

# ALERT

## COBRA HAS CHANGED. IMMEDIATE ACTION IS REQUIRED.

March 6, 2009

The American Recovery and Reinvestment Act of 2009 – also known as the “Economic Stimulus Bill” – has made significant changes to COBRA. *If you are subject to COBRA, these changes affect you – and there are steps you are legally required to take.*

These changes, and the steps you are required to take, are summarized in more detail in the attached memorandum. Changes include the following:

- (1) **Premium Subsidy.** The cost of COBRA coverage for “assistance eligible individuals” will be subsidized. Instead of paying the entire premium, they will only be required to pay 35%. *The employer will be required to subsidize the remaining 65% of the premium, but will be able to recover this amount by taking a credit against its payroll taxes.*
- (2) **Second COBRA Election Period.** If an “assistance eligible individual” did not elect COBRA when it was first offered to him/her, or elected COBRA but later allowed that coverage to lapse, *that individual must be given a second opportunity to elect COBRA* and must be informed of the existence of the premium subsidy. If COBRA is elected by the individual during the second election period, coverage under most group health plans will be retroactive to March 1, 2009.

An “assistance eligible individual” is basically an individual who is or was eligible for COBRA continuation coverage at any time between September 1, 2008 and December 31, 2009, as the result of the “involuntary termination” of a covered employee’s employment during that same time period. This includes not just employees themselves, but also other individuals who are receiving coverage through an employee, such as spouses and dependent children.

*These changes have already taken effect.* To comply with these new provisions, and as explained in more detail in the attached memorandum, employers will need to take the following steps (among others):

- (1) **Notice Regarding Second COBRA Election Period.** A notice must be sent to “assistance eligible individuals” who are entitled to a second COBRA election period.
- (2) **Notice Regarding Premium Subsidy.** A notice must also be provided to “assistance eligible individuals” informing them of the existence of the premium subsidy. Going forward, this notice will need to be part of the standard COBRA election forms that are provided to COBRA qualified beneficiaries.
- (3) **Updated COBRA Forms, Plan Documents, SPDs.** Employers will need to update their COBRA forms, the COBRA provisions in their plan documents, and the COBRA summary in their “summary plan descriptions” to reflect these new provisions.

This represents a very brief and simple summary of some very complicated statutory provisions. Because of the very short time frame for compliance, and because of the potentially serious consequences of noncompliance, ***it is important for you or someone in your organization to read the attached memorandum.*** If you have questions regarding the COBRA provisions in the Economic Stimulus Bill, please feel free to call Eric Namee or Steven Smith at 316-267-2000.

**MEMORANDUM**

**ECONOMIC STIMULUS BILL SHAKES UP COBRA ADMINISTRATION**  
**IMMEDIATE ACTION REQUIRED**

It is too early to know whether or not the American Recovery and Reinvestment Act of 2009 – also known as the “Economic Stimulus Bill” – will be successful in bringing the economy back to life. It is already clear, however, that it will require employers to make immediate and significant changes to the way they have been administering COBRA.

**I. – BACKGROUND**

For the past 23 years, employers have generally been required to offer employees and their dependents the opportunity to continue their coverage under the employer’s group health plan if that coverage would otherwise be lost as a result of a “qualifying event,” such as a termination of employment.

If coverage would be lost because an employee has resigned, been fired, or otherwise had his/her employment terminated for reasons other than “gross misconduct,” the employer is responsible for ensuring that a COBRA election notice is sent to both the employee and the employee’s covered dependents.

The employee and his/her covered dependents then have 60 days to elect COBRA continuation coverage and up to an additional 45 days to begin paying premiums based on the actual cost of coverage (without regard to any subsidies that the employer might be providing to its active employees). If they don’t elect COBRA within this 60-day window, or if they elect COBRA but fail to pay a required premium within the applicable deadline (including grace periods), their right to continue their coverage under COBRA will end.

At least, that’s how it worked before the Economic Stimulus Bill took effect on February 17, 2009. With the enactment of the Economic Stimulus Bill, however, the rules have changed, and those changes went into effect immediately. This means that employers will need to start thinking right away about the steps they will need to take to comply with the new rules.

**II. – CHANGES MADE BY THE STIMULUS BILL**

The Economic Stimulus Bill makes three major changes to the prior COBRA rules:

- (1) **Premium Subsidy.** First, certain “assistance eligible individuals” will be able to receive COBRA coverage without having to pay the full cost of coverage. Under the Economic Stimulus Bill, they will only need to pay 35% of the normal COBRA premium. The remaining 65% of the normal COBRA premium will be subsidized by the U.S. Treasury in the form of a payroll tax credit to the employer.

