

Stimulus Package Contains Expansion of COBRA Provisions

February 2009

This week, President Barack Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA), into law. Commonly referred to as the “stimulus package,” this new law contains a significant change to certain employees’ right to continuation of health care coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). Under this new law, the federal government will subsidize 65% of COBRA premiums for employees who are laid off between September 1, 2008 and December 31, 2009. The federal subsidy will be available for a maximum nine (9) months.

Assistance-Eligible Individuals

Premium support is available for “assistance-eligible individuals” (AEIs). AEIs are defined as (1) employees who are “involuntarily terminated” between September 1, 2008 and December 31, 2009, and (2) their qualified beneficiaries. The subsidy is not available to persons who meet the criteria for COBRA due to other qualifying events—such as a reduction in hours, divorce, voluntary resignation or attainment of a limiting age. The law provides no guidance on the definition of involuntary termination.

Premium assistance for persons with modified adjusted gross income above a certain threshold (\$125,000 for individuals and \$250,000 for couples) will be phased out, with a total loss of subsidy for individuals making above \$145,000 and couples making above \$290,000. Those persons receiving premium assistance who have income above the phase-out threshold will be required to repay the ineligible subsidy amounts in their tax returns. An individual who does not wish to receive the subsidy may permanently waive eligibility for it by notifying the employer.

Group Health Plans Affected

The premium assistance provision applies to medical, dental or vision plans that would be subject to federal COBRA or Cal-COBRA provisions, but does not apply to healthcare flexible spending accounts (FSAs).

Extended Election Period

The election period for the subsidy is generally the same as the regular COBRA election period. However, because ARRA applies to people who have already been laid off, there is an extended election period for AEIs who were terminated on or after September 1, 2008 and do not currently have a COBRA election in effect. Those AEIs will now get a second chance to elect COBRA, with premium assistance. The extended election period began on the date of enactment of ARRA (February 17, 2009) and will end 60 days after the employer provides the AEI with notice of the extended election period. For those AEIs who enroll during the extended election period, coverage will begin on the first date of coverage after the enactment of ARRA. (For most plans, where coverage begins at the beginning of the calendar month, coverage would begin on March 1, 2009.)

Length of Subsidy

AEIs are entitled to premium assistance for a maximum of nine months of coverage. Premium assistance ends on the earliest of:

- Nine months after the subsidy first becomes available to the AEI;
- The first date that the AEI is eligible for coverage under any other group health plan, FSA, on-site employer-provided medical facility, or Medicare;
- For AEIs who enroll during the extended election period, the date on which their coverage would have expired, had they elected COBRA at termination; or,
- The date the AEI's coverage expires under current COBRA rules.

AEIs who fail to notify the employer of their eligibility for other coverage as described above will be subject to a penalty of 110% of the premium reduction provided after they ceased to be eligible for premium assistance.

Optional Plan Changes

ARRA has an optional provision that would allow an AEI to enroll in different coverage than the one in which the AEI was enrolled when terminated. The AEI has 90 days from notification of the option to change enrollment, to elect this change. The AEI may enroll in different coverage only if:

- The employer has decided to allow such changes;
- The premium of the new coverage is equal to or less expensive than the premium for the old coverage; and
- The new coverage is also available to active employees at the time the AEI elects it.

This plan change provision does not allow an AEI to change to dental-only, vision-only, counseling/referral services, FSA, or employer's on-site first-aid or wellness care plan.

Notice Requirements

This new law imposes certain additional administrative burdens on employers that sponsor group health plans. In addition to the regular COBRA Election Notice given to a terminating employee, employers must also provide notice of the availability of premium reduction and the option to enroll in different coverage (if the employer has elected to allow enrollment in different coverage). Specifically, the notice of the availability of premium reduction must provide:

- An explanation of the eligibility requirements for premium assistance;
- The name, address and telephone number to contact the plan administrator and any other person maintaining relevant information in connection with the premium reduction;
- A description of the extended election period for those AEIs who qualify for it;
- A description of the obligation of the AEI to notify the plan of eligibility for subsequent coverage which would end eligibility for premium assistance; and
- A prominently displayed description of the AEI's right to a reduced premium.

