

February 27, 2009

The American Recovery and Reinvestment Act Provisions on COBRA Coverage and Whistleblower Protection

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act ("the ARRA" or "the Act") which, among other things, changes the continuation of health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"). The ARRA provides "assistance eligible individuals" with a 65% subsidy on their premium payments for a period of up to nine months, beginning on March 1, 2009.

Eligibility for Premium Assistance under COBRA

Prior to the enactment of the ARRA, employers with 20 or more employees were required to provide continuation health care coverage to employees terminated for a "qualifying event", and the employee was responsible for paying the entire COBRA premium. Under the ARRA, an "assistance eligible individual" ("AEI") will be required to pay only 35% of the premium¹ for nine months. An AEI is defined as a qualified beneficiary who: (1) is involuntarily terminated between

¹ Someone other than the AEI may pay the premium on the AEI's behalf and the AEI will still qualify for the subsidy.

September 1, 2008 and December 31, 2009; (2) is eligible for COBRA continuation coverage; and (3) elects such coverage after the involuntary termination. An individual will not qualify for the subsidy if he or she is terminated for gross misconduct, voluntarily resigns, or loses health coverage due to a reduction in work hours.

The AEI's eligibility for the subsidy terminates on the earlier of: (1) nine months after the first day of the first month for which the subsidy applies; (2) the end of the maximum COBRA or state law coverage period (generally 18 months); or (3) the day the AEI qualifies for health coverage under another group health plan or Medicare. COBRA coverage will be terminated altogether if the individual actually obtains coverage under another plan or becomes entitled to Medicare benefits. If a qualified beneficiary later becomes eligible for coverage under another group health plan or later qualifies for Medicare coverage, he or she must provide written notice to the plan administrator. A failure to provide such notice shall result in a penalty of 110% of the subsidy provided after the termination of eligibility.

If an AEI was already enrolled in a continuing coverage plan when the Act was enacted, he or she may elect to

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enroll in a different coverage plan offered by the employer. If the employee elects to enroll in a different plan, the coverage shall be treated as COBRA continuation coverage. To enroll in a different plan, the following conditions must be satisfied:

(1) The employer permits the AEI to do so;

(2) The premium for different coverage does not exceed the premium for coverage in which the employee was enrolled at the time of the qualifying event;

(3) The different coverage is offered to the active employees at the time at which such election was made; and

(4) The different coverage is not: (1) coverage that only provides dental, vision, counseling, or referral services; (2) flexible spending arrangement; or (3) coverage for services or treatments furnished in an on-site medical facility maintained by the employer consisting primarily of first-aid services, prevention and wellness care, or a combination thereof.

Reimbursement

Under the Act, the entity to which premiums are paid will be reimbursed for the 65% subsidy. The entity will either be: (1) a multiemployer group health plan; (2) an insurer providing coverage under an insured plan; or (3) an employer maintaining a group health plan that is not a multi-employer plan and where some or all of the coverage is not provided by insurance.

The reimbursement will take the form of a credit against payroll tax liability for the individual. An employer is entitled to receive a reimbursement only after it has received the 35% premium payment

from the AEI, but not before. If the credit against payroll taxes does not cover the subsidy, the employer will qualify for a direct payment from the government. An employer receiving reimbursement for any period must submit a report to the Secretary of Labor which includes an attestation of the involuntary termination of employment for the covered employees, the amount of payroll taxes offset for a reporting period, and estimated offsets of such taxes for the next reporting period.

In case an employer cannot meet the March 1 deadline, the employer shall refund the 65% subsidy amount to the individual or credit the subsidy against the individual's future payments. This grace period does not appear to extend beyond April 2009.

Special Election Period

If a qualified beneficiary is eligible for the subsidy but has not elected continuation coverage as of February 17, 2009, the Act imposes a 60 day election period, beginning on the date the qualified beneficiary is notified of his or her right to elect continuation coverage.¹ An individual who declined COBRA continuation or whose coverage lapsed from lack of payments prior to the enactment of the Act must be given an opportunity to resume the continuation of coverage. The qualifying individual will then have 60 days to elect COBRA coverage following receipt of the notice.

