

Employee Benefits Alert: Economic Stimulus Law Expands and Subsidizes COBRA

2/18/2009

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"). The Act contains many provisions intended to assist displaced workers, including several provisions expanding the rights of terminated employees to elect continuation of health coverage under COBRA.¹

Background

COBRA allows a terminated employee to continue to participate in a terminating employer's group health plans, typically for a period of up to 18 months, provided that the employee makes a valid COBRA election within a limited time period following his or her termination. However, an employee may only elect to continue participation in plans in which he or she was participating at the time of termination. In addition, the employer may require the employee to pay up to 102% of the costs of the coverage. Due to these high costs, COBRA is not a viable option for many struggling terminated workers.

The Act

The Act makes COBRA more affordable and accessible to terminated workers through three key measures. First, the Act offers a 65% COBRA premium subsidy for up to nine months for workers who are involuntarily terminated. Second, if an employer offers more than one coverage option, the employer may allow the terminated worker to change his or her enrollment option (*i.e.*, to a plan option with more affordable premiums). Third, employees who lost coverage on or after September 1, 2008, but who did not make a timely COBRA election, or who allowed COBRA coverage to lapse, are provided an extended opportunity to elect (or re-elect) COBRA.

Eligible Continuation Coverage

For purposes of the Act, "COBRA" coverage includes continuation coverage under any of the following:

- ERISA § 601 et seq. (other than ERISA § 609);
- Title XXII of the Public Health Service Act;
- Code Sec. 4980B (other than Code Sec. 4980B(f)(1) , to the extent it relates to pediatric vaccines);
- 5 USC 8905a (*i.e.*, under the Federal Employees Health Benefit Plan); or
- under a state program that provides comparable continuation coverage.

Thus, for example, employees who are not covered under Federal COBRA because they work for a small business, but who are covered under a state continuation coverage statute applicable to small employers, may also benefit from the Act's provisions.

Eligible Individuals

Not all COBRA "qualified beneficiaries"² are entitled to take advantage of the premium assistance and plan enrollment changes. Rather, a qualified beneficiary is eligible if he or she is an "Assistance Eligible Individual," defined in the Act as a COBRA qualified beneficiary who:

- becomes eligible for COBRA during the period beginning September 1, 2008 and ending December 31, 2009 due to an *involuntary termination of employment* of the covered employee; and
- actually elects COBRA coverage.

The extended COBRA election period, however, is available to any individual who does not have a COBRA election in effect on February 17, 2009, but who would have been an Assistance Eligible Individual if he or she had made a COBRA election.

Premium Assistance Subsidy

The key features of the premium assistance subsidy are as follows:

- Any Assistance Eligible Individual (subject to income thresholds) is treated as having paid his or her COBRA premiums if the individual (or a person other than the individual's employer) pays 35% of the premiums.
- Subsidies are reduced proportionally for taxpayers with modified adjusted gross income (AGI) between \$125,000 and \$145,000 (\$250,000 and \$290,000 for joint filers), and no subsidy is available to taxpayers with AGI greater than \$145,000 (\$290,000 for joint filers), in each case during a year in which the subsidy is received. If the taxpayer receives a subsidy in a year in which he or she exceeds an income threshold, the subsidy is repaid through an increase in the taxpayer's income tax liability. Taxpayers may permanently elect to waive the subsidy in order to avoid this income recapture.
- The Assistance Eligible Individual may avail himself of the reduced premium until the earliest of:
 1. the time the individual is eligible for coverage under any other group health plan (other than coverage that provides only vision, dental, counseling or referral services, a flexible spending account, or coverage for certain care, such as preventative care and first aid, at the employer's on-site medical facility) or is eligible for benefits under Title XVIII of the Social Security Act;
 2. nine months from the time the individual first avails himself of the reduced premium; or
 3. the end of the maximum period of COBRA continuation coverage required under the applicable COBRA provision.

The person to whom COBRA premiums are payable (*i.e.*, the employer, multiemployer plan, or insurer) is entitled to reimbursement, in the amount of the premium subsidy, in the form of a credit against wage withholding and FICA payroll tax obligations. If the subsidy exceeds the payroll tax obligation, the overpayment is refunded or credited as if it were an overpayment of such payroll taxes.