- (2) **Second Opportunity to Elect COBRA Coverage.** Second, certain “assistance eligible individuals” who did not elect COBRA when it was originally offered to them, or who elected COBRA but allowed their COBRA coverage to lapse, must be given a second chance to elect COBRA, even if the normal 60-day deadline for doing so has already expired.
- (3) **Opportunity to Change to Less Expensive Coverage.** Third, if the employer is offering multiple levels of coverage to its employees – for example, if the employer is offering both a premium HMO option and a more basic PPO option – the employer may choose to give “assistance eligible individuals” the opportunity to elect COBRA coverage under a different coverage option if the premiums for that other coverage option do not cost more than the premiums for the coverage option previously elected by the participant.

These new rules and notice obligations are outlined in more detail in the remainder of this Alert.

**Note:** The COBRA changes made by the Economic Stimulus Bill apply to all group health plans, including both “major medical” plans and “limited scope” plans, such plans offering only limited dental and vision benefits plans. They do not, however, apply to health flexible spending accounts (or “health FSAs”).

### **III. – ASSISTANCE ELIGIBLE INDIVIDUALS**

The COBRA provisions of the Economic Stimulus Bill are focused on “assistance eligible individuals.” An “assistance eligible individual” is someone:

- (1) Who is (or was) eligible for COBRA continuation coverage at any time between September 1, 2008, and December 31, 2009;
- (2) Whose eligibility is (or was) the result of the *involuntary termination* of a covered employee’s employment during that same time period; and
- (3) Who elected COBRA when it was offered to him/her (either when it was first offered or during the second election period).

This includes not just employees who are (or will be) involuntarily terminated during this time period, but also other “qualified beneficiaries” – such as spouses and dependent children – who are (or were) receiving their coverage through the employer as a result of another individual’s employment.

### **IV. – PREMIUM SUBSIDY**

An “assistance eligible individual” may elect COBRA without having to pay the full amount of the premium that would otherwise be due. Under the Economic Stimulus Bill, an “assistance eligible individual” is only required to pay 35% of the normal COBRA premium.

#### **A. – Duration of Premium Subsidy**

The premium subsidy will be available until the earliest of the following events:

- (1) The individual has received the subsidy for nine months;

- (2) The individual becomes “eligible for coverage under any other group health plan,” other than a group health plan providing only limited benefits, such as dental or vision coverage;
- (3) The individual becomes eligible for Medicare; or
- (4) The individual is no longer eligible for any further COBRA continuation coverage, for example, because the individual has received coverage for the maximum possible period or because the individual failed to pay his/her share of the required premium on a timely basis.

Losing the premium subsidy as a result of becoming “eligible for coverage under any other group health plan,” will encompass a broader range of situations than it might appear on first reading. If an “assistance eligible individual” becomes eligible for coverage at a new place of employment, the premium subsidy will be lost, regardless of whether the individual signs up for that coverage.

Additionally, it appears that the premium subsidy will be lost if the individual is eligible to be covered under a group health plan offered by his/her spouse’s employer. Because a spouse has the right under HIPAA “special enrollment” to enroll in a group health plan offered by the spouse’s employer if other coverage is lost, and because the spouse can generally enroll his/her eligible dependents in that plan at the same time, a literal reading of this provision would seem to say that the premium subsidy will not be available to any “assistance eligible individual” if the individual’s spouse would be able to enroll that individual in a group health plan of the spouse’s employer by exercising the spouse’s HIPAA special enrollment rights. Whether Congress intended this result is not certain.

#### ***B. – Transition Rule for COBRA Premium Payments for March and April 2009***

Because it is possible that individuals may end up paying their full COBRA premiums for March and April 2009 before they realize that they are eligible for a subsidy, the Economic Stimulus Bill includes a transition provision addressing this situation. If an individual pays 100% of the cost of his/her COBRA premiums during the first 60 days following the effective date of the Economic Stimulus Bill – that is, between February 17, 2009, and April 18, 2009 – the employer must either (i) reimburse the individual for 65% of the premiums or (ii) provide a credit to the individual – in an amount equal to 65% of the premiums – to be used to offset future premiums over the next 180 days.

#### ***C. – Employer Tax Credit for the Premium Subsidy***

An employer that is required to provide a subsidy for the cost of COBRA premiums will be “made whole” through a credit against the amount of its payroll taxes. The credit will be equal to the difference between the full amount of the COBRA premiums and the amount that was actually paid by an “assistance eligible individual.”

