

Employer • Alert

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COBRA PREMIUM ASSISTANCE PROGRAM REQUIRES IMMEDIATE ACTION BY EMPLOYERS

The \$787 billion Economic Stimulus Package, officially named the American Recovery and Reinvestment Act of 2009, which President Obama signed into law on February 17th, provides some immediate financial relief in the form of COBRA premium discounts for workers who were or are involuntarily terminated during the 16-month period that began September 1, 2008 and ends December 31, 2009 (the "COBRA Premium Assistance Program"). It also places some immediate burdens on employers. The COBRA Premium Assistance Program applies to group health plans that must offer federal COBRA or state COBRA (e.g., state COBRA applies in Connecticut to insured group health plans of employers that have fewer than 20 employees). There is no exception under the new law that exempts small employers.

Employers will need to move quickly to comply with the COBRA Premium Assistance Program. It applies to COBRA premiums that become due in March. Employers or their COBRA administrators must notify eligible individuals (those who lost their jobs on or after September 1, 2008) about the availability of the program and their right to make a new COBRA election, even if they turned COBRA down when it was first offered to them or they elected COBRA but their COBRA coverage then lapsed for non-payment of premiums.

This Alert highlights the main features of the new COBRA Premium Assistance Program.

- **Who Qualifies for the COBRA Premium Assistance Program?**

Workers who are involuntarily terminated (for reasons other than gross misconduct) during the period September 1, 2008 through December 31, 2009 are eligible. An employee who voluntarily leaves his or her job (i.e., a voluntary quit) is NOT eligible for this COBRA assistance.¹

¹The determination of whether a termination is involuntary is made by the employer. A former employee who is denied eligibility for the COBRA Premium Assistance Program can appeal that denial to the federal government for an expedited review of such denial, and the new law requires the federal government to issue its decision within 15 business days after receiving the individual's application for review.



- **What benefit does COBRA Premium Assistance provide?**

Eligible individuals may purchase COBRA coverage, effective as of the later of March 1, 2009, or their loss of coverage, by paying 35% of the COBRA premium the individual would have been charged. The federal government ends up paying the other 65%, although the employer will have to make the initial outlay in most cases.

As under current COBRA election rules, an eligible former employee may elect COBRA coverage for his or her covered spouse and covered dependent children; the COBRA Premium Assistance Program applies to whichever coverage level is elected.

Example: Assume the COBRA premium for family coverage (at 102% of the cost of coverage) is \$1,000 per month. Under the new law, an employee who was involuntarily terminated on or after September 1, 2008 can purchase family COBRA coverage for \$350 rather than \$1,000. The former employee's COBRA cost drops by 65% per month because of the COBRA Premium Assistance Program.

- **How long does an individual's COBRA Premium Assistance last?**

The maximum period of time is 9 months. COBRA Premium Assistance, however, ends sooner if the former employee becomes eligible for another employer's group health plan, becomes eligible for Medicare, or when the maximum COBRA period of coverage (generally 18 months) would otherwise end when measured from the date the COBRA coverage would have first begun. (The new law does not provide a clear answer to what, if anything, happens to the maximum 9-month period if the employer provides the former employee with free or substantially discounted COBRA coverage for a period of time after the employee's involuntary termination of employment—e.g., as part of a severance benefit offered in connection with a reduction in force. For example, if as part of a severance benefit, the employer provides 4 months of free COBRA to a former employee who is terminated on February 28, 2009, it is not clear under the new law whether the 4-month period of free COBRA coverage counts against the 9-month period of COBRA Premium Assistance, effectively reducing COBRA Premium Assistance to 5 months.)

- **Will high income workers also receive COBRA Premium Assistance?**

High income individuals, defined by the law as single taxpayers whose adjusted gross income exceeds \$125,000 for the tax year or joint taxpayers whose adjusted gross income exceeds \$250,000, are eligible to receive COBRA Premium Assistance, EXCEPT that, depending on the employee's level of adjusted gross income (AGI), all or a portion of it will be recouped by the federal government when the former employee files his or her income tax return. The amount of COBRA Premium Assistance that a former employee is required to repay on his or her tax return is based on a sliding scale. For individuals whose AGI is greater than \$145,000 (\$290,000 for joint taxpayers), the entire COBRA Premium Assistance will be recouped.

² When COBRA Premium assistance crosses over into a second tax year (e.g., from 2009 to 2010), the former employee's AGI is calculated separately for each year to determine if any repayment of COBRA Premium Assistance will apply for that year.

Employers are not responsible for determining whether any of the COBRA Premium Assistance must be repaid by the former employee. The recoupment process is between the former employee and the federal government.

High income individuals have the option of waiving COBRA Premium Assistance, which avoids the repayment requirement, but the waiver is permanent: it applies even if the individual's AGI falls below the "high income" level in the first or subsequent calendar year.

- **What is the income tax treatment of COBRA Premium Assistance that an employee receives?**

The law adds new Section 139C of the Internal Revenue Code to provide that the value of COBRA Premium Assistance is a non-taxable benefit and is NOT included in the employee's gross income for tax purposes.

- **How will employers and unions receive funds from the federal government to pay for COBRA Premium Assistance?**

For insured or self-insured group health plans that are subject to the requirements of federal COBRA or the Public Health Service Act (e.g., state and local governmental entities), the employer is responsible for paying the other 65% of the full COBRA premium (the "Employer Portion") in the first instance, whether it is a payment to an insurer or a liability with respect to a self insured plan. The employer will then receive reimbursement of the Employer Portion from the federal government. The employer must claim the reimbursement on its Form 941 as either a deemed payment toward payroll taxes due, or as a refund of payroll taxes in the event the employer has reported an overpayment of payroll taxes for the employer's applicable deposit period (e.g., monthly or semi-weekly payroll tax deposit schedule). Under this system, the employer will be made whole for the Employer Portion. The former employee is NOT involved in this part of the reimbursement process.

