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## Stimulus Legislation Makes Significant Changes to Continued Health Coverage Under COBRA

The American Recovery and Reinvestment Act of 2009 (ARRA), which was signed into law on February 17 by President Obama, contains two provisions that facilitate, at least temporarily, the ability of workers adversely affected by the current economic crisis to obtain health coverage for themselves and their dependents through the health care continuation provisions of the Internal Revenue Code (the "Code") and ERISA commonly known as COBRA.

- The ARRA creates a nine-month, government-funded subsidy for the COBRA continuation premiums for employees who lose health care coverage as a result of an involuntary termination of employment between September 1, 2008 and December 31, 2009.
- Under the ARRA, the COBRA continuation coverage period for employees who are eligible for "trade adjustment assistance" under the Trade Act of 2002 (the "Trade Act") is extended for periods during which they are eligible to receive this assistance. In addition, the COBRA continuation period for an individual with a vested right to a pension benefit that is payable, all or in part, by the Pension Benefit Guaranty Corporation (PBGC) is extended until the date of the individual's death, and two years beyond the date of the individual's death, for surviving spouses and dependent children. Each of these extensions, however, is scheduled to end December 31, 2010.

While the first of these provisions may have received the lion's share of the publicity, the second may be at least as troublesome, if not more so, for employers. In any event, each of these provisions creates separate obligations and issues for employers and requires prompt action, because significant penalties can result from a failure to comply. This *GT Alert* discusses the relevant provisions and the practical implications of each of these provisions in detail.

### BACKGROUND

Generally, a group health plan maintained by an employer that normally employs at least 20 employees is required to provide COBRA continuation coverage to employees and their dependents ("qualified beneficiaries") who lose coverage under the plan under certain circumstances referred to as "qualifying events." In the context of the provisions of the ARRA, the qualifying event that is most frequently implicated is termination of employment.

The "COBRA continuation period" is 18 months in the case of a loss of coverage due to a termination of employment. Special rules may extend the COBRA continuation period to as long as 36 months in the event a different qualifying event, such as death of the former employee or divorce, happens after termination. In all cases,

however, the COBRA continuation period ends when the qualified beneficiary becomes covered under a group health plan maintained by another employer that does not include any exclusion or limitation with respect to a preexisting condition of the qualified beneficiary.

COBRA continuation coverage is administered, in part, through a notice system. The timing of the notice determines the time by which a qualified beneficiary must elect continuation coverage, and failure to provide notice timely can subject the plan administrator to liability of up to \$110 for each day that notice is late.

To receive health plan coverage under COBRA, the qualified beneficiary must elect the coverage within 60 days of receiving notice and timely pay a premium established by the group health plan. This premium is typically equal to, but cannot exceed, 102 percent of cost to the plan of providing similar coverage to current employees and their beneficiaries. The premium may be paid to the employer sponsoring the plan or it may be paid directly to an insurer.

#### REDUCED COBRA PREMIUM PAYMENT REQUIREMENT

To ease the economic burden on workers displaced in the current economic crisis, the ARRA provides for a government-funded subsidy for up to nine months to assist certain qualified beneficiaries in paying their COBRA premiums. The subsidy takes the form of a premium reduction of 65 percent of the COBRA premium otherwise payable by the qualified beneficiary and is generally available to qualified beneficiaries who lose or lost health plan coverage as a result of an involuntary termination of employment occurring on or after September 1, 2008 and on or before December 31, 2009. Not all individuals who lose coverage as a result of an involuntary termination during this period, however, will be eligible for the subsidy. There are income caps on the availability of the subsidy. In addition, the ARRA generally does not change the fundamental principles of COBRA continuation coverage. Thus, if the termination was the result of gross misconduct by the employee, the subsidy is not available, because the employee who was terminated would not be eligible for COBRA continuation coverage.

