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## Significant COBRA Changes Require Immediate Action from Employers

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The American Recovery and Reinvestment Act of 2009 ("the Act"), signed into law on Tuesday by President Obama, contains provisions that immediately expand COBRA coverage for employees whose employment has been, or will be, terminated between September 1, 2008 and December 31, 2009. The provisions require immediate attention, as the Act's subsidy provisions apply to all employers maintaining a group health plan subject to the COBRA healthcare continuation rules and/or comparable state continuation coverage provisions.

### Eligible Employees

The Act requires that an employer subsidize 65% of the COBRA premium for employees and their covered dependents who lose health coverage due to the employee's involuntary termination

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between September 1, 2008 and December 31, 2009. The Act does not provide a definition of when a termination qualifies as "involuntary." Therefore, it is not clear at this time whether individuals who have voluntarily resigned from employment in anticipation of layoff and/or taken a voluntary severance will be entitled to the subsidy. While the legislation seems designed to assist employees who have lost their jobs as a result of the current economic downturn, it is recommended that employers initially identify, as affected employees, all the employees involuntarily terminated between September 1, 2008 and December 31, 2009. Employers can then eliminate from consideration all employees terminated due to gross misconduct, as they continue to remain ineligible for COBRA coverage and the subsidy under the Act.

In identifying individuals who are eligible for the subsidy, employers must also include those employees and their eligible dependents who previously declined COBRA coverage. These employees will now be given a new opportunity to elect COBRA, and so receive the subsidy. Eligibility for the subsidy ends either nine months after the subsidy period begins (see below) or upon the date that the eligible former employee becomes eligible for Medicare or health coverage under another group health plan.

#### **Subsidy Mechanism**

Employers will be required to pay 65% of the COBRA premium for the eligible employee or their eligible dependent(s) for up to nine (9) months, beginning with the first period of coverage following enactment of the law. The subsidy applies to medical, dental and vision benefits, but not to medical flexible reimbursement plans. Employers making such payments are then eligible to claim a quarterly payroll tax credit limited to the amount paid pursuant to the Act. For example, if an employer pays all or a larger percentage of an eligible employee's COBRA premium under the terms of a severance agreement, then the employer will be able to take a credit for only that portion of the premium paid as a subsidy. If the premiums paid exceed an employer's tax obligations in any given quarter, the Treasury is required to refund the employer the excess subsidy paid. The Treasury has not yet created the means by which an employer will report the subsidies.

#### **COBRA Enrollment and Subsidy Period**

Group health plans must offer an additional COBRA election notice and enrollment period to those individuals who became a qualified beneficiary -- an eligible employee and/or the employee's dependent(s) -- on or after September 1, 2008. Again, the election notice must also be provided to those individuals who either originally declined coverage or who elected but then terminated coverage due to an inability to pay the premium. The election period for those individuals begins with enactment and ends 60 days after a plan administrator provides the required election notice. For those individuals electing COBRA coverage under these circumstances, subsidized coverage will not exceed nine (9) months and will run only through the date that would have been the maximum coverage period had the covered employee elected COBRA coverage initially. This would generally be a date 18 months

after the employee's termination date.

Subsidized coverage that is elected during this election period, or already existing, starts with the first coverage period that begins after the Act's enactment. For the first two month period after enactment, an employer may continue to require an employee to pay the full COBRA premium. The subsidy owed to the employee for that period, however, must either be offset against future premiums or directly refunded.

#### **Choice of Coverage Offering.**

While an employer is not required to do so, it may allow an eligible individual to elect coverage under any health plan option that the former employer offers to any of its employees, so long as the premium of the option elected by an employee post-termination is equivalent to or less than the employee's health coverage premium during his or her employment.

#### **Income Limitation**

The subsidized premiums are tax-free to recipients subject to an income threshold. Once the former employee's adjusted gross income exceeds \$125,000 (if single or married filing separately) or \$250,000 (if married filing jointly), gradually larger portions of the subsidy become taxable. When income reaches \$145,000 and \$290,000 respectively, the individual must repay the entire premium subsidy. Higher income terminated employees have an option to waive the right to the premium subsidy.

#### **Employer Required Notices**

Within 60 days of the enactment, employers are required to notify eligible former employees and their dependents of their right to elect COBRA and their right to the subsidy. In addition to the regular COBRA election notification, employees must also be informed of their right to the subsidy, along with the qualifying conditions, and the employee's obligation to notify the employer of eligibility under another group health plan or Medicare, along with the penalty for failure to do so.

The Department of Labor is required to develop a model notice within 30 days of enactment.

#### **Action Plan for Employers**

Due to the short timeframe within which employers are obligated to act, employers are recommended to take the following actions:

1. Identify all former employees who have been involuntarily terminated since September 1, 2008. Ensure you have documentation of the voluntary or involuntary nature of any termination. Also determine the affected employees current status with regard to COBRA enrollment (i.e. currently enrolled, enrolled then terminated due to inability to pay, never elected to enroll).

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2. Make a decision as to whether to allow affected employees to choose alternative coverage.

3. Prepare an election notice that notifies the former employees and their covered dependents about the subsidy and coverage options or wait for the Department of Labor to issue a model notice within the next 30 days.

4. Distribute the election notice within 60 days of enactment.

5. Revise or supplement your current COBRA notice to incorporate the required subsidy provisions and coverage options. Again, employers may wish to wait for the model notice to be issued by the Department of Labor.

6. Set up a payroll procedure for making the subsidy payment and then filing for the refund through payroll tax reduction.

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