To claim this credit, an employer must complete a revised IRS Form 941. Although the Form 941 only requires information on the total amount of premium reimbursement claimed and the total number of “assistance eligible individuals” on whose behalf the reimbursement is being sought, employers nevertheless should maintain supporting documentation, including the following:

- Information on each premium payment made by an “assistance eligible individual,” including the dates and amounts of each payment;

- In the case of an insured plan, a copy of any invoice or other supporting statement from the insurance carrier that is evidence of the employer's payment of the COBRA premiums to the insurance carrier;
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to each "assistance eligible individual";
- Evidence documenting that each "assistance eligible individual" receiving the premium subsidy was *involuntarily* terminated between September 1, 2008, and December 31, 2009;
- Proof that each "assistance eligible individual" receiving the premium subsidy was eligible for and elected COBRA during the period from September 1, 2008, to December 31, 2009; and
- A record of the Social Security numbers of all covered employees, the amount of the premium subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or two or more individuals.

#### *D. – "Recapture" Provision for Certain High Income Taxpayers*

For most taxpayers, the premium subsidy will not be taxable. This situation changes, however, for certain high income taxpayers. If the "modified gross income" of an "assistance eligible individual" exceeds \$125,000 (or, in the case of taxpayers filing a joint return, \$250,000), a "phase in" will apply and a portion of the subsidy will become taxable. If the taxpayer's "modified gross income" exceeds \$145,000 (or, in the case of taxpayers filing a joint return, \$290,000), the entire amount of the subsidy will be taxable. The tax is designed to recapture the amount of any excessive subsidy; thus, the amount of the tax will be equal to the portion of the subsidy that is taxable. In other words, it is a "dollar for dollar" tax on the subsidy.

Taxpayers who are concerned that their income will exceed these thresholds may make a permanent election to waive their subsidy. To do so, they must notify the employer in writing of their desire to do so.

#### **V. – SECOND COBRA ELECTION PERIOD**

If an individual would qualify as an "assistance eligible individual" but for the fact that COBRA coverage was not in effect on the effective date of the Economic Stimulus Bill (i.e., February 17, 2009), either because the individual did not elect COBRA in the first place or because COBRA was elected but the coverage later lapsed, the individual must be given a second opportunity to elect COBRA.

To do this, the plan administrator –for most plans, the employer is the plan administrator – will be required to send a second COBRA election notice to the "assistance eligible individual." The new notice must be sent within 60 days after the date of the Economic Stimulus Bill's enactment – that is, by **April 18, 2009**. (Because April 18<sup>th</sup> is a Saturday, it seems likely that the actual deadline will be extended until Monday, April 20<sup>th</sup>.)

The new COBRA election notice must, among other things, inform the "assistance eligible individual" that:

- (1) The individual may elect COBRA continuation coverage;
- (2) The individual will be required to pay only 35% of the normal COBRA premium;

- (3) If elected, the COBRA coverage will be retroactive to the first period of coverage beginning after the effective date of the Economic Stimulus Bill. Because the Economic Stimulus Bill was enacted on February 17, 2009, and because most plans offer COBRA continuation coverage in one-month units beginning on the first day of each month, this means that, for most plans, the COBRA coverage will be retroactive to March 1, 2009; and
- (4) The deadline for making this election is 60 days after the date of the new notice.

## VI. – OPPORTUNITY TO ELECT LESS EXPENSIVE COVERAGE

If the employer offers more than one level of coverage to its active employees, then it may choose to allow “assistance eligible individuals” to switch to that coverage if they would otherwise be covered under coverage that is more expensive.

This represents a change to the normal COBRA rules. Normally, under COBRA, the coverage that is offered to a “qualified beneficiary” must be identical to the coverage that was in effect on the day before the COBRA “qualifying event.” Under the Economic Stimulus Bill, however, an employer may permit “assistance eligible individuals” to enroll in other coverage if each of the following conditions is met:

- (1) The other coverage is also being offered to active employees;
- (2) The premiums for the other coverage do not exceed the premiums for the coverage the individual had at the time of the COBRA “qualifying event;” and
- (3) The other coverage is not “limited scope” coverage, such as coverage that is limited to dental, vision, counseling, or referral services, a health flexible spending account, or an on-site clinic that provides primarily first-aid services or prevention and wellness care.

Employers are not required to give “assistance eligible individuals” the opportunity to change coverage; however, if they choose to do so, they must include information about this option in the notices that they provide to their “assistance eligible individuals,” including the notice of the second opportunity to elect COBRA that is discussed above.

## VII. – NOTICE REQUIREMENTS

The Economic Stimulus Bill adds a number of additional notice requirements to the notice requirements that already exist under COBRA:

- (1) **COBRA Election Notices.** When a COBRA election notice is provided to a “qualified beneficiary,” the notice must include information about the following (among other requirements):
  - (a) The premium subsidy that is being made available to “assistance eligible individuals”; and
  - (b) The opportunity for “assistance eligible individuals” to elect less expensive coverage (if offered by the employer).