Irrespective of when an individual first became entitled to, and may have elected to receive, COBRA coverage, the premium reduction is available to qualified beneficiaries eligible for the reimbursement for their periods of COBRA coverage that begin on or after the date of enactment of the ARRA. Thus, because COBRA is typically provided for coverage periods that coincide with the calendar month, the premium reduction will become available in most cases for COBRA coverage periods beginning on or after March 1, 2009. The following is a discussion of the mechanics by which the premium reduction is provided. (We note that the subsidy provided by the ARRA also applies to health care continuation coverage under a state program that provides comparable continuation coverage. This *GT Alert* focuses, however, only on arrangements that are subject to the actual COBRA rules of the Code and ERISA.)

#### Reduced Premium Payment Obligations

Under the relevant provisions of the ARRA, an "assistance eligible individual," as defined below, will be considered to have paid his or her COBRA premium if he or she - or someone other than the employer on his or her behalf - pays 35 percent of the amount otherwise payable. Thus, if the COBRA premium for the coverage elected by the assistance eligible individual is \$800 for the month, the individual need only pay \$280 for the month.

Because it will obviously take some time to put in place the various processes for implementing the premium reduction, particularly with respect to assistance eligible individuals who are currently receiving COBRA coverage, the ARRA contains a special rule that, if an assistance eligible individual pays the full amount of the COBRA premium for either of the first two coverage periods beginning after the date of enactment, the person to whom the premium payment is made can refund to the assistance eligible individual the amount the individual overpaid or provide credit to the individual that reduces one or more of the subsequent premium payments the individual is required to make.

### Reimbursement of Premium Reduction

As noted above, the premium reduction created by the ARRA is funded by the government; the cost is not borne by the plan or the employer sponsoring the plan. Instead, the amount of the premium reduction is recovered by the person to whom the COBRA premiums are paid.

Although different employers will have different arrangements for how, and to whom, COBRA premiums are actually paid by or on behalf of a qualified beneficiary, the ARRA defines who should be treated as the person to whom the premiums are paid for reimbursement purposes. Specifically, unless otherwise provided in Treasury guidance, this person will be the employer sponsoring the group health plan, if the health plan is a single-employer plan that is subject to the requirements of COBRA under federal law or is self-insured to any extent. If COBRA coverage is provided with respect to a fully insured plan that is not subject to continuation coverage requirements under federal law (generally, smaller plans providing continuation coverage under state law), the relevant person is the insurer, and if the coverage is provided with respect to a multiemployer plan, the relevant person is the plan.

The COBRA premium subsidy is recovered from the withheld income and FICA taxes and from the employer portion of the FICA taxes that the person to whom the premiums are paid is otherwise required to remit to the IRS ("payroll taxes"). If the person entitled to reimbursement does not have sufficient payroll taxes from which to recover the amount of the premium reduction, the Treasury will credit or refund the difference in the same manner as if it were an overpayment of payroll taxes. Note, though, that no reimbursement is available until the assistance eligible individual's reduced premium is actually received. In addition, the person receiving reimbursement will be required to file reports with the IRS attesting to various elements of the entitlement for the premium reduction and the corresponding reimbursement.

*Clearly, employers must work quickly with their insurers, TPAs, COBRA administrators and counsel to ensure that all of their relevant systems are coordinated, so that the premium reduction is provided when, and only when, necessary and the appropriate party can promptly claim reimbursement for the premium reduction - particularly as not all COBRA participants pay their premiums directly to an insurer in the case of an insured plan or to the employer in the case of a self-insured plan.*

*In addition, issues not clearly addressed by the legislation itself may arise if an employer itself subsidizes COBRA premiums for individuals pursuant to a severance, employment or similar agreement.*

### 'Assistance Eligible Individuals'

An "assistance eligible individual" is any qualified beneficiary who elects COBRA coverage and who became a qualified beneficiary as the result of an involuntary termination of employment that occurred during the period beginning September 1, 2008 and ending December 31, 2009. The ARRA includes an expedited 15-day review process under which an individual may request a review of a health plan's denial of "assistance eligible individual" status.

