



**THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**  
**February 2009**

The massive \$787.2 billion economic recovery package signed into law as the American Recovery and Reinvestment Act of 2009 by President Obama on February 17 will impact employers in several ways. While most of the attention has been focused on the COBRA subsidy provisions, there are several other employment-related provisions in the bill including business tax credits, expanded unemployment benefits, executive compensation limitations, and new restrictions on H-1B visas that employers need to be aware of and plan for.

**Changes to COBRA Rules Effecting Employers:**

The American Recovery and Reinvestment Act creates federal subsidies for the COBRA premiums of employees involuntarily terminated between September 1, 2008 and December 31, 2009.

**Applicability and Effective Date:**

Although insurance companies will continue to administer to COBRA, provisions of the Act will affect both federal COBRA and Cal-COBRA programs and most employers must comply as of their next premium billing period (March 1<sup>st</sup>).

References to COBRA throughout this memo also refer to Cal-COBRA.

**New Subsidy for COBRA Beneficiaries:**

The Act provides a 65% subsidy for the COBRA premiums of eligible individuals, leaving them responsible to pay 35% of the cost of coverage.

The subsidy expires after nine months, the date the individual becomes eligible for major medical coverage or Medicare, or when COBRA coverage ends; whichever comes first.

Subsidies apply to group health plans, but not to plans that provide only dental, vision, counseling or referral services, or to healthcare flexible spending arrangements.

**Eligibility, Income Testing and Timing:**

Eligibility is tied to income. Individuals with less than \$125,000 of modified adjusted gross income (and joint filers with less than \$250,000) are eligible for the full subsidy. It is phased out completely when AGI reaches \$145,000 and \$290,000 respectively.

Assuming that income guidelines are met, the subsidy is available to anyone (employee or dependents) for whom involuntary termination created a COBRA qualifying event as

of September 1, 2008. Individuals who elected COBRA on or after September 1<sup>st</sup> are eligible to receive the subsidy prospectively from March 1<sup>st</sup>; but it is not retroactive.

**Special Election Period and Notification Requirements:**

The Act also creates a second election period for individuals who did not enroll in COBRA , as well as for individuals who enrolled but dropped coverage because it was too expensive. Plan administrators must notify all individuals who terminated employment beginning September 1, 2008 of the new subsidy. Information about the special election period, which runs from February 17<sup>th</sup> until sixty days after the plan administrator sends out the newly required notice, must be included.

A sample notice is expected from the Department of Labor by March 19<sup>th</sup>. Failure to comply with notice requirements is a COBRA violation, subject to the standard penalties of up to \$110/day under ERISA and \$100/notice/day under the IRS Code.

**Mechanics of the Premium Subsidy:**

Any entity that collects premium for COBRA coverage (employers, third-party administrators or insurance companies) must immediately begin collecting only 35% of that premium from individuals who are eligible for the subsidy program. Employers will make up the difference and be reimbursed by the federal government through reductions in payroll taxes.

**Additional Information:**

Although not required, employers have the option of allowing COBRA eligible individuals to change to other comparably-priced or less expensive plans within 90 days of receipt of the COBRA election notice, as long as those plans are part of the company's current plan offering.

Individuals receiving a subsidy must notify the plan administrator in writing if they no longer qualify. Failure to do so can subject them to a significant penalty (110% of the subsidy amount).

An eligible individual who does not receive a subsidy may appeal to the Department of Labor, which must rule on the appeal in 15 days. Individuals whose appeal is denied may sue under ERISA.

Depending on the economic outlook, Congress may elect to extend this act.

**Action Items:**

If your company is subject to Cal-COBRA you can expect your health insurance carrier to provide additional information and to continue administering your program.

If your company is subject to federal COBRA, you may find the following list of action items helpful:

- Identify employees and former employees (including their eligible spouses and dependents) who are both eligible to elect COBRA and experienced involuntary termination on or after September 1, 2008.
- Update your existing COBRA communications and notices and prepare a new notice for the special election group. (Sample notices are being prepared by the Department of Labor.)
- Revise your payroll system and procedures to track COBRA premium subsidy payments.
- Establish a process to gather in information needed to accompany your claim for a tax credit.

## **Beyond COBRA: What Does the Stimulus Package Have for Employers?**

### **The Employment Tax Provisions**

#### **State Unemployment Insurance:**

The Act provides significant funds to expand the amount of unemployment benefits, eligible circumstances qualifying for benefits and the duration of unemployment benefits. As a result of these changes, employers are likely to pay higher unemployment insurance taxes and face increasing scrutiny of their utilization of independent contractors as the government enforcement agencies will have more resources to process and audit worker status claims.

