

**CHANGES REGARDING COBRA CONTINUATION COVERAGE UNDER THE
AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

The passage of the American Recovery and Reinvestment Act of 2009 (“ARRA”), better known as the stimulus package, includes tax cuts and spending programs, both of which will affect human resource managers and businesses alike. The ARRA provides for premium reductions and additional election opportunities for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) that will affect most employers that sponsor a group health plan for employees it has terminated or laid off on or after September 1, 2008. These amendments create additional COBRA notice requirements and affect payroll tax administration in order to administer a temporary federal subsidy of COBRA premiums. These amendments are immediate and employers will have to act quickly to implement these new requirements, which will include locating certain former employees and coordinating payroll and COBRA administration.

Health Care Continuation:

The ARRA contains a nine-month, 65 percent federal subsidy (reduction) to premium payments that eligible laid-off and/or involuntarily terminated employees (assistance eligible individuals) would need to make to continue health insurance under COBRA. An assistance eligible individual is a COBRA “qualified beneficiary” who meets all of the following requirements: (i) is eligible for COBRA continuation coverage at any time during the period beginning September 1, 2008 and ending December 31, 2009; (ii) elects COBRA coverage (when first offered or during the additional election period), and (iii) has a qualifying event for COBRA coverage that is the employee’s involuntary termination during the period beginning September 1, 2008 and ending December 31, 2009. Individuals who become entitled to COBRA due to other qualifying reasons, such as voluntary terminations of employment, divorce or loss of dependent status are not eligible for the subsidy. However, in those situations the individual would still be entitled to receive the standard COBRA continuation notification. In most cases, the 65 percent subsidy will be borne by the employer, who may seek reimbursement as a credit on their IRS Form 941. The Form 941 has been revised to allow for this credit. The credit will need to be claimed on Line 12a of the January 2009 revision of the Form 941, which was posted on www.irs.gov on February 20, 2009. In addition, the Form 941 filer will need to include the number of individuals provided COBRA premium assistance on Line 12b of the form. Those claiming the credit must be sure to maintain supporting documentation for the claimed credit which includes the following:

- information on the receipt, including dates and amounts, of the assistance eligible individuals’ 35% share of the premium;
- in the case of an insured plan, copy of invoices or other supporting statements from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA’

Stewart & Irwin, P.C.

Attorneys at Law

March 6, 2009

Page 2

- in the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the assistance eligible individual;
- attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from September 1, 2008 to December 31, 2009) for each covered employee whose involuntary termination is the basis for eligibility for the subsidy;
- proof of each assistance eligible individual's eligibility for COBRA coverage at any time during the period from September 1, 2008 to December 31, 2009 and election of COBRA coverage;
- a record of the social security numbers of all covered employees, the amount of the subsidy reimbursed with respect to each covered employees, and whether the subsidy was for 1 individual or 2 or more individuals; and
- other documents necessary to verify the correct amount of reimbursement.

The ARRA treats assistance eligible individuals who pay 35 percent of their COBRA premium as having paid the full amount. The premium reduction (65 percent of the full premium) is reimbursable to the employer, insurer or health plan as a credit against certain employment taxes. If the credit amount is greater than the taxes due, the Secretary of the Treasury will directly reimburse the employer, insurer or plan for the excess. The premium reduction applies to periods of coverage beginning on or after February 17, 2009. A period of coverage is a month or shorter period for which the plan charges a COBRA premium. The premium reduction starts on March 1, 2009 for plans that charge for COBRA coverage on a calendar month basis.

Special COBRA Election Opportunity:

Individuals involuntarily terminated from September 1, 2008 through February 16, 2009 who did not elect COBRA when it was first offered or who did elect COBRA, but are no longer enrolled (ex. because they were unable to continue paying the premium) have a new election opportunity. This election period begins on February 17, 2009 and ends 60 days after the plan provides the required notice. This special election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee's involuntary termination). COBRA coverage elected in this special election period begins with the first period of coverage beginning on or after February 17, 2009. This special election period opportunity does not apply to coverage sponsored by employers with less than 20 employees that is subject to state law.

Plan administrators must provide notice about the premium reduction to individuals who have a COBRA qualifying event during the period from September 1, 2008 through December

Stewart & Irwin, P.C.

Attorneys at Law

March 6, 2009

Page 3

31, 2009. Plan administrators may provide notices separately or along with notices they provide following a COBRA qualifying event. This notice must go to all individuals, whether they have COBRA coverage or not, who had a qualifying event from September 1, 2008 through December 31, 2009.

Individuals eligible for the special COBRA election period described above also must receive a notice informing them of this opportunity. This notice must be provided within 60 days following February 17, 2009.

Health Plans with Fewer than 20 Employees:

Generally, COBRA does not apply to small health plans where the employer sponsoring the plan has fewer than 20 employees. In some states, these plans are subject to “mini-COBRA” statutes that mandate various levels of continuation coverage. However, Indiana does not provide for any additional expansion of COBRA benefits.

Length of Subsidy:

The subsidy will be available up to 9 months, but could end sooner, such as when the maximum continuation coverage period under COBRA expires. In addition, the subsidy will cease to be available for COBRA coverage following the date an assistance eligible individual becomes eligible for: (i) coverage under any other group health plan; (ii) coverage under a HSA plan; (iii) coverage of treatment at certain employer on-site facilities; or (iv) Medicare or Medicaid. Individuals paying reduced COBRA premiums must inform their plans if they become eligible for coverage under another group health plan or Medicare. Failure to do so is punishable by a penalty equal to 110 percent of the subsidy received after becoming eligible for other coverage.

