



EMPLOYEE BENEFITS BULLETIN

February 17, 2009

IMPORTANT – ACTION REQUIRED!

New Law Requires Lower Contribution for Continued Health Benefits for Certain Terminated Employees

The stimulus package was passed by Congress last week and is expected to be signed into law on February 17, 2009. The final continuation provisions have several differences from the House bill version which was described in the January 19, 2009 Benefits Update.

Under the new law, certain involuntarily terminated employees and their family members will only have to pay 35% of the premium amount (rather than the usual 102%) for up to 9 months (rather than 12 months as proposed in the House bill) to continue group health coverage. Employers will take a payroll tax credit for 65% of the premium amount.

The employer must offer the same health coverage the individual had at the time of the qualifying event in accordance with COBRA, but may also offer other health coverage options.

If the premium assistance is provided to high income individuals, then their income tax will be increased by the amount of the subsidy.

Updated COBRA election notices must be provided to assistance eligible individuals who were COBRA-eligible before now by **April 18, 2009**. The Department of Labor ("DOL") must issue a model notice by March 19, 2009. Individuals have 60 days after notice is provided to elect coverage. Coverage will not be retroactive.

Notably, the provision in the House bill extending coverage to terminated employees who were at least age 55 or who had at least 10 years of service and their family members until Medicare eligibility is not in the final version.

The following provides additional detail.

1. Premium Subsidy

Reduced premium

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February 24th	12PM - 1PM
March 10th	12PM - 1PM
March 24th	12PM - 1PM
April 7th	12PM - 1PM
April 21st	12PM - 1 PM

For up to 9 months, an “assistance eligible individual” must only pay 35% of the premium amount to continue “COBRA coverage.”

Type of coverage

The applicable coverage is group health coverage under COBRA, similar state continuation laws (e.g., those applying to small employer plans), and continuation laws that apply to Federal or State governmental health plans (“COBRA coverage”). It does not include health FSAs.

An assistance eligible individual may elect to continue the same coverage. He may alternatively elect other coverage offered by the employer if:

- the employer agrees;
- the premium is not more than the premium for the coverage in which the assistance eligible individual was enrolled at the time of the qualifying event;
- the other coverage is offered to active employees at the time such election is made; and
- the other coverage is not:
 - only dental, vision, counseling, referral services (or a combination of such services);
 - a health FSA; or
 - on-site medical facility services.

The election for other coverage may be made within 90 days after the date of notice of the plan enrollment option.

Termination of eligibility for reduced premiums

The subsidy terminates with the first month beginning on or after the earlier of:

- the date which is 9 months after the first day for which the subsidy applies;
- the end of the maximum continuation period for the qualified beneficiary under the COBRA rules or the relevant State or Federal law; or
- the date that the assistance eligible individual becomes eligible for Medicare or health coverage under another group health plan (including, for example, a group health plan maintained by the new employer of the individual or a plan maintained by the employer of the individual’s spouse).

Assistance eligible individual

An “assistance eligible individual” is any qualified beneficiary who elects to continue COBRA coverage where:

- the qualifying event causing loss of coverage is involuntary termination of employment (excluding termination of employment for gross misconduct); and
- the qualifying event occurs during the period beginning September 1, 2008 and ending December 31, 2009.

If premium assistance is provided to individuals with a modified gross income of \$125,000 (\$250,000 in the case of a joint return) for the taxable year in which the subsidy is received (2009 or 2010), the individual's taxes will be increased by the amount of the subsidy. However, if the individual's modified adjusted gross income is between \$125,000 and \$145,000 (\$250,000 and \$290,000 in the case of a joint return), the increase in tax will be limited to a ratio of such increase obtained by dividing the amount over the modified gross income limit by \$20,000 (\$40,000 in the case of a joint return).

Highly-paid individuals can waive premium assistance to avoid this recapture.

