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What Every Employer Must Know About the New COBRA Subsidy

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Introduction

On February 17, 2009 President Obama signed into law the American Recovery and Reinvestment Act of 2009 ("Act"). The Act contains important changes to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") that are intended to help employees who have been involuntarily terminated, and their families, continue to maintain group health coverage through their former employers. The changes are significant, particularly when viewed in the context of our nation's current unemployment rates and high number of uninsured individuals, which, unfortunately, is likely to increase as more employees lose their jobs.

It is important for employers to be aware of the Act's provisions in order to implement appropriate compliance procedures, thus ensuring that their involuntarily terminated employees are afforded the opportunity to elect the new benefits to which they are entitled. As discussed below, employers are not only subject to the new requirements with regard to employees who are involuntarily terminated after February 17, 2009, but must also make certain information available to individuals who were involuntarily terminated on or after September 1, 2008.

This Alert is not intended to provide its readers with an exhaustive discussion of all of an employer's obligations under the Act. Rather, it is intended to sensitize employers to what the Act requires. In addition, and in recognition of the fact that COBRA's requirements remain a mystery to many employers, this Alert will provide certain background information pertaining to COBRA compliance, in general.

What the Act Requires

Subject to certain income limits and other rules, the Act provides that an involuntarily terminated employee (and/or his covered spouse or dependents) who qualifies as an "assistance eligible individual" is generally entitled to a subsidy equal to 65% of the premium cost payable by such employee for continuation coverage under a group health plan

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that is either subject to COBRA or comparable state continuation coverage laws. Although the federal government will ultimately bear the cost of the subsidy, employers must initially pay 65% of the premium costs for each assistance eligible individual's continuation coverage, and the individual must pay 35% of such costs. The employer may then recoup the premium subsidy paid by it as a dollar-for-dollar credit on its federal payroll tax return.

A terminated employee (or his covered spouse or dependents) is an "assistance eligible individual" if: (i) he is eligible for COBRA continuation coverage at any time during the period of September 1, 2008 through December 31, 2009; (ii) he elects COBRA continuation coverage; and (iii) the qualifying event entitling him to COBRA continuation coverage is the involuntary termination of his employment during such period. The Act also provides for a special enrollment period for involuntarily terminated employees (and their spouses/dependents) who would otherwise qualify as assistance eligible individuals under the Act but did not timely elect continuation coverage upon the occurrence of their qualifying event, or did so but no longer had coverage in place on February 17, 2009.

The subsidy applies to "periods of coverage" (i.e., monthly or shorter periods of coverage with respect to which premiums are charged under the group health plan) beginning on or after February 17, 2009. Thus, for group health plans that charge premiums on a calendar month basis, the subsidy will first apply beginning on March 1, 2009. Eligible individuals are entitled to the subsidy for a maximum of nine months or, if earlier, until they become eligible for coverage under another group health plan or Medicare.

Employers must change their administrative procedures to comply with the Act's new notice and recordkeeping requirements. By April 18, 2009, group health plan administrators are required to provide notice of the availability of the premium assistance subsidy and special enrollment rights to each employee (and his covered spouse and dependents) who became eligible for COBRA continuation coverage between September 1, 2008 and February 16, 2009. Interestingly, it appears that the new notice must be given to all COBRA eligible individuals even if they could not qualify for the subsidy.

This notice requirement applies with respect to individuals who are currently covered under COBRA and to those who did not elect coverage at the time they became eligible to do so. Notice of the availability of the subsidy must also be distributed to all employees (and their covered spouses and dependents) who have a COBRA qualifying event at any time between February 17, 2009 and December 31, 2009. To comply with the Act, employers must either revise their standard COBRA continuation coverage notices and election forms, or create new notices and forms. To assist employers in this regard, the U.S. Department of Labor issued a model notice on March 19, 2009. In addition, in order for an employer to claim the payroll tax credit for premium assistance subsidy amounts paid, it will have to document, among other items, each individual's eligibility for the subsidy and certain details regarding the payment of continuation coverage premiums.

Overall COBRA Compliance

Employers must act quickly in response to the Act's requirements. However, this prompt action, alone, will not ensure full COBRA compliance. In view of the administrative changes that employers will inevitably

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need to make in order to comply with the Act, this is an opportune time for an employer to review and update all of its COBRA and state law continuation coverage procedures. In particular, it is important for employers (and group health plan administrators) to periodically review the content of, and distribution procedures for, both the initial notice and the qualifying events notice under COBRA. Employers must comply with all of COBRA's provisions to help ensure that their former employees, including those who may be out-of-work, are aware of their rights and are given the opportunity to elect continuation coverage. An employer that has appropriate procedures in place for the distribution of both an initial COBRA notice and a qualifying events notice will be well positioned to fulfill its obligations under COBRA. In addition, an employer's compliance with the law is important in view of the significant penalties for non-compliance.

Contact Us for Help

Please contact **Thomas C. Senter** (tsenter@greenbaumlaw.com or 732-476-2650) or **Lisa J. Clapp** (lclapp@greenbaumlaw.com or 732-476-2534) of our Employee Benefits Practice Group if you have any questions regarding the Act or would otherwise like to discuss your company's COBRA compliance procedures.