



EMPLOYMENT LAW ALERT:

Stimulus Package Provides Premium Assistance for COBRA Benefits

The American Recovery and Reinvestment Act of 2009 (ARRA), signed into law by President Obama on February 17, 2009, makes significant revisions to health insurance continuation provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The most significant of these may be a 65% subsidy of COBRA premiums for employees who were/are involuntarily terminated from employment during the period from September 1, 2008 to December 31, 2009. Under the new provision, employers will be required to “front” the subsidy. They will be able to collect 35% of the premium from the eligible employee, pay the insurance carrier 100% of the premium, and later be reimbursed by the government for the remaining 65%. That reimbursement, in the first instance, is taken as a credit when income taxes that have been withheld from employees are remitted to the government on Form 941. Links to relevant IRS forms are listed at the end of this article.

Perhaps of greater interest to smaller Iowa employers, the ARRA concept of COBRA continuation coverage includes not only COBRA itself (which applies to employers with 20 more employees), but also any continuation coverage provided under a similar state law. Iowa law, specifically Iowa Code Chapter 509B, provides for the continuation of health insurance for any employer, and the terms of continuation are different from what COBRA requires. Clearly, employers with fewer than 20 employees that are exempt from COBRA will still be required to comply with this subsidy program if they are subject to the Iowa law, or the law of any other jurisdiction which requires the offer of continuation of group health coverage to their employees.

The ARRA also has provisions for an extended COBRA election period, for an option to change coverage, and for new notice requirements:

- **Effective Date:** The subsidy is applicable to premiums paid for periods of coverage beginning on or after February 17, 2009. For coverage billed on a monthly basis, premiums paid for coverage periods beginning March 1, 2009 will be the first premiums to which the subsidy applies. The subsidy does not apply to premiums paid for periods of COBRA coverage prior to February 17, 2009.
- **Duration of Subsidy:** The subsidy is available for a maximum of 9 months of coverage. The subsidy also

terminates if:

- The individual becomes eligible for other group health coverage,
- The individual becomes eligible for Medicare benefits,
- The maximum COBRA coverage period required by law terminates. (generally 18 months), or
- In the case of a former employee who elected COBRA under the special election period, the date that COBRA coverage would have terminated beginning on the date the employee could have elected COBRA coverage.

- **Extended Election Period:** The ARRA provides a 60-day extended election period for subsidy-eligible former employees who did not previously elect COBRA coverage. The employee has 60 days from the date notice is received from the employer to elect coverage. This is going to require a new notice (discussed below) be sent to eligible employees. For employees whose COBRA election had lapsed, but who choose to enroll in COBRA coverage under the special election period, coverage is **not** retroactive. For such employees, coverage begins for the first period beginning on or after February 17, 2009. (March 2009 for many employees).
- **Voluntary Coverage Change Option:** If the employer allows, an eligible employee may elect to enroll in a different coverage plan than the individual had at the date of the involuntary termination. The employee has 90 days from the date notice of the option is provided by the employer to change coverage plans. In addition, the employee may only elect to change coverage if:
 - The premium for the different coverage does not exceed the premium for the coverage the individual had at the date of termination,
 - The different coverage is also offered to the active employees of the employer at the time the election is made, and
 - The different coverage is not merely dental, vision, counseling or referral services, a flexible spending arrangement, or on-site treatment consisting primarily of first-aid, wellness care, or similar care.
- **Notice Requirements:** During the subsidy period, plan administrators are required to provide notice of the availability of the subsidy to COBRA (or state plan) qualified employees. For employees that are terminated in the future, notice of the subsidy program must be provided along with other required COBRA continuation notices. For employees that were terminated from September 1, 2008 to the present time, plan administrators have 60 days from the date of enactment of the ARRA to provide notice of the extended election period to those former employees. This means that notice must be provided to those former employees by April 17, 2009. Under the law, the Department of Labor is required to promulgate “model” notices by March 19, 2009 (thirty days after enactment of the ARRA). With respect to all employees eligible for the subsidy, the notice must provide:
 - A prominently displayed description of the employee’s right to a reduced premium and any conditions on that entitlement,
 - The forms necessary for establishing eligibility for the subsidy,
 - The name, address, and telephone number of the plan administrator and any other person maintaining relevant information,
 - A description of the extended election period,
 - If the employer permits changing coverage, a description of the option of the employee to enroll in different coverage, and
 - A description of the individual’s obligation to inform the plan administrator if the individual

becomes eligible for other group health plan coverage or Medicare benefits.

