



## **COBRA Premiums Subsidized Under The American Recovery and Reinvestment Act of 2009**

February 17, 2009

Congress approved the American Recovery and Reinvestment Act of 2009 (“Act”), which President Barack Obama is expected to sign on February 17. Among the Act’s provisions intended to address the nation’s economic turmoil are amendments to the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) that will affect every employer that sponsors a group health plan for employees and has terminated or laid off an employee on or after September 1, 2008. These amendments create additional COBRA notice requirements and affect payroll tax administration in order to administer a temporary federal subsidy of COBRA premiums. Employers will have to act quickly to implement the new requirements, which will include locating certain former employees and coordinating payroll and COBRA administration.

The Act also requires the Department of Labor to provide outreach, focusing on employers and others, consisting of education and enrollment assistance that will first target those individuals terminated from employment prior to enactment of the Act.

### **What is the federal subsidy?**

Under the Act, for COBRA coverage periods beginning on or after the date the Act is signed into law, “assistance eligible individuals” will be required to pay 35% of the applicable COBRA premium. Employers that provide group health coverage through insurance will need to cover the remaining 65% of the premiums until reimbursement can be requested from the federal government. Employers that provide coverage through insurance or self-insurance will be able to obtain reimbursement of the 65% premium subsidy as a credit against their quarterly federal employment tax filings. The language of the Act suggests the subsidy would apply regardless of the level of coverage (single, single plus one, family, etc.).

### **Does the subsidy apply to small health plans (generally, those with fewer than 20 employees)?**

In general, COBRA does not apply to small health plan where the employer sponsoring the plan has fewer than 20 employees. In some states, these plans are subject to state (or “mini-COBRA”) statutes that mandate various levels of continuation coverage. However, the subsidy would be available with respect to such plans where the state continuation coverage requirements are comparable to the continuation coverage requirements under COBRA.

**How long does the subsidy last?**

Generally, the subsidy is available for up to 9 months, but can end sooner, such as when the maximum continuation coverage period under COBRA expires. (The statute does not extend the maximum COBRA continuation coverage periods.) Additionally, the subsidy will cease to be available for COBRA coverage following the date an assistance eligible individual becomes eligible for: (1) coverage under any other group health plan (other than one consisting only of dental, vision, counseling or referral services); (2) coverage under a health flexible spending account plan; (3) coverage of treatment at certain employer on-site facilities; or (4) Medicare or Medicaid.

**Are persons receiving the subsidy required to notify employers of certain events that would cause the subsidy to cease?**

Yes. The Department of Labor is expected to specify the time and manner of notice. Under the Act, absent reasonable cause and willful neglect, the failure to provide this notice would subject the individual to a penalty equal to 110% of the premium reduction provided after termination of eligibility.

**Who are “assistance eligible individuals”?**

Individuals who are or were otherwise eligible for COBRA continuation coverage, who lost coverage under their employer-sponsored group health plan due to an involuntary termination of employment between September 1, 2008 and December 31, 2009, *AND* who elect COBRA continuation coverage are “assistance eligible individuals” under the Act. The Act does not expand on what constitutes an involuntary termination. However, the language in the Act suggests that any type of involuntary termination qualifies for the subsidy, including an involuntary termination for cause, unless it amounts to a COBRA gross misconduct situation.

The Act requires the Department of Labor (DOL) to provide for expedited review of any situations where an individual requests treatment as an assistance eligible individual and the group health plan denies that treatment. Under this provision, the DOL is required to make its determination within 15 business days of the date it receives the individual’s application for review.

**What about persons who recently declined COBRA coverage prior to passage of the Act?**

Congress recognized that many individuals who were recently terminated may have declined to elect COBRA continuation coverage because of its cost. Accordingly, the Act includes a special election opportunity for assistance-eligible individuals who were eligible to elect COBRA coverage when they were terminated from employment, but did not so elect. These individuals are entitled to an extended election period that begins on the date of the Act’s enactment, and ends no sooner than 60 days after an extended election notice is provided to the individuals. *It is important to note that*

*this extended election period does not change the fact that the individual's termination from employment remains the qualifying event for purposes of COBRA.*

The Act requires employers to locate former employees who previously declined COBRA and provide notice of the right to COBRA coverage with the government subsidy. If an eligible individual elects COBRA continuation coverage during the special extended election period, COBRA coverage will commence with the first period of coverage beginning on or after the enactment of the Act. However, for purposes of determining the maximum COBRA coverage period, the date of the individual's involuntary termination of employment (or the date of the loss of coverage resulting from such termination, if applicable) will continue to be treated as the "qualifying event." This means that the COBRA continuation coverage period available to an individual who makes an election during the extended election period will be determined based on the date of the qualifying event as described above. For example, an assistance eligible individual terminated on September 30, 2008, who makes a timely election during the extended election period, generally will be entitled to COBRA continuation coverage *prospectively* beginning March 1, 2009, though the 18-month maximum coverage period is measured from October 1, 2008.