Employer reimbursement

The employer is reimbursed by the amount of the premium that is not paid by an assistance eligible individual on account of the premium reduction. To the extent that such employer has liability for income tax withholding from wages or FICA taxes with respect to its employees, the employer is reimbursed by treating the amount that is reimbursable to the employer as a credit against its liability for these payroll taxes. To the extent that the amount exceeds the amount of tax liability, the IRS will credit or refund such excess in the same manner as if there were an overpayment of taxes. Any overstatement of the reimbursement amount is treated as an underpayment of payroll taxes and employers may be assessed and collected by the IRS in the same manner as it does for payroll taxes.

Qualified beneficiary notice to plan

If a qualified beneficiary paying a reduced premium becomes eligible for coverage under another group health plan or Medicare, he or she must notify the group health plan providing the COBRA coverage of such eligibility in writing or pay a penalty equal to 110% of the subsidy provided after termination of eligibility. The notice should be made at the time and in the manner specified by the DOL.

Special election period

For a qualified beneficiary who is eligible for a reduced premium and who has not elected COBRA coverage as of the date of enactment, a special 60 day election period begins on the date that notice is provided to the qualified beneficiary of the special election period.

Thus, for example, if a covered employee involuntarily terminated employment on September 10, 2008, but did not elect COBRA coverage and was not eligible for coverage under another group health plan, the employee would have 60 days after date of notification of this new election right to elect the coverage and receive the subsidy.

The coverage is not retroactive. It will begin the "first period of coverage" following enactment of the stimulus bill and the coverage period is not extended beyond that required by COBRA.

A "period of coverage" is a monthly or shorter period with respect to which premiums are charged.

For example, if an assistance eligible individual was involuntarily terminated on September 30, 2008 and elects to continue coverage via this special enrollment period, his coverage will start March 1, 2009 (for a plan that provides and charges for COBRA coverage on a calendar month basis) and coverage will end March 31, 2010 (18 months following September 30, 2008 – the regular COBRA period).

For purposes of preexisting condition exclusions, the period between the qualifying event and the date coverage is continued via the special enrollment period is not counted against participants for purposes of the 63-day break in coverage rules.

Denials

If individuals request treatment as assistance eligible individuals and are denied such treatment, they can request an expedited review from the DOL (or the Health and Human Services ("HHS") in connection with non-COBRA continuation) in consultation with the IRS.

Employer notice to qualified beneficiaries

Election notices must be changed to describe these provisions – either by amendment of existing forms or by inclusion of a separate document with the existing notice.

The notice must include:

- the forms necessary for establishing eligibility for premium subsidy;
- the name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium subsidy;
- a description of the special election period;
- a description of the obligation to notify the plan of subsequent eligibility for other group coverage or for Medicare and the penalty associated with failure to notify;
- a description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the subsidy; and
- a description of the option of the qualified beneficiary to enroll in difference coverage options, if the employer so permits.

This notice must be provided to assistance eligible individuals with this additional information within 60 days after the date of the enactment of this law (April 18, 2009). The DOL must issue a model notice no later than 30 days after the date of the enactment (March 19, 2009).

Failure to provide such notice is treated as a failure to meet the notice requirements under the applicable COBRA provisions.

Employer notice to IRS

Upon request, employers entitled to reimbursement may be required to submit a report confirming individual eligibility, the amount of payroll taxes offset and an estimate of future offsets, the tax identification numbers of covered employees, and amounts reimbursed with respect to each qualified beneficiary.

Reimbursement of overpayment

For the first two months, if the full premium amount is paid by an assistance eligible individual, the person who received the payment (e.g., the employer or the carrier) must reimburse the overpayment to the individual who paid the premium (e.g., the qualified individual) or provide a credit to the individual for future payments.

For more information, see pages 396 - 427 at:

http://www.house.gov/billtext/hr1_legtext_crb.pdf and pages 212 - 227 at:

http://www.house.gov/billtext/hr1_cr_jesb.pdf

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