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NEWSLETTER
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American Recovery and Reinvestment Act of 2009 Creates New COBRA Rules for Employers

The American Recovery and Reinvestment Act of 2009 ("the Stimulus Plan") enacted on February 17, 2009 made substantial changes to the rules governing COBRA coverage. These changes require *immediate* action by employers.

COBRA Premium Subsidy

The changes in the Stimulus Plan aim to make health coverage more affordable for employees who have been involuntarily terminated (for reasons other than gross misconduct) during the period September 1, 2008 through December 31, 2009 and are eligible for COBRA ("Assistance Eligible Individuals" or "AEIs"). AEIs will be able to continue COBRA coverage by paying only 35% of the ordinary COBRA premium for up to nine months. Employers (and in some cases insurers) will subsidize the remaining 65%, but have the right to recover the subsidy through a credit against its payroll taxes in the amount of the subsidy. Except for high income employees, the subsidy is not taxable income to the employee. Note the subsidy is only for individuals involuntarily terminated. Individuals who have another COBRA qualifying event, such as reduction in hours, divorce, or voluntary resignation, are not eligible for the subsidy.

High Income Employees

The subsidy phases out for AEIs whose federal adjusted gross income exceeds \$125,000 (\$250,000 for joint filers), so that AEIs whose federal adjusted gross income exceeds \$145,000 (\$290,000 for joint filers) are not eligible for any subsidy amount. Some or all of the subsidy will be recaptured through their individual tax filings. High income individuals have the option under the Stimulus Plan to permanently waive the right to premium assistance.

Employers' Recovery of Subsidy

Employers will not receive any subsidy payment upfront, but will be reimbursed the 65% of the premiums paid in the form of a credit against their payroll taxes on IRS Form 941. If the premiums due an employer exceeded

its tax obligations in any given quarter, the U.S. Treasury will issue a check to make up the difference.

Subsidy Duration

AEIs are eligible to receive subsidy payments effective as of the first month of coverage after the Stimulus Plan was enacted (for most plans, March 1) and the subsidy will continue for a maximum period of nine months. With the short transition period, some AEIs may have already paid the full premium for March and April COBRA coverage. Under these circumstances the employer must either reimburse the AEI or provide a credit towards future premium payments. The subsidy will end earlier than nine months if the individual becomes eligible for coverage under another group health plan or Medicare, or when the maximum COBRA period (generally 18 months) would otherwise end when measured from the initial eligibility date of COBRA coverage. Penalties will apply to individuals who fail to provide appropriate notice when they become eligible for other coverage.

Second Chance to Elect

AEIs who did not elect COBRA prior to February 17, 2009, or AEIs who may have enrolled but terminated coverage prior to that date (e.g., because the premiums were too expensive) will have a second chance to elect COBRA coverage. The employer has until April 18, 2009 to notify the AEIs of the new election opportunity. The AEIs then have 60 days after the notice is provided to elect COBRA.

Note, however, that the new opportunity to elect will not extend the COBRA period that would have applied if COBRA had been elected at the time of the qualifying event. Thus, AEIs will only be entitled to 18 months of COBRA coverage, measured from the date of the involuntary termination.

Notice Requirements

Employers must modify their COBRA election notices or provide separate, supplemental notices to all individuals whose employment is involuntarily terminated between September 1, 2008 through December 31, 2009. The notices must describe the new premium subsidy, the availability of the second chance election, the availability of lower cost options (if any), the requirement to notify the employer of eligibility in another group health plan and the penalties for failure to do so. Model notices should be issued by the Secretary of Labor by March 19, 2009 but some plan administrators may have created their own notices to use in the interim.

Immediate Action Steps

- Employers should compile a list of all employees involuntarily terminated after September 1, 2008. Employees who have not elected COBRA or dropped coverage must be notified of the new election period. Those employees who are currently

enrolled in COBRA must be notified that their COBRA premium payment is being reduced in accordance with the Stimulus Plan. Employees terminated going forward will receive the new notice describing their options under the Stimulus Plan.

- If employers use outside sources for COBRA administration, the employers should contact their COBRA administrators immediately to verify that all AEs identified by the employer will receive the new notices informing them of their right to elect COBRA and receive COBRA premium assistance.
- If employers self-administer COBRA compliance, each employer is required to provide the notices that will be available from the Department of Labor.
- Employers should contact their payroll companies to confirm that they have in place the process for the employer to obtain reimbursement through the employer's regular payroll tax deposits and Form 941 filings.

For further information, please feel free to contact Pat Weitzman at 203-222-3116, pweitzman@levettrockwood.com or Cheryl Johnson 203-222-3126, cjohnson@levettrockwood.com.

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