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2009 American Recovery and Reinvestment Act: New COBRA Obligations Require Immediate Action

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). The Recovery Act imposes new COBRA obligations on companies sponsoring group health plans and their insurers and administrators. The new requirements are effective now and require immediate action.

Key Points

The Recovery Act imposes new COBRA obligations, including the obligations to:

- temporarily subsidize COBRA premiums for certain employees;
- offer "second chance" COBRA elections to certain employees who have left employment;
- update COBRA and HIPAA documents;
- notify plan participants of their new COBRA rights; and
- file new reports with the government.

The new law applies to both the federal COBRA law and any similar state laws (sometimes called "mini-COBRA" laws).

COBRA Generally

Under COBRA, covered employees and their spouses and dependents who participate in group health plans must be permitted to elect to continue group health plan coverage if coverage is lost due to termination of employment, death, or certain other qualifying events. Continued coverage must generally be made available for up to 18 months. Companies are generally permitted to charge covered participants the full cost of the COBRA coverage, plus a 2% administrative fee.

COBRA Subsidies

Under the new law, the federal government will subsidize up to 65% of the COBRA premiums for certain participants for up to nine months.

COBRA SUBSIDIES

Assistance Eligible Participants (AEPs)	<p>Covered employees and their spouses or dependents who:</p> <ul style="list-style-type: none"> • Lose group health plan coverage between September 1, 2008 and December 31, 2009 due to an involuntary termination of employment (other than for gross misconduct); <u>and</u> • Earn less than \$145,000 (single filers) or \$290,000 (joint filers) in the year in which the subsidy is received (phase-outs start at \$125,000 and \$250,000, respectively)*
Subsidy Amount	<ul style="list-style-type: none"> • AEPs are only required to pay up to 35% of the COBRA premium during the subsidy period • The federal government will subsidize 65% of the COBRA premium not paid by or on the AEP's behalf • No subsidy is provided if the company pays the full cost of the AEP's COBRA premium • If the company pays part of the cost of the AEP's COBRA premium, the subsidy is reduced proportionately
Subsidy Reimbursement	Companies must advance the cost of the subsidy and seek reimbursement from the federal government in the form of a payroll tax credit
Subsidy Waivers	AEPs may permanently elect to waive their rights to the subsidy, an option higher-income individuals may choose to reduce taxable income
Grace Period	For the first two COBRA premium periods beginning after February 17, 2009 (March and April 2009 for most plans), companies may require AEPs to pay the full COBRA premium as long as the AEPs are reimbursed or receive credit toward future COBRA premium payments
Subsidy Begins	With the first COBRA premium period beginning after February 17, 2009 (March 1, 2009 for most plans)
Subsidy Ends	<p>On the earlier of:</p> <ul style="list-style-type: none"> • 9 months from the date it begins; • The end of the maximum COBRA period (generally 18 months). For AEPs who elect "second chance" COBRA coverage, the maximum COBRA period runs from the date of the original qualifying event; • The date the AEP fails to pay the required portion of his or her COBRA premium; <u>and</u> • The date the AEP becomes <i>eligible</i> for coverage under another group health plan or Medicare
Maximum Subsidy Period	9 Months

* As a technical matter, individuals with income above these limits may receive the subsidy. However, the IRS will recapture the subsidies with an additional tax on the higher-income individual's tax return for the year in which the subsidy was provided. Higher-income individuals may choose to waive the COBRA subsidy to avoid this recapture tax.

“Second Chance” COBRA Elections

- “Second chance” COBRA elections must be offered to AEPs who became eligible on or after September 1, 2008, but who did not elect (or who elected and later terminated) COBRA coverage.
- This “second chance” election period begins on February 17, 2009 and ends 60 days after the company notifies the AEP of his or her new COBRA rights.
- Companies must provide the “second chance” notice and election forms by April 18, 2009.
- For most plans, coverage for current AEPs who elect “second chance” coverage will begin on March 1, 2009 and end on or before December 31, 2009. (See “COBRA Subsidies” chart, page 2.)

Lower Cost Coverage Options

- Under COBRA, companies are generally required to offer a covered employee only the right to continue the same coverage the employee had in effect immediately before the COBRA qualifying event.
- The Recovery Act allows companies to offer AEPs the choice to enroll in (or change their coverage to) lower cost coverage options.
- If a company does offer lower cost coverage options, AEPs must choose whether to elect such lower cost coverage options within 90 days of receiving notice of the new options.
- In deciding whether to offer the lower cost coverage options, companies should weigh the savings achieved by offering the options against the added administrative requirements in offering the new options.

COBRA Notice Requirements

- Companies must notify AEPs of the new COBRA requirements no later than April 18, 2009.
- The Secretary of Labor is required to issue model notice language by March 17, 2009.
- Companies may wish to consider developing their own notices before the model notice is issued.
- Companies will also need to update their COBRA forms and other documentation, including summary plan descriptions.

