Insight
EMPLOYMENT AND LABOR LAW
KIENBAUM OPPERWALL HARDY & PELTON, P.L.C.
ATTORNEYS AND COUNSELORS
MARCH 2009
SPECIAL EDITION

Immediate Action Required

Financial Stimulus Plan Significantly Impacts COBRA

President Obama signed the American Recovery and Reinvestment Act of 2009 (the "ARRA") financial stimulus plan on February 17, 2009, making sweeping changes to COBRA's continuation coverage provisions. These changes are intended to relieve some of the financial burden of purchasing COBRA continuation coverage for individuals who have lost their employment as a result of the economic downturn, by providing a government subsidy. For most, the changes went into effect on March 1, 2009, and apply to employers who are subject to COBRA under federal law (those with 20 or more employees), and to employers who provide health care benefits to employees under state "mini-COBRA" laws.

Employers (and/or their third-party plan administrators) must quickly respond to these new requirements with little guidance from the Department of Labor ("DOL") or the Internal Revenue Service. The ARRA's most important changes to COBRA and their impacts on employers include:

1. Federal Government COBRA Premium Payment Subsidy. Eligible employees who are involuntarily terminated between September 1, 2008 and December 31, 2009 ("eligibility period") are entitled to a 65% government subsidy for COBRA health insurance payments for a period of up to nine months.

An assistance-eligible individual is defined as any employee who:

- Is eligible for COBRA coverage at any time during the eligibility period;
- Elects such coverage either during the original election period or during the additional special election period, noted below; and
- Is involuntarily terminated during the eligibility period other than for gross misconduct.

An assistance-eligible individual also may be any qualified beneficiary who can independently elect COBRA coverage because of the involuntary termination of the covered employee during the eligibility period.

The subsidy and new election periods are limited to cases of "involuntary" termination (which is undefined in the ARRA), and are not available for other COBRA-qualifying events, such as voluntary termination, divorce, reduction in hours, or a dependent child reaching a limiting age under a health plan. In addition, the subsidy does not apply to individuals (or their dependents) with an adjusted gross income of more than $145,000 ($290,000 for joint filers) in the year in which they would receive a subsidy, and is reduced for individuals with an adjusted gross income between $125,000 and $145,000 ($250,000 and $290,000 for joint filers).

The subsidy period extends until the earlier of:

- The expiration of nine months;
- The eligible person becoming eligible for any other group health plan or Medicare;
- The expiration of the maximum period of COBRA continuation coverage; or
- The eligible individual failing to pay the required 35% share of the premium.

The ARRA requires employers (or, where applicable, third-party administrators) to pay the 65% premium up front, and then allows a deduction equal to those costs as a credit toward payroll taxes. The payroll credit cannot occur until after the individual pays his/her share of the premium. If the amount of the subsidy is greater than the payroll tax liability, the employer may apply to the Treasury Department for reimbursement.

The subsidy applies to periods of COBRA coverage beginning after the enactment of the ARRA on February 17, 2009. Thus, for group health plans using calendar months, the subsidy likely applies beginning March 1, 2009. Given the short transition period, however, employers may require eligible employees to pay the full COBRA premium for the months of March and April 2009. The employer must then either provide a credit toward future premium payments within 180 days if the plan administrator expects the overpayment to be fully applied to future COBRA premiums, or refund the subsidized portion within 60 days.

2. Extended Election Period for Eligible Individuals Currently Not Enrolled. The ARRA provides individuals a second chance for electing COBRA coverage. Eligible individuals who were involuntarily terminated on or after September 1, 2008, but who did not elect coverage or who terminated coverage will have a new 60-day period to elect subsidized COBRA coverage.

For individuals who elect the second chance coverage, the coverage starts on the first "period of coverage" after the enactment date of the ARRA, which in most cases is March 1, 2009. The coverage is not retroactive and ends on the date that would have been the end of the maximum coverage period had the individual initially elected coverage.

Employers must give notice of this second chance election to eligible individuals, as discussed below. The 60-day period will not begin to run until the individual receives notice.

3. Optional Changes in Coverage. Under the ARRA, at the discretion of the employer, all eligible individuals may elect to enroll in coverage that is different from the coverage they were enrolled in at the time the COBRA-qualifying event occurred. Employers would be required to offer this opportunity to active employees, and it could not be limited to specific coverage options (such as dental, vision, etc.). The effect of this provision would be to allow individuals to elect less-expensive (and likely less-comprehensive) coverage. If an employer decides to offer different coverage options, it must provide an election notice and allow an election period of not less than 90 days.

Recommended Action: At a minimum, an employer should take the following steps.

1. Coordinate with internal and external COBRA administrators to confirm assignment of ARRA compliance responsibilities. This should include:

- Updating administrative systems to track subsidy eligibility, periods of eligibility, and discontinuation dates.
- Updating payroll systems to track COBRA subsidy payments to claim tax credits from the federal government.

2. **Implement a protocol for identifying all assistance-eligible individuals.** This must include identification of all individuals who were covered by group health insurance and who were involuntarily terminated, other than for gross misconduct, on or after September 1, 2008. Second, from that group, identify (a) those individuals who did not elect COBRA coverage or those who initially elected it, but dropped the coverage before its expiration, to notify them of the new election rights, and (b) those who did elect coverage to notify them of the subsidy.

3. **Determine whether to implement an optional change in coverage provision** for eligible individuals, and, if implemented, provide notice to eligible individuals.

4. **Develop a procedure for the transition period of March and April 2009** to determine whether eligible individuals will be required to pay the full premium and be reimbursed, or whether they will only be required to pay the 35% premium during the transition period.

5. **Provide all eligible individuals with new notices** explaining the availability of the subsidy and, where applicable, the second election opportunity, within the following guidelines:

- For individuals who become COBRA-eligible after the enactment of ARRA on February 17, 2009, employers must immediately update their COBRA notices to include information regarding the availability of the 65% subsidy.
- For individuals who are not currently receiving COBRA coverage but are eligible under the second election provision, employers must distribute notices before April 18, 2009.
- For individuals currently receiving COBRA, employers must send notification of the subsidy before April 18, 2009.

At a minimum, each notice should contain:

- A description of the eligibility requirements and the subsidy;
- The name, address, and phone number for the plan administrator;
- “Prominent” identification of the new premium amounts after application of the subsidy;
- Limits for high-income individuals;
- A description of appeal rights to the DOL;
- A description of the option of the qualified beneficiary to enroll in different coverage (if permitted by the employer);
- A description of the special election period for eligible individuals; and
- The forms for establishing subsidy eligibility.

The DOL has stated that it will provide model notices by March 19, 2009. If employers wish to start the 60-day second chance period sooner, they will have to prepare and issue the required notice without guidance from the DOL.

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This article is an overview and is not a substitute for legal advice. For specific questions regarding COBRA’s requirements and the ARRA’s changes, please call us at (248) 645-0000.

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