MCHRMA RESOURCE
Minnesota Counties Human Resource Management Association

COBRA Subsidy and Extension Under the Economic Stimulus Bill

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Introduction

On February 17, 2009 President Barack Obama signed into law an economic stimulus bill called the American Recovery and Reinvestment Act of 2009 ("ARRA"). ARRA contains important provisions related to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

Most significantly, qualified employees or dependents who lost or will lose group health plan coverage due to involuntary termination of employment during the period of September 1, 2008 to December 31, 2009 are permitted to enroll in COBRA at a rate of 35% of the participant's cost to maintain coverage for a period of 9 months while enrolled in COBRA. Under this provision there is a 65% subsidy which is advanced by the plan. The plan (either a multi-employer plan; or an employer on behalf of self-insured or certain insured plans; or an insurance company) may then recoup the subsidy via a credit against payroll tax submissions or, if no tax payment is due, a refund.

Employers and health plan administrators must act quickly to implement the administrative procedures necessary to provide the subsidy, as well as to provide notices to COBRA qualified beneficiaries entitled to enroll.

Key - ARRA's and COBRA

Consolidated Omnibus Budget Reconciliation Act (COBRA) Issue

American Recovery and Reinvestment Act (ARRA) of 2009

1. Qualifying Event for Premium Subsidy

Loss of health coverage due to involuntary loss of employment between September 1, 2008 and December 31, 2009.

"Involuntary Termination"—this term ***excludes*** those who retire or otherwise terminate their employment voluntarily, and those who become eligible for COBRA coverage as a result of reduced hours, divorce, loss of dependent status or another qualifying event.

2. Applicability

ARRA applies to coverage under both the federal COBRA and any state continuation laws applicable to employers with fewer than 20 employees (i.e., "mini-COBRA" laws).

3. Non-Qualifying Plans

The subsidy does ***not*** apply to COBRA premiums for health care flexible spending accounts or state mandated life insurance continuation premiums.

4. Amount of Subsidy

The individual pays 35% of the premium required to maintain COBRA coverage. The total COBRA premium may be 102% of the actual premium cost of coverage. The remaining 65% is subsidized by the plan, which the plan may then claim as a credit against wage withholdings and payroll taxes.

If an employee's premium obligation to continue health insurance coverage in a COBRA period is less than the full COBRA premium (usually because of an agreement with the employer), then the employee's responsibility is 35% of that amount. For example, if there is an agreement that an employee need only pay $200 to maintain COBRA coverage, and the employee is an "assistance eligible individual" ("AEI"), then the employee need only pay 35% of the $200 for up to 9 months. The subsidy reimbursement is 65% of the $200.

5. Eligibility for Subsidy

To qualify as an AEI under the Act, a COBRA "qualified beneficiary" must satisfy each of the following:

1. ***Appropriate Timeframe and Involuntary Discharge***—the individual must have been involuntarily terminated on or after September 1, 2008 and before January 1, 2010. Note: See number 7 below. The employee must also not be eligible to participate in other health plan coverage.

2. ***Minimum Payment***—the individual must pay 35% of the premium required to maintain COBRA coverage.

3. ***Election of Benefits***—the individual must (a) have previously elected COBRA coverage OR (b) elect COBRA coverage during the new "special election period," which runs from the time the Act is passed and ends 60 days after the plan administrator sends out the newly-required notice of this new special election period.

6. Effective Date of Subsidy

The subsidy applies to periods of COBRA continuation coverage beginning after the enactment of the Act. A "period of coverage" is the monthly (or shorter) period for which COBRA premiums are charged. Thus, for plans that pay monthly premiums, the subsidy provisions become applicable ***March 1, 2009.***

Prospective Coverage Only—the subsidy applies only to COBRA payments made during the first "period of coverage."

7. Duration of Subsidy

The subsidy expires as of the ***earliest*** of the following:

1. ***Eligible For Other Coverage, Including Medicare***—the date the individual becomes eligible for coverage under another group health care plan (other than plans providing only dental, vision, counseling, or referral services, a health care flexible spending plan, or a health reimbursement arrangement) or Medicare coverage.

2. ***Elapse of 9 Months of Subsidy***—9 months after the first day of the first month to which the subsidy applies.

3. ***End of Maximum COBRA Coverage***—the end of the maximum COBRA coverage period required by law. Importantly, individuals who are not currently enrolled but who elect coverage under the "special election period," are not entitled to coverage beyond the original maximum required period (generally, 18 months after a qualifying event).

Subsidy-eligible individuals must notify the COBRA plan when they are no longer eligible for the subsidy or face financial penalties.

