

New Cobra Rules Require Quick Action

February 20, 2009

The Stimulus Bill became law on February 17, 2009. It makes sweeping changes to the COBRA rules, **which are effective immediately**. This advisory explains some of the highlights of the new rules.

COBRA is the law that requires employers that have 20 or more employees to offer employees and dependents under group health insurance plans "continuation coverage" for at least 18 months after coverage is lost due to a termination of employment (and other "qualifying events"). Employers may charge up to 102% of the cost of the coverage to terminated employees. A similar state law applies to insurance offered by smaller employers. The state coverage is also affected by the new law.

Of the sweeping changes, the more important ones are described below:

- The new changes affect only "Assistance Eligible Individuals" or "AEIs." An AEI is a former employee (or his eligible dependent) who meets both of the following conditions:
 - the qualifying event triggering coverage was the employee's involuntary termination during the period from September 1, 2008 through December 31, 2009 (employees terminated for "gross misconduct" are probably not AEIs); and
 - the individual is eligible for and elects continuation coverage.
- An AEI must pay only 35% of the premium for COBRA coverage. The remaining cost of the premium is subsidized temporarily by the employer and eventually paid in full by the government. The 35% is computed against the 102% value as computed under the pre-Act law.

Example: The monthly premium is \$100. Employee is an AEI. Under the old COBRA rules, Employer could charge Employee \$102 (102% of the applicable premium). Under the new law, Employee would pay only 35% of \$102, or \$35.70.

- An AEI is no longer eligible for the subsidy upon the first of the following:
 - the first date that he is eligible for coverage under any other group health plan. (The individual is obligated to inform the former employer about his eligibility for other coverage and is penalized for failure to do so. Note: this differs from the traditional COBRA coverage rule where an individual loses eligibility for COBRA coverage when he enrolls in another plan.); or
 - the first date he is eligible for benefits under title XVIII of the Social Security Act; or

- nine months after the first day of the first month that he is eligible for the subsidy; or
- the last date of the applicable COBRA period.
- The subsidy will last nine months at most.
- Employers will pay the remaining 65% amount initially. However, they are entitled to credit amounts paid against payroll taxes. Thus, the government ultimately pays the subsidy through the employer's reduced taxes. Rules are being developed for employers whose COBRA subsidy amounts exceed payroll taxes.
- Individuals with adjusted gross income exceeding certain levels are not eligible for the subsidy (\$145,000 for single filers and \$290,000 for joint filers). The subsidy is phased out for income above certain levels (\$125,000 for single filers and \$250,000 for joint filers).
- Employers must notify terminated workers of their right to the COBRA continuation benefits subsidy. ***This obligation will require special review of your existing COBRA notices.*** Notices must be provided to the following individuals:
 - anyone terminated between February 18 and December 31, 2009;
 - any former employee who has already elected COBRA as of the enactment date within 60 days of enactment; and
 - any former employee who, as of February 17, 2009, would be an AEI if a COBRA election were already in place. (The notification must occur within 60 days of February 17, 2009. This is really a "second chance" for some former employees to start COBRA coverage, but it will not entitle them to a longer period of coverage than that to which they would have been eligible had they elected COBRA during the first COBRA notice period. *The pre-existing exclusion rules are modified for the purposes of this extended coverage.*)

Failure by employers to supply the required new notices can lead to substantial fines (up to \$110 per day under ERISA and up to \$100 per day under the Internal Revenue Code).

- The Department of Labor and IRS will issue model notices within 30 days. For employees terminated after February 17, 2009 until the model notices are published, employers must draft their own notices. For employees terminated before February 17, 2009, employers have 60 days from February 17, 2009 to provide the "second chance" notice. After the "second chance" notice is sent, the former employees will have a 60-day election window. Thus, the sooner a notice is sent, the sooner former employees must make their elections.
- The new notices must include the following:
 - forms necessary for the individual to establish that he is eligible for the subsidy;

- a description of the "second chance" extended election period;
 - a description of the obligation of the individual to notify the plan when he becomes eligible for coverage under another group health plan;
 - a prominent description of the individual's right to the reduced premium and any conditions on entitlement to the reduced premium;
 - a description of the individual's option to enroll in different coverage (if such different coverage is offered by the employer); and
 - the name, address, and telephone number for the plan administrator and/or anyone else that should be contacted concerning the premium reduction.
- Employers must determine if an employee is an AEI and must also provide an expedited 15-day review process under which a former employee may request a review of assistance denial. Because there is a required review process, the employer should inform all terminated employees about the COBRA subsidy (including those who the employer has determined are not AEIs), so that the former employees can request a review if they so choose.
 - The Act imposes new, highly technical rules upon employers. ***They are effective immediately and apply to premiums paid for COBRA on or after February 17, 2009 for AEIs.*** Further guidance from the IRS and Department of Labor is expected. In the meanwhile, please do not hesitate to contact any of the Brooks Pierce attorneys listed below with your questions.