



Puerto Rico Labor & Employment Update: The American Recovery and Reinvestment Act of 2009's Amendments to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

The American Recovery and Reinvestment Act of 2009 (hereinafter "ARRA") signed on February 17, 2009 by President Obama, contains far-reaching revisions to the group health plan continuation coverage provisions contained in the Consolidated Omnibus Budget Reconciliation Act of 1985 (hereinafter "COBRA"). The new provisions impose additional burdens and hidden costs on the vast majority of employer-sponsors of group health plans, including Puerto Rico based employer-sponsors.

COBRA applies only to employers with twenty (20) or more full-time employees. Likewise, the ARRA amendments only apply to employers with twenty (20) or more employees.

The key concept contained in the new COBRA provisions involves the creation of a new "qualifying event" that provides a 65% COBRA premium subsidy for eligible involuntarily terminated employees and their covered dependents. Pursuant to the Act, an assistance eligible individual is a COBRA "qualified beneficiary" who meets all of the following requirements:

- Is eligible for COBRA continuation coverage at any time during the period beginning on September 1, 2008, and ending December 31, 2009.
- Elects COBRA coverage (when first offered or during the additional election period discussed below); and
- Has a qualifying event for COBRA coverage that is the employee's involuntary termination during the period beginning on September 1, 2008, and ending December 31, 2009.

Those who are eligible for other group health coverage (such as a spouse's plan) or Medicare are not eligible for the premium reduction.

The subsidy is effective on and after the date of the enactment of the ARRA (February 17, 2009), or March 1, 2009 for "monthly period of coverage" plans. ARRA requires the employer to "front" the subsidy by collecting only 35% of the applicable COBRA premium from the former employees. The employer is then reimbursed from the employer's quarterly federal payroll tax transmittals for the 65% COBRA premium subsidy (or with a direct payment, if payroll tax transmittals are insufficient). For the purposes of ARRA, "payroll taxes" includes amounts to be withheld for federal income taxes and the employer and employee portions of FICA (including Social Security and Medicare taxes). Consequently, Puerto Rico employers will have to complete lines 12a, 12b, and 13 of IRS Form 941-PR (Rev. 01-2009) in order to recover subsidy payments made pursuant to the ARRA.

Pursuant to ARRA, the employer may choose to make available to these subsidy-eligible employees any other broad-based medical coverage option that is also offered to active employees that has the same or a lower premium than the option in which the employee was enrolled prior to termination. The subsidy will end no later than the earlier of nine (9) months after the first day of the first month the subsidy coverage begins, or on the date COBRA would otherwise expire. However, the subsidy will end sooner for a covered individual if he or she becomes eligible for coverage: (1) under another group health plan (other than coverage consisting of only dental, vision, counseling or referral services, or a combination thereof, or coverage under a health flexible spending account or a health reimbursement arrangement); or (2) under Medicare or Medicaid. The subsidy does not apply to health care flexible spending accounts.

All persons receiving the subsidy are required to notify employers of events which would cause the subsidy to cease, such as eligibility for other group healthcare coverage or Medicare. Under the ARRA, absent reasonable cause, the failure to provide this notice would subject the individual to a penalty equal to 110% of the premium reduction provided after termination of eligibility. The Department of Labor has been directed to specify the time and manner of such notice.

In order to qualify for the subsidy, the employee must be otherwise eligible for COBRA coverage (which means that the “gross misconduct” exclusion still applies), and must have been involuntarily terminated on or after September 1, 2008, but on or before December 31, 2009 (and become eligible for COBRA coverage during that period). If the election period had already expired on ARRA’s effective date, the employer is required to provide a COBRA notice and a new sixty (60) day election period to any subsidy eligible former employee who did not elect COBRA. The effective date of such coverage would be the enactment date of the new law (February 17, 2009). However, for purposes of determining the maximum COBRA period, the COBRA “qualifying event” is the date on which the health coverage is lost on account of the employee’s involuntary termination of employment. The period of non-coverage may not be counted toward any pre-existing condition exclusion. The “retroactive” COBRA notice must be provided within sixty (60) days of the enactment of ARRA, meaning on or before April 18, 2009. Any denial of eligibility (such as a gross negligence determination) will be subject to expedited review by the Department of Labor.

Any subsidy-eligible former employee who is paying full COBRA premiums when the law is enacted will also be entitled to the subsidy commencing as of the date of enactment or, for “monthly period of coverage” plans, on March 1, 2009. The employer will be required to refund the excess (retroactive to the enactment date) or provide a credit in future premium payments for the employer-maintained overpayment (to be made up within six months). The employer will be entitled to recover these amounts from its quarterly payroll tax transmissions. There is no premium reduction for periods of coverage that began prior to February 17, 2009.

Although the subsidy is available to all assistance-eligible individuals, up to 100% of the subsidy will be assessed as an additional federal income tax for those classified as “high income individuals”. For these individuals, the subsidy will be assessed as an additional tax on a sliding scale. For single filers, the phase in starts at a modified adjusted gross income of \$125,000 with full 100% tax assessment for those earning at least \$145,000 and, for joint filers, the phase in starts at a modified adjusted gross income of \$250,000, with full 100% tax assessment for those earning at least \$290,000. A “high income individual” may waive the subsidy by notifying his or her former employer and paying the full COBRA premium, thereby avoiding having to report the subsidy and paying the subsidy back in the form of income tax on his or her annual tax return.

Under ARRA, employers are required to amend their COBRA notices to inform all individuals who become eligible between September 1, 2008 and December 31, 2009, of the following:

1. The forms necessary for establishing eligibility for the premium subsidy;
2. Contact information of the plan administrator and any other person with information regarding the premium subsidy;
3. A description of the extended election opportunity for those who previously declined COBRA continuation coverage;
4. A description of an assistance eligible individual's obligation to notify the plan when he or she becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for failure to do so;
5. A prominent description of the qualified beneficiary's right to the COBRA subsidy and any conditions on such right; and
6. A description of the option to enroll in different coverage under the health plan, if applicable.

Such notice may either be incorporated into other COBRA materials explaining election rights or be sent with other COBRA materials as a separate notice.

The notice shall be provided within sixty (60) days after the enactment of ARRA (by April 18, 2009). The U.S. Department of Labor has issued model notices which can be found at <http://www.dol.gov/ebsa/COBRAmodelnotice.html>.

Although ARRA became effective on February 17, 2009, it contains a grace period of two (2) full COBRA billing periods subsequent to the Act's effective date within which to commence the subsidy, so long as appropriate premium credits (or refunds) are provided in subsequent periods.

Please contact the following attorneys if you have any further questions regarding ARRA's amendments of COBRA:

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