

Employee Benefits Client Alert:
March 2009

**Employers Must Act Immediately To Comply With New
COBRA Subsidy and Disclosure Rules**

The American Recovery and Reinvestment Act of 2009 (“ARRA”) which was signed into law on February 17, 2009 provides new COBRA rights for individuals who become eligible for COBRA coverage as a result of an involuntary termination of employment that occurs between September 1, 2008 through December 31, 2009.

To comply with this legislation, and thus avoid significant monetary penalties, employers must act now—at a minimum--to identify COBRA eligible individuals; implement changes to their COBRA procedures and payroll systems; and be ready to provide new COBRA notices by April 18, 2009.

The 65% Premium Subsidy

Under the new COBRA provisions of ARRA employees who were involuntarily terminated (and their families) are entitled to a 65% subsidy of their total monthly COBRA premium for no more than 9-months beginning on or after February 17, 2009. Such individuals need pay only 35% of the total premium amount to receive COBRA coverage during this 9-month period. For most plans the COBRA premium subsidy is assessed monthly, and therefore the subsidy period begins on March 1, 2009.

Employers with less than 20 employees in the previous year may be subject to a state mandated “mini-COBRA” provision. Such employers may also be required to provide a premium subsidy. For further information on the mechanics of this subsidy, small employers should immediately consult with their employee benefits attorney.

High-income individuals (defined as \$125,000-\$145,000 for single filers; \$250,000-\$290,000 for joint filers) are subject to either a full or partial recapture of the subsidy on their income tax returns, depending upon the amount of their

modified adjusted gross income, and therefore may elect to waive the right to this subsidy in order to avoid recapture tax liability.

Mechanics of the 65% Premium Subsidy

ARRA provides that a plan must treat eligible qualified beneficiaries as satisfying their premium payment obligation upon receipt of 35% of the premium amount. If the qualified beneficiary has already paid the full premium amount for March or April of 2009, the plan must credit the excess amount paid against future premium payments due or reimburse the excess amount. Starting May 1, 2009, this 2-month grace period will no longer be available and eligible qualified beneficiaries may not be charged more than 35% of the COBRA premium.

The employer is to be reimbursed for the 65% premium subsidy through an offset arrangement against its payroll tax liability, i.e., a tax credit, using a newly revised Form 941. The IRS will require additional information from the employer to substantiate application of the credit against payroll taxes, and is currently working out the mechanics of this additional reporting requirement. If the reimbursement that is owed to the employer is greater than the employer's payroll tax liability, a credit or refund of the excess will be issued to the employer. A plan sponsor claiming this credit must keep sufficient supporting records.

The 65% premium subsidy (but not necessarily the right to continued COBRA coverage at full premium cost) is cut off upon the earlier of the following events: 9-months after the date the individual becomes eligible for the subsidy; the date COBRA would otherwise expire; the date the individual becomes eligible for Medicare or for coverage under another group medical plan (even if not enrolled); or the date the individual fails to pay 35% of the monthly premium payment.

A Second Bite at the Apple: The Extended Election Period

Employees who were involuntarily terminated on or after September 1, 2008 that either did not elect COBRA when initially eligible or who elected COBRA coverage which terminated before March 1, 2009 may receive a second bite at the apple by electing COBRA coverage within 60 days after receipt of an enhanced notice of COBRA subsidy eligibility provided by the employer. These individuals will not be subject to any pre-existing condition limitation

that might otherwise arise from a 63-day+ break in creditable coverage. For individuals who sign up for the extended election period, COBRA coverage will apply prospectively and the election will not extend the maximum COBRA coverage period that is otherwise available.

Optional Enrollment in a Less Expensive Medical Plan

In addition to the COBRA subsidy, a plan sponsor may allow all eligible employees to switch medical plan options or enroll in a less expensive medical plan, thus reducing the applicable COBRA premium amount. For this purpose, medical plans do not include dental, vision or counseling-only coverage (such as an employee assistance plan), health FSAs, or an onsite clinic that only provides first aid, preventive or wellness care. Employers offering this opportunity must give eligible employees advance notice of this right and permit the eligible individual at least 90 days to make the switch or complete the new enrollment.

Enhanced COBRA Notice Required

All individuals who are entitled to elect COBRA between September 1, 2008 and December 31, 2009 (whether or not involuntarily terminated) are entitled to receive from the employer an enhanced notice explaining these new COBRA rights. Individuals who already received a COBRA election notice may be provided a model form of notice that will be furnished by the Department of Labor on or about March 19, 2009. *(Let us know if you may be interested in having us automatically send you the model notice when it is issued).*

The employer must provide those individuals who qualify under the extended election period the enhanced notice by April 18, 2009.

Enforcement

A plan that fails to timely comply with the enhanced COBRA notice requirements will trigger potentially significant monetary penalties, including a \$110 a day civil penalty for each day that the notice is late. Eligible individuals may also sue under ERISA to enforce their COBRA rights.

Checklist of Steps Employer Must Take To Comply

An employer subject to the new COBRA subsidy and disclosure rules should immediately prepare to take the following steps to comply:

- Identify all qualified beneficiaries who are eligible for COBRA coverage between September 1, 2008 and December 31, 2009. Each is entitled to receive an enhanced COBRA notice to be issued by the Department of Labor. As of now, there is no deadline for sending this notice.
- Identify all qualified beneficiaries above who were involuntarily terminated between September 1, 2008 and December 31, 2009. The individuals who qualify for the extended election period must receive an enhanced COBRA notice from the employer by April 18, 2009.
- Determine whether any qualified beneficiaries eligible for the COBRA subsidy overpaid the premium amount for March or April 2009 COBRA coverage. If so, arrange for granting of a credit or reimbursement of the overpayment, as applicable. Also establish procedures to ensure that eligible qualified beneficiaries pay no more than 35% of the premium amount as of May 1, 2009.
- Determine whether to offer the lower cost coverage option. If so, issue an advanced notice of this option to individuals eligible for the COBRA subsidy, and follow up as required on the switches or new enrollments requested.
- Document any waivers of the COBRA subsidy by high-income individuals. Employers may want to consider preparing and making use of a waiver form for this purpose.
- Implement necessary changes to COBRA procedures and payroll systems required to track the 9-month COBRA subsidy period, to terminate the COBRA subsidy of individuals no longer eligible to receive it, and to obtain tax credits for the subsidized amounts in accordance with IRS procedures.

Additional Guidance

Department of Labor (<http://www.dol.gov/ebsa/COBRA.html>)

Internal Revenue Service

(<http://www.irs.gov/newsroom/article/0,,id=204505,00.html>)

Please feel free to contact us for further information. We would be pleased to answer your questions, address your concerns and assist your compliance efforts.

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