



Employment Law Alert

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Broad COBRA Changes in 2009 Stimulus Bill — What Should You Be Doing Now?

The American Recovery and Reinvestment Act of 2009 (the “Act”) was signed by President Obama on February 17, 2009. This Act includes several significant changes to COBRA that employers will need to address.

The most immediate and notable impact will be a significant reduction in the COBRA premiums paid by certain employees whose employment is involuntarily terminated (and their spouses and dependents who are COBRA-entitled). These individuals can get a 65 percent government-paid subsidy toward their COBRA premiums. Employers are required to “front” the subsidy by paying the full premium and obtaining a reimbursement via a later payroll tax offset. The subsidy takes effect for COBRA coverage periods beginning after the February 17, 2009 enactment date (March 1, 2009 for most plans).

In addition to continuation coverage under COBRA, the premium subsidy also applies to continuation coverage provided under state “mini-COBRA” programs that provide comparable continuation coverage, such as the six-month continuation coverage provided under section 3923.38 of the Ohio Revised Code. However, different notice requirements, yet to be provided by the Secretary of Labor, will apply to state mini-COBRA programs. Also, under state mini-COBRA laws, the insurer, rather than the employer, is entitled to reimbursement for the premium subsidy. The discussion below focuses on premium subsidies under federal COBRA.

Who Gets the Subsidy?

The subsidy is available to employees terminated involuntarily on or after September 1, 2008 and before January 1, 2010, as well as to their spouses and dependents who are COBRA-entitled.

The Act does not define “involuntary termination.” The phrase clearly includes employees terminated by a company for any reason, other than the standard COBRA exception for “gross misconduct.” It would also appear to apply to employees who are asked by a company to sign a separation agreement as an alternative to being fired, even if it is characterized as a “voluntary resignation.” Until there is further official guidance, employers should consult legal counsel if they have a question about whether a specific termination of employment is “involuntary.”

If persons terminated involuntarily before the February 17, 2009 enactment date or their spouses or dependents who are COBRA-entitled are already on COBRA, the subsidy will apply to coverage periods beginning after the enactment date. If these persons did not elect COBRA, or if the COBRA coverage they did elect is no longer in effect (for example, if COBRA coverage was terminated for failure to pay the premium), they will have an opportunity now to elect coverage with the subsidy for coverage periods beginning after the enactment date. If they do so, their period of COBRA entitlement will be measured from their original COBRA-qualifying event date, but their period of coverage and the subsidized premium will begin with the first coverage period after the enactment date. Any break in coverage between the original COBRA-qualifying event date and the commencement of coverage after the enactment date will be disregarded for purposes of calculating breaks in coverage relevant to pre-existing condition limitations.

How Long Does the Subsidy Last?

The subsidized premiums can continue for up to a maximum of nine (9) months, beginning with the first coverage period that occurs after the enactment date. The subsidized premium will end before the expiration of this nine-month period upon the earlier to occur of either of the following: the person is no longer eligible for COBRA or the person becomes eligible for (versus enrolled in) group medical insurance or Medicare. (These subsidy rules are different than the rules for terminating COBRA before the end of the maximum coverage period. COBRA coverage terminates not when a qualified beneficiary becomes *eligible* for other group health plan coverage or for Medicare but when the qualified beneficiary actually *enrolls* in the coverage.) Persons who receive the subsidy are required to notify the group health plan if they subsequently become eligible for other group medical insurance coverage or for Medicare. Failure to provide notification may result in a penalty of 110 percent of the premium subsidy for the period after the person became eligible for the other coverage.

How Do the Notice and Election Rules Work?

For involuntary terminations that occur after the February 17, 2009 enactment date, the terminated employees and their COBRA-entitled spouses and dependents must be given notice of the premium subsidy (referred to in the Act as “additional notification.”) The Department of Labor (“DOL”) is required to issue model notices on or before March 19, 2009. Because that date falls well within the 44-day COBRA notice period applicable to terminations after the enactment date (assuming the employer is also the plan administrator), employers can delay giving COBRA notices until the models are available, if they choose. However, doing so will mean that the 60-day period for electing COBRA will not begin until those notices are given. If an employer prefers to give a COBRA notice before the model notices are available, and thereby begin the 60-day election period, the employer will have to draft a notice regarding the premium subsidy consistent with the requirements of the Act for “additional notification.”

For persons terminated involuntarily after September 1, 2008 and before the enactment date, employers must provide notices about the premium subsidy on or before April 18, 2009. DOL model notices for this purpose are to be available by March 19, 2009. Those who are already on COBRA as of the enactment date must be given notice that the subsidy will take effect with the first coverage period after the enactment date. Those who are not on COBRA as of the enactment date must be given information about the subsidy and notice of their opportunity to elect coverage with the subsidy beginning with the first coverage period after the enactment date. They will have sixty (60) days after the notice within which to elect coverage with the premium subsidy.

