

COBRA CHANGES UNDER THE STIMULUS BILL, EFFECTIVE IMMEDIATELY

By: Patricia McGrath
Email: pmcgrath@devinemillimet.com
Phone: 603.695.8537

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On February 17, 2009, the American Recovery and Reinvestment Act of 2009 ("ARRA" also known as the "Stimulus Package") was enacted with the signature of President Obama. Along with many financial recovery provisions, the ARRA also significantly altered COBRA, at least in the short term. These COBRA changes are effective immediately, and affect many employees who will be or have been involuntarily terminated.

COBRA requires employers with 20 or more employees that sponsor group health plans to offer employees and their families the opportunity for a temporary extension of health coverage (called "continuation coverage") at group rates in certain instances where the employee is no longer eligible for coverage. Prior to the ARRA, employers could charge employees electing COBRA coverage 102% of the group insurance premium (the additional 2% could be charged to cover the employer's administrative costs). Under ARRA, employers are no longer be able to charge the employee for the full cost of group coverage. Under ARRA, an employee who elects COBRA coverage can only be charged 35% of the group premium for a period of up to 9 months. The remaining 65% of the premium cost will be covered by a government subsidy. In addition, some individuals who were already terminated prior to February 17, 2009, and who did not elect COBRA coverage at that time, may get a second chance to elect COBRA, and benefit from the subsidized rate. There are other provisions in ARRA that affect COBRA administration; this E-mail Alert will focus on the subsidy and notice timing provisions.

Who is Affected?

- *An assistance eligible individual.* An assistance eligible individual is an individual who is, first, a qualified beneficiary under COBRA, and

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Aaron Gilman
978.475.9100
agilman@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Karen Levchuk
603.695.8618
klevchuk@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

Anne Trevethick
603.695.8725
atrevethick@devinemillimet.com

Immigration

Marisa DeFranco
978.475.9100
mdefranco@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

- is eligible for COBRA continuation coverage at any time between September 1, 2008, and December 31, 2009;
- elects such coverage; and
- for whom the qualifying event with respect to the COBRA continuation coverage is the individual's involuntary termination of employment between September 1, 2008, and December 31, 2009.
- Certain *employers*:
 - Employers whose group health plan or plans are subject to COBRA; and
 - Employers who sponsor self-insured plans.
- Other *persons*:
 - Sponsors of multiemployer group health plans; and
 - Insurers of employer-based group health plans that are not subject to COBRA and are not self-insured.

What Must Happen?

An *assistance eligible individual* shall be treated for purposes of any COBRA continuation provision as having paid the full premium if he or she pays 35% of the COBRA premium. This subsidy is applicable for premiums for COBRA continuation coverage beginning on or after February 17, 2009.

The subsidy will extend for 9 months at the most. The subsidy will end earlier than 9 months if any of the following occurs first:

- the individual is or becomes eligible for coverage under any other group health plan (including, for example, a spouse's or civil union partner's plan);
- the individual is eligible for Medicare; or
- the individual's maximum COBRA continuation coverage period ends.

Note that an individual's eligibility for alternate coverage or for Medicare is the trigger for earlier subsidy termination, not actual election or enrollment. ARRA provides for a penalty against an individual who fails to notify an employer or plan when he or she becomes eligible for other coverage.

The remaining 65% of the COBRA premium is payable by the employer, the multiemployer plan or the insurer, depending on the type of group health plan. Thereafter, the payor (for example, an employer subject to the ARRA subsidy provisions), will be reimbursed for the employer's 65% insurance premium payment via a credit against the employer's payroll taxes. The IRS has already revised its Form 941, "Employer's Quarterly Federal Tax Return", to allow employers to enter the amount of "COBRA premium assistance payments" as a credit against quarterly payments.

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001



High-income individuals are eligible for the subsidy, but may have to repay some or all of the subsidy, depending on the individual's modified gross income for the affected year. The IRS has been directed to create forms and procedures for these individuals to either pay back some or all of the subsidy or to waive their eligibility for the subsidy.

When Does this Happen?

The ARRA provisions regarding the COBRA subsidy, "second chance" to elect COBRA and new notice content went into effect on February 17, 2009. However, the usual COBRA deadlines for notice to newly qualified beneficiaries still apply. For example, if an individual is involuntarily terminated today, then the employer has 30 days from today to notify the plan administrator of the qualifying event and the plan administrator has 14 days to issue a COBRA notice to the qualified beneficiary. COBRA notices will have to be amended to contain information regarding the ARRA changes..

If any employees were involuntarily terminated before the enactment of ARRA (but after September 1, 2008), and decided at that time not to elect COBRA, then those previously terminated employees must be given a second chance to elect COBRA. Notices to this group of previously terminated individuals must be provided by April 17 (the law says "within 60 days after the date of enactment", which was February 17, 2009), and affected individuals have 60 days after getting the notice to elect COBRA continuation coverage - at the subsidized rate. Note, though, that the length of the actual COBRA coverage period is not extended under ARRA for this "second chance" group - the COBRA period still runs starting from the original date of eligibility.

How Do Employers Comply with the New Notice Provisions?

The ARRA states that the Department of Labor, the IRS and the Department of Health and Human Services will produce model forms by March 19 ("not later than 30 days after the date of enactment"). This does not prevent employers from preparing their own forms, if desired. To date, the IRS and the DOL have already produced Q&A formats of information on their websites. The IRS information can be found at <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>. The DOL's website address for ARRA changes to COBRA is <http://www.dol.gov/ebsa/cobra.html>.

What Should Employers Do Now?

Employers in the midst of involuntary terminations may want to prepare their own notices if they want to have information immediately available to affected employees. Alternatively, DOL notices should be available very shortly. Remember, the same



COBRA notice deadlines apply to this new information, so these notices do not need to be presented on the date of termination to maintain compliance with COBRA.

Employers will need to make a list of employees who were involuntarily terminated back to September 1, 2008. At least some of these individuals will need to hear about their “second chance” at COBRA enrollment and anyone who has already elected COBRA or who might now elect COBRA needs to learn about the subsidy.

Affected employers need to obtain the new IRS Form 941, which can be downloaded at <http://www.irs.gov/app/picklist/list/formsInstructions.html?value=941&criteria=formNumber&submitSe arch=Find> and familiarize themselves with the documentation of this new subsidy credit process.

Finally, employers should continue to review the DOL and IRS websites regularly; this is a fast-developing area of employee benefits law.

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