Expedited Review of Denials of Premium Reduction:

Individuals who are denied treatment as assistance eligible individuals and thus are denied eligibility for the premium reduction (whether by their plan, employer or insurer) may request an expedited review of the denial by the U.S. Department of Labor. The Department must make a determination within 15 business days of receipt of a completed request for review. The Department is currently developing a process and an official application form that will be required to be completed for appeals.

Switching Benefit Options:

If an employer offers additional coverage options to active employees, the employer may (but is not required to) allow assistance eligible individuals to switch the coverage options they had when they became eligible for COBRA. To retain eligibility for the ARRA premium reduction, the different coverage must have the same or lower premiums as the individual's

original coverage. The different coverage can not be coverage that provides only dental, vision, a health flexible spending account, or coverage for treatment that is furnished in an on-site facility maintained by the employer.

Income limits:

If an individual's modified adjusted gross income for the tax year in which the premium assistance is received exceeds \$145,000 (or \$290,000 for joint filers), then the amount of the premium reduction during the tax year must be repaid. For taxpayers with adjusted gross income between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium reduction that must be repaid is reduced proportionately. Because any portion of the subsidy the individual receives but is not eligible for must be reported on the individual's income tax return, employers may treat all assistance eligible individuals as eligible for the subsidy regardless of their income level. However, these individuals have the right to waive the subsidy and pay the full COBRA premium required in order to avoid tax consequences.

New Notice Requirements:

The ARRA requires employers to modify their COBRA election notices or provide separate supplemental notices to all individuals who become entitled to elect COBRA continuation coverage during the period beginning on September 1, 2008 and ending on December 31, 2009.

These notices must include all of the following:

- An explanation of the eligibility requirements for the COBRA subsidy;
- The name, address and phone number of the plan administrator if the individual has questions or requires additional information;
- A description of the qualified beneficiary's obligation to notify the plan if he or she becomes eligible for coverage under another group health plan or Medicare, and a description of the penalty for failure to notify the plan; and
- A description of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium.

Those COBRA-qualified beneficiaries who were involuntarily terminated between September 1, 2008 and February 17, 2009, must be issued a revised notice including the information outlined above within 60 days of the enactment date of the ARRA. These notices must also describe the second 60-day COBRA election period and explicitly state that the maximum COBRA coverage period is still measured from the date of the original qualifying event.

Stewart & Irwin, P.C.

Attorneys at Law

March 6, 2009

Page 5

The ARRA requires the Department of Labor, Treasury and the Department of Health and Human Services to work together to provide a model notice within 30 days of the enactment date. Because employers have a 60-day period in which to provide the revised notices, some employers may choose to wait until the model notices have been issued before revising their own notices.

Additional Guidance:

The Department of Labor is expected to issue additional guidance by March 19, 2009.

Sale of Business or Business Reorganization:

When one company purchases another, typically the former employees of the seller are entitled to continue health benefits under COBRA if they lose coverage as a result of the transaction. The traditional view is that the seller has the obligation to provide COBRA coverage. However, what happens when the seller ceases operation and terminates its health plan?

It is not uncommon, in an asset purchase transaction, for the buyer to assume a substantial portion of the operations of the seller. In many instances, the buyer also agrees to take on and hire former employees of the seller. This creates special considerations for employee benefit plans, the continuation of health coverage being one of them.

Unaffected by the ARRA, COBRA regulations provide detailed explanations of what happens to qualified beneficiaries in the event of an asset purchase transaction. 26 C.F.R. 54.4980B-9 includes provisions that deal specifically with continuation rights and obligations in an asset purchase transaction. Included therein, is an explanation of instances where the buyer is obligated to provide the continuation coverage under its own plan, even though it may not have ever employed the individual employees.

In the context of business reorganization, the regulations recognize the existence of a "M & A qualified beneficiary." In an asset sale, this is someone who has a COBRA qualifying event prior to or in connection with the sale and whose last employment prior to the qualifying event was associated with the assets being sold. Under this standard, an employee working for the seller who loses coverage as a result of the asset sale (i.e., termination) would be an "M & A qualified beneficiary." The regulations go on to provide that if the seller terminates his benefit plan as a result of the transaction, and if the buyer continues the operations associated with the assets purchased "without interruption or substantial change" the buyer becomes a "successor employer." If the buyer is a "successor employer" a group health plan maintained by the buyer has the obligation to make COBRA coverage available to M & A qualified beneficiaries with respect to the asset sale. Thus, by operation of law, if the seller ceases to offer health benefits as

Stewart & Irwin, P.C.

Attorneys at Law

March 6, 2009

Page 6

a result of the sale, the buyer could take on the COBRA obligation of the seller regardless of whether it agreed to do so in an asset purchase agreement.

The regulations acknowledge that the determination of the obligation to provide COBRA coverage under an asset purchase agreement is based on “relevant facts and circumstances” so there are no clear guidelines. They also provide that the Buyer and Seller may specifically contract or allocate the responsibility to make COBRA coverage available. However, if the party contractually obligated to make COBRA coverage available fails to do so, the party liable under the statute will not be relieved of their burden to provide coverage.

The complexity of both the ARRA and the sale of business analysis demonstrates the importance of consulting with counsel about your obligations regarding employee benefits. If you have any questions regarding COBRA or any other employment related topic, please feel free to contact Jeff Halbert at (317) 639-5454 or via e-mail at jhalbert@silegal.com.

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