



ADVISORY BULLETIN – FEBRUARY 19, 2009

## STIMULUS ACT CHANGES TO COBRA COVERAGE

The American Recovery and Reinvestment Act of 2009 (“Act”), signed by the President on February 17, 2009, contains important changes to COBRA coverage that all employers need to know about before they take effect on March 1, 2009.<sup>1</sup> Although the Act provides up to 9 months of government-subsidized COBRA premiums for an “assistance eligible individual,” **the employer will initially be responsible for paying this subsidy** and only later will the federal government reimburse the employer (generally as a payroll tax credit). The Act also **imposes nearly immediate notice, reporting, and administrative requirements on employers.**

### Assistance Eligible Individual

An “assistance eligible individual” (“AEI”) is a COBRA qualified beneficiary *or* dependent who (1) becomes COBRA-eligible during the period beginning September 1, 2008 and ending December 31, 2009, (2) elects COBRA coverage when originally eligible or during the “special election” period (described below), and (3) is COBRA-eligible because of an *involuntary* termination not involving gross misconduct. Eligibility is phased-out for AEI’s whose adjusted gross income exceeds \$125,000 (\$250,000 for married AEI’s filing jointly) and eliminated for AEI’s whose income exceeds \$145,000 (\$290,000 for married AEI’s filing jointly).

An individual who would be an AEI except for not having COBRA coverage on February 17, 2009 must be given a second chance to elect COBRA coverage during a special election period. The special election period begins on February 17, 2009 and ends 60 days after such individual receives the notice described below. For special elections, COBRA coverage begins on March 1, 2009. Except for limited exceptions, the Act does not change COBRA’s maximum coverage period. Therefore, the maximum coverage period for special elections is still calculated based on the AEI’s *original* COBRA eligibility date.

### COBRA Subsidy

The amount of the subsidy is 65% of the COBRA premium actually charged to the AEI.<sup>2</sup> The subsidy applies to coverage periods beginning on or after March 1, 2009, whether such elected

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<sup>1</sup>In fact, the Act even affects North Carolina employers with less than 20 employees who are not covered by COBRA.

<sup>2</sup>Sometimes as part of a RIF or severance package an employer will agree to pay all or a portion of a terminated employee’s COBRA premiums. The rules for calculating the 65% subsidy when an employer already subsidizes a portion of the AEI’s premium are complex. Additionally, an employer may not seek reimbursement for such employer-subsidized amounts. Therefore, employers may wish to reconsider any COBRA premium subsidies that it is already offering to employees who were involuntarily terminated.

coverage is single coverage, family coverage, etc. It ceases to apply on the earliest of (1) the date that the AEI becomes *eligible* for coverage under another group health plan or for Medicare, (2) 9 months after the first day of the first month when the AEI's subsidy begins, or (3) the end of the maximum COBRA coverage period. There are significant penalties for AEI's who do not notify their employers when they become eligible for other health care coverage.

Although the employer must pay the 65% portion initially, it may request a reimbursement from the federal government of the 65% portion by claiming it as a credit against its federal payroll tax liability. If the employer's payroll tax liability is less than the 65% portion, then the employer may request a direct payment for the difference from the federal government in the same way that it would request a direct payment for a payroll tax overpayment. However, reimbursement is conditioned on (1) the employer first receiving the 35% portion from the AEI and (2) the employer filing the reports described below when it makes payroll tax deposits.

Because some employers will be unable to implement the subsidy and provide required notices by March 1, 2009, an employer may require the AEI to pay the full premium in March and April. If an AEI pays the full premium in March and/or April, then the employer must either (1) credit the 65% subsidies for such months against future COBRA premiums or (2) refund such subsidies within 60 days of receiving the full premium from the AEI. If the employer does not reasonably expect such subsidies to be fully credited to future premiums within 180 days of receipt, then it must choose the refund option. The credit and refund process should be easier for employers than attempting to implement the subsidy by March 1, especially because, as explained below, model notices explaining the subsidy to AEI's will probably not be available before March 1.

While we use the terms "COBRA subsidy" and "COBRA premium," the Act applies not only to COBRA coverage but also to continued coverage under state law. For example, North Carolina has state mandated coverage provisions that are nearly identical to COBRA and the subsidy will be available to those involuntarily terminated and entitled to continued coverage under state law as well.

### **Notice and Reporting Requirements**

The Act requires the employer to send up to three notices: (1) a notice (along with all other COBRA notices) to any individual who becomes an AEI on or after February 17, 2009, (2) a notice to all AEI's who currently have COBRA coverage, and (3) a notice to all AEI's who are entitled to make a special election. Generally, these notices must describe the subsidy and its requirements; describe an AEI's obligation to inform the employer when the AEI is eligible for other group health care coverage; include forms for establishing subsidy eligibility and, as applicable, making a special election; and contain contact information for the plan. The Department of Labor is obligated to provide a model notice by mid-March 2009 or earlier.

The first notice is due within 44 days of the employee's COBRA-qualifying event in accordance with the rule for regular COBRA notices. The latter two notices are due no later than April

18, 2009 (60 days after February 17, 2009).<sup>3</sup> The employer may modify its existing COBRA notices or provide standalone notices.

Additionally, the Treasury Department will publish deadlines for certain subsidy-related reports that employers must file. Generally, the employer will need to file reports attesting that all employees receiving the subsidy were involuntarily terminated and reports providing a complete accounting of the subsidies.

## Conclusion

The Act requires employers to quickly implement these new COBRA procedures. Therefore, we recommend that employers:

- (1) Identify employees who were involuntarily terminated on or after September 1, 2008 and qualify as AEIs;
- (2) Identify which AEI's have COBRA coverage now and which AEI's are eligible to make a special election;
- (3) Decide whether to implement the subsidy by March 1, 2009 or credit/refund March/April subsidies;
- (4) Reconsider any existing employer subsidies of COBRA premiums;
- (5) Send revised COBRA notices no later than 44 days following any involuntary termination of employment after February 17, 2009;
- (6) Send revised notices by April 18, 2009 to AEI's who were terminated on or after September 1, 2008 and before February 17, 2009;
- (7) Adapt procedures to accommodate the Act's various administrative requirements; and
- (8) Coordinate with third party COBRA providers as applicable.

Please contact either Ken Johnson [(336) 271-5264] or David Bury [(336) 271-5266] if you have any questions concerning these new COBRA obligations.

This publication is not intended to be a source of legal advice, and should not be relied upon as legal advice on any specific matter. Moreover, information contained in this publication may have changed subsequent to its publication. If you have questions related to this topic, please seek legal counsel regarding your particular situation.

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<sup>3</sup>The Act does not appear to address the situation where an employer terminates an AEI before February 17, 2009 but has not, as of February 17, 2009, sent such AEI the regular 44 day COBRA notice. This situation arguably calls for two notices: a standard 44 day notice *and* a 60 day special election notice.