

CLIENT ALERT

Economic Stimulus Act Provides COBRA Subsidies And New COBRA Election And Disclosure Requirements; DOL Provides Guidance On Defined Benefit Funding Disclosures

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As predicted, 2009 is continuing to be an unusually busy year in the employee benefits field. The first few weeks of February have already yielded two important new developments. First, the Obama Administration's Economic Stimulus Act provides a temporary COBRA subsidy intended to help unemployed workers and their families afford continuation health coverage. This subsidy, however, comes with a potential economic burden for employers and also increases the complexity of COBRA administration. Second, the Department of Labor ("DOL") has issued guidance on the defined benefit plan annual funding disclosure requirements mandated by the Pension Protection Act of 2006 ("PPA"). Model disclosures provided by the DOL are intended to inform defined benefit plan participants about the extent to which their plan is sufficiently funded to meet potential retirement benefit obligations. Both the Stimulus Act amendments to COBRA and the new DOL notices necessitate employer and plan action within the next few weeks in order to assure compliance with these new requirements.

Stimulus Act Provides COBRA Subsidies And Imposes New Administrative Burdens

After intensive negotiations and a great deal of scrutiny, the stimulus package, also known as the American Recovery and Reinvestment Act of 2009 ("ARRA") was signed into law by President Obama on February 17, 2009. In addition to the tax cuts and spending provisions contained in the bill, the ARRA also contains a provision (in a portion of the Act separately referred to as the Health Insurance Assistance for the Unemployed Act of 2009) providing temporary monetary subsidies to help unemployed workers and their beneficiaries pay their COBRA premiums and thereby help them afford continuation health care coverage during a period of unemployment. In concert with this premium assistance, ARRA also requires a new special election period for qualified individuals who, prior to the enactment of ARRA, did not elect COBRA, as well as imposing new COBRA notice requirements. The COBRA subsidies are first effective for the month of coverage beginning after ARRA's enactment date, which for most plans will mean that the subsidies, and the administrative duties they entail, will be applicable on March 1, 2009.

Assistance Eligible Individual

The COBRA provisions of ARRA apply to an "assistance eligible individual," i.e., any employee who is otherwise eligible for COBRA coverage, who elects such coverage, and who was involuntarily terminated from employment at any time on or between September 1, 2008 and December 31, 2009. An assistance eligible individual may also be any qualified beneficiary associated with the relevant covered employee, and such qualified beneficiary can independently elect COBRA (as provided under present law COBRA rules). ARRA provides that each assistance eligible individual will, beginning March 1, 2009, only need to pay 35% of the applicable COBRA premium, with the other 65% being provided as a subsidy by the federal government. The availability of this subsidy is, however, subject to certain income thresholds on such assistance eligible individuals and will not be paid directly to the assistance eligible individual. Rather, the subsidy amount will have to first be paid by "the person to whom premiums are payable under COBRA continuation coverage."

Reimbursement of Premium

The statute is not entirely clear as to how the mechanics of the subsidy will actually work. Although the statute defines "the person to whom premiums are payable under COBRA" to mean (1) a multiemployer plan, (2) the employer maintaining the plan (where some or all of the coverage is not provided by insurance), or (3) the insurer providing the coverage, the reimbursement methods described by the statute seem to have applicability only to an employer. Specifically, ARRA states that "the person to whom premiums are payable under COBRA" can recoup such amounts through a payroll tax credit. The statute does mention that these amounts can also be received as a direct payment from the Treasury Department, but only to the extent that the amount of the payroll tax credit exceeds the amount of the subsidy. The Conference Committee report adds to the confusion by reiterating the statutory language and then stating that the person responsible for the subsidy may take a credit against the payroll tax for "its employees." Furthermore, the exact mechanism by which any party will be able to offset or recoup this subsidy amount, and the exact timing for any such recovery of the subsidy amount, are not clear at this time. However, it is clear that any party entitled to reimbursement of the subsidy is required to submit such reports as the IRS may require, including an attestation of involuntary termination of employment for each covered employee for which the employer is seeking reimbursement.

Coverage Period

Although the general COBRA coverage period of 18 months will still be in effect for assistance eligible individuals, the 65% premium subsidy will not last for the entire COBRA coverage period. Rather, the subsidy will apply only for 9 months or until the individual is eligible for coverage under any other group health plan, whichever occurs earlier. If the individual continues to be covered by COBRA after the nine-month period, coverage will continue but the individual will be responsible for the entire COBRA premium.

Election Period

In addition to the premium subsidy, ARRA allows assistance eligible individuals to elect to enroll in coverage that is different from the coverage they were enrolled in at the time the COBRA qualifying event occurred, with such new coverage treated as COBRA continuation coverage. The decision of whether to allow such rights is within the discretion of the employer. If the employer decides to allow an individual to elect a different coverage, however, ARRA provides that the premium for any such different coverage may not exceed the premium for coverage in which the individual was enrolled at the time the qualifying event occurred. The effect of this provision will, therefore, be to allow individuals to elect less expensive (and potentially less complete) continuation coverage.

