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COBRA CONTINUATION COVERAGE UNDER ARRA

The American Recovery and Reinvestment Act of 2009 ("ARRA") provides for temporary premium reductions and additional election opportunities under the Consolidated Omnibus Budget Reconciliation Act ("COBRA").

COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary extension of health coverage ("continuation coverage") in certain instances where coverage under the plan would otherwise end. Please note that Massachusetts is one of many states that has a so-called "mini-COBRA" statute, which provides similar continuation coverage to employees of smaller employers, those with 2 to 19 employees. As such, some of the ARRA benefits described below in this Advisory, such as premium reduction, will also be available to employees who are eligible under the Massachusetts mini-COBRA statute.

In general, an employee and his/her spouse and dependent children are "qualified beneficiaries" under COBRA. Qualified beneficiaries may elect continuation coverage upon the occurrence of certain qualifying events such as termination of employment (including death and disability), reduction in hours below the minimum required to maintain participation under the health plan, divorce, legal separation, loss of dependent child status, or eligibility for Medicare. COBRA beneficiaries are typically charged the full premium for continuation coverage under the employer's plan plus an administrative fee of two percent. The statute has been in effect since 1986 and its notice and cost shifting provisions are well known to employers.

ARRA, signed into law on February 17, 2009, impacts the COBRA rights of qualified beneficiaries and raises a number of administrative issues that employers will need to address. The Department of Labor only recently clarified its interpretation of the administration of the changes required by ARRA and updated its website to post new model notices and to provide guidance on the requisite changes.

Premium Reduction

Under ARRA, individuals who are eligible for continuation coverage because of their own or a family member's involuntary termination from employment that occurred from September 1, 2008 through December 31, 2009 may only have to pay 35% of the COBRA premium. The remaining 65 percent is reimbursed to the coverage provider (generally the employer) through a payroll tax credit.

The premium reduction is available for "Assistance Eligible Individuals." Under ARRA, an "Assistance Eligible Individual" is the employee or a member of his/her family who:

- is eligible for COBRA continuation coverage at any time during the period from September 1, 2008 through December 31, 2009;
- is eligible for COBRA election opportunity as a result of the employee's involuntary termination of employment that occurred at some time from September 1, 2008 through December 31, 2009; and
- elects COBRA coverage (when first offered or during the additional election period provided by ARRA).

The premium reduction applies to periods of health coverage beginning on or after February 17, 2009 and may last up to nine months. The premium reduction may end sooner upon the first to occur of (i) eligibility for other group coverage (or Medicare), or (ii) the date that continuation coverage is scheduled to end under COBRA. Individuals paying reduced COBRA premiums must inform their plans if they become eligible for coverage under another group health plan or Medicare.

There are phase out limits based on adjusted gross income for the tax year in which the premium assistance is received. If an individual's 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 in full. 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. Individuals may permanently waive the right to premium reduction but may not later obtain the premium reduction if their adjusted gross incomes end up below the limits.

Notice Requirements and Second Election Opportunity

As a result of ARRA, employers must be sure to provide a general notice to all qualified beneficiaries, whether they are currently enrolled in COBRA coverage or not, who have a qualifying event during the period from September 1, 2008 through December 31, 2009. This notice may be provided separately or with the COBRA election notice following a COBRA qualifying event. The notice must inform the qualified beneficiary of his/her rights.

Notice must provide:

- The forms necessary for establishing eligibility for the premium reduction;
- Contact information for the plan administrator or other person maintaining relevant information in connection with the premium reduction;
- A description of the second election period (if applicable to the individual);
- A description of the requirement that the Assistance Eligible Individual notify the plan when he/she becomes eligible for coverage under another group health plan or Medicare and the penalty for failing to do so;
- A description of the right to receive the premium reduction and the conditions for entitlement; and
- If offered by the employer, a description of the option to enroll in a different coverage option available.

Additionally, under ARRA, qualified beneficiaries have a new, second election opportunity.

For those qualified beneficiaries whose employment was involuntarily terminated at any time during the period from September 1, 2008 through February 16, 2009 who either did not elect COBRA continuation coverage or elected but subsequently discontinued COBRA (for example, those who dropped COBRA coverage because they were unable to continue paying the premium), employers must provide notice of a second opportunity to elect continuation coverage (the "Second Opportunity Notice"). **This Second Opportunity Notice must be provided by April 18, 2009**. A qualified beneficiary who receives a Second Opportunity Notice has 60 days to elect COBRA. An election is retroactive to February 17, 2009 (or March 1 in the case of a plan where premiums are due on the first of a month). This special election period does not extend the period of COBRA continuation coverage beyond the original maximum period.

Employers will need to act quickly to update their COBRA notices and summary plan descriptions to describe the new COBRA subsidy and to contact terminated employees who are eligible for the subsidy.

Model notices are available on the United States Department of Labor website at: http://www.dol.gov/ebsa/COBRAmodelnotice.html.

For more information on the COBRA changes under ARRA, please contact **your Conn Kavanaugh attorney or Christina M. Licursi** at clicursi@ckrpf.com.