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Employment Law Alert

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Economic Stimulus Package Imposes New COBRA and H-1B Visa Obligations

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1). Among the many provisions of the $787 billion economic stimulus package are new COBRA requirements that create a federal subsidy for COBRA premiums -- and a host of new obligations for employers. It is important to note that the new provisions apply not just to COBRA-covered employers (those with 20 or more employees), but also to employers that must offer COBRA-like continuation benefits under a state's mini-COBRA law. Therefore, California employers that are covered by Cal-COBRA (generally, those with between 2-19 employees) must comply with the new subsidy and notice requirements.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

In addition, the stimulus package creates new H-1B visa obligations for employers receiving bailout funds under the government's Troubled Assets Relief Program (TARP).
Following is a summary of the new COBRA and visa requirements.

COBRA Premium Subsidy

Eligibility for Subsidy

Under the new law, an "assistance eligible individual" is only required to pay 35 percent of the COBRA premium for any period of coverage that begins on or after the law's enactment date. The enactment date was February 17, 2009, and the first period of coverage generally will be March 1, 2009, for plans that have calendar month coverage periods.

An "assistance eligible individual" is someone for whom the qualifying event for COBRA coverage is the involuntary termination (except for gross misconduct) of the covered employee's employment between September 1, 2008, and December 31, 2009. The individual must elect and otherwise be eligible for COBRA coverage. The subsidy applies to the terminated employee, spouse and any dependents who are qualified beneficiaries.

Employer Reimbursement

Who pays the other 65 percent of the COBRA premium? The employer must front that portion for the employee and then seek reimbursement from the federal government by way of a credit against quarterly payroll tax filings. In particular, on the date the employer receives the individual's 35 percent premium payment, the employer will be treated as having paid payroll taxes equal to the amount of the reimbursement owed. If the reimbursement exceeds the employer's payroll tax liability, the Treasury Department will credit or refund the excess as if the employer had overpaid payroll taxes.

Employers will be required to submit periodic reports to the government including: 1) an attestation of involuntary termination of employment for each covered employee; 2) the amount of payroll taxes offset during the reporting period and an estimate for the subsequent period; and 3) for each covered employee, the tax identification number, amount of subsidy reimbursed (for the employee and qualified beneficiaries), and whether the subsidy reimbursement is for coverage for one person or two or more persons. Although not entirely clear, it appears that the new subsidy does not apply to any portion of COBRA premiums that the employer is subsidizing.

Reimbursement for Premiums Already Paid

For March and April of 2009, if an assistance eligible individual is still paying the full COBRA premium, the employer must reimburse the person for the overpayment (the amount over the 35 percent). The employer can choose to make reimbursement within 60 days and then treat the reimbursement as a credit toward payroll taxes. Alternatively, the employer can credit the overpayment toward the person's future COBRA premiums and seek government reimbursement via a payroll tax credit, but this option can be used only if it is reasonable to expect that the individual will use the premium credit within 180 days.

Term of Subsidy

The premium subsidy lasts for up to nine months from the date the individual became eligible for the lower rate, but will end sooner if the person becomes eligible for coverage under another group health plan or Medicare/Medicaid, or the maximum COBRA continuation period is reached. The individual must notify the employer if he or she becomes eligible for other group health coverage or Medicare/Medicaid before the nine months are up. The new law does not otherwise change the time period for which COBRA coverage is available (usually 18 months).

Second Chance

The new law requires employers to locate former employees who were involuntarily terminated sometime on or after September 1, 2008, but who declined COBRA coverage or elected and then dropped COBRA coverage before the law's effective date. By April 18, 2009, the employer must notify these individuals of the subsidy and give them a second chance to elect

COBRA. This is called an "extended election period." The person has 60 days from the date of the notice to elect COBRA. Note that the period of non-coverage may not be counted for determining pre-existing condition exclusions.

COBRA coverage for these individuals begins on March 1, 2009, and does not reach back to the employment termination date. However, the maximum length of COBRA coverage to which the individual is entitled (typically 18 months) is measured from the employment termination date.

Option for Other Coverage

In addition to the required premium subsidy, employers can choose to offer assistance eligible individuals the option to enroll in different medical coverage than what the employee was enrolled in at the time of termination, without waiting for an open-enrollment period. This coverage must be a plan that is offered to active employees and must cost the same or less than the plan in which the employee was enrolled. Plus, it cannot be a flexible spending arrangement, coverage that provides only dental, vision, counseling or referral services (or a combination), or coverage that provides services at certain on-site medical facilities.

An assistance eligible individual will have 90 days to elect to enroll after receiving notice of the plan enrollment option.

High-Income Individuals

The subsidy is phased out for high-income individuals -- those with a modified adjusted gross income starting at $125,000, or $250,000 for joint filers. They can choose to waive the subsidy and pay the full COBRA premium, or they will have to pay a recapture tax for any subsidy received. Beginning at $145,000, or $290,000 for joint returns, the full recapture tax is imposed.

New Notice Requirements

Employers must update COBRA election notices to include information about the premium subsidy, either by temporarily amending their COBRA election notices to include the new information or placing the information in a stand-alone notice. The U.S. Department of Labor will issue a model notice by mid-March 2009. The new notice must include the following information:

- The forms necessary for establishing eligibility for the premium subsidy.

- The name, address and telephone number of the plan administrator and any other person maintaining relevant information in connection with the subsidy.
- A description of the extended election period for individuals terminated between September 1, 2008, and February 17, 2009, who did not elect COBRA.
- A description of the obligation of the qualified beneficiary to notify the plan of eligibility for subsequent coverage under another group health plan or Medicare/Medicaid, and the penalty for failing to provide this notice.
- A description, displayed prominently, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium.
- A description of the option of the qualified beneficiary to enroll in different coverage, if the employer chooses to offer such coverage.

Steps to Take

Employers will need to take immediate action to comply with the new COBRA provisions. Here is a list of recommended steps:

- Identify employees who were involuntarily terminated since September 1, 2008, and determine which of those individuals (including their spouses and dependents) were enrolled in coverage prior to the termination but did not elect COBRA (or elected COBRA but terminated coverage before the law took effect).
- Determine whether you will offer individuals the option to enroll in a plan other than the one enrolled in at the time of termination.
- Prepare to send out COBRA notices as required by the new law. Employers can prepare their own notice to send out now, or wait for the model notice that will be issued by the Department of Labor.
- Modify COBRA billings to collect only the new 35 percent rate (employers have a grace period for March and April).
- Begin modifying payroll systems in order to claim the payroll tax credit for the subsidy.

H-1B Requirements for TARP Recepients

Another provision of the massive stimulus package imposes new foreign labor hiring restrictions on employers that receive Troubled Assets Relief Program (TARP) funds. In particular, TARP recipients will automatically be deemed "Dependent Employers" for H-1B visa purposes, and therefore must make the additional attestations required of dependent employers when submitting a Labor Condition Application to sponsor an H-1B worker. More information on the requirements can be found at http://www.foreignlaborcert.doleta.gov/.

Miller Law Group is the leading women-owned employment law firm in California, specializing in representing management in all facets of employment litigation and counseling. If you have questions or would like further information about the new law, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

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