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HEALTHCARE BULLETIN

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PREMIUM SUBSIDY FOR COBRA BENEFICIARIES UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The American Recovery and Reinvestment Act (ARRA) of 2009, signed into law February 17, 2009, introduced new COBRA obligations which become effective March 1, 2009. Although the DOL and the IRS will not begin releasing guidance for 30-45 days, ARRA went into effect upon signing and imposes certain COBRA notice and reporting requirements on employers.

The ARRA provides for a COBRA Premium Subsidy Benefit (the “Subsidy”) to individuals who were or are involuntarily terminated from September 1, 2008 to December 31, 2009. The Subsidy is a federally mandated premium assistance benefit. Under the Subsidy, employees who elect COBRA will only have to pay 35% of the applicable COBRA premium. The employer will fund the remaining 65% COBRA premium for up to 9 months of continuation coverage. The employer may then deduct their premium subsidy contributions from payroll tax payments and retain these monies as reimbursement for the health premium. If the employer’s premium subsidy contributions exceed their payroll tax liability, the U.S. Treasury will make up the difference by issuing tax credits or refunds to the employer. Therefore, the Subsidy will ultimately be funded by the U.S. Treasury rather than the employer.

To be eligible for the Subsidy, an individual must:

- Be eligible for COBRA continuation coverage between September 1, 2008 and December 31, 2009;
- Elect COBRA continuation coverage;
- Have lost group coverage due to an involuntary termination of the covered employee’s employment;
- Not be eligible for (i) any other group health plan; (ii) flexible spending arrangement; (iii) coverage for treatment provided by an employer-sponsored, on-site wellness clinic; or (iv) Medicare; and
- Not have adjusted gross income of \$145,000 or more (\$290,000 if filing jointly) and the Subsidy will begin to be phased out at \$125,000 (\$250,000 if filing jointly). Note that these high-income individuals—not the plan or the employer—will be required to repay any ineligible amounts to the government as additional taxes.

The ARRA also provides a COBRA enrollment period for Assistance Eligible Individuals (AEI) who previously waived coverage but would now be available for the benefit. Such individuals may elect COBRA continuation on a prospective basis and begin receiving the Subsidy on March 1, 2009.

Employers have important notification and reporting requirements under the Subsidy. Under ARRA, employers must communicate the availability of the Subsidy to eligible COBRA beneficiaries by April 18, 2009. ARRA requires that notices be provided to COBRA qualified beneficiaries with respect to all qualifying events that occurred on and after September 1, 2008—even those not connected with an involuntary termination of employment—to advise of the special election period. This is the case even though many of these individuals will not be eligible to qualify for the subsidized coverage. Employers failing to meet this requirement may be subject to fines up to \$110 per day per failed notice. It is expected that the DOL will provide model language of such notices by March 19, 2009, but in all cases the notice must include:

- A description of the Subsidy;
- A description of the extended election period available to AEIs who do not have a COBRA coverage election in place as of the date of enactment;
- A description of the individual's obligation to inform the plan if he or she becomes eligible for Medicare or another group health plan;
- The forms necessary for establishing eligibility for the subsidy;
- Contact information for the plan administrator; and
- A description of alternative COBRA coverage options, if the employer elects to provide these.

Employers must also report certain information related to the Subsidy to the IRS after the reduced premium is paid. An employer's report must attest that the covered Qualified Beneficiary was involuntarily terminated and entitled to reimbursement and must include:

- The amount of payroll tax offset for the current period;
- The estimated payroll tax offset for the subsequent period;
- Social Security Numbers of all covered Employees;
- The subsidy amount for each Qualified Beneficiary; and
- The Coverage Level.

Although the remaining details will be provided in further guidance from the IRS and DOL, employers should begin taking the following actions:

- Compile a list of all COBRA qualified beneficiaries who will need to be notified, which includes any former employee who experiences a COBRA qualifying event on or after September 1, 2008 (even if such COBRA qualifying event was not connected to an involuntary termination of employment);
- Revise payroll systems to identify eligible individuals in order to report the payroll tax credit correctly and receive the subsidy;
- If a plan is insured, confirm the appropriate procedures for enrolling AEIs who are not currently enrolled in COBRA continuation coverage with the insurance carrier;
- If a plan is self-insured, review stop-loss contracts to determine whether coverage applies to AEIs who are not currently enrolled in COBRA continuation coverage; and
- Modify applicable COBRA premium billings for March 2009 coverage to take into account the 65% subsidy.

Additional information regarding these new Subsidy rules can be obtained from the IRS at www.irs.gov/newsroom/article/0,,id=204505,00 or the DOL www.dol.gov/ebsa/cobra. These new COBRA requirements will create a number of issues for employers, especially for those who have or will experience layoffs. Our benefits attorneys, listed below, are available to assist you with these new requirements.

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