

FINAL STIMULUS BILL INCLUDES SIGNIFICANT CHANGES TO COBRA COVERAGE

CHICAGO
Citigroup Center
500 West Madison Street
Suite 3700
Chicago, IL 60661-2511
Phone: (312) 715-5000
fax: (312) 715-5155

MADISON
33 East Main Street
Suite 900
Madison, WI 53703-3095
phone: (608) 251-5000
fax: (608) 251-9166

MILWAUKEE
411 East Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202-4497
phone: (414) 277-5000
fax: (414) 271-3552

NAPLES
1395 Panther Lane
Suite 300
Naples, FL 34109-7874
phone: (239) 262-5959
fax: (239) 434-4999

PHOENIX
One Renaissance Square
Two North Central Avenue
Phoenix, AZ 85004-2391
phone: (602) 229-5200
fax: (602) 229-5690

TUCSON
One South Church Avenue
Suite 1700
Tucson, AZ 85701-1621
phone: (520) 770-8700
fax: (520) 623-2418

www.quarles.com

© 2009 Quarles & Brady LLP

This document provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this document. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

This week, President Barack Obama is expected to sign the American Recovery and Reinvestment Act of 2009 ("the Act") into law. Key features of the Act relating to COBRA requirements are described below.

COBRA Subsidy/Immediate Payroll Tax Credit

Currently, COBRA requires that terminated employees and certain beneficiaries be allowed to continue their group health coverage for up to 18 months following the employee's termination. Employers may charge these individuals the full COBRA premium, which is 100% of the coverage premium plus a 2% administrative fee.

Under the Act, an employee who was involuntarily terminated between September 1, 2008 and December 31, 2009 is eligible for an employer subsidy of 65% of the COBRA premium, beginning with March 2009. Employers are then able to immediately include the amount of the COBRA subsidy as a credit against their payroll taxes, using Form 941 or Form 941C. If the amount of the COBRA subsidy exceeds the amount of payroll taxes, employers will receive a direct payment of the difference from the federal government.

Special Employer Notice Requirements

Employers need to provide any employee who was involuntarily terminated (except for gross misconduct), on or after September 1, 2008 but prior to the passage of the Act, with a 60-day period within which to elect COBRA coverage if the employee did not elect COBRA coverage when initially eligible. Employers are responsible for notifying terminated employees and other qualified beneficiaries of their rights under the Act. The notice requirement may be met through a separate document or by amending existing forms. The Act requires the Department of Labor to provide model language for the notice within 30 days after the Act's enactment. Employers have 60 days from the Act's passage to provide the notice to employees. If terminated employees now elect COBRA coverage, coverage would begin on March 1 and would not extend beyond the date it would have originally ended if COBRA had been elected initially.

When the Subsidy Ends

Terminated employees are no longer eligible for the subsidy after nine months or, if earlier, when they become eligible for Medicare or another group health plan. Note that the loss of subsidy occurs when an individual becomes eligible for a group health plan or Medicare, not when the individual has actually enrolled in the new plan. Terminated employees have a duty to notify their previous employer when they are eligible for another group health plan.

Severance Issues

The language in the Act suggests that if the employer pays any portion of the 35% of the COBRA premium that the terminated employee is expected to pay, then the right to the subsidy is lost. Employers who are planning workforce reductions in the near future should consider eliminating employer COBRA contributions from their severance packages to ensure that they can claim the full credit for any employer subsidies.

High-Income Individuals

The Act provides for a recapture of the subsidy if it is provided to high-income individuals (defined as those with an adjusted gross income of \$125,000 for single filers and \$250,000 for a joint return). Employers should consider advising highly compensated employees of their right to waive any premium assistance and, therefore, avoid any tax consequences.

Option to Change Coverage

Under the Act, an employer may permit involuntarily terminated employees to elect, without waiting for the next open enrollment period, any health plan option offered by their employer which has the same or lower premiums as the individual's coverage option while an active employee. There are some restrictions under the Act for which types of coverage qualify as health plan options. Employers have the option of either allowing terminated employees to switch to a different plan or requiring employees to remain on the plan they were on immediately before the termination.

Application to Employers Not Subject to COBRA

The Act broadly defines COBRA continuation coverage to include continuation coverage under a state program that provides continuation coverage comparable to COBRA. Employers operating in states such as Wisconsin, that have continuation coverage requirements under state law, should be aware that the requirements of the Act will apply to them.

Extension of COBRA Period Not Included in Final Legislation

The provision in the House bill that would have allowed employees who are either age 55 or have 10 years of service to continue COBRA coverage until Medicare eligibility was not included in the final legislation.

Actions to Take Now

- Review records to determine which employees were involuntarily terminated since September 1, 2008.
- Review severance policies to determine whether any changes should be made to the employer's contribution to COBRA coverage.
- Examine your COBRA policies to determine how you will comply with the new requirements.
- Decide whether you will permit individuals to elect a different health plan option when they elect COBRA coverage.
- Watch for forthcoming regulations and model notices.

* * *

If you have questions about the Act, please contact Paul Jacobson at (414) 277-5631 / jjp@quarles.com, Robert Rothacker at (414) 277-5643 / rrothack@quarles.com, David Olson at (414) 277-5671 / dpo@quarles.com, Amy Ciepluch at (414) 277-5585 / aciepluc@quarles.com, Sarah Linsley at (312) 715-5075 / sarah.linsley@quarles.com, Kerri Hutchison at (414) 277-5287 / kerri.hutchison@quarles.com or your Quarles & Brady attorney.