

EMPLOYMENT LAW UPDATE

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COBRA PREMIUMS SUBSIDIZED UNDER STIMULUS PACKAGE

FEDERAL LAW

By Douglas J. Melton

Immediate Employer Action Required

By Douglas J. Melton

The economic stimulus package recently signed into law by President Barack Obama includes COBRA subsidies for people losing health coverage due to a recent involuntary job loss. Employers are required to provide immediate notice to impacted employees and to give subsidy-eligible individuals who did not elect COBRA before the law's enactment a special COBRA election period allowing a further sixty-day period to elect COBRA coverage.

Cobra Premium Subsidy

The Federal Government will pay 65% of premiums for people eligible for COBRA due an involuntary job loss between September 1, 2008 and December 31, 2009. Eligible former employees and family members must pay 35% of the COBRA premiums to qualify, and some more highly compensated former employees (those with adjusted gross incomes of at least \$125,000) must include the value of the subsidies in their taxable income. Employers may, but are not required to, allow eligible terminated employees to switch to coverage that costs less than the coverage held before the job loss. The premium subsidy is available now and will last for up to nine months,

ending earlier if the individual becomes eligible for coverage under another group health plan or Medicare. Employers will receive the premium subsidy as a credit against payroll tax (i.e. wage withholding and FICA tax) liabilities.

New Notice Requirement

Persons leaving employment for any reason between September 1, 2008 and December 31, 2009, must receive notices explaining the new COBRA rights. Notices must include information about the subsidy and forms to establish subsidy eligibility. The Department of Labor is preparing a model notice for employer use that should be ready by mid-March. For individuals eligible for the special election period described below, the notice must also describe special election rights.

Special COBRA Election Period

Eligible individuals who did not elect COBRA before the law's enactment must be given a special COBRA election period effective immediately and ending sixty-days after the date of a new special election notice.

New COBRA notices must provide the following information: (1) the forms necessary for establishing eligibility for the premium subsidy; (2) contact information of the plan administrator and any other person with information regarding the premium subsidy; (3) a description of the extended election opportunity for those who previously declined COBRA continuation coverage; (4) a description of an assistance-eligible individual's obligation to notify the plan when he or she becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for failure to do so; (5) a prominent description of the qualified beneficiary's right to the COBRA subsidy and any conditions on such rights; and (6) a description of the option to enroll in different coverage under the health plan if applicable. This information must be included in the COBRA election notices provided to persons who become eligible for COBRA continuation coverage after the enactment of the stimulus package.

For assistance-eligible individuals who became eligible for COBRA continuation coverage prior to the enactment of the stimulus package, a similar notice must be provided within sixty-days of the enactment of the act. The act directs the Department of Labor to issue a model notice within thirty-days after the enactment of the act.

Because the federal COBRA Subsidy is reimbursed to employers through the federal quarterly payroll tax reporting system, the act requires employers to advance the premium subsidies until the employer's payments can be recouped through reduced federal payroll tax payments. To the extent the subsidy amount exceeds the amount of the employer's liability for federal payroll taxes, the Internal Revenue Service will reimburse the employer for the excess directly. If an employer claims too much in reimbursement, it will be treated as an underpayment of federal payroll taxes to be assessed and collected accordingly.

The speed with which the stimulus package was drafted and enacted means that the COBRA subsidy provisions, and the resulting employer obligations, are full of ambiguities and unanswered questions. Employers must nevertheless strive to implement the new COBRA subsidy program even as further guidance trickles forth from the Department of Labor.