

REDUCED COBRA PREMIUMS IMPLEMENTATION OF EMPLOYERS RESPONSIBILITIES

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As covered in our March 6th E-mail Alert, the American Recovery and Reinvestment Act of 2009 (the "Act", also know as the "Stimulus Package") signed into law by President Obama on February 17, 2009, gives employees who are involuntarily terminated from employment and meet specified criteria the right to keep their health/vision and dental insurance in place by paying only 35% of the premium amount for up to 9 months. Our previous E-Alert on this law covered who would qualify for this assistance under federal COBRA and State insurance continuation laws, the basics of what employers are required to do under the law, and when employers are required to comply. The time to comply has come.... so what's an employer to do?

Update COBRA Notices/Forms

On March 19th the U. S. Department of Labor (" DOL") issued new model COBRA forms for employers to use that include the information employers are required to give employees under this Act. Employers are not required to use the DOL's model forms. Employers can incorporate the COBRA premium reduction information required by this Act into their existing COBRA notices or they can provide the information to affected employees in a separate notice. Regardless of the form used the required information must be given to employees who separated/separate from employment during the time period of September 1, 2008 through December 31, 2009. This means that employees must provide retroactive notification to former employees who have already received pre-Act COBRA notices.

The Department of Labor's new model COBRA forms can be obtained from DOL's website at <http://www.dol.gov/ebsa/cobra.html>. Employers should be advised that using DOL's model notices does provide somewhat of a safe harbor in complying with the Act's

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notice requirements. While it is fine to incorporate this information into an employer's existing COBRA notices or to provide the information in a separate notice care must be taken to ensure that the information given in any such notice this is complete and accurate with regard to the right to pay reduced insurance premiums.

Employers who have a third-party administer for their health insurance continuation obligations, whether under federal COBRA or state insurance continuation laws need to make sure that their COBRA administrator is providing the required notices to all affected employees and their beneficiaries. **Responsibility for providing notice to affected employees under this law is squarely on the employer.**

Using the Department of Labor's Model Forms

The Department of Labor has produced four model forms that can be used by employers in different situations under this Act. These forms are to be used as follows:

The model notice form titled **"In Connection with Extended Election Periods,"** or the information contained therein related to an individuals right to reduced premium payments, is **to be sent to every COBRA eligible employee, and their qualified beneficiaries**, whose **employment terminated** at any time **between September 1, 2008 and February 16, 2009**, before the Act was signed, and **who initially chose not to elect COBRA or who subsequently discontinued coverage**. It is the U. S. Department of Labor's position that this notice be **must be sent to all former employees and their qualified beneficiaries** whose employment terminated during this time period **who were entitled to COBRA** at the time of their termination who initially chose not to elect to continue their coverage under COBRA or who subsequently discontinued coverage during the applicable time period **regardless of whether it was or was not an involuntary termination**. However, those who were not involuntarily terminated ultimately will not be eligible for the extended election period or to pay reduced premiums. This notice must **be sent by Saturday, April 18, 2009**.

The **"Abbreviated"** model notice also should be **sent by Saturday, April 18th**. This notice is to be sent to individuals who experienced a COBRA qualifying event from **September 1, 2008 through February 16, 2009, who elected COBRA coverage, and still have it in place**.

The **"Full Notice"** is to be sent to all COBRA qualified former employees and their qualified beneficiaries who experience a **COBRA qualifying event on or after February 17, 2009**

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through December 31, 2009. An employer has already provided an employee/beneficiaries with COBRA notices as a result of a termination between February 17, 2009 and the present , which did not include the required information on the reduced insurance premiums, this new notice should be sent to them as an amended COBRA notice. The information contained in this model notice regarding the right to pay reduced insurance premiums can also be sent as an additional separate notice.

