



INSIGHTS

February, 2009

2009-04

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

On February, 17, 2009, President Obama, as expected, signed the American Recovery and Reinvestment Act of 2009 (ARRA). This sweeping and far-reaching legislation, designed to help bolster the U.S. economy and assist those affected by the economic downturn, incorporates significant changes to the COBRA continuation coverage provisions to assist those who are involuntarily terminated from employment. **The expanded COBRA provisions are effective for periods of continuation coverage that begin after ARRA enactment, February, 17, 2009.**

General Provisions

An individual who is involuntarily terminated from employment from September 1, 2008 through December 31, 2009, (other than for gross misconduct) who would otherwise be eligible for COBRA continuation coverage, may qualify for a federal healthcare subsidy equal to 65% of the required COBRA premium for a period of up to 9 months. The premium subsidy applies to all Assistance Eligible Individuals (AEI) including the employee and his/her qualified beneficiaries (spouse and dependents). Each AEI still independently elects COBRA continuation coverage and each AEI is independently eligible to receive the subsidy (which can continue to be effective following the death of the terminated employee). There is a Special COBRA Election Period (see below) for employees who have been involuntarily terminated beginning September 1, 2008 who do not have COBRA coverage as of the date of enactment.

The subsidy will be reduced for individuals with adjusted gross income for the taxable year (2009 or 2010) in excess of \$125,000 (single) or \$250,000 (joint) and is eliminated when adjusted gross income exceeds \$145,000 (single) or \$290,000 (joint). An AEI who is ineligible

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for the subsidy in one taxable year (i.e.2009) may qualify and be eligible for the subsidy in 2010 based on adjusted gross income. An individual has the right to permanently waive the subsidy.

The subsidy is not included in the gross income of any AEI, and from the health plan and employer perspective, is considered to be an employee contribution to the health plan. It appears that employers will be reimbursed the amount of the premium subsidy as a credit against the liability for payroll taxes. Additional reporting requirements will apply that include:

- attesting to the involuntary termination status of affected employees,
- calculating the payroll tax credit for the current period and providing an estimate of the credit for the following reporting period, and
- the Tax Identification Number, subsidy credit and level of coverage (single or family) for each covered employee.

Covered Plans

The subsidy will apply to group health plans currently subject to COBRA, but healthcare flexible spending accounts are specifically excluded. More importantly, the subsidy is extended to incorporate State continuation coverage requirements when this coverage is considered “comparable” to COBRA. For example, if a State requires small employers (those with less than 20 employees) to provide continuation coverage that is “similar in design” to COBRA, then the ARRA subsidy will apply as well. Comparable health plans maintained by federal or state governments may also be subject to the subsidy requirements.

The Act permits the employer to allow an AEI to change coverage options in conjunction with electing COBRA continuation coverage. The other coverage must be one of the options offered by the employer and cannot be more expensive than the option in which the individual had been previously enrolled. Furthermore, the alternative coverage cannot provide only dental, vision, counseling or referral services (or any combination of these benefits) and cannot be a flexible spending account. An AEI has 90 days to make this election.

Cessation of the Premium Subsidy

Eligibility for the subsidy will terminate on the first of the month on or after the earliest of the following events:

- receipt of 9 months of premium subsidy,
- end of the maximum required period of continuation coverage under COBRA (or State or Federal regulation),
- AEI becomes eligible for other group health coverage or becomes eligible for Medicare. An AEI is required to notify the plan, in writing, (in a time and manner to be prescribed by the Secretary of Labor.) when he/she becomes eligible for other coverage. Failure to do so will result in a penalty equal to 110% of the excess subsidy that was received.

Subsidy coverage will not terminate if an AEI becomes eligible for other group health coverage that provides only dental, vision, counseling or referral services (or any combination of the preceding), a health flexible spending account, health reimbursement arrangement, or coverage for treatment furnished at an on-site prevention, wellness or first-aid site.

Special COBRA Election Period

ARRA has established a special 60-day election period to accommodate qualified beneficiaries who may have initially declined COBRA, who have been dropped from coverage because of a failure to pay the required premium, or are still in the enrollment period as of the date of enactment. The 60-day period begins on the date the notice is provided to the qualified beneficiary. The notice must provide a description of the extended election period now available. However, this special election period does not extend the period of COBRA continuation coverage beyond the original maximum required period established at the date of involuntary termination. For example, an employee who was terminated on October 1, 2008 who now qualifies for the COBRA subsidy will be eligible for COBRA coverage through March 31, 2010 (original 18-month COBRA period).

The time from the AEI's qualifying event through the date of enactment will be disregarded for purposes of determining the 63-day gap in coverage requirement when determining creditable coverage for pre-existing conditions.

Notice Requirements

COBRA notices must be modified to include information about the premium subsidy which includes:

- a description of the subsidy,
- the right to the premium reduction and the subsidy conditions,
- the option to enroll in different coverage (if the plan sponsor elects to make this available) and a description of the alternative coverage,
- forms required to establish eligibility for the subsidy,
- a description of the qualified beneficiary's obligation to notify the plan when becoming eligible under another group health plan or Medicare,
- the penalty for failure to notify the plan, and
- the plan administrator's contact information.

The notice must be given to relevant employees (including those who were involuntarily terminated beginning September 1, 2008) and beneficiaries. The Secretary of Labor is directed to provide model language within 30 days after enactment.

While the premium subsidy is for the first period of coverage that begins on or after the date of ARRA enactment, a group health plan will continue to be in compliance for the first two months after enactment if the AEI is paying the full premium. Any overpayment can be reflected in future COBRA payments or refunded to the covered participant.

Next Steps

To prepare for the new COBRA requirements, employers should:

- identify those individuals who were involuntarily terminated beginning September 1, 2008 and prepare to notify these employees of their rights under the law by April 17, 2009.
- determine whether to allow AEI's the option to elect a lower-cost healthcare option,
- review and update participant communications and COBRA notice materials,
- coordinate with COBRA vendors to ensure they are charging the appropriate COBRA premium for AEIs and implement appropriate procedures to manage ongoing processes, and
- determine any necessary payroll processes and procedures for subsidy credit and/or participant reimbursement of COBRA overpayment.

Contact your Chernoff Diamond consultant for more information.

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