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## Client Advisory

### Overview

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 ("ARRA") into law. The ARRA makes several changes to health care continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). The Department of Labor released model COBRA notices on March 19, 2009, which take into account these changes and provide a safe harbor for plans and employers.

In general, COBRA requires that group health plans sponsored by employers with 20 or more employees in the previous year offer employees and their spouses and dependants the opportunity for a temporary extension of health care coverage, known as "continuation coverage," in certain circumstances where health care coverage would otherwise end. In addition, Massachusetts is one of the 40+ states that has a "mini-COBRA" statute that provides similar continuation coverage to employees of smaller employers (those with 2 to 19 employees). Consequently, some of the ARRA benefits described below will also be available to those employees who are covered under the Massachusetts mini-COBRA statute.

### Reduced COBRA Premiums

Under the ARRA, workers who are **involuntarily terminated** from their employment between September 1, 2008 and December 31, 2009 (and their qualified beneficiaries) may pay reduced COBRA premiums for a period of up to nine months beginning on or after February 19, 2009. Pursuant to the ARRA, Assistance Eligible Individuals (as defined below) will be treated as paying the entire COBRA premium if they (or someone on their behalf, other than their former employer) pay 35% of the amount of such premium.

To take advantage of this credit, the employer (or fund or insurer) must file a Form 941 (which has already been revised to account for COBRA premium assistance) with the federal government. The employer also must maintain supporting documentation for the credit claimed, including: (i) information on the receipt (including dates and amounts of the assistance eligible individuals' 35% share of the premium); (ii) for insured plans, a copy of an 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; (iii) for self-insured plans, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals; (iv) the taxpayer identification numbers of all covered employees (and qualified beneficiaries) and the designation with respect to each covered individual as to whether the subsidy reimbursement is for single or family coverage; and (v) proof of each individual's eligibility for COBRA coverage and election of such coverage. The employer must also keep a sworn statement that the individual was involuntarily terminated during the applicable period, which the date of the involuntary termination. If the reimbursement is overstated, it will be treated as an underpayment of payroll taxes.

### Eligibility for Reduced Premiums

Reduced premiums under the ARRA are available for "Assistance Eligible Individuals" ("AEIs"). To be considered an "AEI" and get reduced premiums an individual:

- MUST be eligible for continuation coverage at any time during the period from September 1, 2008 through December 31, 2009, and must elect the coverage;
- MUST have a continuation coverage election opportunity related to an **involuntary termination** of employment that occurred at some time from September 1, 2008 through December 31, 2009 (individuals who have another COBRA qualifying event, such as reduction in hours, divorce or attainment of a certain age, or who voluntarily resign from their employment are **not** eligible for the subsidy);
- MUST NOT be eligible for Medicare; and
- MUST NOT be eligible for coverage under any other group health plan, such as a plan sponsored by a successor employer or a spouse's employer.

The spouse and dependents of any such "AEI" are also considered "AEIs" for purposes of the premium subsidy, provided that their COBRA qualifying event is the employee's involuntary termination during the applicable time period. Employees who are involuntarily terminated at any time between September 1, 2008 through February 16, 2009 and were offered, but did not elect, continuation coverage OR who elected continuation coverage and subsequently discontinued that coverage are provided a special 60-day election period in which they (and their qualified beneficiaries) may elect COBRA coverage. If an individual elects coverage during this period, coverage begins after the election is made (and is not retroactive to the date of termination). However, the special election does not extend the maximum period of COBRA coverage beyond the period under the applicable COBRA regulations that would have applied if COBRA coverage had been elected when originally available.

Note that the ARRA does not alter the provisions regarding the ineligibility for COBRA by individuals who are terminated for gross misconduct. AEIs whose modified adjusted gross income for the taxable year exceeds $145,000 ($290,000 in the case of joint filers) are technically eligible for the subsidy. However, if such individuals do in fact receive the subsidy, at the end of the year their income tax will be increased by the amount of the subsidy they received. AEIs whose modified adjusted gross income for the taxable year exceeds $125,000 ($250,000 in the case of joint filers), but does not exceed the amount referenced above, are entitled to a reduced subsidy. High income individuals also have the option to waive receipt of the premium assistance.

