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Continuing COBRA Coverage under the American Recovery and Reinvestment Act

On February 17, 2009, the American Recovery and Reinvestment Act ("ARRA") took effect. The ARRA expands eligibility for COBRA continuation coverage and provides premium reductions to certain qualified individuals who are involuntarily terminated between September 1, 2008 and December 31, 2009. This article summarizes the expanded coverage and employers' obligations under the ARRA, which appears at Public Law Number 111-5.

How does the new law expand coverage?

The ARRA offers a second chance for otherwise ineligible employees to elect COBRA continuation coverage by creating a special election opportunity. It also provides a federal subsidy of COBRA premiums to qualified beneficiaries for up to 9 months.

What is the special election opportunity?

The ARRA allows individuals involuntarily terminated between September 1, 2008 and February 16, 2009 who were otherwise eligible for COBRA but did not elect it when offered, or who elected COBRA but are no longer enrolled, another chance to elect coverage. The window to elect coverage, which began February 17, 2009, is open up to 60 days after the employee receives notice of the special election opportunity.

What is the premium subsidy under the ARRA and who pays for it?

The ARRA provides a 65% federal subsidy, so that individuals only pay 35% of the COBRA premium. Under the statute, the individual's employer, plan administrator or insurance company (whichever is applicable) will initially pay the remaining 65% premium. On the date the individual pays his/her 35% share, the 65% share becomes reimbursable to the paying entity as a credit against payroll tax. The ARRA prohibits reimbursement until the individual pays his/her required share of the premium.

Who can claim the payroll tax credit and how is it claimed?

The payroll tax credit may be claimed by: (1) a multi-employer group health plan, (2) an employer maintaining a group health plan that is subject to COBRA or that is self-insured, or (3) an insurer providing coverage under a plan not included in (1) or (2).

The tax credit is claimed on the employer's Quarterly Federal Tax Return, IRS Form 941, available online at: www.irs.gov/newsroom/article/0,,id=204505,00.html. If the credit is greater than the taxes that are due, the excess will be reimbursed to the person or entity claiming the tax credit, in the same manner as if it were an overpayment of taxes.

Who is eligible for the premium subsidy?

Under the statute, "assistance eligible individuals" or "AEI" qualify for the subsidy. AEI are defined as an employee and/or the employee's dependent(s) who were eligible for COBRA as a result of *involuntary termination* between September 1, 2008 and December 31, 2009 and who elect COBRA coverage. Employees eligible for Medicare or other group health coverage, such as a spouse's plan, are not eligible. Also, employees who were terminated for gross misconduct are not eligible.

How is involuntary termination defined?

Unfortunately, the ARRA does not define involuntary termination, which presents potentially difficult scenarios for employers. On March 31, 2009 the IRS published Notice 2009-27, available online at: www.irs.gov/newsroom/article/0,,id=205018,00.html, which attempts to define involuntary termination. Although its definition is lengthy and leaves many questions unanswered, it does confirm that employees terminated *for cause* qualify under its definition. However, because the basic eligibility requirements for COBRA coverage still apply, an employee terminated for *gross misconduct* is not eligible. In either scenario, the employer must notify the employee of the potential for eligibility, but may subsequently deny the application.

What period does the premium subsidy cover and how long does it last?

The subsidy applies to coverage on or after February 17, 2009, and begins on March 1, 2009 for Plans that charge for COBRA coverage on a monthly basis. The subsidy lasts for a maximum of 9 months. However, it ends earlier if the individual becomes eligible for Medicare or other group health coverage, or when the maximum period of COBRA coverage ends.

Does the ARRA affect the maximum period of coverage under COBRA?

No. The maximum period of COBRA coverage is not extended under the ARRA. It still expires 18 months from the date of the qualifying event. For example, assume an individual was involuntarily terminated on September 2, 2008, elected COBRA, but dropped it through non-payment. While he or she is eligible to re-enroll under the ARRA's second chance provision and receive the subsidy, COBRA coverage still expires 18 months from September 2, 2008.

How long do employees have to accept coverage under the ARRA?

Individuals have 60 days from the date they receive notice to accept coverage.

Must an employer notify employees about the new coverage under the ARRA?

Yes. The ARRA requires employers to modify current COBRA election notices or provide supplemental notices to all qualified beneficiaries, not just covered employees, who experience a qualifying event between September 1, 2008 and December 31, 2009, regardless of the type of qualifying event.

What must the notice include?

The notice must clearly describe the second chance special enrollment period, the premium subsidy and conditions for its receipt, the employee's duty to notify the employer if he/she becomes ineligible and the penalties for failure to do so (possible fine up to 110% of the value of the subsidy). The Department of Labor has published model notices that are available at: www.dol.gov/ebsa/COBRAmodelnotice.html.

When must employers notify employees of the election?

Employers must notify individuals who became eligible before February 17, 2009 within 60 calendar days (April 18, 2009). Failure to do so leaves the election period open. The individual's 60 day period to accept coverage does not begin until he or she *receives* notice from the employer. Accordingly, employers should notify individuals as soon as possible to avoid extending the election period.

Is there a grace period for employers before paying the 65% premium?

Yes. The ARRA allows employers to charge individuals full premiums for two months (March and April). However, the employer must subsequently either reimburse the individuals for such excess charges, or apply a credit to future premiums.

Are there income limitations to the subsidy?

Yes. Individuals whose modified adjusted gross income ("AGI") is between $125,000-$140,000 (single) or $250,000-$290,000 (married filing jointly) will receive a proportionally reduced subsidy, referred to as a "phase-in percentage subsidy." The phase-in percentage is calculated by taking the modified AGI and dividing it by $20,000 (single) or $40,000 (joint).

Who determines whether an employee is income ineligible?

The employee makes the call. Employees may waive the subsidy if they believe their income level will be too high to qualify. Employees who accept the subsidy and have a modified AGI that exceeds the maximum income level will see their income tax liability increase accordingly for that year. The waiver must be in writing and cannot be retracted. An employee may not later claim the subsidy if his/her AGI proves to be less than the maximum allowable. The ARRA does not permit employers to make the determination for their employee, but requires them to advise employees that the waiver cannot be retracted.

What happens if an employer denies enrollment or subsidy?

Employees may appeal to the Department of Labor or Health and Human Services for a review of a denial of enrollment or a subsidy, and a decision must be issued within 15 business days after receipt of the application. While the determination is final, an individual may bring a lawsuit to have a court review it. The ARRA specifically provides, however, that courts must give "deference" to the decision made by the Department of Labor or Health and Human Services.

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