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Advisory Bulletin

February 25, 2009

## American Recovery and Reinvestment Act of 2009

### Notice #2

Last week, the President signed the American Recovery and Reinvestment Act (ARRA), also known as the 2009 Economic Stimulus Plan. The ARRA legislation makes several important and significant changes to COBRA that will affect most employers. It also made some changes to HIPAA and to Qualified Transportation Fringe Benefit plans.

### Qualified Transportation Plan Changes

ARRA increases the monthly limit on pre-tax benefits for transit passes and vanpools to the same amount as the limit for qualified parking. For 2009, that means an increase from \$120 to \$230 per month. This increase will be in effect from March 2009 to December 2010.

Employers who offer a Qualified Transportation Fringe Benefit Plan (also known as Commuter Choice) have the right to decide whether to amend their plans and pass on this increase. Benefit Strategies is in the process of contacting our Transportation Fringe Benefit plan clients to facilitate the changes.

### HIPAA Changes (In Brief)

The ARRA contained some substantial modifications to HIPAA's Privacy and Security Rules. Among other things, the law extends certain privacy and security obligations directly to business associates. Benefit Strategies, as a business associate, will be updating our Business Associate Agreement and reviewing our internal operations to ensure the requirements in the law are addressed and covered.

### ARRA Overview As It Applies to COBRA

The ARRA makes COBRA coverage more affordable and accessible to workers who were

involuntarily terminated from employment after September 1, 2008. For the employer or COBRA administrator, it creates new requirements that must be understood and implemented carefully on very short notice.

The Act is effective on the date of enactment, February 17, 2009 and provides premium assistance as of March 1, 2009. The Department of Labor is expected to release model notices by March 17, but since time is of the essence, it is imperative that employers and administrators begin preparing to meet the requirements.

### What Employers are Covered?

Nearly all employers are subject to the ARRA. The federal COBRA rules generally apply to employers with more than 20 employees, however most (40+) states have mini-COBRA laws that extend COBRA requirements to these small employers as well.

### COBRA Subsidies

Under ARRA, Assistance Eligible Individuals (AEI's) may pay reduced COBRA premiums for a period of up to nine months. The federal government will subsidize 65% of the premium leaving the individual responsible for the remaining 35%.

AEI's are subject to the same timing and procedures for paying their portion of the COBRA premium. The reduced premium may be paid for periods of coverage beginning after March 1, 2009. If an AEI has already paid for March, the COBRA Administrator/employer must either reimburse the AEI or provide a credit towards future premium payments.

The subsidy phases out for AEI's whose federal adjusted gross income (AGI) is between \$125,000 and \$145,000 for individuals, and \$250,000 to \$290,000 for joint filers. The IRS will recapture ineligible subsidy payments by increasing the individual's income tax for the tax year, rather than penalize the employer for underpayment of payroll tax deposits. Individuals may elect to permanently waive subsidy eligibility by notifying the employer/COBRA administrator.

### Who is an Assistance Eligible Individual (AEI)?

An AEI is a qualified beneficiary who became eligible for COBRA continuation coverage between September 1, 2008 and December 31, 2009 as a result of their involuntary termination of employment. Individuals who have another COBRA qualifying event, such as reduction of hours, divorce or attainment of a certain age, or who voluntarily resign from their employment are NOT considered AEI's and are not eligible for the subsidy.

Please note that involuntary termination includes employees who were laid off, let go or fired. Essentially it includes anyone who lost their job involuntarily. It is important that employers fully understand this definition!

Individuals fired for Gross Misconduct are not covered, however it is important to note that this term has not been defined in the COBRA regulations. It may be prudent to notify all fired employees of their COBRA rights.

Eligibility for the subsidy ends when an individual becomes **eligible** for (not necessarily enrolled in) Medicare OR another group health plan. ARRA will apply a penalty against an individual who fails to provide appropriate notice when they become **eligible** for other coverage.

### What Plans are Affected?

The new subsidy rules apply to all health plans that are subject to COBRA with the exception of Health Flexible Spending accounts provided through a cafeteria plan. Health

plans subject to COBRA includes medical, dental and vision. Employers will be required to remit the full monthly premium to their insurance carrier and deduct the subsidy amount from their payroll tax obligation.

