



SPECIAL Alert

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In This Issue

In this second McGraw Wentworth Special Alert for 2009, we discuss the Health Insurance Assistance for the Unemployed Act of 2009 that was just signed into law by President Obama.

The Act provides Federal assistance in paying COBRA premiums for employees who meet the regulation requirements. Individuals are eligible for this assistance in most cases beginning on March 1.

The regulations include a number of requirements employers will need to meet in a relatively short time frame.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

“COBRA Assistance Required by Stimulus Package”

On February 17, 2009, President Obama signed into law the “American Recovery and Reinvestment Act of 2009.” This Act is commonly referred to as the “stimulus bill,” and both Houses of Congress have been vigorously debating its contents over the last month. Most of the Act’s provisions are designed to reinvigorate the weakening U.S. economy, but some provisions will impact employers who sponsor a group health plan.



The new law amends the ERISA (Employee Retirement Income Security Act), the PHSA (Public Health Service Act) and the IRC (Internal Revenue Code) and applies to private and public employers subject to COBRA. Employers’ COBRA administration and

notifications will be immediately impacted by this new Act.

COBRA Premium Assistance

A subsection of this legislation is titled the “Health Insurance Assistance for the Unemployed Act of 2009.” This section addresses some additional financial assistance that the Federal government will provide COBRA-qualified beneficiaries who lost group health plan coverage due to the involuntary termination of their employment.

The Act allows certain COBRA-qualified beneficiaries to receive assistance in paying their COBRA premiums. As the economy has continued to slide, layoffs have become part of the daily news. One of the consequences of the high national unemployment rate is the increasing number of uninsured, as people lose employer-sponsored health coverage along with their jobs.

This *Special Alert* will outline the following key points:

Most individuals have the ability to continue coverage through COBRA; however, COBRA premiums are so expensive that many individuals can’t afford the cost with their limited income.

- COBRA Premium Assistance
- Optional Provision to Change Plans
- Employer Tax Credits
- Second Election Period and Notice Requirement
- Action Plan for Employers

Continued on Page 2

The Act provides for premium assistance to any *assistance-eligible individual*. An assistance-eligible individual must meet the following criteria:

- Be a qualified beneficiary who became eligible for COBRA at any time between September 1, 2008 and December 31, 2009, due to the involuntary termination of employment.
- Has actually elected COBRA continuation coverage.

Any COBRA-qualified beneficiaries that meet the requirements to be assistance-eligible individuals can pay 35% of the COBRA premium, and that amount will be considered payment in full. The 35% premium payment applies only to assistance-eligible individuals and to a covered spouse or dependent children who are also qualified beneficiaries due to the employee's involuntary termination of employment. Employers are eligible to secure the remaining balance of 65% through tax credits, which are discussed in the section on employer tax credits.

The premium assistance applies to periods of coverage beginning after the passage of this Act. A period of coverage basically refers to how your organization bills for COBRA coverage. Typically health plans charge COBRA premiums on a monthly basis, with the due date being the first of the month. If this is the case, the premium assistance would apply for periods of coverage beginning on March 1, 2009.



Premium assistance is generally limited to a nine-month period. However, premium assistance may terminate earlier on one of the following dates:

- The first date an individual becomes **eligible** under any other group health plan (unless the coverage is strictly dental, vision, counseling or referral services, or is solely a health reimbursement arrangement or health flexible spending account, or the coverage is through an on-site medical clinic designed to provide first aid or wellness services).
- The date an individual becomes eligible for Medicare.
- The date the maximum continuation coverage period under COBRA expires.

Qualified beneficiaries are responsible for notifying the employer in writing if and when they become eligible for other group health coverage or Medicare, warranting termination of premium assistance and, in some cases, termination of COBRA coverage. If an employee fails to provide this notice, the regulations include a penalty to the employee for failure to notify the employer that he or she is no longer eligible for premium assistance. The penalty is equal to 110% of the premium reductions provided after the employee lost eligibility. The Secretary of Labor will provide further guidance on the manner and timing of this employee notification.

The premium assistance only applies to COBRA premiums for medical, dental, vision and some EAP coverage. The only specific exclusion is medical flexible spending accounts. The premium assistance that is received by any former employee will not be treated as taxable income to the individual on either the state or federal level.

These regulations also contain an income limitation for assistance-eligible individuals. A qualified beneficiary is not entitled to COBRA premium assistance during a year in which the taxpayer, the spouse or child of a taxpayer has adjusted gross earnings that exceed \$145,000 (or \$290,000 if filing jointly). The amount of COBRA assistance is reduced if the taxpayer's adjusted gross earning exceeds \$125,000 (or \$250,000 if filing jointly).

In general, employers need not be concerned with administering this income exclusion; the government will add any premium assistance to high-income individuals when they file their taxes at year's end.

