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Interaction between COBRA and Medicare in C-Suite Executive Severance and Retirement Arrangements

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Both companies and their C-suite executives should be mindful of the interactions between COBRA and Medicare and their implications when negotiating a severance or retirement arrangement. This is because Medicare enrollment can terminate COBRA coverage, depending on the timing of when an executive elects COBRA and when they enroll in Medicare, and because an executive will be penalized under Medicare if they do not timely enroll after their medical coverage as an active employee ends.

COBRA Overview

COBRA generally gives employees and their dependents who lose their health benefits for certain reasons (including involuntary job loss) the right to continue health benefits provided under their employer's group health plan for a period, generally for up to 18 months (and up to 36 months in certain circumstances). Premiums for COBRA coverage may be up to 102% of the cost to the health plan, and the eligible individual must elect to continue their coverage within a 60-day election period.

In connection with a C-suite executive's termination of employment by their employer without "cause" or resignation for "good reason," it is common for the executive to be entitled to subsidized COBRA premiums. A company may continue to pay its portion of its health plan premium in effect on the date of separation or even all of the executive's COBRA premiums. Alternatively, if there is concern that subsidized COBRA premiums cannot be offered under the company's health plan due to various tax-related reasons or otherwise, the company may pay cash to the executive to cover the company's portion or all of the executive's COBRA premiums. These payments would be taxable for the executive, but the executive may seek to negotiate for a tax gross-up (however, for public companies, arrangements with named executive officers and other publicly disclosed arrangements with gross-ups are viewed unfavorably by proxy advisory firms).

Medicare Overview

Medicare is a federal health insurance program for individuals who are 65 or older or who have certain disabilities. Original Medicare consists of two parts—Part A (hospital insurance) and Part B (medical insurance). Most individuals will get Part A for free automatically when they turn 65 after applying for Social Security benefits. However, Part B is a voluntary program and requires payment of a monthly premium. Individuals can enroll in Part B during their seven-month initial enrollment period, which starts three months before the month in which they turn 65 and ends three months after the month in which they turn 65.

If an individual has health plan coverage through their employer's health plan during their initial enrollment period, they are generally eligible to enroll in Medicare during a special enrollment period, which is up to eight months after their health coverage as an active employee ends or their employment ends, whichever happens first (this does not include retiree health coverage or COBRA coverage). **Losing employer health plan coverage under COBRA does not trigger a special enrollment period for Part B.** If an individual does not elect to start Part B during their initial enrollment period or a special enrollment period, they must wait until the general enrollment period, which runs from January 1 to March 31, and may have to pay lifetime monthly late enrollment penalties. Not timely enrolling in Part B could also result in gaps in coverage.

Implications and Timing of COBRA and Medicare Elections

If an individual is enrolled in Medicare (Part A or Part B) before they are eligible for COBRA, they are still eligible to enroll in COBRA and have coverage under both COBRA and Medicare. However, generally COBRA coverage pays secondary to Medicare.

If an individual is not enrolled in Medicare before they are eligible for COBRA, subsequent enrollment in Medicare can prematurely terminate their COBRA coverage (although individuals may be able to keep coverage for services that Medicare does not cover, such as dental or vision benefits). For example, this can occur if the individual turns 65 and is automatically enrolled in Part A after applying for Social Security benefits, or it can occur upon enrollment in Part B (whether or not previously enrolled in Part A). However, if an individual either does not enroll in Part B when they are first eligible, or, if later during their special enrollment period after their employment ends—for example, if the individual waits to enroll until the end of their COBRA coverage period—the individual may have a gap in coverage until the next general enrollment period and may have to pay lifetime monthly late enrollment penalties.

Proskauer Perspective

C-suite executives who are at least 65, or will turn 65 during a COBRA continuation period, and are not already enrolled in Medicare when they experience separation from their employer should carefully consider whether to enroll in Medicare upon their separation based on their personal circumstances. The executive may decide not to elect COBRA and instead enroll in Medicare. If the executive would have otherwise negotiated or is already entitled to subsidized COBRA premiums, the executive may alternatively try to negotiate a cash payment or other benefit from their employer to retain similar economic value in exchange for relieving the employer of its obligation to pay subsidized COBRA premiums and otherwise cover the executive under its health plan.

In light of the technical details and interactions between COBRA and Medicare, it is important for both companies and C-suite executives to be mindful of the nuances and engage competent legal counsel. Proskauer's Employee Benefits and Executive Compensation team is advising companies and executives on the negotiation of severance and retirement arrangements. Please contact a member of our team with questions.

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