Finally, notice of the available premium subsidy must be provided to all other individuals who are or were COBRA-qualified beneficiaries based upon *any* qualifying event that occurred on or after September 1, 2008, even though these individuals would not be entitled to receive the subsidy unless they became eligible due to an involuntary termination.

What About People Who Pay the Full Premium During the First Two Months of the Subsidy Period?

Persons who pay the full COBRA premium for either of the first two periods of coverage to which the premium subsidy applies will be entitled to reimbursement of the premium subsidy or to a credit against future premium payments (if it is reasonable to believe the credit will be used within 180 days of the overpayment).

How Does the Company Get Reimbursement for Premium Subsidies?

Employers can offset the COBRA premium subsidies against their federal payroll tax obligations by claiming a credit on IRS Form 941 – Employer’s Quarterly Federal Tax Return. If the company’s payroll tax obligation is less than the amount of COBRA premium subsidies, the resulting “overpayment” of payroll taxes can be applied to the next return or be requested as a refund. Employers are required to maintain supporting documentation, including attestations of involuntary terminations of employment for each affected employee, a report of the amount of payroll taxes offset during the current reporting period and an estimate of amounts to be offset during the next reporting period, and a report for each covered employee and qualified beneficiary containing taxpayer identification numbers, amounts of subsidy reimbursed, and an identification of whether coverage is of one or more than one individual.

Can a Person Change From One Plan to Another?

At its option, an employer may offer persons eligible for the premium subsidy the choice to enroll in a different, lower cost medical plan offered by the employer. Because of the administrative burdens and complexities involved with allowing enrollment changes, some employers may choose not to permit them.

Do All Persons Who Are Involuntarily Terminated Qualify For the Subsidy?

Subject to the early termination provisions discussed above, all employees terminated involuntarily on or after September 1, 2008 and before January 1, 2010, as well as their spouses and dependents who are COBRA-entitled, qualify for the subsidy. However, only those persons who earn less than \$125,000 annually (\$250,000 for joint returns) receive the subsidy tax-free. Eligible persons earning more than those amounts are subject to recapture of all or a portion of the subsidy with their tax return, depending on their actual income. The Act provides that persons who earn in excess of those amounts may choose to permanently waive the subsidy by notifying the employer of the waiver.

What If The Employer is Paying the COBRA Premium Under a Severance Arrangement?

In some cases, employers offer severance agreements to terminated employees under which the employer pays the COBRA premium for a period of time. The Act does not directly speak to this somewhat common circumstance. The logical presumption is that the subsidy will not begin until the first month in which the former employee has to pay a portion of the COBRA premium. It is unclear in that circumstance whether the former employee will be entitled to the subsidy for nine (9) additional months from that point. Although it would seem reasonable to conclude that the subsidy is available for up to nine (9) months beginning with the first month for which the premium subsidy is actually paid, Treasury officials have reportedly stated in informal, nonbinding remarks that the nine (9) month period is to be measured from the first coverage period for which the subsidy would have been payable, had the employer not been paying the COBRA premium.

Do Persons Denied the Subsidy Have Special Appeal Rights?

Persons who are not provided the subsidy may appeal the denial directly to the Secretary of Labor (or to the Secretary of Health and Human Services, in certain cases) in a manner to be determined by the Secretary, in consultation with the Secretary of the Treasury. A decision on the appeal will be rendered within 15 days after receipt of the application for review.

What Should You Do Now?

- Identify those employees involuntarily terminated on or after September 1, 2008, together with their spouses and dependents who were or are COBRA-entitled. Of this group, identify as a subset (the “Special Election Group”), the people who are entitled to a special COBRA election period because COBRA was either never elected or COBRA coverage ended before February 17, 2009. Determine the last available contact information for all people involuntarily terminated on or after September 1, 2008, all of whom are entitled to notice of the availability of the premium subsidy. As soon as the DOL has provided model notices, and before April 18, 2009, send notice to this group, informing them of the availability of the premium subsidy. Also before this April 18, 2009 deadline, provide people in the Special Election Group notice of the opportunity to elect COBRA during the special sixty (60)-day COBRA election period.

- Identify those individuals who are or were COBRA-entitled based upon any qualifying event that occurred on or after September 1, 2008 other than involuntary termination. These individuals must be provided notice of the premium subsidy.
- Determine whether you will permit election of coverage in a different, lower cost medical plan.
- For all persons terminated from employment on or after February 17, 2009, provide a modified election notice or separate notice regarding the availability of the COBRA premium subsidy, either based upon the language in the Act or upon the model notice that is to be issued by the DOL.
- Modify, as necessary, plan documents, summary plan descriptions and COBRA notices. Distribute revised summary plan descriptions or summaries of material modifications and revised COBRA notices, as appropriate.
- Contact your COBRA Administrator, if you have one. They may assist you in taking these steps.

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