

Today February 17, 2009, President Obama is expected to sign the **American Recovery and Reinvestment Act of 2009** (ARRA), requiring changes to COBRA administration, tax administration, and transportation plan limits, among other things. The final measure, totaling more than 1,000 pages and containing dozens of tax breaks and spending initiatives, addresses employee benefits and several other HR areas. While some of these changes are very complex please see an overview below.

The COBRA changes take effect on the first coverage month following the date ARRA was enacted (i.e., March 1, 2009, for most plans). The Department of Labor (DOL) has 30 days in which to issue model notices. The Treasury Department is responsible for issuing other guidance and regulations.

There are seven major areas of ARRA that relate to COBRA and other benefits:

- COBRA Subsidy
- Second COBRA Election Period
- COBRA Plan Enrollment Option
- Employment Tax Offset for COBRA Subsidy
- Health Coverage Tax Credit (HCTC) and Other Features
- Increase in Transit Pass Limit for Transportation Plans
- Health Information Technology and HIPAA Privacy and Security

COBRA Subsidy

The major change is a 65 percent COBRA subsidy for up to nine months for “assistance eligible individuals” who had an initial qualifying event on or after September 1, 2008, and on or before December 31, 2009.

An assistance eligible individual must meet the following qualifications:

- The initial qualifying event must be for involuntary employment termination for reasons other than gross misconduct
- The subsidy is available to all coverage connected with that qualifying event, except Health FSAs, which are specifically excluded
- The qualified beneficiary must elect COBRA or applicable state continuation coverage (both small employer and post-COBRA coverage)
- The qualified beneficiary must have had a modified adjusted gross income (Modified AGI) of less than \$125,000, if single, or \$250,000, if married filing jointly, for each tax year in which the subsidy is received.

The method for the fourth eligibility criterion is complicated. The Qualified Beneficiary may take the subsidy but if his Modified AGI exceeds the threshold amounts, the credit will be recaptured on the tax return. For those with a Modified AGI between \$125,000

and \$145,000 (or between \$250,000 and \$290,000, if married filing jointly), the amount of credit that is recaptured on the tax return is according to a sliding scale. For example, a Qualified Beneficiary with \$140,000 of AGI would have 75 percent of the subsidy $([140,000 - 125,000]/20,000)$ recaptured on the tax return for that tax year. For multiple tax years, some may have a recaptured subsidy in one year but not another year.

Some assistance eligible individuals may pay the full COBRA premium as employers gear up to implement these changes. For March and April of 2009, an employer has the option of either reimbursing the amount of the subsidy or applying the premiums as a credit toward later months.

The subsidy does not extend the normal maximum coverage period of 18 months for employment termination. If an assistance eligible individual becomes eligible (not enrolled) for other group medical coverage, the subsidy ends. Qualified Beneficiaries have an incentive to notify employers when this happens. They are subject to a penalty equal to 110 percent of any subsidy that was provided when they were not eligible. Such group medical coverage excludes coverage for dental, vision, EAP, on-site clinic services, Health FSAs and most Health Reimbursement Arrangements (HRAs).

Second COBRA Election Period

Those who would otherwise qualify for the COBRA subsidy but did not elect COBRA when first offered have a second election period of 60 days. This election period starts when a new election notice is sent. If these individuals elect COBRA, they become assistance eligible individuals and coverage dates back to February 17, not their original loss of coverage date.

The period of time between the qualifying event date and February 17 does not count toward the HIPAA 63-day gap in coverage rules for determining creditable coverage.

COBRA Plan Enrollment Option

Employers may, but are not required to, offer all assistance eligible individuals a new "Plan Enrollment Option." This provision allows assistance eligible individuals to change to another health plan offered by the employer to active employees (if any) as long as the premium is less than their current COBRA coverage. This other plan option excludes the following:

- Dental plans
- Vision plans
- Counseling or referral services (EAP)
- Health FSAs and most HRAs
- On-site medical clinics

The Plan Enrollment Option period is 90 days and starts when a notice describing the option is sent. This Option must be offered to all assistance eligible individuals, including those with second election rights and those with qualifying events that occur later in 2009.

Because of the complexity of this provision, it is not expected that many, if any, employers will offer this option.