The increase in benefits coupled with the current high levels of unemployment are likely to result in employers being pushed into the highest unemployment tax brackets for the next three or more years.

From an employees perspective, unemployment insurance benefits have been taxable income to such recipients for at least federal tax purposes. Under this Act, the first \$2,500 received will not be subject to federal income taxes during 2009.

Keep in mind, state computer systems and administrative processes will require modification likely leading to much confusion in making both eligibility and benefit determinations. Employers will have to be vigilant to avoid excessive benefit charges.

It is anticipated that the increased state resources will significantly increase the number of misclassification audits. Employers are strongly advised to conduct an internal review of the utilization and classification of independent contractors.

#### **Income Tax Payroll Holiday:**

This is what is known as the "Making Work Pay" credit allowing for an adjustment of the federal income tax withholding tables to potentially allow single and couples filing jointly to reduce the amount of income taxes withheld by up to \$400 for singles and \$800 for couples in 2009 and 2010. These phased out "credits" are available only to individuals earning \$97,000 or less per year or \$190,000 for couples.

The IRS will be issuing revised withholding tables that will need to be loaded into an employer's payroll system. As this process will not be implemented immediately, such tables will be adjusted to reflect prospectively credits retroactive to January 1, 2009.

It is anticipated that additional paperwork will be required from employees. Employers do not appear to have any choice but to utilize the adjusted tables even though employees have the option to take this credit as part of filing their 2009 2010 tax returns.

**Work Opportunity Tax Credit:**

The WOTC, a voluntary program by which employers earn a tax credit for hiring individuals from one or more specific groups has been expanded. Under the Act, employers are eligible to earn a tax credit for hiring unemployed veterans and disconnected youths after December 31, 2008.

**Earned Income Tax Credits:**

Earned Income Tax Credits are temporarily increased for employees with three or more children. To the extent that an employee has provided notice of EIIC eligibility to an employer, the amount of funds provided by an employer under the advance payment system may increase for 2009 2010.

**Qualified Transportation Fringe Benefit Level Increased for Commuters:**

The law adjusts the pre-tax or subsidized transit pass and vanpool amount for 2009 beginning in March 2009 from the present value of \$120 per month to \$230 per month. The law does not require that employers make these adjustments nor does it require that any such adjustments be made effective March 1.

While the cap has risen, it is still limited to the lesser of \$230 or the actual qualified expenses incurred. Employers are not required to increase their existing subsidies but should advise their employees as to their intention before March 1.

**Government Contractor Withholding Postponed:**

As part of the 2005 law, government contractors were obliged after 2010 to begin withholding 3% from their payments to subcontractors and remit this to the IRS as a pre-payment of income taxes owed by such contractors. The Act has now delayed the effective date of this provision for an additional year.

**Executive Compensation Limitations:**

In response to the public's disapproval of current compensation legislation for troubled companies, the Act amends the corporate governance and executive compensation requirements of the Troubled Asset Relief Program. These limitations apply on a sliding scale to a TARP Recipient's employees depending upon the amount of financial assistance received.

## **Immigration-Related Provisions**

### **H-1B Visa Program Amendments:**

The stimulus package includes a number of immigration-related provisions. The most controversial one severely limits the ability of employers receiving bail-out funds to sponsor H-1B employees.

### **E-Verify Amendment:**

The E-Verify amendment was eliminated from the final version of the stimulus bill. Business groups have taken the position that while the verification of US employment authorization is a laudable goal, putting this immigration enforcement burden on employers in this way creates additional delays and complications in hiring, which is especially counterproductive in this ailing economy.

There are signs that the federal government may be moving away from E-Verify.

### **Unemployment Benefits for Non-Citizens or Permanent Residents:**

Under the stimulus package, workers receiving unemployment benefits who are not US citizens or permanent residents will be required to have their immigration status re-verified if the initial documentation that they provided expires at any time while they are receiving unemployment benefits. The purpose of this provision is to ensure that unemployment benefits will go only to people who are eligible to work legally in the US.

### **Other Immigration Provisions:**

It is also worth noting that this package bill prohibits the issuance of a stimulus loan to any company that the Secretary of Homeland Security or Attorney General have determined engaged in a pattern or practice of hiring or recruiting unauthorized workers.

**NOTE: This summary is NOT intended as legally advise. It is purely a summary of a very complex bill and is intended to point out areas that CFO's HR & Payroll professionals need to be aware of.**

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