SHEEHAN
PHINNEY
BASS +
GREEN

Client Advisory

COBRA Subsidies Under ARRA – EMPLOYERS MUST ACT NOW

Mark J. Ventola, Esquire
Sheehan Phinney Bass + Green PA

February 27, 2009

Overview

The American Recovery and Reinvestment Act of 2009 ("ARRA"), enacted on February 17, 2009 provides qualified individuals with a 65% government subsidy of the premiums paid for health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), for up to nine months. The subsidy provides an incentive to elect COBRA coverage for involuntarily terminated employees and their qualified beneficiaries.

The new administrative requirements of the law and its substantive benefits will need to be understood by employers quickly, particularly for companies that have engaged in a reduction in force since September 1, 2008, or are currently contemplating such reductions.

What follows is a summary of the major provisions of the new law. Further guidance is expected from the Department of Labor within the next few weeks.

COBRA Premium Subsidies

Eligibility and Duration. To be eligible for the 65% COBRA continuation premium subsidy, individuals must (i) be employees involuntarily terminated between September 1, 2008, and December 31, 2009; (ii) be eligible for COBRA continuation coverage; and (iii) elect COBRA coverage under the normal or special election rules added by ARRA.

There is also an income threshold to eligibility. Individuals whose modified adjusted gross income for any taxable year in which the subsidy was received exceeds $145,000 ($290,000 for joint filers) will receive the premium subsidy but will have to repay the full amount they receive as part of their income tax filing, unless they elect to permanently waive the subsidy. Employees whose modified adjusted gross income is between $125,000 and $145,000 (or joint filers between $250,000 and $290,000) may also elect to waive the subsidy but will be allowed a pro rata amount if they do not.

The COBRA premium subsidy is available for a period of coverage beginning on or after ARRA's enactment provided the qualified individual pays 35% of the premium due. The subsidy ends on the earliest of (i) nine months after it begins; (ii) at the end of the maximum COBRA coverage period; or (iii) on the first day the individual could be covered by any other group health plan or is Medicare eligible.

Special Election Period. For employees involuntarily terminated between September 1, 2008, and February 17, 2009, ARRA provides a 60-day period in which they may elect COBRA coverage. If an individual elects coverage during this period, coverage begins after the election is made (and does not reach back to the date of termination). This special election does not extend the maximum period of COBRA coverage beyond the period under the applicable COBRA regulations that would have applied if COBRA coverage had been elected when originally available.

Subsidy Reimbursement. A qualified individual who pays 35% of the premium due will be treated as having paid the full amount of the premium. The entity to which payments are made (typically the employer, but in some circumstances the group health plan or the insurer providing coverage under the plan) must file a claim for reimbursement of the remaining 65% of the premium. The entity is reimbursed by taking a credit against payroll taxes otherwise due. If the reimbursement due exceeds the entity's payroll tax liability, the excess is credited or refunded.

If any qualified individual pays the full amount of his or her COBRA premium for the first two coverage periods following enactment of ARRA, the entity to which premiums are payable must reimburse the individual for 65% of the premium paid or provide the individual with a credit towards one or more future premium payments until full reimbursement is made. In effect, employers are being given a 2 month window to understand and then take the action required by ARRA.

Immediate Action Required – Notice Obligations

New Notification Requirements for Employers and Group Health Plans. Plan administrators must notify qualified individuals about the premium subsidy and the option to enroll in different coverage as part of their regular COBRA notice. This may be accomplished by amending existing notice forms or by supplementing existing notice forms with a separate document. **The new notification must also be provided within 60 days of ARRA's enactment to those qualified individuals who qualify to elect COBRA continuation under the special election period.**

Model notices are expected from the Secretary of Labor by the middle of March.

Unanswered Questions. The ARRA leaves many questions unanswered. For example, it does not specifically define the term "involuntary termination" or address whether the term includes employees who lose health benefits when they move to part-time employment with no coverage to avoid involuntary termination. In addition, because the subsidy is determined by reference to the premium the employee is actually required to pay, it appears that where an employer subsidizes COBRA premiums as part of a severance package, the employee must pay 35% of his or her portion of the premium only and the employer will be reimbursed for 65% of the amount the employee would have paid.

Further guidance is expected soon and employers should pay immediate attention to new developments in this area.

If you have any questions regarding this advisory, contact Mark Ventola, a member of Sheehan Phinney Bass + Green's Labor, Employment, and Employee Benefits Group at 617-897-5630 or via e-mail at mventola@sheehan.com.