As noted above, there are income caps applicable to the availability of the subsidy. Specifically, the full subsidy is not available in a taxable year to any taxpayer who has modified adjusted gross income for the taxable year in excess of \$145,000 (if the taxpayer files an individual return) or \$290,000 (if the individual files a joint return).

Because it may not be clear at the time a qualifying individual becomes eligible to elect COBRA coverage whether he or she will have income in excess of the cap for any year in which the premium reduction may be available, qualified beneficiaries with income in excess of these caps are still considered "assistance eligible individuals." As such, they are entitled to receive COBRA coverage upon the payment of only the 35 percent of the applicable premium. (The premium reduction, if provided to these individuals, will be recovered from the individual by the Treasury.) These individuals may, however, waive the right to the premium assistance by making an irrevocable election in a form and manner to be specified by the IRS and providing appropriate notice of the election to the person to whom his or her COBRA premiums are paid.

*Employers need to implement processes to ensure that the premium reduction is afforded only to people who have incurred an involuntary termination. In addition, employers and administrators must coordinate their processes to handle waivers by high income individuals once guidance is provided specifying the manner in which the waiver is to be made.*

### New COBRA Elections for Assistance Eligible Individuals

Because many qualified beneficiaries may not have elected COBRA continuation coverage upon their termination of employment because they could not afford it, the ARRA requires that group health plans provide a special 60-day election period in which assistance eligible individuals are given another opportunity to elect COBRA coverage. This election period will run for 60 days from the date that notice is provided.

If elected, COBRA coverage for assistance eligible individuals will be effective as of the first day of the first coverage period beginning after the date of enactment (i.e., generally, March 1, 2009). In addition, the period that begins on the date of the qualifying event (e.g., the termination of employment) and ends with the beginning of the first period of coverage that begins on or after February 17, 2009, is disregarded for purposes of calculating the 63-day period under the rules that limit group health plans from imposing pre-existing condition limitations.

In no event, however, will the assistance eligible individual's COBRA continuation period run beyond the date on which it would have expired if elected at the time of the qualifying event. For example, if an assistance eligible individual lost coverage on October 1, 2008, did not elect COBRA coverage at that time, and elects it during the new special election period, the individual will still cease being eligible for COBRA coverage on April 1, 2010, even though his or her COBRA coverage will have been in effect for less than 18 months.

The ARRA also provides that, if an employer so chooses, it can offer assistance eligible individuals a 90-day period in which the qualified beneficiary can elect to receive COBRA coverage under a different option for medical coverage made available by the employer to active employees that has a lower premium than the option in which the assistance eligible individual was enrolled at the time of the qualifying event or, if the qualified beneficiary previously elected COBRA continuation coverage, is currently enrolled.

*Before determining whether to make this option available to assistance eligible individuals, an employer should consult with its insurers and third-party administrators to determine whether a significant change in coverage elected pursuant to this option would cause the plan's rate structure to be changed for the year. And if an employer decides to make this option available, it should also consider whether to limit the period to the 60 days the qualified beneficiary is otherwise entitled to make his or her election.*

#### Notice Requirements

The ARRA provides that COBRA notices must be modified during the period in which the subsidy is in effect to provide qualified beneficiaries with sufficient information about the subsidy and the rules applicable to it. For qualified beneficiaries who previously received COBRA notice, a supplemental notice can be provided, and **must be provided by April 18**. In either case, the notice must include:

- the forms necessary for establishing eligibility for the premium reduction;
- the name, address and phone number necessary to contact the plan administrator or anyone else having relevant information in connection with the premium reduction;
- a description of the additional election period following the enactment of the ARRA;
- a description of the qualified beneficiary's obligation to notify the plan administrator of coverage under another group health plan or Medicare and the penalties for not providing that notice;
- a description, displayed in a prominent manner, of the qualified beneficiary's right to the premium reduction and any conditions on entitlement to the premium reduction; and
- a description of the option of the qualified beneficiary to change coverage options, if the employer provides this opportunity.