COBRA NOTICES

Notice Provision	Notice Recipients	Notice Contents
Subsidy Rights	All AEPs	<ul style="list-style-type: none"> • Who is eligible for the subsidy • Amount of the subsidy • When the subsidy begins and ends • How and when to apply for the subsidy • Company contact information for obtaining more information on subsidy rights • How and when to notify the company of coverage under another group health plan or Medicare • Penalties for failing to notify the company of such other coverage
“Second Chance” Elections	AEPs who did not elect (or who elected and later declined) coverage before the date the notice is sent	<ul style="list-style-type: none"> • Description of Subsidy Rights (see above) • Who is eligible to make a “second chance” election • How and when to make a “second chance” election
(Optional) Lower Cost Coverage Options	All AEPs	<ul style="list-style-type: none"> • Description of any lower cost coverage options • How and when to elect the lower cost coverage options • When coverage under the lower cost coverage option will begin and end

COBRA Reporting Requirements

Companies must file the following documents with the Treasury Department:

- Taxpayer Identification Number (TIN) for each AEP;
- Attestation of involuntary termination of employment for each AEP who receives a subsidy;
- Payroll tax credits report for the payroll reporting cycle;
- Payroll tax credits expected for the next payroll reporting cycle; and
- Amount of subsidy reimbursed for each AEP and whether the subsidy is for individual or family coverage.

HIPAA Requirements

For AEPs who elect “second chance” coverage, companies will need to revise Health Insurance Portability and Accountability Act (“HIPAA”) certificates of creditable coverage to show that breaks between the date of the AEP's qualifying event and the first date of coverage are not coverage breaks under HIPAA's creditable coverage and pre-existing condition rules.

Additional Guidance

The Treasury Department is expected to issue additional guidance on the new COBRA requirements in the near future.

Assistance with New COBRA Requirements

The new COBRA requirements are fairly complex and very little guidance has been issued on how to comply with the new requirements. Given the current economic climate with increased reductions in work force and other involuntary terminations, companies should implement an action plan to comply with the new COBRA requirements. We have attached a sample COBRA Action Plan that may be used to develop a more specific plan for your company. We would be happy to help your company comply with these new requirements.

COBRA ACTION CHECKLIST

ACTION	DEADLINE
1. Develop company-specific COBRA action plan <ul style="list-style-type: none"> • Work with HR, payroll, IT, tax, legal, accounting and COBRA administrators 	As soon as possible
2. Identify current Assistance Eligible Participants (AEPs) (See “COBRA Subsidies” chart, page 2)	As soon as possible
3. Decide whether to notify AEPs of new COBRA rights before Treasury issues model form of notice (due by March 17, 2009) <ul style="list-style-type: none"> • Companies currently undergoing reductions in force and other involuntary terminations may wish to consider providing notice before Treasury issues the model notice 	As soon as possible
4. Decide whether to offer alternate lower cost coverage options for AEPs <ul style="list-style-type: none"> • Weigh pros and cons (See “COBRA Notices” chart, page 4) 	As soon as possible
5. Decide how to structure COBRA premium payments and subsidy advances and whether to use two-month grace period	As soon as possible
6. Develop income limit attestation to help determine who is an AEP	As soon as possible
7. Prepare subsidy waiver form for higher-income employees who wish to waive the subsidy	As soon as possible
8. Notify participants of new COBRA rights including subsidy, second chance enrollments and any lower cost coverage options	April 18, 2009
9. Update COBRA election forms and notices	April 18, 2009
10. Update HIPAA certificates of coverage	As soon as possible
11. Develop internal procedures to file certifications with Treasury Department	As soon as possible

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

Authors

Marjorie M. Glover
+1 (212) 408-1016
mglover@chadbourne.com

Rachel M. Kurth
+1 (212) 408-5185
rkurth@chadbourne.com

Contact for More Information

William G. Cavanagh
+1 (212) 408-5388
wcavanagh@chadbourne.com

David Gallai
+1 (212) 408-1033
dgallai@chadbourne.com

Marjorie M. Glover
+1 (212) 408-1016
mglover@chadbourne.com

Lauren D. Kelly
+1 (212) 408-5520
lkelly@chadbourne.com

Rachel M. Kurth
+1 (212) 408-5185
rkurth@chadbourne.com

Edward P. Smith
+1 (212) 408-5371
esmith@chadbourne.com

www.chadbourne.com

New York Washington Los Angeles Houston Mexico City
London (a multinational partnership) Moscow St. Petersburg
Warsaw Kyiv Almaty Dubai Beijing

CHADBOURNE
& PARKE LLP