ARRA Changes Health Care Continuation Coverage under COBRA

On February 17, 2009, the President signed into law the American Recovery and Reinvestment Act of 2009 (“ARRA” or the “Act”), which, among other things, makes a number of changes to health care continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”). The Department of Labor released model COBRA notices on March 19, 2009, which take into account these changes and provide a safe harbor for plans and employers.

This alert provides an overview of some of the key changes to COBRA, their implications for employers and the steps they need to take now.

**Premium Assistance**

ARRA provides certain former employees with assistance to pay their COBRA premiums. The assistance is equal to 65 percent of COBRA premiums and mandates that these individuals be given the opportunity to elect COBRA continuation coverage, even if they had declined such coverage previously. This subsidy applies to the COBRA premiums of individuals who are involuntarily terminated from employment during a specified window of time. It also applies to anyone who is a spouse or dependent of such individuals, provided certain income limits are not breached (“assistance eligible individuals,” as described more fully below). Not only does premium assistance apply to any entity that is subject to the federal COBRA requirements, but it also applies to entities subject to similar continuation coverage mandated by state or local law (i.e., small employer plans).

Under ARRA, assistance eligible individuals will be treated as paying the entire COBRA premium if they (or someone, on their behalf, other than their former employer) pay 35 percent of the amount of such premium.

If an individual pays the full COBRA premium for up to two months after the effective date of the COBRA provisions of ARRA (i.e., March and April 2009), then the individual is eligible for a direct reimbursement of 65% of the premium within 60 days or may be given a credit to

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1 Under COBRA, employers with at least 20 employees must provide certain former employees with the option to elect continued coverage under the employer’s health insurance plan. Plans maintained by employers with less than 20 employees, the federal government, churches and certain church related organizations are not subject to COBRA. The District of Columbia requires small employers (2-20 employees) to offer COBRA coverage to their departing employees for a period of 3 months, unless they were terminated due to gross misconduct. However, the DC Council amended the law in March 2009 to allow certain involuntarily terminated employees to receive 9 months of subsidized benefits.
reduce any future premium payments paid within the next 180 days.

The cost of the remaining 65 percent of the COBRA premium payable by the eligible individual is initially borne by the entity to whom the COBRA premiums are payable (i.e., the former employer, insurance company or plan sponsor). Such amount is then recouped through a dollar-for-dollar credit against the entity’s federal payroll taxes. In the case of an employer maintained group health plan that is self-insured, the employer will receive the credit. In the case of an insured plan where the employer is billed by the insurance carrier for the remaining 65% of the premium, the employer will also receive the credit. If the employer is not billed for the balance, the insurance carrier may claim the credit.2

If the subsidy amount exceeds the entity’s payroll tax liability, the excess will either be credited towards the next payroll tax payment or, if requested, paid directly to the entity as a refund. To take advantage of this credit, the employer (or fund or insurer) must file a Form 941 (which has already been revised to account for COBRA premium assistance) with the federal government. In addition, an employer claiming the credit must maintain supporting documentation for the credit claimed, including:

(i) Information on the receipt (including the dates and amounts) of the individual’s 35 percent share of the premium;

(ii) For insured plans, a copy of an invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA;

(iii) For self-insured plans, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals;

(iv) The taxpayer identification numbers of all covered employees and qualified beneficiaries and the designation with respect to each covered individual as to whether the subsidy reimbursement is for single or family coverage; and

(v) Proof of each individual’s eligibility for COBRA coverage and election of such coverage.

The employer must also keep a sworn statement that the individual was involuntarily terminated during the applicable period, including the date of the involuntary termination. If the reimbursement is overstated, it will be treated as an underpayment of payroll taxes.

Who is Eligible for Assistance?

Premium assistance is available for “assistance eligible individuals.” For purposes of the Act, “assistance eligible individuals” are employees who are involuntarily terminated from employment during the period beginning September 1, 2008 and ending December 31, 2009 and are eligible to elect COBRA during that time. The spouse and dependents of any such assistance eligible individual are also considered “assistance eligible individuals” for purposes of the premium subsidy, provided their COBRA qualifying event is the employee’s involuntary termination during the applicable time period.

Individuals who are not eligible for COBRA because they were terminated for gross misconduct are not eligible for benefits under ARRA. In addition, assistance eligible individuals whose modified adjusted gross income for the taxable year exceeds $145,000 ($290,000 in the case of joint filers) are technically eligible for the subsidy. However, if such individuals do in

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2 In the case of a multiemployer plan, the plan claims the credit.
fact receive the subsidy, at the end of the year their income tax will be increased by the amount of the subsidy they received.

