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EMPLOYMENT LAW

Changes to COBRA

What you need to know

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On Feb. 17, 2009, President Barack Obama signed into law a $787 billion economic stimulus package entitled the American Recovery and Reinvestment Act of 2009. The ARRA made some significant changes to COBRA. It provides for a 65 percent government subsidy of COBRA premiums for up to nine months for certain employees (and their dependents) involuntarily terminated between Sept. 1, 2008 and Dec. 31, 2009. The 65 percent premium subsidy initially must be paid by employers who thereafter will be reimbursed by the government.

Under COBRA, terminated employees and their qualified beneficiaries may continue their health insurance at the group rate plus a 2 percent administrative fee. Under ARRA, the federal government for up to nine months will pay 65 percent of the cost of a qualified beneficiary's COBRA premium if the qualified beneficiary (1) experiences a qualifying event that is an "involuntary termination" during the period Sept. 1, 2008 to Dec. 31, 2009; (2) elects COBRA coverage; and (3) pays 35 percent of the COBRA premium. The employer must initially pay the 65 percent of the COBRA premium and receive a credit for such amount against its federal payroll tax liabilities. Involuntary termination is not defined. However, it is clear that layoffs qualify but terminations for gross misconduct do not.

> If as part of a severance package the employer agrees to pay all of a former employee's COBRA contributions, the employer will not be reimbursed at all by the federal government.

Employers agreeing to pay a portion of their employees' COBRA premiums as part of a severance package should take note: employees are only obligated to pay 35 percent of their premium obligation. Moreover, employers will only be reimbursed by the federal government for 65 percent of their employees' contributions. In other words, if as part of a severance package the employer agrees to pay all of a former employee's COBRA contributions, the employer will not be reimbursed at all by the federal government. If an employer agrees to pay 40 percent of the employee's COBRA contributions, the employee only needs to pay 35 percent of his or her 60 percent obligation and the employer is only entitled to obtain reimbursement for 65 percent of the employee's 60 percent. Stated differently, the employer will not be entitled to a payroll tax credit for the 40 percent of the premium the employer agreed to pay pursuant to a severance agreement.

Income threshold

There is an income threshold. If the individual's modified adjusted gross income exceeds $145,000, or $290,000 for joint filers, the government's premium subsidy must be repaid by the employee. The repayment is reduced proportionately for income between $125,000 and $145,000. Individuals can elect to waive the premium subsidy if they are above the income threshold to avoid being subject to a recapture tax.

The subsidy applies to periods of COBRA coverage that began after Feb. 17, 2009. If a company's period of coverage under its plan is a calendar month, the employer will have had to start providing the subsidy as of March 1, 2009.

The subsidy is available for up to nine months as long as the individual remains eligible to continue COBRA coverage, but will end earlier if the individual becomes eligible for any other group health coverage or Medicare. Under COBRA, an individual eligible for Medicare does not need to terminate COBRA coverage. However, under ARRA, the subsidy will end.

There is a grace period under ARRA. For employers who charged qualified beneficiaries for the full COBRA premium for up to two billing periods after Feb. 17, 2009, the employer must then either reimburse the qualified beneficiary for the amount of the premium subsidy or credit that amount toward future COBRA premium payments.

New election opportunity

Those who were terminated on or after Sept. 1, 2008, who originally did not elect COBRA, will have an additional opportunity to elect. They have 60 days to make the election after notice is provided. The notice must be sent by April 18, 2009 to all qualified beneficiaries (not just to individuals who were involuntarily terminated).

Coverage would begin Feb. 17, 2009 (or March 1, 2009) but will ends no later than the date the original maximum COBRA continuation coverage period would have expired.

So, what's the bottom line?

- Identify those individuals who have been involuntarily terminated since Sept. 1, 2008.
- Those involuntarily terminated individuals who elected COBRA must be given a subsidy starting with the next COBRA payment period (Feb. 17, 2009 or March 1, 2009).
- Those involuntarily terminated employees who did not elect COBRA coverage (and the qualifying dependents of those individuals) must be notified of their special election rights by April 18, 2009.
- Revise premium notices for those qualifying for the subsidy to reflect the 35 percent premium amount.
- Determine how you will allow high-income employees to waive the COBRA subsidy.
- Revise your COBRA election notice or prepare an attachment to use with your existing notice. These revisions should be used until Dec. 31, 2009.
- Should anyone have overpaid their COBRA premiums beginning March 1, 2009, decide whether you will refund the overpayment or apply it as a credit toward future COBRA premiums.
- Review employee manuals, summary plan descriptions, etc. to reflect the ARRA changes.

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