

Client Alert

March 19, 2009

Guidance Issued on the New COBRA Subsidy Rules**Areas of Interest****Employee Benefits****Executive Compensation****United States**

The American Recovery and Reinvestment Act of 2009 (commonly being referred to as the Stimulus Bill) included new rules relating to continuation of health coverage, including rules relating to premium subsidies and special coverage elections. These rules were summarized in our February 20, 2009, Client Update, "[2009 Economic Stimulus Package Provides for COBRA Subsidies IMMEDIATE ACTION REQUIRED](#)." The Department of Labor (DOL) and the Internal Revenue Service (IRS) have each recently issued guidance to assist employers in complying with the new rules. The more significant clarifications are discussed below.

Second Chance to Elect Coverage; Involuntary Termination

The Stimulus Bill provides that assistance eligible individuals (that is, employees and their dependents who became or become eligible for continuing health coverage as a result of an *involuntary termination* occurring between September 1, 2008, and December 31, 2009) must be given a second chance to make an election to receive continuing health coverage. Although the provisions of the Stimulus Bill relating to continuing health coverage generally apply to both continuing coverage required under federal law (COBRA) and similar provisions of state law, the [DOL guidance](#) clarifies that second chance elections currently only apply with respect to COBRA coverage and do not apply with respect to state continuation coverage.

Additional guidance from the Ways and Means Committee of the House of Representatives also clarifies that death is not considered an "involuntary termination" for purposes of the new rules.

Expiration of Subsidized Coverage

The Stimulus Bill provides that the federal government will subsidize 65 percent of the applicable premiums for continuing health coverage for assistance eligible individuals. The [IRS guidance](#) clarifies that the federal subsidy does not apply for months of coverage beginning after the first of the following to occur: (i) the date the eligible individual becomes eligible for coverage under another group health plan (other than coverage consisting of only dental, vision, counseling or referral services (or a combination thereof), a flexible spending arrangement or on-site care provided by an employer) or Medicare, (ii) the nine-month anniversary of the date on which the subsidy first applies to such eligible individual, or (iii) the date on which the continuation period otherwise expires for such person.

How the Subsidy Works—Reporting and Documentation

The Stimulus Bill provides that the "person to whom premiums are payable" is entitled to a credit for payroll taxes equal to the amount of the subsidy provided by such person. The "person to whom premiums are payable" is generally defined as (i) in the case of a plan to which COBRA applies or in the

case of a plan which is wholly or partially self-insured, the employer or (ii) in the case of any other plan, the insurer providing the coverage. Special rules apply for multiemployer plans. The IRS guidance clarifies that the credit may only be taken by the entity determined under the foregoing rules.

The IRS guidance provides more detail on how the credit for the subsidy is to be claimed by employers entitled to the credit. The employer may claim the credit as part of the quarterly filing of Form 941. The IRS has updated Form 941 to include Line 12a for the amount of the credit claimed and Line 12b for the number of individuals who have been provided the subsidy. If Line 12a is larger than Line 10, there is a resulting overpayment that can be claimed as a refund or a credit against future payments. The IRS also noted that, although the Form 941 is only filed on a quarterly basis, the employer can choose either to reduce its payroll tax deposits prior to the end of the quarter or to wait and claim the subsidy as an overpayment at the end of the each quarter. The Form 941 is the only information that needs to be filed with the IRS. Employers should begin using the new Form 941 immediately. No filing extensions are provided. The IRS has also indicated that the credit can be claimed as part of filing Form 943 or Form 944.

Additionally, the guidance specifies that supporting documentation relating to the credit must be maintained, including:

- Information on the receipt (including date and amounts) of the assistance eligible individual's unsubsidized portion of the premium;
- In the case of an insured plan, a copy of the invoice or other supporting documentation from the insurance carrier as proof of timely payment of the full premium to the insurance carrier;
- In the case of a self-insured plan, proof of the premium amount and proof of coverage provided to the assistance eligible individual;
- An attestation of involuntary termination, including the date of the involuntary termination for each covered employee whose involuntary termination is the basis for eligibility for the subsidy;
- Proof of each assistance eligible individual's eligibility for continuing health coverage at any time during the period from September 1, 2008, through December 31, 2009, and election of such coverage;
- A record of all social security numbers for all covered employees, the amount of the subsidy reimbursed with respect to each covered employee and whether the subsidy was for one individual or for two or more individuals; and
- Any other documents necessary to verify the correct amount of reimbursement.

Obviously, coordination among the employer and service providers to the health plan will be necessary in order to maintain the required supporting documentation.

If you would like more information about the foregoing, please contact the authors of this Client Alert, [Debra B. Hoffman](#) (+1 312 701 7219) and [Ryan Liebl](#) (+1 312 701 8392), or any other member of our Employee Benefits and Executive Compensation practices.

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