To comply with this requirement, an employer must either update its existing forms for COBRA election notices or include a separate document with the COBRA election notices it sends out. This requirement applies *immediately* and is an ongoing requirement that will remain in effect for as long as notices are being sent to “assistance eligible individuals.”

**Note:** This requirement applies to all COBRA election notices, and not just to notices that are provided to “assistance eligible individuals.” Thus, for example, an election notice that is being provided to a former spouse following a divorce will be required to include this additional information even though the premium subsidy and the opportunity to elect less expensive coverage will not be available when the “qualifying event” is a divorce (as opposed to an involuntary termination of employment between September 1, 2008, and December 31, 2009).

- (2) **Special Notice Regarding Premium Subsidy.** If an individual became entitled to COBRA prior to the effective date of the Economic Stimulus Bill – that is, before February 17, 2009 – the plan administrator must provide a special notice regarding the availability of the premium subsidy and, if applicable, the opportunity to elect less expensive coverage. *This notice must be provided within 60 days of enactment* – that is, by April 18, 2009. (Because April 18<sup>th</sup> is a Saturday, the deadline will presumably be extended to Monday, April 20<sup>th</sup>.)

The Department of Labor is required to provide model notices no later than 30 days after the bill’s enactment date – that is, by March 19, 2009. An employer is still required, however, to meet its deadlines as set forth in the Act, even if the Department of Labor fails to provide model notices on time.

## VIII. – ACTION STEPS

We are still waiting for the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services to fill in important details. Until they provide additional guidance, we will not be able to identify all of the steps that need to be taken.

There are, however, steps that employers can and should get started on now. These steps include the following:

- (1) **Identify Employees Whose Employment Was Involuntarily Terminated.** An employer needs to identify all employees whose employment was involuntarily terminated (other than for “gross misconduct”) between September 1, 2008, and the present;
- (2) **Determine if the Involuntarily Terminated Employees Were Covered Under a Group Health Plan.** An employer then needs to determine if the involuntarily terminated employees were covered under the employer’s group health plan (or plans) at the time their employment was involuntarily terminated;
- (3) **Determine if Any Dependents of the Involuntarily Terminated Employees Were Also Covered Under a Group Health Plan.** The dependents of an employee who was involuntarily terminated (other than for “gross misconduct”) between September 1, 2008, and the present will also be considered to be an “assistance eligible individual” if they were covered under the group health plan on the day before the involuntary termination of employment. These individuals thus need to be identified as well;

- (4) **Prepare to Send Out Notices to “Assistance Eligible Individuals.”** Although employers may need to wait for additional guidance before sending out notices to “assistance eligible individuals,” an employer can “gear up” for that now by making sure that it has an up-to-date mailing list;
- (5) **Prepare Updated COBRA Notices for Use On a “Go Forward” Basis.** An employer will also need to update its existing COBRA notices to reflect the requirements of the Economic Stimulus Bill, as summarized above, and will need to begin using those new notices. Again, additional guidance is needed, but employers need to know that this change will be coming and that it will need to be implemented quickly once updated notices are available;
- (6) **Update Your Plan Documents and SPDs.** An employer will need to amend the plan document for each of its group health plans to reflect the new COBRA rules in the Economic Stimulus Bill. It will also need to update each summary plan description (or “SPD”) to reflect these same changes, either by preparing a new SPD or by distributing a “summary of material modification” to the participants in each plan.

*The requirement for a plan document and an SPD is not new. If you do not already have them, you need to know that they are legally required and that we can help you prepare them. A contract of insurance is not enough, by itself, to satisfy this requirement. If we have already prepared plan documents for you, we will contact you about updating them. If you do not have plan documents or you are not certain that what you have is legally adequate, you are welcome to contact us and we would be happy to review what you have to help you determine if you are in legal compliance.*

- (7) **Account for Premium Subsidies Paid to all “Assistance Eligible Individuals.”** Finally, employers will need to modify their payroll/accounting systems to keep track of all COBRA premium subsidies provided to “assistance eligible individuals.” This will be necessary to ensure that individuals whose income renders them ineligible to take full advantage of the COBRA premium subsidy know how much additional tax they must pay based on their receipt of subsidies to which they were not legally entitled.

## IX. – CONCLUSION

The Economic Stimulus Bill is highly detailed and extremely complicated. Many unanswered questions remain. We are keeping an eye on things. In the meantime, if you have questions regarding the Economic Stimulus Bill, please feel free to call Eric Namee or Steven Smith at (316) 267-2000.

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