COBRA PROVISIONS OF THE AMERICAN RECOVERY AND REINVESTMENT TAX ACT OF 2009

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On February 17, 2009, President Obama signed the American Recovery and Reinvestment Tax Act of 2009 (the "Act"). The Act contains provisions which are intended to make health care coverage, particularly COBRA coverage, more affordable. Unfortunately, some of the burden of achieving this goal is placed on employers, including certain actions which must be taken quickly. Following is a brief description of the COBRA provisions of the Act.

COBRA SUBSIDY

The Act provides a subsidy for COBRA coverage equal to 65% of the cost of such coverage. Most individuals who lose coverage due to an involuntary termination of employment from September 1, 2008 through December 31, 2009 will be eligible to receive the subsidy. Such individuals are responsible for paying the remaining 35% of the premium to the employer (or the entity the employer has designated to receive COBRA premiums), through the normal method prescribed by COBRA. The government will reimburse the 65% subsidy to the employer either directly or through a credit against payroll taxes, meaning that the employer will need to front the cost of the coverage for the period it takes to file for and receive the subsidy payment. The IRS is expected to provide details on what employers need to do to obtain the credit against payroll taxes.

There are exceptions to eligibility for the subsidy for certain high-paid individuals (generally, individuals with income over $125,000 or couples filing jointly with income over $250,000). However, the employer is not required to determine the eligibility of individuals on COBRA. Any individual who receives a subsidy, and is subsequently determined to be ineligible, will be required to report the value of the subsidy on his or her income taxes in the following year.

SPECIAL ELECTION RIGHT

The subsidy is available for nine months of COBRA coverage, although individuals are still eligible for the full COBRA period (18 months in most cases of involuntary termination of employment). Because eligibility for the subsidy is retroactive, otherwise eligible individuals who previously declined COBRA coverage due to its cost must be given a second chance to enroll. Specifically, within 60 days following the enactment of the Act, the employer must provide a notice of eligibility to any individual whose employment was involuntarily terminated on or after September 1, 2008, and who declined COBRA coverage or had his or her eligibility to elect such coverage lapse. The "second notice" gives the individual the right to elect COBRA coverage at any point during the 60 days following the date the notice is provided. Although coverage will be prospective from the date the individual affirmatively elects coverage, the period of coverage for which the individual is eligible is still counted from the original qualifying event. In other words, if the individual lost coverage due to an involuntary termination of employment on September 30, 2008, and declined COBRA coverage at that time, he or she may elect continuation coverage to begin on March 1, 2009 (or a later date), but any such coverage will end on March 31, 2010 (18 months following the original qualifying event).[1] Unlike ordinary COBRA coverage, the individual is not required to retroactively pay for coverage for periods

1. The individual may receive additional coverage under the Social Security disability extension available under COBRA. Although it is not clear from the legislation, it appears that the subsidy does not cover the additional premium applicable to such individuals.

between the original qualifying event and the date on which he or she elects coverage. The Department of Labor is expected to issue a model notice for employers to use for individuals eligible for this special election within 30 days after enactment of the Act.

SUGGESTED ACTIONS

1. Compare a list of all employees involuntarily terminated since September 1, 2008 to your current COBRA participation list, and develop a list of those individuals who will be eligible for the special enrollment right. Individuals currently on COBRA may be eligible for the subsidy, as long as they have not become eligible for alternative group coverage.
2. Be prepared to transmit the special COBRA enrollment notice as soon as it becomes available.
3. If your company uses a payroll vendor, (e.g. ADP or Ceridian), you should coordinate with them to allow them to determine how to apply the credit at the time they otherwise fund payroll taxes.
4. Coordinate data retention with vendors to ensure accurate reporting and crediting of any participant premium overpayments.
5. Consider your existing severance plans or policies, or severance plans or policies you may be developing. This may be an appropriate time to reconsider any such programs that offer employer-paid COBRA coverage, and to revise or amend plans or policies.