8. Special Election Period

Individuals who could have enrolled in COBRA on or after September 1, 2008 have a second chance to elect COBRA coverage. The special election period begins on the date of enactment, February 17, 2009 and ends 60 days after the plan administrator provides the required notice described below.

"Second Bite at the Apple" For Qualified Beneficiaries Not Currently Enrolled—a qualified beneficiary who did not elect COBRA coverage has 60 days from his receipt of notice to elect COBRA coverage. Even a qualified beneficiary who elected COBRA coverage before February 17, 2009 but who was no longer enrolled on February 17, 2009 is entitled to elect COBRA coverage during the 60-day period.

9. Notice of Subsidy

ARRA's notice requirement varies based on (a) when the qualifying individual was involuntarily terminated and (b) whether the individual is currently enrolled:

1. ***Subsidy-Eligible After Enactment***—all newly-COBRA eligible participants who are involuntarily terminated between February 17, 2009 and December 31, 2009 must be given a COBRA election notice that includes information about the subsidy and describes the option to enroll in different coverage offered if so permitted by the employer. ARRA does not affect the timing of these notices, so such notices must be provided no later than ***44 days*** after a qualifying event.

2. ***Subsidy-Eligible Before Enactment & Currently Enrolled—ARRA provides that a plan*** must notify those who currently have COBRA coverage within 60 days of February 17,

2009 (i.e., ***April 17, 2009***) of the availability of the subsidy and the requirements to qualify for the subsidy.

a. ***Transition Period*** — because a Plan may not be able to timely notify those currently enrolled in the Plan of the subsidy for their premium payments (i.e., March 2009 for Plans paying monthly premiums) qualified individuals are permitted to pay full COBRA premiums for the first two coverage periods. If that happens, the Plan must either credit the subsidized portion of the premium against future COBRA payments or refund the subsidized portion within 60 days.

3. ***Subsidy-Eligible Before Enactment & Not Currently Enrolled***—ARRA provides that a new notice must be sent out to any qualified individual who was previously involuntarily terminated after September 1, 2008, re-offering COBRA election. The plan must provide this notice within 60 days of February 17, 2009 (i.e., ***April 17, 2009***). The notice must contain information about the subsidy and describes the option to enroll in different coverage offered if so permitted by the employer.

The Department of Labor will provide model notices within 30 days of February 17, 2009. DOL has indicated that notices must be provided to all terminated employees.

10. Pre-Existing Condition Exclusions

When determining if a qualified beneficiary had a 63-day significant break in coverage for purposes of applying pre-existing condition exclusions, ARRA excludes from calculation the period beginning on the original qualifying event date (i.e., date of the "involuntary termination") and ending on the first day of the first COBRA coverage period after the date of enactment (i.e., March 1, 2009 for plans that pay monthly premiums).

> ***Period Excluded From Consideration***—the period from an individual's involuntary termination to the first day of the first COBRA coverage period may not be considered in applying pre-existing condition exclusions.

11. Tax Credits for the Plan

The person to whom premiums are payable (either the multi-employer plan, employer or insurer) may claim tax credits against periodic deposits for wage withholdings and FICA payroll taxes for the COBRA premium subsidy funded by the plan. The plan may only seek to recover up to 65% of the premium that an employee is required to pay to obtain COBRA coverage. Therefore, if an employer only requires an employee to pay $500 to continue coverage under COBRA, even though the full COBRA premium is $1000, the subsidy recovered is 65%. If the plan's claims for COBRA subsidy payments exceed the amount of wage withholdings or FICA payroll taxes reported by the plan, the Treasury is directed to reimburse the plan directly for the excess amount.

Next Steps For Employers And Health Plan Administrators

1. Identify who was involuntarily terminated on or after September 1, 2008 and their dependents.

2. Notify qualified beneficiaries whose qualifying event was a termination of employment of new COBRA election period and subsidy option.

3. Update COBRA notices to reflect ARRA provisions. (DOL to provide model within 30 days of February 17, 2009.)

4. Notify qualified beneficiaries whose qualifying event was a termination of employment of new COBRA election period and subsidy option.

5. For assistance eligible individuals (AEI's), provide COBRA coverage at no more than 35% of the cost the AEI would otherwise have to pay to continue coverage in the COBRA period.

6. Document and account for the 65% subsidy provided. This amount is impacted by the cost of COBRA continuation coverage that an AEI is charged normally to continue COBRA coverage.

7. Provide subsidy for up to nine (9) months only.

8. File forms with IRS (Form 941) to get credit or refund of subsidy provided. (IRS to provide further information.)

For any questions or for assistance with the COBRA Subsidy and Extension Under the Economic Stimulus Bill, please contact Ruth Marcott at (612) 373-8435 or by email, rmarcott@felhaber.com.