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## CLIENT ALERT

### American Recovery and Reinvestment Act Revises COBRA Coverage Provisions

On February 17, 2009, President Obama signed into law a bill that makes important changes to the continuation coverage provisions of the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). The law takes effect the first COBRA coverage period beginning on or after February 17, 2009. Under most plans, this will be March 1, 2009.

The American Recovery and Reinvestment Act of 2009 ("ARRA") provides for a temporary federal subsidy to cover 65% of the cost of COBRA coverage for eligible individuals. The subsidy also applies to health care continuation coverage required under state health continuation laws for small employers with fewer than 20 employees that not subject to COBRA.

### Employer Obligations

The ARRA directs that by April 18, 2009, employers or health plan administrators must send a notice to all qualified beneficiaries who were involuntarily terminated between September 1, 2008 and February 17, 2009, informing them of the availability of the COBRA subsidy and the opportunity to enroll in COBRA. Individuals who were involuntarily terminated between September 1, 2008 and February 17, 2009 but failed to initially elect COBRA have an additional 60 days from receipt of this notice to elect COBRA and receive the subsidy.

Employers must also modify their general COBRA election notices to include all of the following information:

- An explanation of the eligibility requirements for the COBRA subsidy;
- The name, address and phone number of the plan administrator if the individual has questions or requires more information;

- A description of the individual's option to enroll in different coverage, if the employer so permits; and
- A description of the participant's obligation to notify the plan about subsequent eligibility for coverage under another employer-sponsored health plan or Medicare, as well as the penalty for failure to do so.

While the Department of Labor is expected to issue model notices no later than March 19, 2009, employers should take steps to modify their notices now, as failure to comply with the ARRA notice requirements will be treated as a failure to provide adequate COBRA notification under the existing COBRA penalty provisions under ERISA and the Internal Revenue Code. We are available to assist you in preparing the required COBRA election notices.

### **Payment of the Subsidy**

Under the ARRA, employees will pay 35% of the cost of their premium and the employer will pay the remaining 65%. The employer may then claim tax credit against periodic deposits for wage withholdings and payroll taxes for the amount of COBRA subsidy payments. Generally, the employer is the entity that may claim the tax credit, with two exceptions. In the case of a multi-employer plan, the plan may claim the credit, and in the case of fully insured COBRA-like coverage provided under a state continuation health statute, the insurer is the party entitled to claim the credit. If the employer's claims for COBRA subsidy payments exceed the amount of wage withholdings or payroll taxes reported by the employer, the Internal Revenue Service is required to reimburse the employer directly for the excess amount.

### **Period of the Subsidy**

The maximum period of subsidized COBRA coverage is nine months, followed by unsubsidized coverage for up to nine additional months. The subsidy ends when the eligible participant becomes eligible for any employer-sponsored health coverage or Medicare, or when the 18-month COBRA period expires, whichever is earliest. Eligible employees must notify the health plan when they become eligible under another employer-sponsored health plan or Medicare; failure to do so may result in a penalty tax equal to 110% of the premium subsidy.

### **Employee Requirements**

An individual employee must meet three requirements to qualify for the subsidy:

- (1) The individual must be eligible for COBRA continuation coverage at any time during the period beginning September 1, 2008 and ending December 31, 2009;
- (2) The individual must elect COBRA coverage, either when it is first offered or during the additional election period; and

- (3) The individual's loss of health coverage must be due to involuntary termination of employment (other than by reason of gross misconduct) between September 1, 2008 and December 31, 2009.

Eligible family members also qualify for the subsidy if they lose health insurance coverage as a result of the employee's involuntary termination. However, individuals whose modified adjusted gross income exceeds \$250,000 (for joint return filers) or \$125,000 (for all other filers) are not eligible for the full premium subsidy. Instead, the premium subsidy is phased out for individuals with adjusted gross income of between \$125,000 and \$145,000 (for single filers) and between \$250,000 and \$290,000 (for joint return filers); for such individuals, income tax is increased by a percentage of their total COBRA subsidy received in that year. Similarly, individuals earning more than \$145,000 (\$290,000 for joint return filers) will have their income tax increased by the total amount of the COBRA subsidy they receive.

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The Departments of Labor, Treasury, and Health and Human Services are expected to issue guidelines and help employers to comply with the law. Of course, if you should have any questions regarding the changes to COBRA, please contact us.

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