This additional notice may be added to the existing COBRA Election Notice, or may be provided in a separate notice, but it must be issued to AEIs eligible for the extended election period within 60 days of the enactment of ARRA.

Reimbursement Procedures

Under ARRA, the AEI will be responsible for paying 35% of COBRA premiums; the employer will pay remaining 65% to the insurer (or, in the case of a self-insured employer, the remaining 65% will be borne by the plan). The employer will then be reimbursed for the 65% subsidy through offsetting periodic payroll tax payments (i.e., FICA and wage withholding) by the subsidy amounts. Employers who are entitled to reimbursement amounts greater than the payroll tax liability will receive a credit or refund from the IRS. Conversely, employers who over-report their subsidy reimbursement are subject to the same penalties that are applicable to the underpayment of payroll taxes.

Reporting Requirements

Employers entitled to reimbursement will be required to submit the following information to the IRS:

- An attestation that each covered AEI was involuntarily terminated;
- A report of the amount of payroll taxes offset during the reporting period;
- An estimate of the payroll taxes to be offset during the following reporting period;
- The tax identification numbers (TINs) of all employees who received the premium subsidy;
- The amount of subsidy reimbursed for each person whose coverage is subsidized; and,
- With respect to each former employee receiving the subsidy, whether the subsidy reimbursement is for one, two or more covered individuals.

The Secretary of the Treasury has been directed to develop regulations concerning the form and manner in which employers report these items.

Effective Date

AEIs are eligible for the subsidy as of the first day of the first period of coverage beginning on or after the date of the enactment of the law. Since the law was enacted on February 17, 2009, and COBRA coverage periods are generally measured in months, AEIs will be eligible for subsidized COBRA on March 1, 2009.

Because of the speed with which this law will be enacted, it is possible that some AEIs will elect premium assistance, but will nonetheless be billed for the entire premium for the first month or two. Those AEIs who elect premium assistance, but wind up paying the full premium for these initial months are entitled to either (1) reimbursement of the excess amount paid within 60 days, or (2) a credit toward subsequent premium payments, if it is reasonable to believe that the AEI will use the entire credit within 180 days of overpayment.

Areas Where the Statute Requires Regulatory Clarification

There are a number of places in the new law where the Secretary of the Treasury, the Secretary of Labor and/or the Secretary of Health and Human Services is directed to develop regulatory guidance. These include:

- The time and manner in which an AEI receiving the subsidy must notify the group health plan of his or her loss of eligibility for the subsidy.
- Model COBRA notices, which the statute directs to be published within 30 days of enactment of the law. This would mean that we should see model notice forms by March 19th.

- The time and manner in which an employer entitled to reimbursement must submit the required reports to the federal government.
- The time and manner in which a high-income individual may waive the right to premium assistance.
- Regulations regarding the prevention of fraud and abuse and the expedited review of denials of subsidized COBRA.

As stated above, model notices are to be published by March 19, 2009. We hope that the three federal agencies responsible for issuing clarifying regulations will work quickly to clear up the statute's remaining ambiguities.

Action Items

The immediate effectiveness of this law and the lack of immediate regulatory guidance pose substantial hurdles for employer compliance. Employers are advised to:

- Assume a broad definition of the term “involuntary termination,” in the absence of regulations.
- Identify those employees who have been involuntarily terminated since September 1, 2008—both those who have elected COBRA and those who haven't.
- Decide whether to permit the optional plan changes allowed by the statute.
- Work with payroll departments to obtain the information necessary to comply with the reporting requirements.
- If you have a COBRA administrator, find out which responsibilities they will be taking on.
- Develop a procedure for high-income AEIs to waive premium assistance.

For clients with whom Keenan has contracted to perform COBRA administration services, Keenan is in the process of developing Election Notices and procedures that comply with ARRA's requirements. We will ask those clients to provide us with a list of the names and last known addresses of AEIs who were involuntarily terminated between September 1, 2008 and February 17, 2009.

Conclusion

This *Briefing* is provided for employee benefits insurance consulting purposes only. It concerns new areas of the law that are subject to later clarification through regulations, interpretation through court decision and change through further legislation. Nothing in this *Briefing* will constitute legal advice, nor shall it substitute for consultation with your own legal counsel. If you have questions about this *Briefing*, please contact your Keenan employee benefits consultant.