## Duration of Premium Assistance

The subsidy will only be made with respect to periods of continuation coverage beginning after March 1, 2009, the effective date of the COBRA provisions of the ARRA, and for a maximum period of nine (9) months. The subsidized premium will end on the earliest to occur of:

- The date the individual becomes eligible for coverage under any other group health plan or Medicare;
- The date the maximum applicable COBRA continuation period for the individual ends; or
- The date the individual receives nine (9) months of coverage under the ARRA premium assistance.

Note that individuals are required to notify the plan as soon as they are eligible for coverage under another group health plan or Medicare (regardless of whether or not they enroll in such health plan or Medicare). An individual who fails to provide such notification will be subject to a penalty tax of 110% of the amount of the subsidy for all periods following the date the subsidy should have ceased.

## Alternative Coverage Option

Employers may provide alternate coverage under ARRA that is different from the coverage under the health plan in which the individual was enrolled at the time of his or her involuntary termination. This alternate coverage is **not required** and will be treated as COBRA continuation coverage only if: (i) the premium for the alternate coverage is not more than the premium for the coverage the employee was enrolled in at the time of termination; (ii) the alternate coverage is also offered to active employees at the time the election is made; and (iii) the alternate coverage is not limited to dental, vision, counseling or referral services, or a flexible spending arrangement, or provides coverage for services or treatments only at on-site employer facilities. Once the terminated employee elects the alternate coverage, it becomes COBRA continuation coverage under the applicable COBRA continuation provisions and must be continued for the duration of the COBRA continuation period even though the subsidy ends after nine months.

## Subsidy Reimbursement

A qualified individual who pays 35% of the premium due will be treated as having paid the full amount of the premium. The entity to which payments are made must file a claim for reimbursement of the remaining 65% of the premium. The entity is treated as if the amount to be reimbursed had been paid by the entity as payroll taxes. If the reimbursement due exceeds the entity's payroll tax liability, the excess is credited or refunded in the same way as an overpayment of payroll taxes. The ARRA also provides that if any qualified individual pays the full amount of his or her COBRA premium for the first period or the immediately subsequent period following enactment to which the premium reduction applies (generally March and April 2009), the entity to which premiums are payable must reimburse 65% of the premium to the individual or provide the individual with a credit towards one or more future premium payments. The entity to which premiums are due will then be reimbursed in the manner described above.

## New Notice Requirements

All affected individuals (and their eligible spouses and dependents) must be notified of the COBRA premium subsidy and, for those individuals who were terminated from employment after September 1, 2008 and prior to the enactment of the ARRA, of the special election opportunity. The notice requirement can be satisfied **either** by amending the regular COBRA notice **or** by providing this information in a separate notice. Model notices published by the Department of Labor may be found at the Department's website using the following link: http://www.dol.gov/ebsa/COBRAmodelnotice.html.

The following information **must** be included in the notices:

- The forms necessary for establishing eligibility for this premium subsidy;
- The contact information for the plan administrator and any other person maintaining relevant information in connection with the premium subsidy;
- A description of the special election period for AEIs who had a qualifying event **prior** to the enactment of ARRA but had not previously elected COBRA continuation coverage;
- An explanation of the individual's obligations to advise the former employer when he or she becomes eligible for coverage under another group health plan or Medicare and the penalty for the failure to so notify the plan;
- A description, displayed in a **prominent manner**, of the right to the reduced premiums, and any conditions to the entitlement to such reduced premiums; and
- If the employer is allowing individuals to choose a different plan, a description of those options.

For more information on the COBRA changes under the ARRA, please contact your Rose, Chinitz & Rose attorney.

*share with us any confidential information about your or any specific legal problem without the express authorization of an attorney at Rose, Chinitz & Rose.*