



## EMPLOYEE BENEFITS LAW **ALERT**

February 26, 2009

### **COBRA CHANGES UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT**

*We are sending this Employee Benefits Law Alert to update an alert we distributed on February 18, 2009. Government representatives have explained that although the Act states that insurance companies providing insurance for group health plans will be entitled to reimbursement of the COBRA subsidy, the employer (and not the insurance company) generally will be entitled to the reimbursement. Accordingly, we have updated the alert to reflect those statements and have included the updated alert below. We will continue to provide updates of any significant announcements and/or developments with respect to the COBRA subsidy.*

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On February 16, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the “**Act**”). Although a substantial portion of the Act is dedicated to stimulating the economy, there are other provisions designed to assist individuals in making it through these tough economic times. Of particular interest to the employee benefits community is a 65% government-paid subsidy for COBRA premiums (up to 9 months) for eligible individuals. The subsidy provision is temporary and, under the Act, will end on December 31, 2009.

To comply with the COBRA subsidy provisions of the Act, employers will need to make significant changes immediately. A brief summary of some of the relevant provisions follows.

Amount of Subsidy: the amount of the subsidy is 65% of the COBRA continuation coverage premiums for eligible individuals for a maximum of 9 months. IRS/Treasury representatives have stated, on an informal basis, that their interpretation of the Act is that the subsidy will be calculated based on the premium the employee is actually charged by the employer – instead of the maximum COBRA premium the employer could charge the employee.

Who is Eligible for COBRA Subsidy: if an employee is involuntarily terminated during the period of September 1, 2008 to December 31, 2009, that individual (and dependents) may be eligible for the COBRA subsidy. However, the amount of the subsidy is reduced if the individual’s modified adjusted gross income exceeds \$250,000 (for joint return filers) or \$125,000 (for all other filers) and completely eliminated if the individual’s modified gross income exceeds \$290,000 (for joint filers) and \$145,000 (for all other filers).

Individuals who were involuntarily terminated before the date the Act was signed and who declined COBRA coverage will need to again be given the opportunity to elect COBRA coverage. If that individual now decides to elect coverage, then the maximum COBRA period would be measured from the original date he or she was eligible for COBRA coverage.

Notices: employers must modify their COBRA election notices or provide separate, supplemental notices to all individuals who become entitled to elect COBRA through December 31, 2009. The new notices must describe the new premium subsidy. The notices also must describe any right to change coverage options. Model notices should be issued by the government within 30 days of February 17, 2009. For those

individuals who became entitled to elect COBRA before the Act's enactment date, the employer must provide new notices within 60 days after February 17, 2009. Failure to provide these notices could result in monetary penalties under ERISA and the Internal Revenue Code.

How the Subsidy Works: although the text of the Act is not clear, government representatives have stated that the following reimbursement rules will generally apply:

- for a single employer plan that is subject to COBRA, the employer will be entitled to the COBRA subsidy reimbursement;
- for a multiemployer plan, the multiemployer plan will be entitled to the COBRA subsidy reimbursement; and
- for an insured plan not described above (where continuation coverage is provided pursuant to state law, *e.g.*, a state law applicable to employers with fewer than 20 employees), the insurance company providing the insurance will be entitled to the COBRA subsidy reimbursement.

The Act provides that the reimbursement will be accomplished through reducing the amount of payroll taxes that the entity receiving the reimbursement owes. If the reimbursement is greater than the payroll tax due for that period, then the excess reimbursement will be treated in the same manner as a refund or a credit due for overpayment of payroll taxes. The IRS will have to provide additional guidance on how exactly this reimbursement process is to work. Further, with respect to reimbursement of multiemployer plans, the Act also provides that the IRS will have to provide guidance on how the reimbursement process will work.

Appeal Procedure: if an individual's request for the subsidy is denied, he or she may generally appeal the decision to the DOL. The DOL must rule on the request within 15 business days.

The COBRA provisions in the Act will require significant and immediate changes by sponsors of group health plans. As mentioned above, additional guidance will need to be issued by the various federal government agencies. However, sponsors do not have the luxury of waiting until that guidance is issued before implementing the new COBRA rules.

If you have any questions, please contact David Sawyer at 412.594.5642 (or [dsawyer@tuckerlaw.com](mailto:dsawyer@tuckerlaw.com)), Joni Landy at 412.594.3945 (or [jlandy@tuckerlaw.com](mailto:jlandy@tuckerlaw.com)), or Jonathan Grossman at 412.594.5574 (or [jgrossman@tuckerlaw.com](mailto:jgrossman@tuckerlaw.com)).

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