Notice Requirements

The availability of the COBRA premium subsidy will also require employers to provide all COBRA-eligible individuals (not just assistance eligible individuals) with a new notice explaining both the availability of the subsidy and the option to enroll in different coverage (if the employer permits assistance eligible individuals to elect enrollment in different coverage). This notice may be provided either by an amendment to existing notice forms or by a separate document and must include several specific provisions including: (1) the forms necessary for establishing eligibility for premium reduction; (2) a description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium and (3) any other conditions on entitlement to the reduced premium. This notice must be provided in the same time frame as any COBRA notice provided after a qualifying event has occurred; however, for any assistance eligible individual who became entitled to COBRA coverage before the date of the enactment of ARRA, this notice must be provided within 60 days of the enactment of ARRA (i.e., by April 18, 2009).

Special Enrollment Period

The statute also provides for a special enrollment period for individuals who were involuntarily terminated from employment on or after September 1, 2008, but who had not elected COBRA coverage by the date of the enactment of ARRA. Such individuals are provided a special 60-day enrollment period in which they can elect COBRA coverage. This special enrollment period does not begin to run until these individuals have been provided with notice of their rights under this special election. If these individuals elect coverage, their coverage will commence with the first period of coverage beginning on or after the date of the enactment of ARRA and will not extend beyond the period of COBRA coverage they would have received if they had elected COBRA when they first became eligible for such coverage. For example, if a covered employee was involuntarily terminated on October 1, 2008, but did not elect COBRA at that time (and has no other group health plan coverage), and was provided the special-enrollment notice on March 1, 2009, the employee would have 60 days after the date of this notice, or until April 30, 2009, to elect the coverage and receive the subsidy. If the employee made the election, his coverage would begin on March 1, but would end April 1, 2010 (i.e., 18 months after October 1, 2008), with the subsidy available for 9 months (i.e., through November 2009).

Administrative and Practical Concerns Going Forward

The statute contains the seeds for significant confusion in plan administration going forward. The March 1, 2009 effective date for the subsidies essentially means that the enhanced employee rights contained in the bill may take effect before plans and insurance companies are administratively capable of dealing with them. For example, current law provides civil penalties for failure to provide required COBRA notices. These penalties are not suspended in the case of the new disclosure requirements. Further, although the new 60-day special-enrollment period does not begin running until notice is provided to affected individuals, the statute does not require the DOL to issue a model notice for such purposes until 30 days after the enactment of the ARRA. Therefore, employers who wish to start the 60-day period running immediately will have to craft their own notice, in advance of any DOL model or guidance. In addition, the statute's requirement that the general notice of COBRA subsidies must be provided to all COBRA-eligible individuals and not just to assistance eligible individuals may cause significant confusion as employers attempt to amend existing disclosures without the benefit of DOL guidance. A further complication is that employers will need to reexamine employee rosters to identify those individuals whose employment was terminated since September 1, 2008, and identify those who did not elect COBRA coverage (to provide them with new election rights) and those who did (and who therefore may be eligible for the subsidy). In addition, although ARRA leaves open the possibility that insurers will have to pay the initial amount of the subsidy, and therefore will be responsible for submitting such reports as the IRS may require, the ARRA does not explain whether and to what extent the clients of the insurers must cooperate in providing this information. Finally, employers will have to be extremely careful as to how and when they take a credit for the subsidy amount against their payroll taxes, in order to avoid inadvertently being subject to IRS penalties by seeking a credit before the premium amount is actually received.

DOL Guidance on Defined Benefit Annual Funding Disclosures

On February 10, the DOL released Field Assistance Bulletin 2009-01, which provides both guidance on the defined-benefit plan annual funding disclosure requirements mandated by the PPA as well as model notices that can be used to comply with these requirements. According to the bulletin, the annual funding notice requirements apply to plan years beginning on or after January 1, 2008, and plans generally must furnish funding notices no later than 120 days after the close of each plan year. As a result, for defined-benefit plans which operate on a calendar-year basis, the first annual funding notice must be provided no later than Thursday, April 30, 2009 (i.e., 120 days after the close of their 2008 plan year). The notices must be provided to the

Pension Benefit Guaranty Corporation ("PBGC"), to each plan participant and beneficiary, to each labor organization representing such participants or beneficiaries, and, in the case of a multiemployer plan, to each employer that has an obligation to contribute to the plan. The notice must include, among other things, the plan's funding percentage, a statement of the value of the plan's assets and liabilities and a description of how the plan's assets are invested as of specific dates, and a description of the benefits under the plan that are eligible to be guaranteed by the PBGC. The bulletin contains two model notices (for single-employer plans and multiemployer plans) which the DOL has stated will satisfy the content requirements of section 101(f) of ERISA. The bulletin also contains additional language that can be used to provide transition data for years before the PPA required certain types of data to be calculated. Finally, the bulletin notes that plan administrators may add additional or explanatory information to a model if it is necessary or helpful to understanding the mandatory information and does not have the effect of misleading or misinforming participants.

If you have any questions about the COBRA changes made by ARRA, the DOL guidance on defined-benefit plan annual funding disclosures, or about any other employee benefits matter, please contact those listed below or your usual Crowell & Moring contact.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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