



AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The American Recovery and Reinvestment Act of 2009 (ARRA) is a massive attempt at economic stimulus. The basic legislation is over 3000 pages and deals with a multitude of issues, including making some basic changes of a temporary nature to COBRA. President Obama signed this Act on Tuesday February 17, 2009.

COBRA changes take effect as early as February 17, 2009. These changes are applicable to persons who experienced an involuntary loss of employment between September 1, 2008 and December 31, 2009. These individuals would become eligible for a 65% subsidy of their COBRA premium for a maximum period of nine (9) months. The subsidy would be applied by the employer who would then claim the amount as a credit to its quarterly payroll taxes.

Individuals subject to the Law are those individuals involuntarily terminated from employment between September 1, 2008 and December 31, 2009, who

- (1) Elected and continued COBRA coverage up to and through February 17, 2009;
- (2) Did not elect COBRA continuation when first offered;
- (3) Elected COBRA continuation but ceased paying before February 17, 2009; or
- (4) Covered dependents of employees involuntarily terminated from employment who do not elect continuation for themselves.

In Notice 2009-27, the IRS provides some guidance on the application of "involuntary termination of employment." Basically, the IRS states that "An involuntary termination means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services." They further qualify that it is the loss of employment that triggers the ARRA events. This then excludes those Secondary Qualifying Events under original COBRA (death of the

employee, divorce/legal separation, etc.). It also means that absence from work due to illness or disability are not included.

Among the other reasons that may constitute an "involuntary termination of employment" are:

- ◆ Termination of employment while the individual is absent due to illness or disability but mere absence from work without the employer taking action to end the individual's employment is not.
- ◆ Retirement may be considered "involuntary termination" if, absent retirement, the employer would have terminated the employee's services and the employee has knowledge that the employee would be terminated.
- ◆ Individuals terminated for cause, except that those persons terminated for gross misconduct as interpreted in original COBRA are not eligible for the subsidy.

Individuals with adjusted gross incomes between \$125,000 and \$145,000 for single filers and \$250,000 to \$290,000 for joint filers employees may be eligible for a subsidy based on a sliding scale. If subsidies are applied to these individuals, they will be subject to recapture as an addition to taxes due for the year subsidies are taken. These individuals can make a one-time waiver of the subsidy.

Employers affected by the Law include:

- ◆ Plans subject to ERISA COBRA rules,
- ◆ Plans subject to the Public Health Service Act (federal government, states, counties, etc.), and
- ◆ Small employer plans not subject to ERISA COBRA rules, but whose states mandate continuation coverage.



ARRA OVERVIEW, (cont.)

Benefit plans covered by the Law include;

- ◆ Medical Plans
- ◆ Dental Plans
- ◆ Vision Plans
- ◆ EAP programs subject to ERISA
- ◆ Voluntary plans subject to ERISA

Medical Reimbursement Plans under Flexible Spending Accounts (FSAs or Section 125 plans) are NOT subject to this Law.

The nine month subsidy period can be terminated on the earlier of:

- ◆ The first date the individual is eligible for coverage under any other group health plan (excluding vision, dental, EAP referral services or FSA);
- ◆ The date on which nine months of subsidy coverage would end; or
- ◆ The date on which the COBRA coverage period would have normally expired.

Individuals eligible for other coverage must advise the employer plan of this eligibility. "Eligible" in the Law means able to enroll in other like coverage but the individual is not necessarily required to actually enroll. Failure of the individual to notify the plan of their eligibility for other coverage will make them subject to a penalty of 110% of the subsidy they received. This will apparently be added to their federal income taxes. This provision is explicitly explained in IRS Notice 2009-27. Note that failure to enroll in this other coverage stops premium subsidy eligibility but the individual may still continue COBRA at the normal rate structure.

For those experiencing an involuntary termination of employment April 1 through December 31, 2009, the subsidy will be available for the entire nine months, even though this extends well into 2010.

Employers will need to contact each employee involuntarily terminated September 1st or later and offer them a new 60 day election period. The Congressional Record indicates that the continuation coverage "shall commence with the first period of coverage beginning on or after the date of the

enactment of this Act...." It further indicates that the Act will not extend the COBRA coverage period that would have been in effect had the individual elected when first eligible. The DOL and IRS provided sample notices on March 19, 2009. These notices are available at the DOL website: <http://www.dol.gov/ebsa/cobramodelnotice.html>. Employers have until 60 days after the Law's effective date (April 19, 2009) to issue the notices to individuals. Employers who have contracted with COBRA administrators should work with those firms to issue the proper notices.

Employers will claim the subsidy on their quarterly 941 filings. The IRS has already issued revised forms and instructions. The revised form adds three lines for the information necessary. Supporting documentation is to be retained by the employer in case it is requested by the IRS. No subsidy can be claimed until such time as the COBRA participant actually remits his/her portion of the cost. Neither do employer plans need to reinstate individuals until they pay the first required premium. Revised 941 forms and the instruction packet can be obtained at the IRS website: www.irs.gov.

For individuals who either did not elect COBRA when they were first eligible during the coverage period or who ceased paying for COBRA during that period, coverage will not be retroactive but will begin with the first COBRA period after February 17, 2009. If there is a gap of 63 days or more, the employer plan can NOT apply any pre-existing condition limits.

It is clear that a number of things will need to be adjusted to adhere to these requirements:

- ◆ Employers and their COBRA Administrators will need to first identify those persons whose coverage termination, on/after September 1, 2008, was involuntary. Then a special enrollment notice should be prepared and sent to these individuals advising them of their rights under this new law.
- ◆ Employers and their COBRA Administrators will need to look at current COBRA participants and determine if their terminations were involuntary. These individuals should also receive a special notice telling them of their new contribution and the terms of the subsidy provisions. The new Act also allows employers to offer these individuals a chance to change to other less costly plans available – this appears to be a choice that the employer can make, it does not appear to be mandated.

CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT OF 2009

- ◆ Administrative procedures will need to address what is necessary to make the system work, including payroll processes to account for the subsidies actually used during each month and to substantiate the information needed to file the quarterly 941 reports. Outside payroll vendors will need to be consulted.
- ◆ Notices will need to be developed to advise COBRA participants when they reach the maximum subsidy limit.
- ◆ All procedures and policies will need to be revised to incorporate the new requirements.

Remember that this subsidy will expire for individuals involuntarily terminating from employment on/after January 1, 2010 **UNLESS** the government extends these provisions. All materials issued by the employer and its COBRA Administrator should reflect this date.

Since this is an extensive Act and since many clarifications by the affected government departments will be forthcoming, the above is merely a short summary of the terms that may affect employers, plans and their COBRA Administrators. Close attention needs to be paid to additional information on this subject.

Additional changes under ARRA include:

- ◆ An immediate temporary increase in the mass transit allowance under formal transportation plans to \$230, the same as the parking allowance; this is scheduled to sunset as of December 31, 2009; and
- ◆ Changes taking effect in 2010 to HIPAA Privacy rules affecting the relationship with Business Associates. Currently the federal government only has the right to take action against plan sponsors; the new change will allow the federal government to take direct action against Business Associates. All Business Associate Agreements will need to be changed to accommodate this change.

Both the DOL and IRS websites contain helpful information on this subject. Those websites can be reached at:

www.dol.gov

www.irs.gov

<http://www.irs.gov/pub/irs-drop/n-09-27.pdf> for IRS Notice 2009-27

On February 4, 2009, President Obama signed into law the Children's Health Insurance Program Reauthorization Act of 2009 (The Act). This Act extends and expands the State Children's Health Insurance Program (SCHIP or CHIP).

The Act has several areas which will affect employer sponsored benefit plans. These areas are:

- ◆ Premium Assistance Subsidies
- ◆ Additional Special Enrollment Rights
- ◆ Employee Notice Requirements
- ◆ Disclosure to States
- ◆ Penalties for Non-compliance

PREMIUM ASSISTANCE SUBSIDIES

States may elect to offer premium assistance subsidies to eligible low-income children and their families for "qualified employer-sponsored coverage" as it is defined in the new Act. For an employer to qualify under the Act, the employer must contribute at least 40% towards the premium cost. This "qualified coverage" does not include health FSAs or high deductible health plans. The subsidy may be administered either as a reimbursement to the individual employee or as a direct payment to the employer. Employers may opt out of receiving direct reimbursements. Information on which states will elect this option and how that will be implemented is not yet available.

ADDITIONAL SPECIAL ENROLLMENT RIGHTS

The Act requires that group health plans (fully-insured and self-funded) must permit employees and their dependents who are eligible but not enrolled for coverage to enroll in two additional circumstances:

- ◆ The employee's or dependent's Medicaid or CHIP coverage is terminated as a result of loss of eligibility and the employee requests coverage within 60 days after such termination; or
- ◆ The employee or dependent become eligible for a premium assistance subsidy under Medicaid or

CHIPRA OVERVIEW (cont.)

CHIP, and the employee requests coverage under the plan within 60 days after eligibility is determined.

Note that these two Special Enrollment Rights allow the individual 60 days for election rather than the 30 day period allowed for other HIPAA Special Enrollment events.

These two Special Enrollment Rights are effective April 1, 2009.

NOTICE TO EMPLOYEES

In states that adopt the premium assistance subsidy program, employers who maintain plans in those states will be required to provide a written notice to employees. This notice will tell employees of the potential opportunities for premium assistance by the state in which they reside. The employer may provide the notice with other plan eligibility materials, with open enrollment materials, or when furnishing the SPD. The Department of Health and Human Services (DHHS) has been directed to develop national and state specific model notices. The Act directed that this is to be done by February 4, 2010. However, as of this date, there has been no communication on this or advice published on the websites. The Act further requires that employers must comply for plan years beginning after the date the model notices are actually first issued.

DISCLOSURE TO STATES

The Act requires group health plan administrators to disclose plan benefit information to states when requested. This will enable the state to determine the cost-effectiveness of providing premium assistance for the purchase of coverage under the plan and to provide supplemental benefits. HHS and the Department of Labor (DOL) have been directed to establish a working group to develop a model

coverage disclosure form for plan administrators that would provide information for this purpose. States may not request the model coverage coordination disclosure form until the first plan year that begins after the date on which the form is first issued.

PENALTY FOR NON-COMPLIANCE

The Act provides for civil penalties of up to \$100 per day for failure to comply with the new notice and disclosure requirements. This penalty will apply separately to each employee affected thus multiplying the total penalty that can be assessed.

ACTION ITEMS

The addition of the two new HIPAA Special Enrollment Rights need to be added to health plans whether fully-insured or self-funded. This will require:

- ◆ An amendment to the plan documents effective April 1, 2009, and
- ◆ A notice to employees explaining the changes on the first day of the plan year on/after the date model notices are issued by the DOL and the DHHS, scheduled to be completed on/before February 4, 2010.

Carriers for fully-insured plans should create the amendment for existing policies and include it in new documents. Self-funded plans will need to work with their administrators who create the plan documents.

On the Notice Requirements for the state assistance and on the Disclosure Obligations, compliance is based on the issuance by the appropriate agencies of the model notices. Until this is done, employers are not required to comply.

The DOL can assess a civil penalty of \$100/day/per employee against any employer failing to provide the general notice as required.



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