

Economic Stimulus Bill has Sweeping Impact on Employee Benefits

On February 17, 2009 President Obama signed the economic stimulus package, the American Recovery and Reinvestment Act of 2009 (“Act”), into law. The Act makes significant changes to COBRA continuation coverage rules as well as rules governing other employee benefit arrangements. **THE ACT REQUIRES IMMEDIATE EMPLOYER ATTENTION AND ACTION AND APPLIES TO MANY EMPLOYERS NOT OTHERWISE SUBJECT TO FEDERAL COBRA CONTINUATION COVERAGE.**

COBRA CONTINUATION COVERAGE RULES UNDER THE ACT

In general, the Act provides qualifying individuals a 65% subsidy toward COBRA continuation coverage costs. (References in this memo to “COBRA coverage” refer to state-mandated continuation coverage as well as federal COBRA.) This subsidy is paid by the employer, who is in turn reimbursed for the amount by the federal government. The Act also provides a special continuation coverage enrollment right and extended COBRA coverage periods for eligible individuals.

COBRA Subsidy

Eligibility for the Subsidy

The COBRA subsidy is available to employees, their spouses, and dependents, where the employee:

1. experienced or experiences an involuntary termination of employment between September 1, 2008 and December 31, 2009;
2. is eligible to elect COBRA continuation coverage under federal law or a similar state mandated continuation coverage law; and
3. elected COBRA continuation coverage, either at the time of the involuntary termination or during the extended COBRA election period (explained below).

Further guidance is needed on what constitutes an “involuntary termination,” including whether employees terminated through a voluntary reduction-in-force, early retirement program, or other constructive discharge are eligible for the subsidy.

Eligibility for the subsidy is phased out if an individual’s modified adjusted gross income for the tax year is between \$125,000 and \$145,000 (\$250,000 and \$290,000 for joint filers). If an individual earning income above these thresholds receives an excess subsidy, the individual must report the subsidy on his federal income tax return and repay the excess subsidy directly to the federal government. Individuals are permitted, however, to make a one-time election to waive the right to the subsidy.

If an individual’s former employer opts to pay a portion of the COBRA premium, the amount of the subsidy is proportionately reduced. For example, if an employer offers a severance package under which the employer pays 50% of required COBRA premiums, the applicable subsidy is limited to 65% of the remaining premium balance. As a result, employers who are planning to include employer-paid health plan premiums as part of a severance package should carefully consider how this will impact the availability of the subsidy.

The subsidy is available for premium payments toward any plan that is subject to federal COBRA continuation coverage rules or a state mandated continuation coverage law other than health flexible spending accounts.

Duration of the Subsidy

The subsidy is available for a maximum of 9 months, and will terminate earlier if the individual becomes eligible for coverage under another health plan (including Medicare), the right to continuation coverage ends, or the maximum COBRA period ends.

The subsidy must be provided beginning with the first coverage period after February 17, 2009. For plans that bill on a monthly cycle, this means coverage must be subsidized beginning on March 1, 2009. However, the Act allows for up to a two-month transition period provided that excess premiums paid during this period must be refunded or credited to the individual.

Subsidy Reimbursement

Employers become eligible to recoup the subsidy once the individual has paid his 35% share of the premium. The subsidy is actually recouped via a reduction of federal payroll taxes (including wage withholding and FICA taxes) as provided for on Form 941. In certain circumstances, an insurance company providing plan benefits is entitled to the subsidy reimbursement.

Each employer entitled to the subsidy reimbursement is required to file certain reports in connection with subsidies paid.

Special Continuation Coverage Enrollment Rights

Additional Time to Elect Continuation Coverage

An individual who would otherwise qualify for the subsidy, but did not elect COBRA coverage or lost such coverage prior to February 17, 2009, must now be given a new opportunity to elect COBRA. While such newly elected coverage is effective prospectively only, the maximum COBRA period is measured from the original qualifying event date. Further, the period between the date the individual previously lost coverage and the date continuation coverage now begins is disregarded in calculating a break in coverage for purposes of the pre-existing condition coverage limitations under the Health Insurance Portability and Accountability Act of 1996. An election made pursuant to this provision of the Act must be made within 60 days from the date notice of the additional time to elect continuation coverage is provided.

Ability to Change Coverage Option

The Act grants a special enrollment right to choose a different plan coverage option if: (i) the employer has elected to permit enrollment in a different coverage

option; (ii) the premium for the new coverage does not exceed the premium for the coverage the individual was enrolled in at the time of the involuntary termination; (iii) the different coverage is not a flexible spending account, dental only, vision only, or similar plan; and (iv) the alternative coverage is also offered to the employer's active employees. The election to change coverage options must be made within 90 days from the date notice of this special enrollment right is provided.

Notice Requirements

The Act provides that employers must provide notice to all employees and their eligible spouses and dependents who experienced a COBRA qualifying event between September 1, 2008 and December 31, 2009, regardless of whether the qualifying event was or is an involuntary termination. The Notice must describe the subsidy and ability to enroll in a different coverage option (if so permitted by the employer). For individuals who became eligible for COBRA between September 1, 2008 and February 16, 2009, this notice must be provided by April 18, 2009. For individuals who become eligible for COBRA between February 17, 2009 and December 31, 2009, it appears this notice must be provided at the time the usual COBRA election notices are provided.

Notice must also be provided to any individual who was involuntarily terminated on or after September 1, 2008, as well as their spouse and dependents, who did not elect COBRA or have since lost COBRA coverage, informing them of the extended period within which they may make a COBRA election. This notice must be provided by April 18, 2009.

The Department of Labor is required to issue a model notice for these purposes, no later than March 19, 2009.

Further guidance is needed regarding the timing of notices for health plans that are subject only to state continuation coverage laws.

Further Guidance Expected

The Internal Revenue Service and the Department of Labor are expected to publish model notices by March 19, 2009 and further guidance on the Act generally in

the coming weeks. Pending the issuance of further guidance, employers must carefully consider how they will comply with the Act's requirements, especially in light of the timing of the usual COBRA notices.

ACTIONS EMPLOYERS NEED TO BE TAKING NOW

1. Decide whether to wait for model notices or revise or prepare a supplemental COBRA notice to be given now. The notice must include:
 - Description of the COBRA subsidy and eligibility requirements
 - Contact information for the plan administrator
 - Information on the special COBRA election rights
 - Information and procedures (and forms) for waiving the subsidy
 - Information on the obligation to notify the employer of eligibility for other plan coverage and the penalty for failing to notify the employer
2. Review all terminations that have occurred since September 1, 2008 and determine who declined COBRA or has lost COBRA coverage.
 - Provide these individuals with the notice and election form to elect COBRA now
3. Determine whether to eliminate any employer premium payments for those who have involuntarily terminated employment since September 1, 2008.
 - If the employer-provided payment is eliminated, determine whether and how to make up the 35% premium to be paid by the employee (such as a taxable cash severance payment).
4. Determine whether the Plan will use the permitted two-month transition period.
 - If yes, individuals will need to be reimbursed or credited with any overpayments.
5. Determine whether individuals will be allowed to elect other coverage options (at the same or lower costs).
6. Modify payroll administration to reflect the COBRA subsidy. This will include:
 - Identifying eligible individuals
 - Calculating the amount of the subsidy
 - Tracking payment of the employees' 35% portion of COBRA premiums
 - Tracking the duration of the subsidy
7. Prepare any required reporting to the government (further guidance on employer reporting is expected).

Once you have reviewed this memorandum, please contact us using the below contact information to discuss what steps your organization may need to take to be in compliance with the Act.

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