Employment Tax Offset for COBRA Subsidy

The way the subsidy works is that eligible Qualified Beneficiaries pay the reduced COBRA premium each month. The employer is required to make up the balance by reducing its employment tax deposits (i.e., for federal income taxes, Social Security and Medicare) and reporting these offsets on a revised Form 941, which the IRS is currently finalizing. Two new lines (12a and 12b) have been added to Form 941 for reporting the amount of COBRA premium assistance payments and the number of subsidy recipients.

The IRS will need to revise several other forms, including:

- Form 943 (Employer's Annual Federal Tax Return for Agricultural Employees)
- Form 944 (Employer's Annual Federal Tax Return)
- Corresponding amended form (941-X, 943-X and 944-X)

At this time, the IRS does not expect any changes to Forms W-2 or W-3.

HCTC and Other Features

The HCTC is a 65 percent tax credit for health coverage that is available to three groups of people:

- Those receiving trade adjustment assistance (TAA) because they lost their job due to foreign competition
- Those receiving alternative TAA under a demonstration program for older workers
- Those whose nonforfeitable pensions are paid or partially paid by the Pension Benefit Guaranty Corporation (PBGC)

Effective May 1, 2009, through the end of 2010, all HCTC recipients will see their HCTC subsidy increase to 80 percent. Other provisions are in place to extend HCTC availability in cases of Medicare entitlement, death and divorce.

The COBRA maximum coverage period is affected in two instances. First, those receiving HCTC because of PBGC payments have their coverage continued until the earliest of the following events:

- The date of death of the covered employee (for covered employees)
- The date of death of the covered employee plus 24 months (for spouse and dependents of the covered employee)
- December 31, 2010

Second, those receiving HCTC because of TAA eligibility have their coverage continued until the earliest of the following events:

- Their TAA eligibility terminates
- December 31, 2010

All told, employers are required to send the following COBRA-related notices:

- A revised election notice with specified verbiage for those with a second election right
- A new notice with specified verbiage for those who have already elected COBRA
- A Plan Enrollment Option notice (if applicable)
- A revised election notice for new qualifying events through the end of 2009

A House provision would have extended the maximum coverage period for covered employees and their qualified beneficiaries if the employees were either age 55 or older or had 10 or more years of service with the employer on the qualifying event date. ARRA does not contain this provision.

The DOL has an expedited time frame of 15 business days for reviewing any subsidy-related complaints made by Qualified Beneficiaries. Treasury has been tasked with monitoring compliance and reporting on the program's effectiveness. Bottom line: compliance with this law will be closely scrutinized.

The total cost of the COBRA provisions in ARRA is estimated at about \$24 billion.

Increase in Transit Pass Limit for Transportation Plans

ARRA also changed the monthly reimbursement limits for transit passes under §132(f) of the Tax Code. Before ARRA, the monthly limits were \$120 for transit passes and vanpooling combined, \$230 for parking and \$20 for bicycles. Starting in March 2009 and continuing through December 2010, the limit for transit passes will equal the parking limit (\$230).

Health Information Technology and HIPAA Privacy and Security

ARRA allotted about \$17 billion to invest in health information technology, providing incentives to hospitals and other providers to begin using electronic health records. Significantly, the law expands the reach of HIPAA to certain entities that would normally not qualify as business associates, namely those that maintain or access personal health records or are classified as health information exchange organizations. The Department of Health and Human Services is required to issue regulations within 180 days of February 17.

ESS has already formed a working group to address these changes. Clearly, ARRA increases the complexity of COBRA and payroll administrative services, rewarding those employers and administrators who can perform both services in a timely and efficient manner.

For ESS COBRA clients, ESS will create new notices and notice inserts and send them to assistance eligible individuals. For ESS COBRA clients with Premium Collection, ESS

will also manage the subsidy process and create new reports for employer use in reducing their employment taxes. On a go-forward basis, employers will be able to report via our usual methods whether a qualifying event is an involuntary employment termination.

ESS clients should realize that some amount of information gathering from employers may be required to comply with ARRA. As always, we will make every effort to gather this information in the most efficient and secure way possible.

Please note we are actively working toward assisting all clients work through these changes.

If a questions or have a client in need of COBRA, Human Resource, or Payroll assistance please do not hesitate to give me a call

Thank you

Craig Broome



8530 Anselmo Lane
Baton Rouge, LA 70810
225-364-3091 Direct Line
1-800-535-7206
225-266-5915 Mobile
www.employersupport.com