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COBRA SUBSIDY – DOL WEBCAST

The American Recovery and Reinvestment Act of 2009 (“ARRA”) provides in § 3001 that any employee or beneficiary who is eligible for COBRA continuation health coverage on account of an involuntarily termination of employment between September 1, 2008 and December 31, 2009 will be entitled to a nine months government subsidy of 65% of the COBRA premiums beginning with the first period on or after February 17, 2009. The Department of Labor issued model COBRA notices on March 19. See our March 6 and March 19 memos.¹

In a DOL webcast on March 24, a number of issues relating to the COBRA premium subsidy were discussed. (“New COBRA Provisions in the American Recovery and Reinvestment Act of 2009 Compliance Assistance Webcast,” with Amy Turner – DOL Senior Advisor and Special Projects Manager, Russell Weinheimer – Senior Counsel Office of the IRS Associate Chief Counsel, Kevin Horahan – DOL EBSA Senior Employee Benefits Law Specialist, and Kevin Knopf - Attorney-Adviser, Office of Benefits Tax Counsel - Treasury.) The following are some of the more pertinent comments made by the panelists on the webcast.

- 35% of Whatever Would be Charged to Participants. The 35% premium cost is 35% of whatever the employer charges for COBRA, be it 102%, 100% or a less amount of cost.
- Not Taxed to Participants. The premium reduction is not included in income of the participants.
- High Income Individuals. For high income individuals for which the subsidy is eliminated, a participant can waive the subsidy amount. However, the waiver is irrevocable even if the individual’s adjusted gross income ends up below the phase-out amount in a year covered by the subsidy. Therefore, a better approach is to take the subsidy and repay it as a 100% tax on Form 1040.
- Second Elections for States. The special enrollment opportunity (the second election) does not apply to State continuation coverage. However, if the State passes a law allowing for a second election, the IRS will honor such an election.

¹ <http://www.ebeclaw.com/memos/EBEC Law Update - COBRA Subsidy ARRA.pdf> and <http://www.ebeclaw.com/memos/EBEC Law Update - Model COBRA Subsidy Notices.pdf>

- Where Notices Must be Sent to all Qualified Beneficiaries. The notices for premium reduction (at www.dol.gov/cobra) must be sent to COBRA qualified beneficiaries, even where the qualifying event was not an involuntary termination. However, if a COBRA qualified beneficiary becomes eligible for COBRA on or after 9/1/2008 by reason of a qualifying event other than an involuntary termination, and the beneficiary does not elect COBRA prior to ARRA, he or she need not be furnished a new ARRA notice since a notice of extended election need only be sent to those who are eligible for the premium reduction.
- Timing for Notices. Individuals who were eligible but did not elect COBRA coverage (or were dropped off coverage for nonpayment of premiums) prior to enactment of ARRA must be provided notice by April 18, 2009. Notice for those who become eligible for COBRA after the effective date of ARRA should be sent out within the time required for regular COBRA notices (generally 44 days). The extended election notices should be sent out as soon as possible.
- 15-Day Review. The DOL (or Department of Health and Human Services, in the case of government employees and those under State mini-COBRA rules) are gearing up to respond to participant rights to appeal within 15 business days, as required by ARRA. The employer will be given a short window to respond. Paper and electronic forms will be available on the www.dol.gov/cobra website.
- Involuntary Termination. Constructive discharge, e.g., quitting by reason of demand for employee relocation or a significantly reduced position or hours, would be an involuntary termination for purposes of the COBRA subsidy. Even a termination for cause will be an involuntary termination. However, in the case of gross misconduct there is no COBRA entitlement at all and the subsidy would therefore not be relevant. Where there is uncertainty about whether the termination was for gross misconduct and the employer decides to provide COBRA in any event, it will be respected as an involuntary termination.
- Employer Provided Coverage for Severance Period. Often an employer provides fully or partially covered health insurance as part of a severance arrangement. If the 18 month COBRA period is treated by the employer as beginning to run only after the employer-provided coverage ends, in accordance with Internal Revenue Code § 4980B(f)(8), the eligible individual would begin to receive the 65% premium reduction only once the 18 month COBRA period begins. Where the employer-provided coverage is treated as running concurrently with the 18 month COBRA period, the nine month premium subsidy would be applied right away as a 65% reduction in whatever the employee portion of severance-related coverage and, if applicable, will continue to with a full 65% for the remainder of the 9 month period that extends beyond the severance period.
- Additional Guidance. Substantial guidance on the employee benefit aspects of the new COBRA subsidy rules should be released next week.