

Stimulus Act
Requires 65% Subsidy for
COBRA Coverage

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the “Stimulus Act”). The Stimulus Act contains provisions which amend the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) in a manner which will have a significant and immediate impact on most employers.

In general, the Stimulus Act provides that an employee and his or her covered dependents who are covered under a covered employer’s group health plan and who lose coverage due to the employee’s involuntary termination between September 1, 2008 and December 31, 2009 (otherwise known as “assistance eligible individuals”) are eligible for a 65% subsidy of their normal COBRA continuation coverage premiums. The subsidy amount can be used to cover medical, dental and vision benefits, but not medical flexible reimbursement plans. However, employees who are terminated for gross misconduct are not eligible for the subsidy, and the subsidy amount will be reduced or eliminated for certain highly compensated employees based on income limitations.

Under these new rules, the COBRA premium to be charged to the assistance eligible individual during the subsidy period can be no more than 35% of the applicable COBRA premium otherwise payable by that assistance eligible individual. If an employer otherwise subsidizes part of the COBRA premium, then the assistance eligible individual would only be required to pay 35% of their portion of the premium. The entity who receives the 35% payment from the assistance eligible individual (generally the employer) is then required to pay the remaining 65% of the COBRA premium to the insurance company.

For most plans, the subsidy will apply to premiums paid for periods of coverage beginning on or after March 1, 2009, and it can extend for up to 9 months following eligibility. The subsidy does not extend the maximum COBRA continuation period, and it will terminate prior to the end of the 9 month period if the assistance eligible individual becomes eligible for Medicare, Medicaid or other group health plan coverage. Assistance eligible individuals are required to provide written notice to the employer in the event they obtain such replacement health care coverage.

The Stimulus Act requires employers to provide a general notice regarding the COBRA subsidy to all employees (not just those who are terminated involuntarily) who terminate employment between September 1, 2008 and December 31, 2009. If an employer has former employees who are eligible for the subsidy who have previously elected the COBRA coverage, the employer must provide them with notice and the subsidy will then apply to reduce their premium payments for up to 9 months beginning on March 1, 2009. If the employer has former employees who are eligible for the subsidy but who previously chose not to elect the COBRA coverage, the employer must provide them with a new COBRA notice of a special election period within 60 days of enactment of the Stimulus Act and offer them another opportunity to elect COBRA coverage. The Department of Labor is expected to issue model COBRA notices within 30 days of the effective date of the Stimulus Act.

Employers must seek reimbursement of the 65% premium subsidy amounts by taking a credit or a refund on its payroll tax returns (either quarterly on Form 941 or annually on Form 943 or 944). The Internal Revenue Service recently stated that a payroll tax return is the **only** means to claim credit and be reimbursed for the COBRA subsidy. The IRS also stated that the fourth

quarter of 2010 will be the last time an employer can take the credit on its payroll tax returns. Obviously, employers need to be diligent in their efforts to receive timely reimbursements of the subsidy amounts. Those employers claiming the reimbursement must also maintain supporting documentation for the amount claimed. Such supporting documentation includes, but is not limited to:

- Information on the receipt, including dates and amounts, of the assistance eligible individual's 35% share of the premium;
- In the case of an insured plan, copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA;
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals;
- Attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from Sept. 1, 2008, to Dec. 31, 2009), for each covered employee whose involuntary termination is the basis for eligibility for the subsidy;
- Proof of each assistance eligible individual's eligibility for COBRA coverage at any time during the period from Sept. 1, 2008, to Dec. 31, 2009, and election of COBRA coverage.
- A record of the SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or two or more individuals;
- Other documents necessary to verify the correct amount of the reimbursement.

Although the above documentation must be maintained by the employer, it will not be required to be submitted to the IRS with Form 941.

As an employer, you must act quickly to comply with these new rules. You should contact your attorney, COBRA administrator and/or insurance provider for details and assistance in complying with the new law. You should also make a list of all employees who were involuntarily terminated since September 1, 2008, and begin the process of locating them and their dependents so you can send the new COBRA notices. You should also develop a procedure to assist you in identifying any other eligible employees who are involuntarily terminated between now and December 31, 2009. You will need to create new COBRA notices and revise your old COBRA notices to provide the information required by the Stimulus Act. The model notices from the Department of Labor should assist you in his process, and they are expected to be released in the very near future. Finally, you need to meet with your payroll department and ensure they are ready to handle the subsidy payments and the payroll tax reimbursement procedures.

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