Premium subsidy amounts are not includible in the gross income of an Assistance Eligible Individual.

Plan Enrollment Change

The key features of the enrollment change measure are as follows:

An employer may, but is not required to, allow Assistance Eligible Individuals to enroll in coverage that is different from the coverage in which such individual was enrolled at the time of termination.

The enrollment change must occur not later than 90 days following receipt of the notice of plan enrollment (described below).

The different coverage must also be offered to active employees at the time the change is made.

The premium for the different coverage must be less than or equal to the premium for the original coverage.

The different coverage may not be coverage that provides only vision, dental, counseling or referral services, a flexible spending account, or coverage for certain care (such as preventative care and first aid) at the employer's on-site medical facility.

Extended Election Period

The Act permits any individual who does not have a COBRA election in effect on February 17, 2009, but who would have been an Assistance Eligible Individual if he or she had made a COBRA election, to elect COBRA during the 60-day period beginning with the date of the notice described below. Such coverage, if elected, is effective with the first period of coverage following February 17, 2009 and will last only as long as the COBRA coverage would have lasted if the election was made at the time of the original COBRA eligibility. In addition, the period from the qualifying event through the first period of coverage following February 17, 2009 is not counted when determining whether the individual has had a "break in service" for purposes of the HIPAA portability rules.

Employer Notices Required

The Act requires that, in addition to notices already required under COBRA, Assistance Eligible Individuals terminated after February 17, 2009 be informed of the availability of premium reduction and, if available, the option to enroll in different coverage. An Assistance Eligible Individual who became eligible for COBRA on or after September 1, 2008 but before February 17, 2009, must receive notice no later than April 18, 2009 of the availability of the premium subsidy, the right to choose different coverage (if offered), and the extension of the COBRA election period (if such individual is not a COBRA participant as of February 17, 2009). The Act directs the Department of Labor to issue model notices no later than March 19, 2009. Specific contents required to be included in the notices, such as forms, plan administrator contact information, and descriptions of the parties' rights and obligations, are also described in the Act.

Additional Features

The Act calls for expedited review by the Secretary of Labor or the Secretary of Health and Human Services of cases where Assistance Eligible Individuals are denied treatment.

Premium assistance amounts will not be considered income or resources for purposes of determining eligibility for, or benefits under, any federal or state public benefit.

Effective Date

Other than the premium subsidy, the Act's provisions became effective on February 17, 2009. The premium subsidy is available to Assistance Eligible Individuals for the first "period of coverage" beginning after February 17, 2009. A "period of coverage" is defined in the Act as a monthly or shorter period during which premiums are charged. For most Assistance Eligible Individuals, eligibility will commence March 1, 2009, and the first "period of coverage" will be the month of March, 2009.

The Act provides a special rule whereby, for the first two "periods of coverage" following February 17, 2009 (typically, March and April, 2009), Assistance Eligible Individuals may be charged the non-subsidized COBRA rate, provided that the individual is later reimbursed or credited for the missed subsidy.

Immediate Actions for Employers

Identify all qualified beneficiaries who became eligible for COBRA between September 1, 2008, and February 17, 2009. Determine which of these qualified beneficiaries lost coverage due to an involuntary termination.

No later than April 18, 2009, notify Assistance Eligible Individuals terminated between September 1, 2008, and February 17, 2009 of the premium subsidy and, if applicable, the right to elect different coverage. If these Assistance Eligible Individuals were not participating in COBRA as of February 17, 2009, notify them, in addition, of their extended opportunity to elect COBRA.

Modify company COBRA notices and election forms to reflect subsidies and election changes available to workers who are involuntarily terminated on or after February 17, 2009.

Review accounting and payroll procedures to capture the amount of the subsidy for purposes of the payroll tax credit.

Final Notes

This Alert summarizes the key terms of the Act. It is anticipated that the Act's provisions will be expanded and clarified over the coming weeks.

Endnotes

¹ "COBRA" is an acronym for the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

² COBRA "qualified beneficiaries" include employees as well as their spouses and dependent children.

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