The “**Alternative Notice**” is suggested to **be sent** to anyone eligible to continue coverage under a **state insurance continuation** law rather than COBRA. The main **difference** for state (non-COBRA) continuation coverage under this Act and COBRA continuation coverage is that unless the applicable state enacts legislation allowing an extended coverage election period, **employees terminated before the Act was signed into law on February 17th who are covered by state insurance continuation are not eligible for a “second chance” at electing coverage if they initially declined or lost coverage before the Act took effect.**

Identify Who Must Receive Notice

In order to know who must be given the required notices Employers must immediately identify all individuals who qualified for COBRA since September 1, 2008.

Choice of Cheaper Plan

If the employer offers its employees a variety of health insurance options, it must decide if it will allow individuals who qualify for the premium reduction to switch their coverage to a cheaper health insurance plan the employer offers. Employers are not required to allow qualified beneficiaries to make this switch, but are allowed to do so. The rationale for allowing employees who are involuntarily terminated to switch plans is that an individual who had the employer’s “Cadillac” plan may not be able to afford this plan once they lose their job even if they only have to pay 35% of the premium cost for 9 months. However, the person might be able to afford a cheaper plan offered for their entire period of COBRA. If the employer offers employees a variety of plans with different costs this **decision whether to allow individuals** who qualify for a premium reduction **to switch to a cheaper plan offered** needs to be made before the Company’s revised COBRA notices are finalized and sent out. If the option to switch plans is going to be available that information must be included in the notice. If the employer does not offer alternative plans, or does not allow individuals to switch coverage, model forms should be not be included in the employer’s notices.



Employees on Reduced Hours/Leave of Absence/Lay-off with Right of Recall

Generally, an employee who loses coverage while on reduced hours or a leave of absence is not entitled to the reduced premiums benefit, even if their reduced hours or leave of absence constitutes a COBRA qualifying event. However, if an employee terminates employment as a result of an involuntary reduction in hours or leave of absence, such change will probably be considered a constructive discharge entitling the person to the benefits of this Act. Involuntary lay-offs and furloughs will generally constitute an involuntary termination and entitle the person to the right to pay reduced health insurance premiums under this Act.

Severance Agreements

As a result of this Act, great care needs to be taken in any severance agreement providing for payment of health insurance premiums while the right to pay reduced premiums under this Act is in force.

For example: If the severance agreement provides that for 6 months the employer will pay the same % of the cost of the former employees health insurance under COBRA as it pays of its active employees health insurance premiums the former employee will only have to pay 35% of the employee's portion of the reduced premium, not 35% of the entire premium, and the employer will only be able to take a tax credit for 65% of the 35% premium payment the employee actually pays, rather than 65% of the entire premium amount the employer pays. For example, if the premium cost is \$1,000 per month and the employee portion of the premium is \$200, for 6 months the former employee will be required to pay \$70 (35% of \$200) and the employer will pay \$800, only \$130 of which the employer will be able to take as a payroll credit (65% of the \$200 employee payment). Once the 6 month severance period is over if the employee remains eligible for reduced premiums for the remaining 3 months entitlement under this Act: The employee will be required to pay \$350 (35% of \$1,000) and the employer will pay \$650 (65% of \$1,000) but get a tax credit for the entire \$650 paid. Thereafter, the former employee would be responsible to pay the entire \$1,000 premium amount.

Summary Plan Descriptions

Department of Labor regulations require that Summary Plan Descriptions for group health plans include a full description of beneficiaries COBRA rights, and plan documents and the summary plan description should be consistent with COBRA notices. Employers should check these plan documents to see if they need to be amended to comply with the requirements of this law.



Conclusion

The health insurance premium reduction provisions of the American Recovery and Reinvestment Act of 2009 do impose some burdens on employers in the hope that by the government subsidizing reduced health insurance premiums more terminated employees will be able to continue to be covered by health insurance after termination of their employment and thus present less of a burden as uninsured individuals to taxpayers and health care systems. Employers should take care that they or their third party administrator give qualified beneficiaries of the health plans they provide all information required by this Act, and should take great care in any severance agreements including the payment of a former employees health insurance premiums.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at employment@devinemillimet.com.

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