

Employers must provide notice to former employees by April 18th!
**EMPLOYERS HAVE IMMEDIATE RESPONSIBILITIES
UNDER NEW COBRA SUBSIDY**

By: Stacey A. DeKalb, Esq.

The federal stimulus act, the American Recovery and Reinvestment Act of 2009 ("ARRA"), which became law February 17, 2009, includes significant changes to the health benefit provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and immediately affects eligible former employees, their families and employers.

Description of COBRA Subsidy Provided

Under the new law, assistance-eligible individuals (AEIs) (generally, former employees who are or were involuntarily terminated between September 1, 2008 and December 31, 2009 and their beneficiary dependents) are provided a 65% subsidy of their COBRA premiums under any group health plan, including medical, dental and vision coverage. Each eligible former employee and dependent is permitted to pay only 35% of the full COBRA premium for up to nine months, beginning on the later of March 1, 2009, or the date the individual first qualifies for COBRA coverage. The 65% subsidy may end earlier than nine months if the former employee becomes eligible for Medicare or other qualifying group health coverage. The reduced premium applies even to former employees, and their dependents, who did not elect COBRA, or who dropped COBRA prior to March 1, 2009. Those AEIs have a second chance and may now reinstate COBRA coverage. General provisions include:

- The subsidy only applies to the portion actually paid by the employee. Any portion of the COBRA premium paid by the employer (e.g. under a severance arrangement) is not eligible for reimbursement.
- Employees who have paid more than 35% of the full premium in March must receive a credit against future premiums or receive a refund if the credit is not used.
- The Department of Labor is setting up an expedited appeal process for employees who are denied status as an AEI by an employer.

- Highly-paid individuals (individuals earning more than \$125,000 or couples earning more than \$250,000) who utilize the subsidized premiums must repay the subsidy as an additional tax, or waive the right to the subsidy.

Employers Must Send Written Notice by April 18, 2009

Employers must now provide written notice about the federal subsidy for COBRA premiums to all eligible former employees and beneficiaries. Plan administrators must provide notices by April 18, 2009 to

- 1) former employees who currently have COBRA coverage; and
- 2) former employees who were involuntarily terminated on or after September 1, 2008 and who either did not elect COBRA coverage when originally offered or who voluntarily dropped coverage.

Individuals who dropped COBRA prior to March 1, 2009, will have a special election period ending 60 days after receiving the notice to re-elect COBRA to qualify for the subsidy. For these persons, coverage will commence retroactive to March 1 and will continue for the remainder of the 18-month period based on the date the individual originally became eligible for COBRA. The DOL has published model notices for plan administrators and those model notices can be accessed at [this link](#) from the U.S. Department of Labor. Employers providing coverage under state continuation laws (not subject to federal COBRA continuation) are not required to provide the special re-enrollment period.

Employers may claim the 65% subsidy as a tax credit that will reduce future payroll tax deposits otherwise payable by employers for the amount of the subsidy provided the employer maintains supporting documentation of receipt of the employee's 35% share of the premium; a declaration of the former employee's involuntary termination; and in the case of insured plans, a copy of the invoice or other supporting statement from the insurance carrier and proof of timely

payment of the full premium to the insurance carrier. The reimbursement is available to small employers (who have fewer than 20 full-time employees and thus are not subject to federal COBRA law) who provide coverage only under state continuation laws. In that case, the insurer of a fully insured plan can also claim a tax credit of the 65% where the employee premium is paid directly to the insurer. The IRS has set up a [webpage](#) with information for employers on administering the subsidy and obtaining credits against payroll taxes. Employers are to use an updated Form 941, Employer's Quarterly Federal Tax Return, to report COBRA premium assistance payments. The updated Form 941 and further questions and answers are available at [this link](#).

Immediate Action by Employers

Employers need to immediately identify all qualified former employees and beneficiaries who are or were eligible for COBRA through an involuntary termination of employment occurring between September 1, 2008 and February 16, 2009, who did not elect COBRA as of the enactment date (February 17, 2009) or who elected COBRA and subsequently lost coverage, including spouses and children covered at the time of the qualifying event but not covered now. Included are those employees and beneficiaries whose election period had not ended as of the enactment date but who may choose to take advantage of the special election period. These assistance-eligible individuals must be provided notice of their right to obtain a subsidy. In addition, notice must be provided to former employees, and their beneficiaries who were involuntarily terminated after February 17, 2009.

For assistance in implementing your COBRA subsidy program, contact [Stacey A. DeKalb](#) at stacey@lommen.com, 612-336-9310 or [Glenn Kessel](#) at glenn@lommen.com, 612-336-9338.