For union health plans that are multiemployer plans as defined by ERISA, the group health plan will be responsible for the Employer Portion and will receive reimbursement.

For insured group health plans that are either not subject to ERISA (e.g., a church plan) or are required to provide COBRA coverage under state law rather than federal law (generally when the employer has an insured health plan AND has fewer than 20 employees), the insurer will be responsible for the Employer Portion and will receive reimbursement from the federal government under the same payroll tax filing system described above for employers. Neither the employee nor the employer with this type of insured health plan is involved at all in this reimbursement process.

- **What responsibilities does the new law place on employers?**

Employers (or their COBRA administrators) must notify all former employees who were involuntarily terminated on and after September 1, 2008 (for reasons other than gross misconduct) about the availability of the COBRA Premium Assistance Program and their right to elect COBRA and receive COBRA Premium Assistance.

For former employees who terminated before February 17, 2009 (the new law's effective date), notice must be provided by April 18, 2009. The person will then have 60 days from the receipt of the notice to elect COBRA for the remainder of his or her original COBRA period of coverage, retroactive to March 1, 2009.

For employees who terminate on or after February 17, 2009, notice must be provided in accordance with existing COBRA notification periods. In most cases, this will mean that the new COBRA notice must be sent to the former employee not later than 44 days after the later of (a) the date he or she was terminated, or (b) the date his or her group health coverage ended.

The law requires the U.S. Department of Labor to provide employers with model notices that employers can use to satisfy their notification responsibilities under the new law. DOL must publish its model notices no later than 30 days after the law's enactment date of February 17 (in other words, by March 19).

The new law also appears to require that any person experiencing any qualifying event (even a voluntary quit) after February 17, 2009, must receive a COBRA notice explaining the COBRA Premium Assistance Program and the eligibility requirements to qualify for it.

- **Can an eligible individual elect different COBRA coverage?**

The employer may, but is not required to, permit eligible individuals to elect to enroll in COBRA health coverage that is different coverage from what the individuals had at the time of their loss of coverage. (Under prior COBRA law, an individual entitled to elect COBRA coverage must be offered only the right to elect the same health coverage he or she had at the time he or she lost the coverage as a result of a COBRA qualifying event.)

If an employer wants to add these additional COBRA plan choices, the employer must notify the individual of the additional coverage choices, and the individual will have 90 days from the date of that notice to make the coverage election. However, none of the alternative coverages can have a higher premium than the otherwise applicable COBRA coverage, and the additional coverage choices must also be available to active employees.

- **What should employers be doing now?**

Employers that outsource COBRA compliance: The employer should contact its COBRA administrator right away to find out exactly what services the COBRA administrator will be providing with respect to COBRA Premium Assistance. For example, many COBRA administrators send the COBRA notices and election forms to eligible individuals when notified by the employer that an individual has had a termination of employment or other COBRA event. If the COBRA administrator already sends the notices and election forms, the employer should confirm with the COBRA administrator that it is gearing up to send the new notices and election forms needed to comply with the new law.

Employers that self-administer COBRA compliance: The employer is required to provide notice of the COBRA Premium Assistance Program. The employer should obtain the new model notice to be published by the

DOL (recognizing that quick action by the employer may be necessary in order to coordinate the logistics of distributing the notice and election forms by the deadline). Failure to furnish a COBRA notice that satisfies the new requirements is considered to be a defective COBRA notice by the employer, and extends the deadline for an individual to make an election. It will also be a violation of ERISA Section 502(c)(1) as to which a court could impose a \$110 per violation per day fine on the employer.

Employers that outsource payroll: The employer, whether or not it outsources COBRA compliance, should be in contact with its payroll company (such as ADP, Paychex, etc.) to be sure that the payroll company has in place (or will be setting up) the process for the employer to obtain reimbursement from the federal government through the employer's regular payroll tax deposits and Form 941 filings.

All employers: All employers should compile a list of former employees who were eligible to elect COBRA since September 1, 2008. This group (except for those persons fired for gross misconduct) must receive the notice of the new law's COBRA Premium Assistance, and those who were involuntarily terminated also must be given the right to make a new COBRA election. Even if they are currently receiving COBRA coverage, they must be notified that their COBRA premium payment is being reduced in accordance with the COBRA Premium Assistance Program.

QUESTIONS OR ASSISTANCE?

The new law requires the IRS and the DOL to issue regulations that provide guidance under the new law, and both federal agencies already have posted information about the new law on their respective websites. We are of course ready and able to help employers understand the new COBRA rules and what they must do to comply.

Please contact any member of our **Employee Benefits Practice Group** if you have any questions.

Richard I. Cohen	860.251.5803	rcohen@goodwin.com
Ira H. Goldman	860.251.5820	igoldman@goodwin.com
Ali G. Haffner	860.251.5091	ahaffner@goodwin.com
Kelly Smith Hathorn	860.251.5868	khathorn@goodwin.com
Natalie W. Welsh	860.251.5828	nwelsh@goodwin.com

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C O U N S E L O R S A T L A W

One Constitution Plaza
Hartford, CT 06103-1919
(860) 251-5000

300 Atlantic Street
Stamford, CT 06901-3522
(203) 324-8100

289 Greenwich Avenue
Greenwich, CT 06830-6595
(203) 869-5600

12 Porter Street
Lakeville, CT 06039-1809
(860) 435-2539

www.shipmangoodwin.com