Failure to provide this notice will be subject to the same potential penalties applicable to a failure to provide the notice required at the time of the qualifying event. The ARRA calls for the Department of Labor to issue model notices within 30 days after the date of enactment.

*Employers should consider whether to wait for the model notices to be released or to prepare their own notices that incorporate the statutory requirements. By preparing a notice now, the period during which the assistance eligible individual is able to elect COBRA continuation coverage may be minimized.*

#### EXTENSION OF COBRA CONTINUATION PERIOD FOR QUALIFIED BENEFICIARIES ELIGIBLE FOR TRADE ACT ASSISTANCE AND CERTAIN OTHER QUALIFIED BENEFICIARIES

In addition to providing for a COBRA subsidy, the ARRA provides for a separate (though in some cases overlapping) extension of the COBRA continuation period. This potential extension applies to two groups of qualified beneficiaries.

**TAA - Eligible Individuals.** Under the Trade Act, certain workers who have lost their jobs as a result of increases in imports or shifts of production out of the United States are eligible for services and benefits through a program administered by the Department of Labor. For any month during which these individuals are receiving (or in certain cases would be eligible to receive) these services or benefits, these individuals are considered "TAA-eligible individuals" and are entitled to a tax credit under the Code for a portion of the individual's premiums for qualified health insurance - including coverage offered under COBRA. This same tax credit is available for an "eligible PBGC pension recipient." In a provision of the ARRA that was in neither the House Bill nor the Senate Bill, but that was added in Conference, Congress has indicated an intent to align the COBRA continuation coverage period with the duration of the tax credit, at least temporarily. As a result, certain individuals will be entitled to a **longer** continuation period.

COBRA currently contains provisions relating to "TAA-eligible individuals." Because it may take time for the Department of Labor to certify a group of workers as being eligible for TAA assistance, current COBRA rules provide a second 60-day election period that begins when the individual becomes a "TAA-eligible individual," but this election period does not extend more than six months after the date of the loss of coverage.

Under the ARRA, a "TAA-eligible individual" will now be entitled to continue COBRA coverage beyond the otherwise-applicable 18-month (and, in some cases, 36-month) period following termination of employment during any month in which he or she remains a "TAA-eligible individual." The COBRA continuation period for these individuals will not, however, be extended beyond December 31, 2010.

**Individuals with Vested Pensions that May Be Paid by the PBGC.** Before the ARRA, no provision of COBRA dealt with "eligible PBGC pension recipients," although, as noted above, there is a tax credit. The ARRA now provides an extension of the COBRA continuation period to an individual who, as of the time of the qualifying event "has a nonforfeitable right to a benefit any portion of which is to be paid by the [PBGC...]" This definition is much broader than the one used in connection with the tax credit, which is limited to people age 55 or older and currently receiving pension payments.

In furtherance of the purported objective of this provision, the ARRA extends the COBRA continuation period until the death of the former employee (i.e., the date on which the individual would cease receiving the pension). For surviving spouses and dependent children of these individuals, however, the COBRA continuation period continues until two years after the death of the covered employee. As with the extension for TAA-eligible individuals, though, this provision does not extend the COBRA continuation period beyond December 31, 2010.

Clearly, this provision goes well beyond the stated purpose - particularly as it covers individuals who are not yet drawing a pension. In addition, it presents significant challenges for the group health plan from which the individual is entitled to COBRA coverage. Specifically, as the provision is written, it appears that an employer must know whether any of its terminating employees have vested benefits under pension plans that the PBGC has taken over from former employers of the employee. In light of these considerations, perhaps there will be a technical correction made to this provision. In any event, further guidance is needed.

*Employers must work with their administrators to ensure that all relevant information concerning employees' TAA status and entitlement to a benefit that may be paid by the PBGC is available to ensure that COBRA coverage is not terminated earlier than permitted under the COBRA revisions of the ARRA. In addition, employers must ensure that their health plan documents clearly contain the appropriate COBRA continuation rules, and that the relevant summary plan description or, at a minimum, a summary of material modifications properly informs participants of these new rights.*

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