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*Reply to: Harrison, NJ Office*

March 10, 2009

***Contractor Alert: COBRA Subsidy in Economic Stimulus Package  
Imposes Many Immediate Responsibilities on Employers***

By: Jill Tobia Sorger, Esq.

***Introduction:***

The American Recovery and Reinvestment Act of 2009 (ARRA), more commonly known as President Obama's Economic Stimulus package, provides eligible employees with a nine (9) month subsidy of health care premiums under the Consolidated Omnibus Budget Reconciliation Act (COBRA). Signed into law on February 17, 2009, the ARRA imposes immediate responsibilities on an employer that maintains a group health plan subject to COBRA. Federal agencies such as the United States Department of Labor (USDOL), the Department of Health and Human Services and the Internal Revenue Service (IRS) have all been charged with developing model instructions and notices for employers to utilize in fulfilling their responsibilities. These model notices are required to be drafted by the agencies within thirty (30) days of the law's enactment or by March 17, 2009. In addition, under the ARRA, employers are also expected to take certain required action, including issuing notices, within sixty(60) days, or by April 18, 2009. With these dates fast approaching, employers must immediately get up to speed on what is currently known about the law's provisions

and most importantly, what is expected of the employer now with respect to implementation of the COBRA subsidy.

***COBRA Subsidy:***

The COBRA subsidy is equal to sixty five percent (65%) of the COBRA premium charged to an eligible individual. Under the ARRA, an eligible employee becomes entitled to the sixty five percent (65%) subsidy after the employee pays thirty five percent (35%) of the COBRA premium. *When the employee makes the required partial payment, the employer (or in some cases the multiemployer plan to which an employer belongs) is then responsible for making the remaining sixty five (65%) premium payment on the employee's behalf.* Thereafter, the employer (or multiemployer plan if applicable) is entitled to receive reimbursement for the premium amount "fronted" by applying for a tax credit on its quarterly federal employment tax return. If the tax credit were to exceed the amount of the employer's actual payroll tax deposits, then the law provides for a direct refund to the employer for the excess.

The IRS has already revised Form 941 to allow for an employer to claim said credit on Line 12a. The IRS website <http://www.irs.gov> has posted this revised form and will also post additional information pertinent to the law as it becomes available. The IRS has already stated that the due date of April 30, 2009 for the first quarter Form 941 will not be extended even in light of recent implementation of the law.

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***Eligibility for the Subsidy:***

Employees eligible for the subsidy are those COBRA eligible employees who lost health care coverage due to a layoff or other involuntary termination (with the exception of termination for gross misconduct) between September 1, 2008 and December 31, 2009. Qualified beneficiaries of eligible employees, such as a dependent children who were covered under the group health plan immediately prior to the COBRA qualifying event, are also eligible to receive the subsidy. Employees entitled to COBRA by virtue of other qualifying events, such as voluntary resignation, are not eligible to receive the subsidy.

Additionally, there are income limitations on the right to receive the subsidy. Individuals whose modified adjusted gross income exceeds \$145,000.00 (\$290,000.00 for those filing jointly) in the year the subsidy would be received are not eligible to receive the subsidy. There is also a phase out of the subsidy for individuals beginning at \$125,000.00 (\$250,000.00 for joint filers) of adjusted gross income up to the maximum amounts of adjusted gross income of \$145,000.00 (\$290,000.00 for those filing jointly). While proof of income is not required to be demonstrated at the time of COBRA election, an employee that proves ineligible or subject to a phase out upon the filing of his/her tax return will be required to repay the subsidy received or a portion thereof as the case may be.

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Finally, while the subsidy is generally available for a period of nine (9) months, said period is subject to early termination on the date that the individual becomes eligible for coverage under another group health plan or becomes eligible for Medicare. Employees who wilfully neglect to report these early termination circumstances are subject to a penalty in an amount equal to one hundred ten percent (110%) of the subsidy that would be due after his/her eligibility terminates.

