

EMPLOYEE BENEFITS ALERT

February 25, 2009

ECONOMIC STIMULUS PACKAGE INCLUDES MAJOR CHANGES TO COBRA ADMINISTRATION

The economic stimulus package signed by President Obama on February 17, 2009, requires significant changes to COBRA administration. The new law, referred to as the American Recovery and Reinvestment Act of 2009 (the "Act"), provides for a governmental subsidy of 65% of the cost of COBRA premiums for group health plan coverage (excluding health care flexible spending accounts) for up to nine months for those involuntarily terminated employees who qualify. The law is effective for periods of COBRA coverage beginning on or after February 17, 2009. Therefore, it would generally apply as of March 1, 2009, for those employers with monthly COBRA coverage billing periods, but could apply earlier or later for other employers. The following is a very general summary of this complex legislation and should not be relied on to implement a COBRA subsidy program without further professional consultation and guidance.

Eligibility for the Subsidy

Only those individuals who were involuntarily terminated between September 1, 2008 and December 31, 2009, are considered "assistance eligible individuals." Unfortunately, the Act does not specifically define the term "involuntarily terminated." An individual has a right to appeal an employer's determination of whether such individual was involuntarily terminated to the Department of Labor ("DOL").

The subsidy will not apply for any periods of coverage beginning prior to February 17, 2009; however, even those otherwise eligible individuals who previously rejected COBRA coverage or who elected COBRA, but then failed to pay COBRA premiums at some point will have right to elect COBRA coverage for periods of coverage beginning on or after February 17th, and receive the subsidy for up to nine months after such date. The subsidy will no longer apply if the individual becomes eligible for other health coverage or the initial 18-month COBRA period expires. Special limitations, which reduce or eliminate the subsidy, are applicable for individuals earning over \$125,000 (or \$250,000 for joint returns).

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Collecting the Subsidy

Assistance-eligible individuals will pay only 35% of the employer's required COBRA premium. Upon satisfying certain reporting requirements (to be determined by the Internal Revenue Service ("IRS")), the employer will be reimbursed by the government for the remaining 65% of the COBRA premium in the form of payroll tax credits. In certain limited cases, the plan insurer may collect the subsidy rather than the employer.

Required COBRA Notices

The DOL is charged with providing model forms no later than March 19, 2009. Employers may rely on the DOL notices to describe the subsidy rights to former employees and obtain new COBRA elections. Employers must provide such notices no later than April 18, 2009. Although only involuntarily terminated employees have a right to elect subsidized COBRA coverage under the Act, notices must be sent to all individuals whose employment terminates between September 1, 2008, and December 31, 2009, not only those whose employment was involuntarily terminated. In addition, employers may permit individuals to elect a different, less costly coverage option available under the plan.

Employer Action Required

Until additional IRS and DOL guidance is available, employers should consider taking the following steps: (1) identify all individuals whose employment terminated (voluntarily or involuntarily) on or after September 1, 2008, and make initial determinations as to whether such individuals were "involuntarily terminated"; (2) review any severance agreements or other releases applicable to individuals whose employment terminated on or after September 1, 2008, to identify any special COBRA provisions (such as employer-paid premiums for a period of time) that may affect the right to a subsidy; (3) discuss the subsidy with employer payroll personnel to prepare for new reporting requirements relating to W-2 income reporting and payroll tax credits; (4) contact any third-party COBRA administrators, third-party payroll administrators and insurance providers, if applicable, to determine to what extent those entities will assist with compliance issues; and (5) send a preliminary notice or otherwise communicate with potential assistance-eligible individuals to inform them of their subsidy rights (employers may begin charging these individuals only 35% of the usual COBRA premium or provide credits for the excess amounts paid even though the new DOL model forms have not yet been released and returned to the employer).

Once the DOL forms are released, employers must notify all employees who terminated on or after September 1, 2008, of their new election rights. Employers will be required to follow the reporting requirements set forth by the IRS in order to receive the tax credits.

Compliance Assistance

The Conner & Winters Employee Benefits/Compensation Group is closely monitoring developments regarding interpretation and implementation of the Act and is ready to assist you with your COBRA compliance needs. Please contact us if you have any questions or would like assistance with compliance with these new requirements or other COBRA issues.

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