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## NEW COBRA PREMIUM SUBSIDY

The American Recovery and Reinvestment Act of 2009 (the "Act") signed into law by President Obama on February 17, 2009 affects COBRA continuation coverage and rights in several important ways. Employers that sponsor group health plans need to update their COBRA administration practices to conform with the provisions of the Act. The COBRA provisions in the Act include:

### Premium Assistance

Beginning March 1, 2009, employees who are or were involuntarily terminated between September 1, 2008 and December 31, 2009 may be eligible for a 65 percent subsidy of their COBRA premium for up to nine months. Members of the employee's family may also be eligible for the subsidy if the reason for their COBRA coverage is the employee's involuntary termination of employment. The subsidy also applies to state continuation coverage applicable to small employers and others exempt from COBRA. To be eligible for the subsidy, an employee must:

- be involuntarily terminated other than for gross misconduct during the applicable period;
- elect COBRA (or applicable state continuation coverage); and
- meet the income requirements for the year(s) of the subsidy. An individual with adjusted gross income over \$145,000 (or \$290,000 for a couple) is technically still qualified for the subsidy but any subsidy taken will be recaptured on the individual's tax return (partial recapture will occur for an individual with adjusted gross income between \$125,000 - \$145,000 (or \$250,000 - \$290,000 for a couple)). Individuals with income over the limit may voluntarily opt out of the subsidy.

During the subsidy period, the individual pays 35 percent of the COBRA premium to the employer or health insurer, as applicable. The employer or health insurer is responsible for the remaining portion of the premium. The subsidy applies to all coverage connected with the qualifying event, except health flexible spending account coverage. The subsidy lasts for a maximum of nine months, or until the individual's COBRA period ends or the individual becomes eligible (not enrolled) for Medicare or coverage through another group health plan. The subsidy is not retroactive, meaning that an individual who is currently on COBRA and is eligible for the subsidy will not receive any reimbursement for COBRA premiums paid for pre-March 1, 2009 coverage. However, an individual eligible for the subsidy who pays the full premium for March or April coverage before their employer or insurer has had an opportunity to implement subsidy procedures will be entitled to reimbursement of the overpayment or application of the overpayment toward future premiums.

### Employment Tax Offset for COBRA Subsidy

The entity that receives the reduced premium (for a self-insured plan, the employer, and for an insured plan, the insurer) may offset the amount of the premium subsidy against its payroll tax obligations. If the credit for the premium subsidy is greater than the entity's payroll tax liability, the entity can be reimbursed directly for the excess amount. Entities eligible for the offset or reimbursement will be required to file a detailed report with the U.S. Treasury regarding the subsidy, including an attestation of the involuntary termination of the employment of each individual who receives the subsidy, a report of the amount of payroll taxes for a reporting period, and the estimated offsets of such taxes for the next reporting period.

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## Additional Election Period

Employers must offer individuals who would otherwise qualify for the COBRA subsidy but did not elect COBRA coverage when first offered, a second chance to elect COBRA coverage. COBRA coverage for individuals who take advantage of this second election will begin as of the first coverage period after February 17, 2009 (March 1, 2009 for most employers), but there is no extension of the maximum COBRA period.

## Change in Coverage

Employers may (but are not required to) allow individuals eligible for the COBRA subsidy to change their coverage option under the group health plan in conjunction with electing COBRA coverage, so long as the premium cost of the new coverage option is less than their current option. This change in coverage option cannot be used to elect coverage under a health flexible spending account or a coverage option that provides only dental, vision, counseling or referral services.

## Notice Requirements

The Act requires that all individuals who became eligible to elect COBRA between September 1, 2008 and December 31, 2009 must be given notice of the availability of the subsidy, the conditions for the subsidy (such as the income limits), the individual's obligation to notify the plan of eligibility under another group health plan or Medicare and the penalty for failure to give timely notice, and if adopted by the employer, the option to elect alternate coverage. The employer can modify its general COBRA notice or it can prepare a separate supplemental notice. Employers must also notify all individuals potentially eligible for the subsidy who are not on COBRA as of February 17, 2009 of the additional election period. Notices must go out within 60 days of February 17, 2009. The Act directs the Secretary of Labor to provide model notices within thirty days after enactment.

## Action Items for Employers

- Identify individuals who became entitled to COBRA on or after September 1, 2008.
- Identify individuals potentially entitled to premium subsidy and those potentially entitled to special election period.
- Determine whether to make alternate coverage available to subsidy eligible individuals.
- Revise COBRA notices or prepare supplemental notices.
- Notify all individuals who became entitled to COBRA between September 1, 2008 and December 31, 2009 of the availability of the subsidy and, if the employer permits it, the option to elect alternate coverage.
- Notify individuals potentially eligible for subsidy who are not on COBRA as of February 17, 2009 of the additional election period.
- Work with COBRA administrators, health insurers and the employer's payroll department to implement subsidy and payroll tax offset procedures.

## Further Developments

Holme Roberts & Owen LLP will be monitoring further developments and will issue additional alerts as more guidance is released.

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