The regulations include a one-time waiver option for high-income individuals who know they are not eligible for the premium assistance. The government will release more information on the process for high-income waivers in the near future.

Optional Provision to Change Plans

The Act also contains a provision that will allow employers to let assistance-eligible individuals elect a lower-cost plan option. The basic provisions of COBRA require employers only to offer qualified beneficiaries the continuation of plan coverage in force on the day before a

qualifying event. The qualified beneficiaries can make changes at open enrollment under the same terms as active employees, and may also have the opportunity to change plans mid-year if they move outside a plan's service area.

These new regulations permit employers some flexibility regarding this rule. If the employer allows, assistance-eligible individuals can elect a less expensive medical plan option within 90 days of the beginning of the COBRA continuation period, or within 90 days of the passage of this Act. If the assistance-eligible individual elects a lower-cost plan option, that plan will still be seen as COBRA coverage and will meet COBRA requirements.

The rules surrounding a new plan election include:

- The new plan option must cost less than the plan in which the assistance-eligible individual is currently enrolled.
- The new option must be a plan that is offered to active employees.
- The plan must be a medical plan option; it cannot be coverage that provides only dental, vision, or medical flexible spending account benefits.

The intent of this provision is a good one: to allow employees the opportunity to elect a lower-cost medical plan option, so they can keep at least some level of health coverage while looking for new employment. However, it does create an additional administrative bur-

den for employers, who must now create the communication materials explaining this provision. In addition, employers who decide to allow this change should first verify with their vendors that such flexibility will be permitted.

Employer Tax Credits

Employers will be limited to charging assistance-eligible individuals only 35% of the applicable COBRA premium. That does not mean employers will be subsidizing the additional 65%; they can treat the 65% as a credit against any required payroll taxes. If the credits for applicable COBRA premiums exceed the

payroll tax liability, the Secretary of Treasury shall pay the employer any amounts that exceed the payroll tax liability.

Employers can apply the 65% tax credit once they actually receive an assistance-eligible individual's 35% premium payment.

For purposes of these regulations, payroll taxes are defined as:

1. Amounts required to be deducted and withheld for wage withholding (Section 3402).
2. Amounts required to be deducted and withheld for FICA employee taxes (Section 3102).
3. Amounts required to be deducted and withheld for FICA employer taxes (Section 3111).

Employers will need to submit reports to support the tax credits taken. The reporting requirements will be released by the government and will include the following key information:

- Attestation of the involuntary termination of employment of each covered employee that is being treated as an assistance-eligible individual.
- A report of the amount of payroll taxes offset by the COBRA premium assistance.
- A report including the Tax Identification Number of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and a designation as to whether the subsidy is for the coverage of one or multiple individuals.

The timing of this legislation is very quick, and the government needs to release the reporting requirements. In recognition of this issue, the Act has provisions that will allow employers to reimburse employees who have paid the full premium for the next coverage period when they would qualify for premium assistance. This allows a bit of time for employers to establish their procedures for complying with these rules. The employer can simply reimburse the employee the 65% premium assistance within 60 days, or the employer can offer a credit toward future COBRA premium payments. For the employer to offer a premium credit, there must be a reasonable expectation that the assistance-eligible individual will use the credits within 180 days.



Many organizations are downsizing in these tough times, and employers often offer severance benefits to employees losing their jobs. How will your severance arrangements be impacted by the premium assistance? If the employer agrees to pay part of the COBRA premium as part of a severance arrangement, it will affect how the tax credit is calculated for these individuals. If the employee is not paying the full premium, the employer needs to take the employee cost and divide it by 35%. The employer should only take a tax credit on 65% of that reduced cost.

Second Election Period and Notice Requirement

The new regulations also require health plans to offer a second election period to qualified beneficiaries who would have qualified for assistance if they had elected COBRA when initially eligible, but may not have done so due to the cost of the COBRA premium. With the substantial government subsidy, COBRA may now be affordable for these individuals. The second election period gives these individuals a new opportunity to elect COBRA.

Employers should offer the second election period to any qualified beneficiary who, due to involuntary termination of employment, became eligible for COBRA at any point between September 1, 2008 and the enactment of these rules. In addition, employers should extend the secondary election period to anyone who elected COBRA after September 1st, but had COBRA terminate due to non-payment of premium. While this is not directly spelled out in the regulations, it follows the spirit and intent of the rule.

Employers need to provide a notice related to "retroactive coverage" to all qualified beneficiaries eligible for the second election period, which will last for 60 days from the enactment of these new regulations. The second election notice must disclose that the government will help fund 65% of the COBRA premium.

In addition to the notice of the second election period, the employer needs to provide an election form to allow the employee to elect COBRA. If the employee elects COBRA during the second election period:

- Coverage only needs to be reinstated back to the first coverage period following the effective date of this Act. For most plans this will be March 1.
- The maximum coverage election period is measured from the original qualifying event date.
- Any time between the initial loss of plan coverage and a COBRA election in the secondary election period will not be counted as a break in creditable coverage for the purpose of pre-existing condition limitations.



