



Legal Alert: Economic Stimulus Act Impacts COBRA Coverage

2/18/2009

Signed by President Obama on February 17, 2009, the American Recovery and Reinvestment Act of 2009 ("ARRA" or the "Act") expands COBRA in ways that, although temporary, will certainly impact employers. Most significantly, the ARRA offers "assistance eligible individuals" a 65% subsidy of their required COBRA premiums and an additional enrollment period within which to elect COBRA coverage.

The Subsidy:

The ARRA gives eligible individuals a 65% subsidy of the COBRA premiums they would be required to pay for any group health plan in which they participated at the time of their termination. Eligible individuals who elect COBRA can benefit from the subsidy for up to nine months. The subsidy does not apply to flexible spending accounts.

How It Works:

The "assistance eligible individuals" pay only 35% of their COBRA premiums otherwise charged under the group health plan. The remaining 65% of the COBRA premiums, which are paid by the employer (or by the plan, if a multiemployer plan), will be reimbursed through a payroll tax credit to the employer, to the plan (if plan is a multi-employer plan), or, in some limited cases, to the insurer. The credit will be taken on the Form 941 that is filed for the period during which the subsidized premium is paid, and the payment of the subsidized premium will be treated as a deposit of payroll taxes for purposes of, e.g., penalty computations. The Secretary of the Treasury is expected to issue further guidance concerning the tax credit. If the payroll tax credit does not reimburse the entity for the total amount of its subsidized COBRA expenses, then the remaining amount will be reimbursed by check from the Treasury.

Who is Eligible:

An assistance eligible individual is any person who loses health coverage as a result of being "involuntarily terminated" between September 1, 2008 and December 31, 2009, and the terminated person's dependents, as long as the person's adjusted gross income (with certain modifications) is \$125,000 or less (\$250,000 or less for joint filers). The subsidy is phased out as adjusted gross income increases from \$125,000 to \$145,000 (\$250,000 to \$290,000 for joint filers), so that there is no subsidy at all above those levels. A reduced premium will often still be provided to an individual who turns out to be ineligible for the subsidy due to these income requirements, but, in such a

case, the amount of the premium reduction is taxable to the individual. If a highly-paid individual wishes to avoid a taxable subsidy, he or she may permanently waive the right to any premium assistance.

The term "involuntary termination" is not further defined in the Act. However, the Conference Committee report adds that a termination for gross misconduct would not qualify the employee for the subsidy (since he or she would not qualify for COBRA coverage at all).

Election Period:

Employees who were terminated between September 1, 2008 and December 31, 2009, and who did not initially elect COBRA coverage have a new election period under the ARRA. These employees have 60 days after receiving the new COBRA notice during which they may elect COBRA coverage at the subsidized rate. The COBRA coverage starts effective with the first period of coverage (e.g., the first calendar month) beginning after February 17, 2009, the date the ARRA was enacted, and will not continue past the maximum coverage period based on the qualifying event.

For example, if an employee was involuntarily terminated on September 1, 2008 and did not initially elect COBRA, but now elects COBRA under the new ARRA rules, his or her COBRA continuation coverage will still end 18 months after he or she lost coverage due to the termination from employment (e.g., March 1, 2010 if coverage ended immediately upon termination).

Employees who were involuntarily terminated since September 1, 2008, even those who previously elected COBRA coverage, may also be given the right to elect coverage under an option other than the option by which they were covered at the time of termination, provided that the option (i) is made available to active employees, (ii) has the same or lower cost (pre-subsidy) as the option under which previously covered, and (iii) is other than a health FSA or coverage consisting only of dental, vision, or certain other limited services. If offered by the employer, this option may be elected within 90 days following receipt of the required Notice.

New COBRA Notices Required:

Under the Act, information about the premium subsidy and the option to enroll must be added to current COBRA Notices, or provided to employees in a separate document.

The additional information or notification must include:

- the forms necessary for establishing eligibility for premium reduction;
- the name, address, and telephone number necessary to contact the plan administrator;
- a description of the 60-day extended election period;
- if applicable, a description of the right to elect an alternative coverage option within 90 days, as described above;
- a description of the qualified beneficiary's obligation to notify the plan of his or her eligibility for coverage under another group health plan or Medicare,

and the penalty for failing to do so; and

- a prominently displayed description of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium.

The U.S. Department of Labor is required to issue model COBRA Notices that comply with the requirements of the ARRA within 30 days following enactment (i.e., by March 19, 2009). The Plan Administrator must provide the amended COBRA Notices to assistance eligible individuals within 60 days of the enactment of the ARRA (on or before April 18, 2009).

Any assistance eligible employees that initially elected COBRA continuation coverage, but whose COBRA was terminated for nonpayment of premiums are also entitled to receive these new Notices, make new elections, and to take advantage of the premium subsidy.

If you have any questions regarding the new law, please contact the Ford & Harrison attorney with whom you usually work or any member of Ford & Harrison's Employee Benefits practice group.