



# Employment Edge 96th Edition - New COBRA Obligations for Employers

February 19, 2009

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the Act) into law. Part of the Act modifies the continuation coverage rules under the Consolidated Omnibus Reconciliation Act of 1985 (COBRA) by imposing new notice and administrative obligations on employers regarding premiums and by providing a subsidy for health care continuation benefits for eligible individuals.

## **The Subsidy**

Under the Act, employers sponsoring group health plans subject to COBRA or a State program that provides comparable continuation coverage must provide "assistance eligible individuals" with the opportunity to elect continuation coverage of group health plan benefits at 35 percent of the applicable COBRA premium for up to nine months of coverage. Assistance eligible individuals are those who experience an involuntary termination of employment between September 1, 2008 and December 31, 2009, and their spouses and dependents. If an individual requests treatment as an assistance eligible individual and is denied that treatment by the plan, the act requires the Department of Labor to provide an expedited review of the denial within 15 days of receipt of the application for review.

Employers must offer the full subsidy to individuals with a modified adjusted gross income of less than \$125,000 (\$250,000 for joint filers), and must offer a reduced subsidy to individuals with modified adjusted gross incomes between \$125,000 and \$145,000 (\$125,000 and \$290,000 for joint filers). The subsidy is available for up to nine months, however, the subsidy period will not extend the individual's otherwise applicable maximum continuation period and, like traditional COBRA coverage, the coverage will end early if the individual becomes covered under another group health plan or Medicare. The subsidy will apply to premiums for COBRA coverage beginning on or after February 17, 2009.

Employers may be reimbursed for the remaining 65 percent of the COBRA premium through a payroll tax credit. Reimbursement is contingent upon the individual's payment of the reduced premium, and will not be available until the reduced premium has been received by the Plan. Guidance on how to file for and receive the tax credit will be issued by the Secretary of the Treasury.

## **The Employer Notice Requirements**



The Act requires employers to provide notice of the availability of the subsidized benefit, along with new COBRA election rights within 60 days of February 17, 2009. This notice can be made by amending the existing COBRA notice forms or by utilizing a separate document with the new information. The Secretary of Labor will provide a model notice for such use within 30 days of February 17, 2009.

Failure to provide the new notices will be treated as a notice failure under the COBRA provisions.

### **Individual Notice Requirements**

Under the Act, individuals receiving reduced premium benefits are responsible for notifying the Plan when they are no longer eligible for such benefits because they are eligible for other group health plan, on-site medical or Medicare coverage. Failure to provide this required notice may result in a penalty of 110 percent of the premium reduction amount provided after the individual was no longer eligible for reduced premium benefits.

### **New Election Rights**

The Act requires employers to offer another opportunity to elect coverage to assistance eligible individuals who experienced an involuntary termination of employment after September 1, 2008 and who previously did not elect COBRA coverage. Individuals with new election rights will have 60 days from the date of the notice in which to elect coverage. Coverage under this new election option will begin on the first COBRA period of coverage (usually, the calendar month) beginning after February 17, 2009. Note, however, that this delayed coverage effective date will not extend the employee's otherwise applicable maximum continuation period.

### **Opportunity to Change Coverage Options**

Unlike with traditional COBRA coverage, employers can choose to permit assistance eligible individuals the opportunity to elect a coverage option that is different than the coverage in effect at the time of the qualifying event, so long as the coverage is also available to active employees and the premium for the different coverage does not exceed the premium for the coverage the individual had in effect at the time of the qualifying event.

### **Coverage Requirements**

Individuals who previously declined or did not elect COBRA continuation coverage who are electing coverage under the new election rights will not have a gap in coverage caused by the initial failure to elect coverage count toward any break in coverage under the Health Insurance Portability and Accountability Act (HIPAA) creditable coverage requirements or any pre-existing condition limitations or restrictions under the Plan.

### **Action Items for Employers**



- Review available information (payroll records, COBRA notice and election materials) to determine which involuntarily terminated individuals may be eligible for the premium subsidy.
- Review, modify or prepare new COBRA Notice materials to include the new required information.
- Determine whether other coverage is available and will be offered to eligible individuals.
- Review agreements with health plan and COBRA administration service providers to determine how these requirements will affect information responsibilities and services.

For more information about the American Recovery and Reinvestment Act, contact Kathi Wright at 612.632.3384 or any of the Employee Benefits and Executive Compensation attorneys at Gray Plant Mooty by calling 612.632.3000.

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