



Economic Stimulus Bill Expands Cobra Requirements

Insights

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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), which, among other things, provides for a nine-month subsidy of COBRA premiums for employees who are involuntarily terminated. The law also subjects employers to additional administrative and notice requirements.

The COBRA Subsidy

The subsidy for COBRA coverage (excluding health FSAs) is available to individuals who were involuntarily terminated from employment between September 1, 2008 and December 31, 2009. The COBRA subsidy also extends to spouses and dependents who are qualified beneficiaries.

Specifically, beginning March 1, 2009, eligible individuals will only be required to pay 35% of the COBRA premium for coverage under a prior employer's health plan instead of the full amount. Depending on how the plan is funded, the employer or health plan (payor) pays the remaining 65% of the premium. The payor is reimbursed for its payment of 65% of the premium by taking a credit for those premiums against its payroll taxes to the federal government for current employees. If the credit is insufficient to cover the payor's COBRA expense, then the remainder is reimbursed directly from the Treasury Department.

An individual's eligibility for the subsidy terminates on the earlier of 1) the individual becoming eligible for coverage under another group health plan or Medicare or 2) the end of the 9-month period of subsidy. The ARRA does not extend COBRA coverage beyond the original maximum required period, which is generally 18 months after an employee's termination of employment.

Although neither the language of the ARRA nor the legislative history indicates whether the subsidy applies to COBRA premiums with the addition of the optional 2% administration fee, the language of the ARRA seems to imply that the premium subsidy is based upon the full 102% premium.

Employer Notice Requirement and Retroactive Application of the Subsidy

The ARRA provides eligible individuals a special 60-day period to elect subsidized COBRA continuation coverage. Notice of this right must be sent to otherwise-eligible individuals no later than April 18, 2009, even if they declined COBRA coverage in the past. This notice may be supplied via a modified COBRA notice, or in a separate document. The Secretary of Labor is charged with issuing form notices for this purpose within 30 days.

This special 60-day election period starts the day the eligible individual is provided notice regarding the availability of the COBRA subsidy. If an eligible individual who terminates prior to March 1, 2009 elects COBRA coverage after receiving the special 60-day election notice, then coverage begins on March 1, 2009, not on the date of the individual's initial qualifying event. The extended election period does not extend the period of COBRA continuation coverage beyond what would have been available if COBRA had been initially elected.

Electing a Change in Coverage

Prior to the enactment of the ARRA, qualified beneficiaries could generally only elect to continue the type of coverage they had immediately before the qualifying event until the next open enrollment period. Under the ARRA, eligible individuals may be able to elect a different type of coverage in conjunction with electing COBRA if 1) the employer permits such a change in enrollment, 2) the premium for the different coverage is not more than the premium for the coverage in which the individual was enrolled at the time of the qualifying event and 3) the coverage option is one that is offered to the employer's active employees.

If an employer provides eligible individuals with an option to enroll in different coverage, eligible individuals must make their election to change coverage options within 90 days after being given notice of the option to change coverage.

Employee Notice Requirement

Recipients of the COBRA subsidy are required to notify the group health plan providing subsidized COBRA coverage of their eligibility for other health coverage under another group health plan or Medicare. Failure to provide proper notice may result in a penalty of 110% of the subsidy provided.

Elimination of Subsidy for High-Income Individuals

The ARRA provides a recapture provision for premium assistance provided to high-income taxpayers. For taxpayers with modified adjusted gross income (MAGI) for a year in excess of \$125,000 (\$250,000 in the case of a joint return) the taxpayer's gross income is increased by all or a portion of the premium subsidy. There is a phase-in to full income inclusion of the subsidy for taxpayers whose MAGI is between \$125,000 and \$145,000 (between \$250,000 and \$290,000 for a joint return). High-income individuals are permitted to waive the subsidy in order to avoid income inclusion by making a permanent election with the employer or the plan.

What You Should Do Now

As usual, there are many details that will need to be filled in through further guidance from the Internal Revenue Service and the Department of Labor. In the meantime, we recommend that employers begin taking the following steps:

- Compile a list of all assistance eligible individuals who will need to be notified, which generally includes all former employees who were involuntarily terminated on or after September 1, 2008 and any eligible spouses and dependents who were enrolled in coverage prior to the termination;

- Revise payroll systems to identify eligible individuals in order to report the tax credit to the government and receive the subsidy;
- If a plan is insured, check with the insurance carrier to determine the appropriate procedures for enrolling assistance eligible individuals who are not currently enrolled in COBRA continuation coverage;
- If a plan is self-insured, review stop-loss contracts to determine whether coverage applies to assistance-eligible individuals who are not currently enrolled in COBRA continuation coverage;
- Modify applicable COBRA premium billings for March 2009 coverage to take into account the 65% subsidy; and
- Stay tuned for more information regarding the details, including model notices and updated employment tax forms for taking the subsidy credit.

For future updates please contact a member of the firm's Employee Benefits Practice Group.

This Legal Alert provides an overview of new law. It is not intended to be, and should not be construed as, legal advice for any specific factual situation.