In addition to providing a secondary election period to qualified beneficiaries impacted by these regulations, employers must also begin notifying COBRA participants going forward about the Federal assistance available for assistance-eligible individuals. This notice information

can be included with the COBRA election notice. It is recommended that this notice be included as a separate and discrete notice alongside the formal COBRA election notice. This process is recommended because, as it stands today, the Federal government will not provide assistance to those individuals who involuntarily lose coverage on or after January 1, 2010. This may change in the future depending on how well the U.S. economy recovers. By keeping the information separate, the employer can make sure it is not included for qualifying events occurring after December 31, 2009.

The notice must include a description, displayed in a prominent manner, of the qualified beneficiary's potential right to reduced premiums. All required notices must include information to help qualified beneficiaries determine if they are eligible for the premium assistance. In addition, it must include the name, address and telephone number of the employer contact a qualified beneficiary

can call with any questions. The notice should also include the qualified beneficiary's responsibility to notify the plan administrator if he or she becomes eligible for any other group health plan or Medicare, as that would terminate the individual's eligibility for premium assistance. If your plan will allow employees to change to a lower-cost plan option within 90 days, the notice should outline this option and describe the process and timing to make such a change.

Within 30 days of the enactment of this legislation, the government will release model language employers can use to develop the necessary notices. In addition, the Secretary of Labor will develop a community outreach plan targeting employers, public assistance programs, states, insurance carriers and others to educate all parties about the new requirements.

Action Plan for Employers

The timing of this legislation is fairly quick and, in many respects, employers will be waiting for the government to release model notices or instructions on how to comply with various aspects of this legislation. It is important to get a jumpstart on complying with these regulations so your organization is ready to act when the government issues additional guidance:

Step 1: Determine the employees that may be considered *assistance-eligible individuals*. Note that the regulations do not define what is considered an involuntary termination of employment. The safest course of action is to flag any employees terminated by the employer for a reason other than gross misconduct on or after September 1, 2008. Divide the group into 2 sections:

1. Those involuntarily terminated former employees that elected COBRA.

2. Those involuntarily terminated former employees who failed to elect COBRA or elected COBRA that subsequently terminated for non-payment of premium.

The first group should receive information on the premium assistance available. They will need to provide an affidavit affirming that they meet the requirements of an assistance-eligible individual.

The second group must receive notification about the premium assistance available and information on the secondary election period.



The government will

release model notice language within 30 days. Employers can prepare to send these notices and wait for the actual model notice language to turn around quick mailings. The employer can also craft an initial "heads up" notice with the information provided in this *Special Alert* and then follow up with the complete model notice after that language is released.

Step 2: Decide if your organization will allow employees to elect a lower-cost plan option within 90 days of becoming eligible for COBRA. If your organization is inclined to offer this option, approach all your vendors to make sure they will allow this. If so, create a form that will allow COBRA participants to elect

lower-cost plan options and create a communication to discuss the option.

Step 3: Develop an accounting procedure to track the assistance-eligible individuals and the associated 65% premium credit. The report should include the information discussed in this *Special Alert*. Again, the government should be releasing more details, but creating a report in your accounting system is critical. If your organization uses an external vendor to process payroll and report employment taxes, ask if they will provide assistance in calculating tax credits. If not, start building the spreadsheets that will allow you to track the amount of the tax credit.

Step 4: Identify severance-applicable COBRA participants that are impacted by the tax credit. For any reduced premium requirements, your tax credit will be less than 65% of the total premium. Calculate applicable tax credits and create a follow-up system if the severance benefits end during the timeframe for premium assistance. Once the individual begins paying 35% of the full COBRA premium, the employer can take the full 65% tax credit.

Step 5: Develop a waiver form for high-income individuals once the government releases model notice language.

Step 6: Consider revisiting your cost projections for the health plan. COBRA participants generally use the plan at a higher rate than actives. A significant increase in COBRA participation, due to the lower cost to qualified beneficiaries, may result in higher plan utilization than was expected when budgets were initially developed.

Step 7: Develop all new notifications required by the Act by using the model notice language provided by the government, and then release the notices as soon as practical to all former employees identified in Step 1. Follow the COBRA delivery requirements when sending the



notices and keep copies of all notices sent. To the extent possible, keep all notice language related to this law separate from your regular COBRA notices. This assistance expires at the end of the year and you will not need to include this information for qualifying events occurring after December 31, 2009.

If your organization uses a separate vendor for COBRA administration, contact your vendor to ask how they will assist you in complying with these new requirements. There may be an additional charge for the new notices needing to be sent.

If you have any questions regarding these new requirements, please contact your McGraw Wentworth Account Manager. McGraw Wentworth will keep you posted on continuing developments. **MW**

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