¹ The special election period does not affect the original maximum period of coverage under federal COBRA, generally 18 months for an involuntary termination. The coverage period will still run from the date of the termination, *not* from the date the qualified beneficiary elects for coverage.

The application of COBRA coverage will not be retroactive but instead will take effect on March 1, 2009 or whenever the individual makes the election.

Notice Requirements

If an individual is eligible for coverage, the employer must notify the individual on or before April 18, 2009 of: (1) the forms necessary for establishing eligibility for premium reduction; (2) the name, address, and telephone number to contact the plan administrator or relevant entity; (3) a description of the extended election period; (4) a description of the obligation of the qualified beneficiary to notify the plan administrator that the individual has enrolled in another plan or is eligible for Medicare; (5) a description of the beneficiary's right to a reduced premium and any conditions attached, which must be displayed prominently; and (6) a description of the beneficiary's option to enroll in different coverage if the employer permits it.

Employers must provide this notice to those individuals who became entitled to COBRA coverage between September 1, 2008 and February 16, 2009 and to those who qualify for the 60 day special election period. Employees who are involuntarily terminated between February 17, 2009 and December 31, 2009 must receive this notification as soon as possible following the termination. An employer must still provide notice to all employees who were terminated voluntarily in order to comply with COBRA.

Income Threshold

For employees who earned a modified adjusted gross income of over \$145,000 (\$290,000 for joint filers) and who received a COBRA subsidy, the amount of the aid will be added to his or

her income tax liability for the year. For those employees that earn between \$125,000 and \$145,000 (\$250,000 to \$290,000 for joint filers), the increase in personal tax liability from the subsidy shall reflect a phase-in percentage established in the Act. Individuals earning more than \$125,000 may elect to opt out of the subsidy.

McCaskill Amendment

Senator McCaskill from Missouri drafted a whistleblower amendment to the ARRA, which was ultimately inserted in the final bill. The Amendment was designed to provide protection to employees who report to the authorities regard the misuse of federal funds provided under the ARRA. The Amendment applies to non-federal employers who receive "covered funds". Non-federal employers include: (1) contractors, subcontractors, grantees, or recipients; (2) professional membership organizations, certification or other professional bodies, agents or licensees of the federal government, or persons acting in the interest of an employer receiving "covered funds"; or (3) state or local governments. Covered funds include contracts, grants, or other payments received by any non-federal employer if the federal government provided any portion of the funds and at least some of the funds were appropriated or made available by the ARRA.

Under the Amendment, an employer is forbidden from discharging, demoting, or discriminating against any employee for disclosing evidence of mismanagement, waste, danger to health and safety, abuse of authority, or violation of law, rule or regulation with respect to the use of "covered funds." Protected activities include disclosure of such evidence to a supervisor, a regulatory or law enforcement agency,

Congress, a court, a grand jury, a federal agency, or an inspector general. In addition, the Amendment extends its whistleblower protection to employees who make disclosures in the ordinary course of performing their job duties.

Any person who believes that an employee has been subject to a prohibited reprisal may submit a complaint to the inspector general who is charged with investigating the complaint and reporting the findings. Unless the inspector general determines that the complaint is frivolous, he or she has 180 days to investigate the complaint and submit a report detailing the findings.

Upon inspection, an employee need only prove that the protected conduct was a contributing factor to the reprisal. An employer must prove by clear and convincing evidence that it would have taken the same action against the employee regardless of the employee's protected activity. A court may award that the employee be reinstated, receive back pay, damages, and attorneys' fees if successful.

Next Steps

Employers should review and revise their COBRA policies and notification protocols to comply with ARRA and provide necessary notifications to former employees who are eligible for the special enrollment provision. In addition, employers who are government contractors should review and amend whistleblower policies to ensure compliance with ARRA. If you have any questions or require assistance with ARRA compliance, please contact [Tonianne Florentino](#) at 212-758-7782 or [Adam Harris](#) at 212-758-7724.

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