***Employer Notification Requirements:***

Under the law, employers have an *affirmative obligation* to send COBRA subsidy eligibility notices to *each and every* employee that has been laid off and/or involuntarily terminated (with the exception of those employees terminated for gross misconduct) from September 1, 2008 to December 31, 2009. *This means that even employees who have previously turned down COBRA coverage or stopped paying premiums must be given a second chance to elect the same in light of the subsidy.* Accordingly, employers must immediately identify all previously laid off/involuntarily terminated employees and make sure these individuals receive notice of their automatic eligibility for the COBRA subsidy effective March 1, 2009. These employees must then be given a sixty (60) period after the notice to elect the same. Additionally, all currently enrolled COBRA participants paying the full premium must be notified of the subsidy and their statements must reflect the reduced premium as of the effective date (i.e., March 2009). In order to allow for notices to be given, it should be understood that the law has a transition period whereby the regular premium can be paid

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for the months of March and April 2009 and then the subsidy may be applied retroactively to these months.

*Employers are required to send notices of the COBRA subsidy to all qualifying individuals by April 18, 2009 (60 days after the law's enactment).* These employees will have sixty (60) days in which to elect coverage. The UDSOL has been charged with developing model notices for employers to use for this purpose by no later than March 17, 2009.

***Type of Insurance Coverage:***

While typically under COBRA the employee is afforded only the right to continue the same health coverage that was in place at the time of the qualifying event, under the ARRA the employer may offer the employee the option of choosing different coverage if the same is available to active employees (i.e. an HMO plan as opposed to a PPO plan). However, the optional coverage premium may not be higher than the original COBRA premium available to the employee. Additionally, the law does not require that an employer offer the employee the option to change coverage.

***Employer Maintenance of Supporting Documentation:***

Employers must also maintain records to support the COBRA subsidy credit claimed on its Form 941. For example, the employer should keep a list of all eligible employees (including eligible dependents), social security numbers, and the amounts subsidized to each individual. Additionally, the employer must maintain receipts demonstrating both the timely monthly payment by assistance

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eligible employees of the thirty five percent (35%) COBRA premium and payment to the insurance carrier thereafter of this amount plus the employer subsidy. Finally, the employer must also maintain documents supporting an employee's involuntary termination during the requisite time period of September 1, 2008 through December 31, 2009.

***Advice for Employers:***

Since the ARRA has just been enacted, its implementation will continue to raise a litany of questions. However, as set forth above, it is entirely clear that employers that maintain group health plans are required to take immediate action with respect to the COBRA subsidy. At the very minimum, the following steps should be taken by all employers and/or employers should make sure that their multiemployer plans are taking the following steps on their behalf:

- Identify and begin to maintain documentation for all qualifying individuals, i.e. each and every employee who experienced a layoff or other involuntary termination (with the exception of terminations for gross misconduct) during the period September 1, 2008 to December 31, 2009 as well as eligible dependents, including employees that did not elect COBRA the first time;
- Ensure that COBRA notices are properly updated to explain eligibility for the COBRA subsidy (the USDOL's mandated model notices are to be issued by no later than March 17, 2009);

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- Send new COBRA notices to all eligible employees, including those employees who previously declined COBRA, by no later than April 18, 2009;
- Establish procedures and maintain documentation to claim the payroll tax credit on IRS Form 941 (revised Form 941 found at [www.irs.gov](http://www.irs.gov));
- Update COBRA billing to reflect the COBRA subsidy;
- Identify and review all contracts, agreements and/or severance policies to determine if the same are impacted by the COBRA subsidy and contact legal counsel to review and revise the same.

Employers should make every effort to stay apprised of new information concerning the law. To this end, the USDOL, the Department of Health and Human Services and the IRS will continue to address questions and develop model forms and policies in the upcoming months. Accordingly, both the websites of these entities as well as legal counsel should be periodically consulted to ensure full compliance with the law.

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