

Stimulus Bill Contains Temporary COBRA Premium Subsidy for Involuntarily Terminated Employees

The economic stimulus bill signed into law on February 17, 2009 by President Obama (known as the American Recovery and Reinvestment Act of 2009 (the "Act")) contains temporary provisions relating to continuation of group health insurance coverage under COBRA. Generally, under COBRA, employees who lose their jobs can elect to continue their employer-sponsored group health insurance coverage if they pay 100% of the cost of the coverage (plus a 2% administrative fee). The Act's temporary COBRA provisions include a subsidy for premiums designed to make COBRA continuation benefits less expensive (and therefore more attractive) to employees and their eligible dependants. The temporary subsidy and related provisions will affect employers in significant ways, and will require prompt action. This Employment Law Alert summarizes the Act's key COBRA-related provisions.

The Temporary COBRA Subsidy

The Act makes certain involuntarily terminated employees (and their covered dependants) eligible for a 65% COBRA premium subsidy for up to nine (9) months. In other words, employees will only need to pay 35% of the cost of monthly COBRA premiums. The Act provides that "the person to whom premiums are payable" (which may be: (i) the plan in the case of any group health plan which is a multi-employer plan, (ii) the employer sponsoring the group health plan, or (iii) the insurer providing the coverage under the group health plan) shall pay the COBRA subsidy amount (65% of the premium) upfront and then recoup that amount from the federal government via a credit against payroll taxes. (If the COBRA subsidy pay-

ments paid exceed the payroll taxes owed, the U.S. Treasury will issue reimbursement for the excess payment.) The Act does not provide details about how this credit and reimbursement scheme will work, however, further guidance from the federal government is expected.

Employers who are not covered by federal COBRA (because they have fewer than 20 employees) may still be impacted by the Act. The Act, by its terms, applies to state programs [such as mini-COBRA laws] that provide health care continuation.

Eligibility

An "assistance eligible individual" is defined as a person who becomes eligible for COBRA between September 1, 2008 (the Act looks backwards to September 1, 2008) and December 31, 2009 as the result of a covered employee's involuntary termination of employment during such period, and who elects COBRA coverage. The term "involuntary termination" is not defined in the Act, however it should encompass layoffs and most terminations except those for gross misconduct. Further U.S. Department of Labor guidance, in the form of regulations and educational outreach to employers, is expected.

There are also income limitations. The full 65% subsidy is available for individuals with a modified adjusted gross income of \$125,000 (\$250,000 for joint filers) or less for the tax year in which the subsidy is received. A reduced subsidy is available to individuals with a modified adjusted gross income between \$125,000 and \$145,000 (\$250,000 and \$290,000) for joint filers). Under the Act, an assistance eligible

individual who pays more than 35% of the COBRA premium during the first and second months of eligibility, must be refunded any premium overpayment unless such overpayment can be applied to future 35% premium payments (within 180 days).

Temporary Duration of Subsidy

Although the subsidy is available for nine months, it does not extend the maximum period of coverage required under COBRA (generally 18 months after an employee's termination of employment). It also will terminate sooner than nine months if the covered individual becomes eligible for coverage under another group health plan (other than coverage consisting of only dental, vision, counseling or referral services, or a combination thereof; coverage under a flexible spending arrangement; or coverage of treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, preventative and wellness care or similar care) or Medicare. If the covered individual remains eligible for COBRA coverage after the end of the 9-month temporary subsidy, then that person must pay the full cost of COBRA premiums for the remainder of the COBRA period.

Individuals receiving the subsidy are required to notify the group health plan in writing when they become eligible for coverage under another group health plan

(among other events that would cause the subsidy to terminate). The Department of Labor is expected to issue further guidance regarding employee notice obligations. The Act provides for the individual to be subject to a penalty equal to 110% of the premium reduction provided after eligibility terminated for the employee's failure to provide the required notice (absent a showing of reasonable cause).

Option to Change Coverage

Employers and group health plans may provide a special enrollment right for individuals eligible for the COBRA subsidy to elect different coverage under the plan than the coverage they had at the time of the involuntary termination. The alternate coverage must meet certain requirements (e.g., it must also be offered to active employees) and may not be more expensive than the original coverage in which the individual was enrolled at the time the qualified event occurred.

Special Election Period Requires Employer Notice

Because the eligibility period looks back to September 1, 2008, individuals who would have been eligible for the subsidy, but who declined or did not elect COBRA coverage as of February 17, 2009 (or who previously elected then terminated COBRA coverage), will have a special sixty-day election period under the Act. This special election period begins February 17, 2009 and ends sixty days after the date notice of the subsidy is provided. (Coverage elected during this period begins with the first period of coverage beginning on or after February 17, 2009; it is not retroactive to the date of the individual's involuntary termination.)

Notice regarding the availability of the temporary subsidy must be given to eligible beneficiaries. This means that employers must identify involuntarily terminated em-

ployees going back to September 1, 2008 in order to provide the required notice to eligible beneficiaries by April 18, 2009. The employer can amend its COBRA notice or provide a supplemental notice that contains required information about the subsidy. The Act requires the Department of Labor to promulgate model notices before March 19, 2009.

General Notice Obligation

Employers must also provide notice to individuals who become entitled to elect COBRA continuation coverage after February 17, 2009. The Act specifies requirements for the notice, which include:

- the forms necessary for establishing eligibility for the premium subsidy;
- the name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with the premium subsidy;
- a description of the Act's extended special election period;
- a description of the obligation of the qualified beneficiary under the Act to notify the plan providing continuation coverage of eligibility for subsequent coverage under another group health plan or Medicare and the penalty provided under the Act for failing to notify the plan;
- a description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium; and
- a description of the option of the qualified beneficiary to enroll in different coverage if the employer permits such beneficiary to elect to enroll in such different coverage under the Act.

What Should Employers Do?

Although additional guidance is expected from the Department of Labor and De-

partment of the Treasury, the temporary COBRA provisions are effective for most employers as of March 1, 2009. Accordingly employers should consider the following steps:

- In light of the special election period, employers should immediately identify those involuntarily terminated employees who are eligible for the subsidy and communicate with the plan administrator (if applicable) to determine who will be responsible for sending the notices to comply with the Act's requirements.
- Employers should review their severance agreements and practices with respect to the continuation of health insurance benefits and the payment of premiums. Read literally, the Act requires the employee to pay 35% of the premium, so it is not yet clear if the subsidy (and payroll tax credit) is available if the employer provides complete post termination coverage without cost to the employee or if the employee pays less than 35%. Thus, employers should consider paying post-involuntary termination health premiums in a way that takes advantage of the payroll tax credit.
- Employers should review and update their COBRA notices and forms or work with their plan administrators to ensure compliance with the Act.
- Employers should begin planning to take steps to recover any premium payments as payroll tax credits.

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