

NEW COBRA RULES EFFECTIVE FEBRUARY 17, 2009

The American Recovery and Reinvestment Act of 2009 (the “Recovery Act”), signed into law by President Obama on February 17, 2009, provides a COBRA subsidy for all employees who are “involuntarily” terminated from employment at any time during the period from September 1, 2008 through December 31, 2009. This subsidy applies to group health plans, including self-insured plans, that are subject to COBRA continuation coverage requirements, and to health care continuation coverage required by states for smaller employers. Illinois employers having fewer than twenty employees will be subject to the new subsidy rules.

Under the Recovery Act, an employee eligible for the subsidy will be required to pay only 35% of the monthly premium for continuation coverage. This subsidy will be available for a maximum period of nine months. The remaining 65% of the premium is paid by the employer or the insurance company and is reimbursed to the employer through a credit on the employer’s quarterly employment tax return (Form 941). The employer can either offset its payroll tax deposits or claim the subsidy as an overpayment at the end of the quarter. An updated Form 941 has been issued by the IRS and must be used by the employer to receive the reimbursement.

The full subsidy is available to individuals having modified adjusted gross income of up to \$125,000 (\$250,000 for joint return filers). A reduced subsidy will be calculated for individuals having modified adjusted gross income between \$125,000 and \$145,000 (\$250,000 and \$290,000 for joint return filers). The full amount of the subsidy will be paid as additional tax if the taxpayer’s modified adjusted gross income exceeds \$145,000 (\$290,000 for joint filers).

Although the Recovery Act became effective on February 17, 2009, a transition rule anticipates that employees electing COBRA may continue to pay the full amount of the premium for up to two months following the effective date (i.e., March and April). However, the employees will be entitled to receive a retroactive payment of the subsidy portion.

Employers are required to provide a notice of the new COBRA rules to all employees whose employment was involuntarily terminated during the period from September 1, 2008, through December 31, 2009. The deadline for providing this notice is April 18, 2009. The text of a model notice is due from the Department of Labor on March 19, 2009. Employers are advised to review the model notice before submitting a notice to eligible employees. It is anticipated that the government’s instructions accompanying this model notice will clarify whether the notice is required to be given to a broader field of separated employees.

Employees who were involuntarily terminated during the period from September 1, 2008 through February 17, 2009, but failed to initially elect COBRA in response to a COBRA notice,

will be given a second opportunity to elect COBRA at any time during the 60-day period following their receipt of the COBRA notice reflecting the subsidy rights under the Recovery Act.

Employers should start *now* to compile a list of individuals whose employment was involuntarily terminated since August 31, 2008, or experienced any other qualifying event under COBRA or applicable state law since that date. The employer must then begin the task of locating any missing former employees, and identifying former employees whose employment was “involuntarily” terminated (there is no definition of that term included in the new law). Employers will also have to set up procedures to pay the 65% premium subsidy, to obtain reimbursement from the U.S. Treasury, and to credit overpayments to those individuals who are entitled to the subsidy but pay full premiums in March and April. All compliance mechanics should be in place so that notices and election forms are available for delivery to former employees and others entitled to notice prior to the April 18, 2009 deadline.

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