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COBRA and the American Recovery and Reinvestment Act

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President Obama has now signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA"), effective February 17, 2009.

The COBRA provisions in the Act are now finalized. The age 55 or 10 years of service requirement providing COBRA continuation coverage until Medicare eligibility has been dropped from the law. The Act will now apply not only to employers with 20 or more employees on more than one-half of the business days in the previous year, but to employers with fewer than 20 employees if the state in which they operate has a "mini-COBRA"

However, the subsidy provisions have remained. Thus, there is now a 65 percent subsidy, advanced by the employer or plan sponsor and then recouped via a credit against payroll tax submissions. The subsidy is available to Assistance Eligible Individuals ("AEIs") for up to nine months. The subsidy is not retroactive, but begins with the first COBRA coverage period after February 17th, which for most employers will be March 1st, and lasts for up to nine months.

To be eligible for a subsidy, all of the following must occur:

1. The employee must have been involuntarily terminated on or after September 1, 2008 and before January 1, 2010. Since the Act does not adequately define involuntary termination, we believe it covers not only a laid-off employee but one who is fired as well (just not for gross misconduct). But many questions remain that are not answered in the Act itself: is an employee who accepts the terms of a severance agreement considered an involuntary termination? An employee who quits in anticipation of a layoff?
2. The qualifying individual must have annual taxable income of less than \$125,000 for an individual or \$250,000 for a couple in order to receive (and be allowed to keep) the full subsidy. There is a gradual phaseout of the subsidy allowance for AGI between \$125,000 and \$145,000 for an individual, and between \$250,000 and \$290,000 for a couple. If such an individual receives a subsidy and is later determined to not meet the income qualification requirements, the subsidy must be repaid in whole or in part via an additional tax liability on their 2009 or 2010 income tax filing. The Act does provide a waiver provision for an AEI to opt-out of the subsidy.

In a change from “regular” COBRA coverage, an AEI can elect a lesser amount of coverage if the plan sponsor opts to make such lesser-cost COBRA coverage available to AEIs. That is, if the employer offers one or more other health plans that cost less premium, the COBRA qualified beneficiary can elect that plan instead if the employer so allows. This does not apply to dental or vision-only plans, counseling plans, health care flexible spending accounts or HRAs. It does however apply to health plans. AEIs will have 90 days from the date of the new notice to make a lesser-cost election. Once a qualified beneficiary makes such a decreased election, that new benefit becomes “COBRA-ized”, and until another open enrollment period the qualified beneficiary may not change their coverage level.

There is a new notice requirement relating to this subsidy. First, all newly COBRA eligible participants who are involuntarily terminated must be given a notice outlining the subsidy provisions. Second, a new notice must be sent out to any employee who was involuntarily terminated between September 1, 2008 and February 16, 2009 and who didn't elect COBRA coverage or who did elect such coverage but had it terminate re-offering a new COBRA election, along with notice of the subsidy provisions. That second category of noticed employees will then have a new 60 day window in which to elect COBRA coverage back to the date of the involuntary termination, and in which to receive the subsidy prospectively only.

In order to recoup the advanced subsidy amount, the employer reduces its payroll tax deposits in the period in which the AEI makes his or her 35 percent payment. While all of the reporting mechanisms required for this tax deposit reduction are not outlined sufficiently in the Act, it does stipulate that each tax deposit taking a subsidy credit must be accompanied by a data feed to the IRS with an attestation of each AEI's involuntary termination, the calculation of the tax deposit offsets, an estimate of the next tax deposit period's subsidy offsets, the amount of each individual's subsidy amount, and whether the subsidy is for individual or coverage of two or more individuals.

What to Do Now

There are nine things employers subject to COBRA or a state “mini-COBRA” law must do (and quickly):

1. Identify AEIs involuntarily terminated such that health coverage was lost back to September 1, 2008, as well as identifying their eligible dependents.
2. Determine if the employer wishes to continue to subsidize COBRA coverage if it does so already.
3. Determine if the employer will allow a lower-cost coverage option to be available for AEIs. This is an option allowed under the Act, but is not required.

4. Revise and update all COBRA communication materials, and in particular the new subsidy notice(s).
5. Notify all AEIs by April 18, 2009 of the new COBRA election period and the availability of a premium subsidy.
6. Determine your subsidy waiver procedure and implement that process. This may entail modifying the election forms themselves.
7. Coordinate with payroll systems/vendors and COBRA billing systems for paying and collecting the premium subsidy. Determine the procedure to administer the payroll tax deposit credit and to report the required items to the IRS in order to recapture the subsidy through the payroll tax deposits.
8. Develop a mechanism for premium overpayments, which are most likely to occur for the March 1 and April 1 coverage periods since the newness of the law and the lack of specific guidance will not enable many employers to be fully compliant within the two weeks between the enactment of the law and its first effective period of coverage. The Act provides that if an AEI makes a full payment (rather than only 35 percent of the applicable premium) the employer can either refund the difference or apply it to a future payment. However, such crediting against future payments must be calculated to not last more than 180 days.
9. Determine processes and procedures to end the subsidy either when the nine months of subsidy expire or COBRA coverage terminates.

There are many unanswered questions in the Act. Until the IRS, the Department of Labor, and HHS release further guidance and model notices as required by the Act ([Model Notices](#) were provided by DOL on March 19, 2009), an employer is best served to make good-faith efforts to comply. As soon as such guidance is forthcoming we will update this information.

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