#### **What about persons who already paid the full COBRA premium?**

The Act entitles such assistance eligible individuals to reimbursement from the employer for the excess over which the individual is required to pay under the Act, or a credit of that amount against future COBRA premium payments. The credit is permissible depending on whether it is reasonable to expect the individual to use it within 180 days of the full premium payment.

#### **What options are there with respect to plan enrollment?**

Under COBRA, a qualified beneficiary generally is entitled only to elect continuation of the same coverage option he or she was receiving on the day before the date of the qualifying event. The Act permits employers to be flexible here. Assuming different coverage options are available, an assistance eligible individual may enroll in coverage under a plan that is different than the coverage in which he or she was enrolled at the time the qualifying event occurred. To make this change, the assistance eligible individual must make his or her election change within 90 days after receiving notice. Such election must be permitted by the employer. The premium for such coverage must not exceed the premium for the coverage in which the individual was enrolled prior to termination of employment. In addition, the different coverage also must be offered to active employees at the time the election is made and the different coverage may not be coverage providing only dental, vision, counseling, referral services (or a combination of these), or coverage under a flexible spending arrangement *or* coverage that provides services at certain on-site medical facilities.

#### **Are there income limitations on who may receive the subsidy?**

Assistance-eligible individuals who receive a subsidy under the Act and who are considered high-income individuals will see their income tax liability increased by the amount of the subsidy for the tax year in which they receive the subsidy. High-income individuals are those individuals with modified adjusted gross income (AGI) that exceeds \$125,000 (\$250,000 in the case of joint return filers) for the tax year in which they receive the subsidy.

### **What are the notice requirements for employers?**

Employers will need to amend their current COBRA election notices temporarily to include generally information about the availability of the premium subsidy and, if applicable, the option to enroll in different coverage. Specifically, the notices must include:

1. The forms necessary for establishing eligibility for the premium subsidy;
2. Contact information of the plan administrator and any other person with information regarding the premium subsidy;
3. A description of the extended election opportunity for those who previously declined COBRA continuation coverage;
4. A description of an assistance-eligible individual's obligation to notify the plan when he or she becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for the failure to do so;
5. A prominent description of the qualified beneficiary's right to the COBRA subsidy and any conditions on such right; and
6. A description of the option to enroll in different coverage under the health plan, if applicable.

This information must be included in the COBRA election notices provided to persons who become eligible for COBRA continuation coverage after enactment of the Act. For assistance-eligible individuals who became eligible for COBRA continuation coverage prior to enactment of the Act, a similar notice must be provided within 60 days of enactment of the Act. The Act directs the Department of Labor to issue model notices within 30 days after enactment of the Act.

### **How do employers apply for the reimbursement?**

Because the federal COBRA premium subsidy is reimbursed to employers through the federal quarterly payroll tax reporting system, the Act requires employers to advance the premium subsidies until the employer's payments can be recouped through reduced federal payroll tax payments. Employers will have to determine the total amount of the subsidy with respect to premiums received during the federal payroll tax reporting period from assistance eligible individuals that have elected COBRA continuation coverage. The employer may use this amount as an offset to its federal payroll tax liability. For purposes of the Act, "payroll taxes" includes amounts to be withheld for federal income tax and the employer and employee portions of FICA

Social Security and Medicare taxes.

To the extent that such amount exceeds the amount of the employer's liability for these federal payroll taxes, the Internal Revenue Service will reimburse the employer for the excess directly. If an employer claims too much in reimbursement, it will be treated as an underpayment of federal payroll taxes to be assessed and collected accordingly.

In addition to expected modifications to current payroll tax reporting forms, the Act requires additional information be provided by employers seeking reimbursement of subsidy payments, such as attestations that terminations of employment were involuntary and the levels of coverage individuals are receiving.

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These new, albeit temporary, COBRA requirements no doubt will create a number of issues for employers, particularly for employers who have or will experience layoffs. Jackson Lewis' benefits attorneys are available to assist you with these new requirements.

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**For More Information Contact:**

**Joseph J. Lazzarotti**

Partner  
White Plains Office  
One North Broadway  
15th Floor  
White Plains, NY 10601

Email:  
LazzaroJ@jacksonlewis.com  
Phone: (914) 514-6107  
Fax: (914) 328-0820

**Jason A. Rothman**

Associate  
Cleveland Office  
6100 Oak Tree Boulevard  
Suite 400  
Cleveland, OH 44131

Email:  
RothmanJ@jacksonlewis.com  
Phone: (216) 750-0418  
Fax: (216) 750-0826

**Bruce H. Schwartz**

Partner  
White Plains Office  
One North Broadway  
15th Floor  
White Plains, NY 10601

Email:  
SchwartB@jacksonlewis.com  
Phone: (914) 328-0404  
Fax: (914) 328-0820

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