Assistance eligible individuals whose modified adjusted gross income for the taxable year exceeds $125,000 ($250,000 in the case of joint filers), but does not exceed $145,000/$290,000, are entitled to a reduced subsidy. High income individuals also have the option to waive the premium assistance.

**Duration of Premium Assistance**

The subsidy will only be made with respect to periods of COBRA coverage beginning after March 1, 2009, and for a maximum period of 9 months. The subsidized premium will end on the earliest to occur of:

(i) The date the individual becomes eligible for coverage under any other group health plan or Medicare,

(ii) The date the maximum applicable COBRA continuation period for the individual ends, or

(iii) The date the individual receives 9 months of coverage under ARRA premium assistance.

For example, suppose an individual was terminated from employment on October 1, 2008, was eligible for 18 months of COBRA continuation coverage and timely elected such coverage, and remains eligible for the balance of the 18 month COBRA period, ending March 2010. The individual would pay the full COBRA premium from October 2008 through February 2009. For nine months starting in March 2009, the individual would only be required to pay 35 percent of the premium. To continue coverage for December 2009 through March 2010, the individual would again need to pay the full premium for those months.

Individuals are required to notify the plan as soon as they are eligible for coverage under another group health plan or Medicare (regardless of whether or not they enroll in such health plan or Medicare). An individual who fails to provide such notification will be subject to a penalty tax of 110 percent of the amount of the subsidy for all periods following the date the subsidy should have ceased.

Those who are eligible for other group health coverage (such as a spouse's plan) or Medicare are not eligible for the premium reduction.

**Special Rules for Previously Terminated Assistance Eligible Individuals**

Individuals who were involuntarily terminated from employment on or after September 1, 2008 and before the enactment of ARRA, and who did not elect COBRA during the normally applicable COBRA election period, now have a special opportunity to elect COBRA and receive premium assistance.

Coverage elected pursuant to this opportunity will not be retroactive to the original qualifying event but will begin with the first coverage period beginning after enactment of ARRA (for most group health plans that will be March 1, 2009). The special election does not extend COBRA continuation coverage beyond the period that would have applied had the individual elected COBRA when it was first available. Employers (or insurers, as applicable) must provide notice of this opportunity by April 18, 2009 (i.e., 60-days after the enactment of ARRA) and the individual has 60-days following receipt of such notice to elect to receive COBRA continuation.

These changes mean employers, insurers and funds will need to work quickly to identify assistance eligible individuals, implement adequate notification procedures and manage the process required by these new rules.

**Option to Provide Alternative Coverage**

The Act allows, but does not require, employers to permit an assistance eligible
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individual to elect, within 90-days after the date of notice of the plan enrollment option, coverage under another health plan offered by the employer, and such coverage will be treated as COBRA continuation coverage. The alternative health coverage opportunity may only be made available if:

(i) The premium for the alternate coverage is less than or equal to the premium for the coverage in which the individual was enrolled at the time of the qualifying event;

(ii) The plan is available to active employees at the time the election is made, and

(iii) The plan is not limited to dental, vision, and/or counseling or referral services, a flexible spending account or an on-site medical facility that provides limited services.

New Notice Requirements

All affected individuals (and their eligible spouses and dependents) must be notified of the COBRA premium subsidy and, for those individuals who were terminated from employment after September 1, 2008 and prior to the enactment of the Act, of the special election opportunity. The notice requirement can be satisfied either by amending the regular COBRA notice or providing this information in a separate notice. The following information must be included in the notice:

(i) The forms necessary for establishing eligibility for this premium subsidy;

(ii) The contact information for the plan administrator and any other person maintaining relevant information in connection with the premium subsidy;

(iii) A description of the special election period for individuals who had a qualifying event prior to the enactment of ARRA but had not previously elected COBRA continuation coverage;

(iv) An explanation of the individual’s obligations to advise the former employer when he or she becomes eligible for coverage under another group health plan or Medicare and the penalty for the failure to so notify the plan;

(v) A description, displayed in a prominent manner, of the right to the reduced premiums, and any conditions to the entitlement to such reduced premiums; and

(vi) If the employer is allowing individuals to choose a different plan, a description of those options.

Additional Resources

For additional information, please visit:


Model COBRA notices published by the Department of Labor: http://www.dol.gov/ebsa/COBRAmodelnotice.html


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