

The American Recovery and Restoration Act Imposes New COBRA Subsidy Requirements

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"). Included in the Act's provisions are significant amendments to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). These amendments provide COBRA subsidies and special election rights to terminated employees who lose group health care coverage due to an involuntary termination on or after September 1, 2008. The amendments also require new notice requirements and have payroll tax credit implications. Below is a summary of the Acts provisions.

Eligibility:

Individuals who lost coverage under their employer-sponsored group health plan and are otherwise eligible for COBRA benefits are considered "assistance eligible individuals" ("AEI") if they meet the 2 prong test:

- 1) They were **involuntary** terminated between September 1, 2008 and December 31, 2009; *AND*
- 2) They elect COBRA continuation coverage either during the original COBRA election period or during a special election period.

Note: A special election period allows AEI's who could have elected COBRA coverage when they were terminated but chose not to do so a second chance to elect coverage. This second window to elect coverage is within 60 days after the individual receives a new special notice from the employer.

Coverage Period:

The COBRA subsidy terminates the earliest of the following: 1) when COBRA normally would end; 2) after 9 months of subsidy; or 3) when the AEI becomes eligible for coverage under another group health plan, a flexible spending program, on-site medical treatment program or Medicare. To avoid abuse, the Act provides for a 110% penalty to AEI's who fail to notify the employer of eligibility for other coverage.

COBRA Subsidy Benefits:

AEI's will be required to pay 35% of the applicable COBRA premiums. Employers must provide the remaining 65% of the premium for up to 9 months, but can apply an equal tax credit toward payroll taxes. Note, there are certain limitations that apply to "high income" AEI's, defined as individuals with modified adjusted gross income that exceeds \$125,000 if filing singly, or above \$250,000 if filing jointly.

Notice Requirement:

Any COBRA notices provided by plan administrators in connection with qualifying events must include additional information describing qualified beneficiaries' rights under the new Act. These requirements include, among other things, the forms necessary for establishing eligibility, plan administrator contact information, a description of the extended election opportunity for those who initially declined coverage, and a description of the beneficiary's rights to COBRA subsidy. The Department of Labor is required, within 30 days after enactment, to provide model language for the additional notifications.

Plan administrators must provide notice of this new election period within 60 days of the Acts' enactment (that is., by April 18, 2009) or face ERISA penalties. The significance is that the burden is on plan administrators to locate all qualified beneficiaries back to Sept. 1, 2008 who are not enrolled in COBRA coverage on Feb. 17, 2009, and advise them of their rights.

Notices to individuals who already elected COBRA coverage. If an AEI had already elected COBRA coverage and started to pay for the applicable premiums in full, special rules apply that will result in the plan administrator having to notify these qualified beneficiaries about their rights to the premium subsidy and the extent to which they can lose entitlement to the subsidy if they are eligible for other coverage.

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