NEW MANDATED COBRA SUBSIDIES: A PRACTICAL PRIMER

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Starting March 1, 2009, employers are required to provide a subsidy for COBRA premiums for employees (and their spouse and dependents, if applicable) who have been involuntarily terminated since September 1, 2008, and to provide notice to those who are eligible for this benefit which may last for a maximum of nine months. The logistics of compliance with this new mandate will likely be a challenge for smaller employers. The new COBRA subsidy is part of the American Recovery and Reinvestment Act of 2009 (ARRA), commonly referred to as the Stimulus Bill signed into law by President Obama on February 17, 2009. Over a thousand pages long, ARRA is packed with many legislative changes. This article is a brief overview of how the subsidy works and what employers need to do now in order to ensure compliance. As with any new legislation, the provisions are complex and additional interpretation and regulations are sure to follow. The DOL website currently states that the Employee Benefits Security Administration is actively working on additional guidance regarding the premium subsidy.

The new COBRA subsidy requirement applies to all plans which were previously subject to the COBRA requirements, including self-insured plans. Employees who experience an involuntary termination of employment between September 1, 2008 and December 31, 2009 and are eligible for COBRA coverage due to their termination during such period (referred to as "assistance eligible individuals" or "**AEIs**") are eligible for this new subsidy equal to 65% of the COBRA premium. The benefit of this subsidy phases out for higher paid employees. The employee is still required to pay his/her 35% portion of the premium.

The employer must make the subsidy available for periods of coverage beginning after the date of the enactment of ARRA. If a plan provides and charges for COBRA continuation coverage on a monthly basis, the subsidy will be effective starting on March 1, 2009. Eligible employees who are currently paying 100% of COBRA premiums may end up paying the full premium amount in March and April 2009 because of the short period in which the plan administrators have to respond and send notices. If an employee pays the full premium for a period of coverage for March or April, the employer will be required to credit the subsidized portion of the premium against future COBRA premiums or refund the subsidized portion within 60 days.

Eligibility Limitation

The subsidy is available for a maximum of nine months, but it will end sooner if the individual becomes eligible for coverage under another group health plan or Medicare, or if the individual's maximum COBRA coverage period ends. Note that this cutoff of the subsidy is different from the normal COBRA rules which require actual obtaining of substituted coverage under a new group plan, not merely eligibility for participation.

Although ARRA does not impose income limits for individuals receiving the subsidy, it does impose a recapture provision which effectively imposes a cap of $145,000 modified adjusted gross income (or $290,000 for joint filers). In other words, if a subsidy is provided for an individual, or the spouse or dependent of an individual with this income level or above, then the individual's taxable income will be increased by the amount of the subsidy. A portion of the subsidy is taxable to those taxpayers with modified gross income levels between $125,000 and $145,000 (or $250,000 to $290,000 for joint filers). The subsidy is received tax-free for all other taxpayers who fall below the above-listed income levels.

How should the employer provide notice to an AEI?

For individuals who become eligible because of an involuntary termination after February 17, 2009, and before January 1, 2010:

- The plan administrator must include with all required COBRA election notices and forms specific information about the availability of the subsidy.

For individuals who were terminated since September 1, 2008:

- The plan administrator must provide notices to two groups of AEIs within 60 days of enactment of ARRA.

The first notice must go to AEIs who have COBRA coverage to advise them of the availability of the subsidy. The second notice must go to individuals who qualify as AEIs but have not previously made a COBRA coverage election following termination of employment, or made a COBRA election but subsequently lost coverage because of non-payment of premiums.

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The notices must provide information regarding the availability of the subsidy and the requirements to qualify, as well as the forms necessary for a COBRA election.

How does the qualified beneficiary elect coverage?

If an individual becomes qualified for the premium subsidy following the enactment of ARRA, then the individual has 60 days from the receipt of the special COBRA notice to elect coverage. The special election period applies to those individuals who were previously involuntarily terminated prior to the enactment of ARRA but had not elected COBRA coverage. ARRA provides such individuals a second chance to elect coverage if done within 60 days following the receipt of a COBRA notice.

How does the employer pay for the subsidy?

The employer must initially pay 65% of the premium subsidy. The employer is then entitled to take a corresponding deduction to its periodic payroll tax deposits (wage withholding and FICA). This credit is claimed on Line 12a of the January 2009 revision of Form 941, which was posted on the IRS website on February 20, 2009. If an employer is entitled to subsidy amounts greater than payroll tax liability, the IRS will credit or refund the excess amount to the employer.

Employers should be careful to take the credit only after the employee/beneficiary has paid his or her 35% of the premium. Some companies advance the full cost of the COBRA premium prior to receiving the qualified beneficiary's premium payment. In these cases, the employer is expected to wait and confirm receipt of the 35% premium prior to taking any credit on Form 941.

What should employers do?

1. Identify all potential AEIs – employees who were covered by the group health plan whose employment was involuntarily terminated (other than for gross misconduct) beginning September 1, 2008 - and their last known addresses.
2. Identify which AEIs are currently receiving COBRA coverage and which are entitled to a special enrollment period.
3. Determine the correct premium subsidy.
4. Develop a method for applying either the excess of any COBRA premiums above the 35% received from an AEI for March and April 2009 COBRA premiums to future premiums or refunding the excess.
5. Create administrative procedures to reflect the maximum nine months of available COBRA premium subsidy and the maximum COBRA coverage period for AEIs who elect COBRA continuation coverage during the special enrollment period.
6. Develop and provide notices as required by ARRA (noting that the DOL is to provide model notices within 30 days of the ARRA).

What type of documentation must be submitted?

Currently, there is no requirement that additional information be submitted with Form 941 in order to provide the premium subsidy. However, employers are encouraged to keep track of the following information:

1. Information on the receipt, including dates and amounts, of the AEI's 35% of the premium.
2. Copy of the invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required by COBRA.
3. Attestation of involuntary termination, including date of the involuntary termination, for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.
4. Proof of each AEI's eligibility for COBRA coverage at any time during the period from September 1, 2008 to December 31, 2009, and election of COBRA coverage.
5. A record of the SSNs of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for 1 individual or 2 or more individuals.

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