COBRA Subsidy Under ARRA

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Overview

The American Recovery and Reinvestment Act of 2009 (ARRA), P.L. 111-5, 123 Stat. 115 (Feb. 17, 2009), provides qualified individuals with a 65% government subsidy for up to nine months of the premiums paid for health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The subsidy provides an incentive to elect COBRA coverage for involuntarily terminated employees and their qualified beneficiaries. The new administrative requirements of the law and its substantive benefits will need to be understood by employers quickly, particularly for companies that have engaged in a reduction in force since September 1, 2008, or are currently contemplating such reductions. There are likely to be increased costs from the administration of this new subsidy. There may also be additional costs (in excess of maximum COBRA premiums) arising from increased utilization of COBRA benefits, particularly for those employers whose health benefit plans are self-insured or funded through retrospectively rated insurance policies.

COBRA Premium Subsidies Under the American Recovery and Reinvestment Act of 2009

Eligibility and Duration. To be eligible for the 65% COBRA continuation premium subsidy, individuals must (i) be employees involuntarily terminated between September 1, 2008, and December 31, 2009; (ii) be eligible for COBRA continuation coverage; and (iii) elect COBRA coverage under the normal or special election rules added by ARRA (see *Special Election Period* below). There is also an income threshold to eligibility. Individuals whose modified adjusted gross income (MAGI) for any taxable year in which the subsidy was received exceeds $145,000 for individuals ($290,000 for joint filers) will receive the premium subsidy but will have to repay the full amount they receive as part of their income tax payments, unless they elect to permanently waive the subsidy. Employees whose MAGI is between $125,000 and $145,000 (or joint filers between $250,000 and $290,000) may also elect to waive the subsidy but will be permitted a pro rata amount if they do not. The COBRA premium subsidy is available for a period of coverage beginning on or after ARRA's enactment for which the qualified individual (or another person on behalf of the individual, other than the individual's employer) pays 35% of the premium due. The subsidy ends on the earliest of (i) nine months after it begins; (ii) at the end of the maximum COBRA coverage period; or (iii) on the first day the individual could be covered by any other group health plan or is Medicare eligible.

Special Election Period. Employees involuntarily terminated between September 1, 2008, and February 17, 2009, and who do not have an election of COBRA continuation coverage in effect on February 17, 2009, are provided a 60-day special election period in which they (and their qualified beneficiaries) may elect COBRA coverage. If an individual elects coverage during this period, coverage begins after the election is made (and does not reach back to the date of termination). However, the special election does not extend the maximum period of COBRA coverage beyond the period under the applicable COBRA regulations that would have applied if COBRA coverage had been elected when originally available.

Alternate Coverage Option. Employers may provide alternate coverage under ARRA that is different from the coverage under the health plan in which the individual was enrolled at the time of his or her involuntary termination. This alternate coverage is not required and will be treated as COBRA continuation coverage only if (i) the premium for the alternate coverage is not more than the premium for the coverage the employee was enrolled in at the time of termination; (ii) the alternate coverage is also offered to active employees at the time the election is made; and (iii) the alternate coverage is not limited to dental, vision, counseling or referral services, or a flexible spending arrangement, or provides coverage for services or treatments only at on-site employer facilities. Once the terminated employee elects the alternate coverage, it becomes COBRA continuation coverage under the applicable COBRA continuation provisions and must be continued for the duration of the COBRA continuation period even though the subsidy ends after nine months.

Subsidy Reimbursement. A qualified individual who pays 35% of the premium due will be treated as having paid the full amount of the premium. The entity to which payments are made (typically the employer, but in some circumstances the group health plan or the insurer providing coverage under the plan) must file a claim for reimbursement of the remaining 65% of the premium. The entity is treated as if the amount to be reimbursed had been paid by the entity as payroll taxes. If the reimbursement due exceeds the entity's payroll tax liability, the excess is credited or refunded in the same way as an overpayment of payroll taxes. ARRA also provides that if any qualified individual pays the full amount of his or her COBRA premium for the first period or the immediately subsequent period following enactment to which the premium reduction applies (generally, March and April 2009), the entity to which premiums are payable must reimburse 65% of the premium to the individual or provide the individual with a credit towards one or more future premium payments. The entity to which premiums are due will then be reimbursed in the manner described above.

New Notification Requirements for Employers and Group Health Plans. Plan administrators must notify qualified individuals of the availability of the premium subsidy and the option to enroll in different coverage (if any) as part of their regular COBRA notice. This may be accomplished by amending existing notice forms or by supplementing existing notice forms with a separate document. The additional notification must also be provided, within 60 days of ARRA's enactment, to those qualified individuals who qualify to elect COBRA continuation under the special 60-day election period. Model notices are required to be provided by the Secretary of Labor within 30 days of enactment. Finally, in order to collect the full amount of the premiums due, employers and group health plans will have to file claims/reports for reimbursement in the time and manner prescribed by the Secretary of the Treasury.

Unanswered Questions. The ARRA leaves many questions unanswered. For example, it does not specifically define the term "involuntary termination" (although it is clear that an employee who is ineligible for COBRA because he or she was terminated for gross misconduct is also ineligible for the subsidy) or address whether the term includes employees who lose health benefits when they move to part-time employment with no coverage to avoid involuntary termination. In addition, because the subsidized amount is determined by reference to the premium the employee is actually required to pay, it appears that where an employer subsidizes COBRA premiums, for example, as part of a severance package, the employee must pay 35% of his or her portion of the premium only and the employer will be reimbursed for the remaining amount. Further guidance is expected and additional details will be posted to the IRS website as soon as they become available.

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