

# First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

March 4, 2009

Issue No. 71



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## America's New Economic Stimulus Bill Includes Changes to COBRA

Employers must act quickly to implement COBRA changes signed into law on February 17, 2009 as part of the American Recovery and Reinvestment Act of 2009 (commonly known as the “stimulus package”). The stimulus package includes changes to COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985) and, therefore, impacts every employer that sponsors a group health plan and has terminated an employee on or after September 1, 2008. The amendments to COBRA essentially require that every laid-off employee since September 1, 2008 must receive a new COBRA notice explaining the reduced premiums of their health care coverage.

As background, COBRA is the federal law that first introduced the concept of continuing health care coverage for employees. Congress sought to help employees who lost their health coverage when they lost their jobs or who experienced major life changes. The COBRA rules give employees and their family members the right to continue their coverage under an employer’s group health plan for a period of time following specified “qualifying events” (for example, termination of employment or death of the employee) that would otherwise cost them their health coverage. Continued coverage is not automatic – the employee must elect it. It is not permanent, but typically limited to 18 or 36 months from the qualifying event. And it is not free. The employee (or the employer in some cases) must continue paying the premiums.

As part of the stimulus package, Congress and the President decided to order a temporary federal subsidy of COBRA premiums. For COBRA coverage beginning on or after February 17, 2009, eligible individuals will be required to pay only 35% of the applicable COBRA premium. Employers that provide group health coverage through insurance will need to cover the remaining 65% of the premiums and then seek reimbursement from the federal government. Employers may then obtain reimbursement of the premium subsidy as a credit against their quarterly federal employment tax filings.

The stimulus package does not extend the maximum COBRA continuation coverage period for any individual. The subsidy is currently available for the sooner of nine months or when the maximum continuation coverage period under COBRA expires. The subsidy will also cease after the individual becomes eligible for: (1) coverage under another group health plan that provides medical care; (2) coverage under a health flexible spending account plan; (3) coverage of treatment at certain employer on-site facilities; or (4) Medicare or Medicaid. Individuals have a duty to notify their ex-employers of changes that would cause the subsidy to cease.

## Who Is An Eligible Individual Entitled to Receive the Subsidy?

Individuals who are or were otherwise eligible for COBRA coverage, who lost health care coverage due to an involuntary termination of employment between September 1, 2008 and December 31, 2009, and who elect COBRA coverage, are eligible for the subsidy. But “high-income” individuals are not eligible for the subsidy. A “high-income” individual is roughly defined as someone making an adjusted gross income of \$145,000 for a single tax filing or \$290,000 for a joint tax filing.

Not every type of “involuntary termination” will qualify for the subsidy, but, in general, everyone who is involuntarily terminated, including a termination for cause (unless it is for “gross misconduct” under existing COBRA law) will qualify. Mere inefficiency, inability to perform the job, ordinary negligence or bad judgment does not amount to gross misconduct under COBRA. Employers should use this definition sparingly in favor of providing COBRA notification rights. In California, to deny COBRA coverage is comparable to the stringent standard for denying unemployment insurance, which happens in only the most egregious cases of employee misconduct.

## Why the New Notice Requirement?

Individuals terminated between September 1, 2008 and the present may have chosen not to elect COBRA based on the cost of premiums. Thus, they need to be notified now and have, essentially, a new election period that begins on February 17, 2009, and ends no sooner than 60 days after an extended election notice is provided. The extended election period does not change the fact that the individual’s termination from employment or other

qualifying event remains the trigger entitling that person to COBRA coverage in the first place.

Thus, employers must act now to locate ex-employees who previously declined COBRA and provide the notice of the right to COBRA coverage with the new government subsidy. Note that the 18-month maximum coverage period under COBRA is not extended from the date an employee was terminated. Receipt of the notice simply extends the individual’s election period.

The bottom line for employers is that they need to change their current COBRA election notices to describe the new premium subsidy.

## Contents of Notice

The notices must include: (1) the forms necessary to establish eligibility for the premium subsidy; (2) contact information of the plan administrator and any other person with information regarding the premium subsidy; (3) a description of the extended election opportunity for those who previously declined COBRA coverage; (4) a description of an eligible individual’s duty to notify the plan when he becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for the failure to do so; (5) a prominent description of the qualified beneficiary’s right to the COBRA subsidy and any conditions on such right; and (6) a description of the option to enroll in different coverage under the health plan, if applicable.

The Department of Labor has been charged with issuing model notices within 30 days of the stimulus package. Each employer’s employee benefits provider should also have a form of notice that meets the new criteria.

## Timing Requirements

Most individuals who became eligible for COBRA coverage before the enactment of the stimulus package must receive notice on or before May 1, 2009, but possibly as early as April 18. For those who become eligible after February 17, and up to December 31, 2009, the notices must be provided when COBRA notices will otherwise be due (typically 60 days from the qualifying event, such as the termination date).

## Employer Contributions and Recovery

Employers are required to advance the premium subsidies until the employer’s payments can be recouped through reduced federal payroll tax deposits. The Government will also subsidize the 2% administration fee. Employers should check with their accountants and benefits providers

to determine the details of reporting and recovering the premium subsidies from the federal government.

As an immediate matter, however, employers need to notify all potentially eligible employees who were involuntarily terminated or laid off between September 1, 2008 and the present, and provide them the required notice.

**Warning:** This is a very new bill dealing with an already complex area of law. Employers are urged to consult their counsel and other advisors with any compliance questions. The stimulus package raises many issues not addressed here. Additional issues exist with respect to Cal-COBRA as well. For Cal-COBRA, mainly applicable to small employers (19 employees or less), these employers should also be preparing documentation identifying eligible individuals.

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