

65% Subsidy of COBRA Health Insurance Premium

Legal Alert

February 24, 2009

The American Recovery and Reinvestment Act of 2009 (the "Act") provides for a government subsidy of 65% of COBRA premiums for employees laid off between September 1, 2008 and December 31, 2009. The subsidy takes effect on **March 1, 2009**. Below is a summary of the COBRA subsidy provisions and a "To Do" list of needed action.

Eligible COBRA continuation coverage

The subsidy for continuation coverage applies to coverage required to be offered under COBRA, but also includes continuation coverage required under State law that is comparable to COBRA. This would allow the subsidy to apply to small employer plans (i.e., employers with less than 20 employees) who offer continued coverage not under COBRA, but under applicable state law programs.

The subsidy is limited, however, to individuals below a certain income threshold. Under this income threshold, if the subsidy is provided with respect to any COBRA continuation coverage which covers the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer during a taxable year and the taxpayer's modified adjusted gross income exceeds \$145,000 (or \$290,000 for joint filers), then the amount of the subsidy for all months during the taxable year must be recaptured through income taxation. For taxpayers with adjusted gross income between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium subsidy for the taxable year will be recaptured proportionately.

Special election opportunity

For individuals who were laid off between September 1, 2008 and the effective date of the subsidy (**March 1, 2009**), there is a special **60 day election** period for them to enroll for the COBRA benefits and the subsidy. This special election does not extend the period of COBRA, but offers the eligible individual another opportunity to participate or to change to permissible coverage options. Moreover, pre-existing conditions that arose between September 1, 2008 and before enactment are disregarded for purposes of eligibility.

Required Notifications

The notice of COBRA continuation coverage that a plan administrator is required to provide to eligible participants must now also contain a description of the right to the subsidy and the obligation (and associated penalty for a failure) of the participant while benefiting from the subsidy to provide notice of eligibility under another group health plan, Medicare or under title XVIII of the Social Security Act.

A new notice must also be given to eligible participants entitled to the special election within **60 days** of enactment (**April 18, 2009**). The Secretary of Labor is to issue model language for this notification within 30 days of the Act's enactment.

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Period of Subsidy

While COBRA coverage generally extends for a period of 18 months, the COBRA subsidy generally will not be for more than 9 months. The subsidy will terminate on the earlier of: (i) the first date alternative coverage is available through an alternative health plan or government coverage; (ii) nine months after the subsidy becomes available; or (iii) the expiration of the extended coverage under the applicable COBRA continuation coverage.

How the Subsidy will be Paid to Employers

While employers will bear the responsibility for the initial payment of the premiums, they will be reimbursed for the subsidized portion of COBRA through a credit to their payroll tax liability. The balance must come from the employees. To the extent that the COBRA subsidy exceeds the employer's payroll tax liability, the employer may seek a credit or refund just as if the employer had overpaid its payroll tax liability.

Impact on Recipients

The subsidized premiums are generally excluded from income, except for certain high income taxpayers who will have to recapture the subsidized premium. Participants who receive the COBRA premium assistance cannot claim the health coverage tax credit. The subsidized individuals must timely notify employers in writing upon obtaining other health coverage, or else a penalty will be imposed. Finally, individuals denied the subsidy have access to an expedited governmental appeal process.

Employer To Do List:

- Compile an accurate list of eligible COBRA (and COBRA equivalent) participants who were laid-off since September 1, 2008 and their addresses so as to be prepared to send out required notices for 60 day election after a model notice is published by the Secretary of Labor.
- Send out required notices for 60 day elections before April 18, 2009.
- Revise your standard COBRA (and COBRA equivalent) notices to reflect information on the subsidy by March 1, 2009 and requirement that participant provide written notice when he or she has obtained equivalent coverage to avoid a penalty
- Arrange with third-party administrator/payroll services or internally to adjust COBRA invoices to reflect subsidy and arrange for reimbursement or credit for excess premiums collected.
- Implement information collection process to communicate and identify when participants' adjusted gross income exceeds permitted thresholds.
- Keep track of IRS publications and guidance for procedures to claim the payroll tax credit or to seek reimbursement for the subsidy.
- Provide information for an expedited governmental appeal process if an affected individual is denied the subsidy. For more information, Contact Steven S. Poulathas at 856-382-2225 or by email at Steven.Poulathas@flastergreenberg.com

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ATTORNEYS MENTIONED

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