

BENEFITS & COMPENSATION

>> ALERT

NEW LEGISLATION INCLUDES SIGNIFICANT COBRA CHANGES

The American Recovery and Reinvestment Act of 2009 (Act) provides recently terminated employees with a 65% federal subsidy of their COBRA premium payments. Employers that sponsor group health plans must take **immediate action** to facilitate the subsidy.

IN GENERAL

ERISA and the Internal Revenue Code provide that employer-sponsored group health plans must offer qualified beneficiaries the opportunity to elect to continue health plan coverage (i.e., COBRA coverage) at full cost after a qualifying event (e.g., termination of employment). Employers must provide COBRA coverage properly or risk certain taxes and penalties.

COBRA SUBSIDY

The Act provides that, for a period not exceeding nine months, "assistance eligible individuals" (AEI) may be charged no more than 35% of the applicable COBRA premium.

DEFINITION OF AEI

An AEI is any qualified beneficiary who elects COBRA coverage and satisfies the following:

- >> the qualifying event is a loss of coverage due to the **involuntary termination** of the covered employee's employment, and

- >> the qualifying event occurs between September 1, 2008 and December 31, 2009 and the qualified beneficiary is eligible for COBRA coverage during that period and elects this coverage

SPECIAL COBRA ELECTION

AEIs who were involuntarily terminated between September 1, 2008 and February 17, 2009 but do not have a COBRA election in effect on February 17, 2009 must be given a second chance to elect subsidized COBRA. The election must be made by the AEIs within 60 days of receiving notice of their second chance.

Coverage would generally begin on March 1, 2009. However, the COBRA period is not extended beyond the original maximum required period (generally 18 months after the qualifying event).

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THE BOTTOM LINE

Employers must become familiar with the employee benefit provisions of the Act, with immediate attention paid to the Act's COBRA subsidy provisions, which provide that employees who are involuntarily terminated between September 1, 2008 and December 31, 2009 and their eligible dependents are eligible for a 65% subsidy of their COBRA payments, beginning with premiums payable March 1, 2009.

To address the COBRA changes, among other steps, employers will typically need to:

- >> coordinate with COBRA administrators and insurance carriers to amend service contracts, COBRA notices, HIPAA certificates and plan documents;
- >> identify employees eligible for the subsidy and provide them with proper notice;
- >> pay or arrange and then obtain credit for the COBRA subsidy;
- >> examine severance programs that otherwise subsidize COBRA coverage, domestic partner programs and retiree medical plans to determine how the COBRA subsidy works under those plans;

TERMINATION OF SUBSIDY

An AEI's eligibility for the subsidy terminates with the first month beginning on or after the earlier of:

- >> nine months after the first day of the first month for which the subsidy applies,
- >> the end of the maximum COBRA coverage period, or
- >> the date that the AEI becomes eligible for Medicare or other group health plan coverage. This includes coverage under the AEI's new employer's plan or coverage under the employer-plan of the individual's spouse. The qualified beneficiary must notify the plan of this eligibility or risk a penalty of 110% of the expired subsidy.

INCOME LIMITS

The Act includes an income threshold based on an individual's modified adjusted gross income for the taxable year in which the subsidy is received (\$145,000 (or \$290,000 for joint filers), with a phase-out between \$125,000-\$145,000 (\$250,000-\$290,000 for joint filers)). Plan administrators must allow individuals to waive the subsidy.

REIMBURSEMENTS

Employers may be reimbursed for the COBRA subsidy once they receive the AEI's reduced premium payment. For

insured plans, insurers may bear the cost of the subsidy and the reimbursement. The reimbursement typically will take the form of a credit against the entity's liability for income tax withholding from its employees' wages or FICA taxes. Employers will be required to submit certain IRS reports, including an attestation of the involuntary termination of employees, and a report of the amount of taxes offset and estimated offsets for the next reporting period.

NOTICES

COBRA notices must be updated to include information regarding the subsidy. Also, within 60 days of the Act's enactment date, a new notice must be provided to AEI's who became entitled to COBRA prior to February 17, 2009 (model language to be provided by the Secretary of Labor).

EFFECTIVE DATE

The COBRA changes are generally effective for premiums for months of coverage beginning on or after March 1, 2009. Plans may accept an AEI's payment of 100% of the premium during March and April, provided the premium overpayment is credited against future months' premium obligation or the overpayment is repaid to the employee.

THE BOTTOM LINE

>> *continued*

- >> develop waivers for highly paid employees;
- >> calculate the permitted COBRA premium and
- >> adopt a refund procedure for March and April overpayments and otherwise coordinate with payroll personnel and vendors.

FOR MORE INFORMATION

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