



Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.  
Clients and Friends Legal Alert  
**Employer COBRA Obligations Changed**



## Special Edition Newsletter

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On February 17, 2009, President Obama signed into law the **American Recovery and Reinvestment Act**. The 407-page statute provides, in part, for a combination of tax cuts and new funding for various programs. Of immediate importance to employers is a new subsidy arrangement providing most eligible employees separated from employment with assistance in paying COBRA premiums.

These new COBRA rules in part provide a Federal subsidy of 65% for up to nine months of coverage for those eligible employees that elect coverage. Under this provision of the law, beneficiaries will be able to elect or continue their COBRA coverage while paying only 35% of the premium (the premium subsidy is not included in the gross income of the beneficiary). Although this premium assistance is characterized as a "federal subsidy", the employer -- at least initially -- will be responsible for paying the remaining 65% of the premium costs. However, it will be allowed to deduct that payment from otherwise required payroll taxes, essentially making the payment an advance -- and a "wash" in the long run.

The American Recovery and Reinvestment Act also requires employers to notify eligible employees of the changes to COBRA within 60 days of enactment. We will be contacting our clients soon concerning their requirements in this regard. The Federal Government will create a model notice within 30 days. The Act also directs the U.S. Treasury to provide additional guidance on reporting the employer subsidy.

We will continue to apprise you of the reporting requirements as they are made available, and in the meantime, are available to assist you in addressing any immediate issues concerning application of this law. More specifics as to relevant detail follow below.

## **Basic Subsidy Requirement**

Prior to the passage of this Act, an individual entitled to health benefits under COBRA may be responsible for up to 100% of the premium, plus an additional 2% for administration fees.

Under the American Recovery and Reinvestment Act, employers (or in some cases a health plan or insurer) will be required to pay 65% of COBRA premiums for a maximum of nine months. Please note that this percentage applies to the employee's premium responsibility which may not be the same as 65% of the total premium for coverage.

## **Employee Eligibility**

An employee who loses his/her coverage under a group health plan between September 1, 2008 and December 31, 2009 due to an involuntary termination is eligible for the COBRA premium subsidy. The subsidy starts phasing out for individuals filing single with adjusted gross incomes of \$125,000 or filing joint with an adjusted gross income of \$250,000. The subsidy is completely phased out for individuals with an adjusted gross income of \$145,000/\$290,000. However, unless an individual notifies the entity (multiemployer plan, employer or insurer) that he/she does not want to receive the subsidy, the employer (or multiemployer/ insurer) is obligated to provide it. Any payments made to ineligible individuals (due to income limitations) will be reported on his/her annual tax return. The amount of tax the ineligible individual pays will be increased by the amount of subsidy he/she received.

An individual is eligible for nine months unless he/she becomes eligible for a group health plan before the expiration of the nine-month period. The individual is required to notify the employer of eligibility for the other coverage in writing. Failure to do so will result in a penalty of a 110% of the subsidy.

## **Employer Reimbursement for the Subsidy**

In general, the entity to whom premiums are payable under COBRA continuation coverage will be reimbursed for the amount not paid by the eligible individual.

**Plan:** In the case of a multiemployer group health plan, the plan is entitled to reimbursement.

**Employer:** In the case of any group health plan subject to Federal COBRA laws or a group health plan under which some or all of the coverage is not provided by insurance, the employer is entitled to reimbursement.

**Insurer:** In the case of any group health plan not covered by the above definitions, the insurer is entitled to reimbursement.

## **How Does One Obtain Reimbursement for the Subsidy?**

An employer shall receive reimbursement of the subsidy by treating the subsidy as a credit on its payroll taxes. If the amount of premium/subsidy is greater than the payroll tax liability, than the outstanding balance will be treated as an overpayment of payroll taxes. If the employer claims too much on its payroll taxes, the deficit will be treated as an underpayment of payroll taxes.

Under the Act, the U.S. Treasury is required to provide further guidance for reporting and verifying the subsidy provided as well as an individual's entitlement to that subsidy.

## **Those Who Elected to Receive COBRA before the Subsidy**

Individuals who are eligible for the subsidy but elected to receive COBRA before the passage of this Act, may receive the coverage on a prospective basis only, beginning with the first coverage period following the date of enactment.

## **Those Who Declined COBRA before the Subsidy**

Individuals, otherwise eligible for the subsidy, who declined COBRA before the passage of this Act are entitled to elect coverage on a prospective basis only. The nine-month period is measured from the earliest date that COBRA coverage could have been elected.

## **Notice Requirements**

The Act requires employers to provide updated notices or supplemental notices of the subsidy and, if applicable, an option to enroll in different coverage. For those individuals who are currently eligible for the subsidy, notice must be provided within 60 days of the passage of the Act. Notice of the changes to COBRA must also be provided to those individuals who become eligible for the subsidy within 44 days of the qualifying event.

The Act instructs the Department of Labor, U.S. Treasury, and Department of Health and Human Services to prepare a model notice within 30 days of the passage of the Act.

## **Special Concern Regarding Separation Agreements**

Employers need to carefully consider how separation agreements are drafted. There is already a great deal of debate and confusion regarding how the subsidy is affected when an employer agrees to pay a portion of the COBRA premium. The Act provides that an individual (or a person other than the individual's employer, paying on behalf of the individual) need only pay 35% of the premium to satisfy his/her payment obligations. If an employer typically pays 20% of the individual's COBRA premium, the employer is not entitled to reimbursement of that 20%. The reimbursement amount is to be taken from an eligible individual's payment obligations. Any separation agreement should clarify how the parties intend to handle this

issue.

Please feel free to contact us at 315-437-7600 with any questions.