

## NEW COBRA RULES FOR EMPLOYERS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

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 65% premium subsidy of COBRA for nine (9) months for employees or their dependents who lose group health plan coverage due to an involuntary termination of employment between September 1, 2008 and December 31, 2009. The law also imposes additional administrative and notice requirements on employers.

### What is the COBRA Premium Subsidy?

Specifically, beginning March 1, 2009, eligible individuals only will be required to pay 35% of the COBRA premium for coverage under a prior employer's health plan instead of the full amount of the premium. The employer pays the remaining 65% of the premium. The employer thereafter will be 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 employer's COBRA expenses, then the remainder is reimbursed directly from the Treasury Department.

### Who Is Eligible for the Subsidy?

The subsidy for COBRA coverage is available to individuals (and their dependents and/or qualified beneficiaries) who were or are (1) involuntarily terminated from employment between September 1, 2008 and December 31, 2009, and (2) elect COBRA continuation coverage either during the initial COBRA election period or, for those who were terminated prior to the effective date of this law, who elect COBRA coverage during the "special election period" (described below). Those who are eligible for other group health coverage (such as a spouse's plan) or Medicare are not eligible for the premium reduction.

Individuals involuntarily terminated from September 1, 2008 through February 16, 2009 who did not elect COBRA when it was first offered or who did elect COBRA, but are no longer enrolled (for example because they were unable to continue paying the premium) have a new election opportunity. This election period begins on February 17, 2009 and ends 60 days after the plan provides the required notice (the "special election period"). This special election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee's involuntary termination). COBRA coverage elected in this special election period begins with the first period of coverage beginning on or after February 17, 2009.

Although the subsidy is available to all eligible individuals as described

above, the subsidy will be subject to income tax for those classified as "high income individuals." For these individuals, the subsidy becomes taxable on a sliding scale. For single filers, the phase-in starts at a modified adjusted gross income (AGI) of \$125,000 (\$250,000 for joint filers) and with full taxability for those earning at least \$145,000 (\$290,000 for joint filers), and, taxability for those earning at least \$290,000. A "high income individual" may waive the subsidy by notifying his or her employer and paying the full COBRA premium, thereby avoiding having to report the subsidy and paying the tax on his or her annual income tax return.

While COBRA generally does not apply to plans sponsored by employers with less than 20 employees, many states have similar mini-COBRA statutes/requirements for small plans providing benefits through an insurance company. The premium subsidy is available for plans covered by these state laws; however, the "special election period opportunity" does not apply to coverage sponsored by employers with less than 20 employees that is subject to state law.

### When Does the COBRA Premium Subsidy Terminate?

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. COBRA coverage does not extend beyond the original maximum required period, which is generally 18 months after an employee's termination of employment.

### What are an Employer's New COBRA Notice Requirements?

The law 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 by a modified COBRA notice, or in a separate document. The Secretary of Labor must publish form notices within 30 days of the Act's enactment.

The Act requires employers to amend COBRA notices to inform all individuals who become eligible for COBRA between September 1, 2008 and December 31, 2009, of the following:

1. A description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium;

2. A description of the eligibility rules for the premium reduction/subsidy and its duration;
3. An eligible individual's ability to make a COBRA election even if COBRA was initially declined (i.e., a description of the special election period);
4. The option to elect different, but same or lower-premium coverage, if available;
5. A description of how the premium subsidy may be elected, including the name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium subsidy; and,
6. An explanation of an individual's obligation to notify the plan of eligibility for other group plan or Medicare coverage and the penalty for failure to provide this notification.

This notice may either be incorporated into other COBRA materials explaining election rights or be sent with other COBRA materials as a separate notice.

The 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.

The law also provides for an expedited review process by the Department of Labor for individuals who are denied the premium subsidy (whether by their plan, the employer or an insurer), and the DOL must make a determination within 15 business days of its receipt of a completed request for a review.

## What Are The Employee's Notice Requirements?

Individuals who receive 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.

## What Steps Should Employers Take Now?

Further guidance and model notices from the Internal Revenue Service and the Department of Labor on the new COBRA subsidy under the AARA are expected. In the meantime, in addition to updating the company's form COBRA notices, employers should begin to compile a list of all individuals eligible for the subsidy 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. Employers with insured plans should also contact their insurance carriers to determine the steps that will need to be taken to enroll individuals who elect coverage during the special election period and who currently are not enrolled under the employer's health insurance plan. Finally, the company's payroll processes should be reviewed and updated to meet the requirements of the AARA.

If you have any questions regarding the new COBRA requirements under the AARA or need assistance with drafting new COBRA notices, please contact our office.