A statement of the involuntary terminations, and the premium subsidies accrued will be reported by the employer to the IRS. If the subsidy is more than the payroll taxes due, the government will send a check to the employer.

### What About Employers who Already Subsidize COBRA Premiums?

ARRA provides that the subsidized premium amount is determined based on the COBRA premium that the AEI is actually required to pay. For example, if the employer is subsidizing COBRA and paying 60% of the premium, the AEI is required to pay 35% of their remaining 40% which is 14% of the total premium ( $35\% \times 40\% = 14\%$  of total premium). Employers may then seek reimbursement for the government subsidy of 65% of the 40%. ( $65\% \times 40\% = 26\%$  of total premium).

**Example:** An AEI elects family COBRA coverage for \$1,000 per month. The employer subsidizes 60% of the premium:

**Employer owes:**  $\$1,000 \times 60\% = \mathbf{\$600}$   
**AEI owes:**  $\$1,000 \times (40\% \times 35\%) = \mathbf{\$140}$   
**Govt. owes:**  $\$1,000 \times (40\% \times 65\%) = \mathbf{\$260}$

### Employer Reporting Requirements

Employers seeking subsidy reimbursements must submit reports to the IRS with information that includes:

- 1) An attestation that involuntary termination triggered the basis for AEI's eligibility.
- 2) The amount of payroll taxes offset by subsidy reimbursements for the reporting period.
- 3) Taxpayer Identification Numbers for all covered employees.
- 4) The subsidy amount reimbursed for each covered employee and qualified beneficiary.
- 5) A designation for each covered employee indicating whether the subsidy reimbursement covers one individual, or two or more.

### Changes in Plan Enrollment

If an employer offers multiple medical plan options, and a current COBRA participant's coverage is more expensive than one or more of these options, the employer MAY (but is not required to) allow a new 90 day open enrollment period to allow him/her to elect the less expensive option. Previously, this option was only offered at the plan's open enrollment period.

The less expensive option cannot be a plan that provides dental, vision, counseling or other specific services only.

## Benefit Strategies' Action Plan for COBRA Clients

Benefit Strategies is working closely with our COBRA software vendor to respond quickly to the new regulations on behalf of clients who engage us to provide COBRA administrative services.

It is important to note that employers / COBRA administrators are required to notify AEI's no later than April 17, 2009 (60 days after the law was enacted). We are expecting the ARRA software updates including the new notification letters by March 2nd and will notify AEI's as quickly and accurately as possible. At this time we envision our action plan to be as follows: (It may be modified a bit once we receive the system updates and have more perfect knowledge)

- 1)** We will be sending a list of employees who have been terminated and issued a COBRA notice from our system since September 1, 2008. Employers will then have the opportunity to review the list and let us know which ex-employees meet the definition on an Assistance Eligible Individual (AEI) and should therefore be sent a notice of their rights under ARRA. An employer may elect to have us issue the ARRA notice to all potential AEI's (people who were terminated after 9/1/2008 and were issued a COBRA notice) These lists and information about the new law will be sent out by Friday, February 27, 2009.
- 2)** After we receive the updates to our COBRA software, we will be able to generate the new ARRA notices for all people in our system who were issued a COBRA notice since 9/1/08. If a client has identified an ex-employee as not having been involuntarily terminated, we will pull the letter and refrain from sending it out.
- 3)** The materials issued to potential AEI's will include:
  - o Information on the new law and the new enrollment period with coverage effective 3/1/2009.
  - o An explanation of the definition of an AEI under the law.
  - o An explanation of how the government subsidy works and who qualifies. It will also explain the income limits that reduces or disqualifies someone to receive a subsidy.
  - o If the option to switch to a less expensive plan is available, it will be covered.
  - o An enrollment form listing the restrictions of the law and the AEI's new COBRA premium obligation.
- 4)** Once AEI's return their enrollment forms, they will be enrolled in their applicable benefit plans and will be sent premium payment coupons.
- 5)** Employers will be sent the following reports:
  - o AEI's enrolled in COBRA coverage
  - o Premium Reduction Summary report Showing the government subsidies used to pay premiums.

**As stated in our earlier advisory, Benefit Strategies stands ready to provide COBRA outsourcing services to any employer who does not want to take on the administrative burdens contained in this new law.**

**If you would like additional information please contact:**

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