- **Employer Reimbursement:** As noted above, following the payment of 35% of the premium by the employee, and the payment of 100% to the insurance carrier, the employer is entitled to reimbursement of the remaining 65% of the premium. The reimbursement will be in the form of a credit against payroll tax liabilities. To the extent the credit exceeds payroll tax liability, a refund check will be issued to the employer. As the ARRA appears to be written, the employee must pay the reduced premium before the employer is entitled to the reimbursement for the remaining 65%.
- **Miscellaneous Provisions:**
 - *Health Care Flexible Spending Accounts:* The subsidy does **not** apply to COBRA premiums for health care flexible spending accounts.
 - *Employee Obligation to Notify of New Coverage:* The employee must notify the plan administrator in writing if he or she becomes eligible for other group health coverage or Medicare benefits. If the former employee fails to do so, a penalty of 110% the cost of the subsidized portion will be assessed on the individual.
 - *Refunds for Employees Who Paid Full Premiums:* Subsidy-eligible employees who paid full premiums after the ARRA was enacted (beginning March 2009 for monthly premiums) are entitled to a refund of the excess 65% paid. Employers are required to refund the excess or provide a credit against future premium payments under the plan.
 - *Income Limitations on Subsidy Recipients:* While all assistance-eligible employees are technically eligible for the subsidy, certain “high income individuals” will be subject to income tax for the amount of subsidy received. (Others may exclude the subsidy from gross income). The phase-in of taxability begins at AGI of \$125,000 and reaches full taxability at AGI of \$145,000 for single filers. For joint filers, the phase-in begins at AGI of \$250,000 and reaches full taxability at AGI at \$290,000. A high income individual may elect to forego the subsidy and pay full COBRA premiums.

What Should Employers Do To Comply?

Identify Eligible Individuals. Initially, employers should identify those individuals who are eligible for the subsidy. Because eligible employees include those terminated on or after September 1, 2008, this requires employers to review terminations dating back to that date. For any employee involuntarily terminated between September 1, 2008, and the present time, employers have until April 18, 2009 to provide notice of the availability of the subsidy and the special election period.

Determine Whether the Employer Will Offer a Coverage Change Option. If the employer offers a same or lower-cost health plan, the employer should decide if it will offer eligible individuals the option to enroll in that different coverage instead of the continuation coverage made available on the date of termination. Under the ARRA, this is voluntary on the part of the employer, and the employee has 60 days following the date of notice of the option from the employer to elect different coverage.

Determine How and When Eligible Individuals Will be Notified. During the subsidy period, employers must provide notice of the subsidy program to all eligible employees. This might be accomplished by amending currently required COBRA continuation notices, or creating new notices to be provided in conjunction with the already-required COBRA notices. Further, eligible former employees who currently have COBRA continuation

coverage, and former employees who are eligible to elect COBRA continuation coverage under the special election period, must be notified by April 18, 2009. Employers should determine whether they will create their own notice, or wait for the Model Notices required to be published by the Department of Labor by March 19, 2009. Iowa employers which are **only** subject to the continuation provisions of Iowa Code Chapter 509B should contact their carrier or insurance agent to determine how continuation under the state law should be handled, especially for those individuals whose right to continuation under the state law has otherwise expired.

Review and Change Payroll Processes. Finally, employers should review and alter their payroll processes to meet the requirements of ARRA. Employers must take necessary steps to provide the subsidy to eligible former-employees. For most employers, this means preparing to provide the subsidy beginning with premiums paid for coverage beginning on March 1, 2009.

Form 941:

<http://www.irs.gov/pub/irs-pdf/f941.pdf>

Instructions for completing Form 941:

<http://www.irs.gov/pub/irs-pdf/i941.pdf>

FAQs:

<http://www.irs.gov/newsroom/article/0,,id=204708,00.html>

News release:

<http://www.irs.gov/newsroom/article/0,,id=204709,00.html>

If you have questions about the COBRA provisions contained in the ARRA, please contact the Dickinson attorney with whom you normally work or a member of the firm's Employment and Labor Law Practice Group at employmentlaw@dickinsonlaw.com.

MORE INFORMATION

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