligible individuals can either receive the benefit of the HCTC on a monthly basis as their health plan premiums become due or claim the HCTC yearly as a credit on their federal tax return.

² In order to qualify for the HCTC for a given month, an individual must be enrolled in a qualified health plan (e.g., individual coverage, spouse’s group health plan coverage, COBRA continuation coverage). In addition: (i) the individual must not be enrolled in Medicare (or, if enrolled in Medicare, his family member(s) qualified for the HCTC), Medicaid, the Children’s Health Insurance Program, the Federal Employees Health Benefits Program, or be eligible for TRICARE benefits; (ii) the individual must not have been imprisoned; (iii) the individual’s employer must not have paid 50% or more of the cost of coverage; and (iv) the individual must not have received a 65% COBRA premium reduction from his former employer or COBRA administrator. See IRS Form 8885.

³ For certain months beginning prior to February 13, 2011, the amount of the HCTC was equal to 80% by reason of

increases the amount of the credit from 65% to 72.5%, beginning with coverage months beginning after February 12, 2011.

Comment: The amount of the HCTC is increased retroactively. Thus, it appears that HCTC-eligible individuals who already have received a 65% credit for coverage months beginning after February 12, 2011 will be eligible to receive an additional 7.5% credit for such months.

The IRS has posted a message on its website stating that it is currently working to determine how the 2011 Act will affect eligible taxpayers and current recipients of the monthly tax credit. It does not appear that the IRS has determined how it will apply the credit increase on a retroactive basis. Interestingly, the IRS message asks taxpayers not to call the IRS with questions in this regard.

In addition to the above, the Act imposes a termination date for the HCTC. Specifically, the Act amends Code section 35 to provide that the HCTC will cease to be available to individuals on January 1, 2014.

Comment: The apparent rationale for terminating the HCTC effective January 1, 2014 is that individuals who meet certain income requirements will be eligible for valuable premium and cost-sharing credits by reason of the Affordable Care Act, i.e., the health reform legislation signed into law by President Obama in 2010.

COBRA Continuation Coverage

The 2011 Act also made important modifications regarding individuals' rights to COBRA-governed continuation coverage ("COBRA coverage").

Very generally, COBRA provides workers and their families the ability to elect to continue certain employer-sponsored health coverage for limited periods of time under certain circumstances (such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events). Typically, COBRA coverage lasts no longer than 18 months although it can be extended in certain limited instances ("Maximum COBRA Coverage Period").

With regard to TAA-Eligible Individuals, ATAA-Eligible Individuals, and PBGC Payees, prior federal legislation extended the Maximum COBRA Coverage Period to the later of, but not beyond, (i) the Maximum COBRA Coverage Period, and (ii) February 12, 2011.⁴ The 2011 Act

the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 ("ARRA"), and the Omnibus Trade Act of 2010, Pub. L. No. 111-344.

⁴ See Omnibus Trade Act of 2010, Pub. L. No. 111-344.

amends COBRA yet again to extend the Maximum COBRA Coverage Period for such individuals to the later of, but not beyond, (i) the Maximum COBRA Coverage Period, and (ii) January 1, 2014.

Significantly, the Act does not appear to provide for any retroactive reinstatement or extension of COBRA coverage that has already terminated. The Act expressly states that the extension only applies with respect to “periods of coverage which would [without regard to the 2011 Act] end on or after the date which is 30 days after the date of the enactment of this Act” (emphasis added).⁵ Thus, because the Act was signed into law on October 21, 2011, the COBRA extension would seem to not apply to individuals whose COBRA coverage lapses before November 20, 2011.

Comment: Although not entirely clear from the text of the Act, it does not appear that the extension of COBRA coverage applies on a retroactive basis. Thus, if an otherwise eligible employee’s COBRA coverage lapsed prior to the effective date of the provision, i.e., November 20, 2011, then it does not appear that such individual’s COBRA coverage is reinstated, either prospectively or retroactively. Query whether future regulatory action could operate to require retroactive/reinstated COBRA coverage.

It remains to be seen how – or if – the regulators will address the COBRA provisions in the Act. For now, it appears that an individual whose COBRA coverage has expired has no recourse to extend or reinstate COBRA coverage.

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⁵ 2011 Act § 243(b).