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**An Introduction to the Temporary
Federal Subsidy for COBRA Premium
Assistance Under the American
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The American Recovery and Reinvestment Act of 2009 (“ARRA” or the “Act”)¹ was signed on February 17, 2009 with the announced purpose of providing a massive economic stimulus to the U.S. economy. In addition to subsidies for transportation, green technologies, and infrastructure (among others), the Act includes temporary provisions requiring employers to provide Federally subsidized premium assistance to certain former employees—referred to as “assistance eligible individuals”—who timely elect health care continuation or “COBRA” coverage.² Section I of this outline provides a summary of the law prior to the Act. Because these rules are likely to be familiar to readers seeking to understand the Act’s COBRA subsidy, the treatment of prior law is cursory, at best. Section II describes the Act’s COBRA premium assistance subsidy. Section III deals with compliance. This outline will be updated from time-to-time to reflect guidance issued under the Act and related developments.

I. Background

Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”)³ requires employers who offer health insurance to continue coverage for their employees under certain circumstances.⁴ The law affects private sector employer group health plans through amendments to the Employee Retirement Income Security Act (“ERISA”)⁵ and the Internal Revenue Code (the “Code”).⁶ COBRA continuation coverage for employees of state and local governments is required under amendments to the Public Health Service Act (“PHSA”).⁷ Continuation coverage similar to COBRA is provided to federal employees under the Federal Employees Health Benefits Plan (“FEHBP”).⁸

A. Overview of the COBRA mandate

Under COBRA, employers must offer the option of continued health insurance coverage at group rates to qualified employees and their families who are faced with loss

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¹ Pub. L. No. 111-5 (Feb. 17, 2009) [hereinafter ARRA].

² *Id.* at Title III, §§ 3000-3001.

³ Pub. L. No. 99-272, Title X (Apr. 7, 1986) (codified as amended at 29 U.S.C. §§ 1161-1169 (2006)). The treatment of the COBRA health care continuation rules in this Section I is adapted from a Congressional Research Service Report entitled “Health Insurance Continuation Coverage Under COBRA.” Janet Kinzer, Congressional Research Service, No. R40142, *Health Insurance Continuation Coverage Under COBRA* (January 16, 2009).

⁴ Kinzer, *supra* note 3, at 1.

⁵ Pub. L. No. 93-406 (codified as amended at 29 U.S.C. § 1001, *et seq.* (2006)).

⁶ 26 U.S.C. §1, *et seq.* [hereinafter I.R.C.] (2006, as amended).

⁷ 42 U.S.C. §§ 300bb-1-300bb-8 (2006, as amended).

⁸ 5 U.S.C. §§ 8901-8914 (2006, as amended).

of coverage due to certain events.⁹ Coverage generally lasts 18 months but, depending on the circumstances, can last for longer periods. COBRA covers all employers, except the following:

(i) Small employers. Employers with fewer than 20 employees are not covered under COBRA. An employer is considered to meet the small employer exception during a calendar year if on at least 50% of its typical business days during the preceding calendar year it had fewer than 20 employees.

(ii) Church plans.

(iii) Federal, state, and local governments (other than as required by the PHSA and under FEHB).

B. *Qualified beneficiaries and qualifying events*

Qualified beneficiaries are those individuals who benefit from the COBRA health care continuation rights. The term “qualified beneficiary” means and includes: (i) an employee covered under the group health plan who loses coverage due to termination of employment (other than by reason of gross misconduct) or a reduction in hours; (ii) a retiree who loses retiree health insurance benefits due to the former employer’s bankruptcy under Chapter 11; (iii) a spouse or dependent child of the covered employee who, on the day before the “qualifying event,” was covered under the employer’s group health plan; or (iv) any child born to or placed for adoption with a covered employee during the period of COBRA coverage.¹⁰

Circumstances that trigger COBRA coverage are known as “qualifying events.”¹¹ A qualifying event must cause an individual to lose health insurance coverage. Losing coverage means ceasing to be covered under the same terms and conditions as those available immediately before the event. Qualifying events affecting “covered employees” include termination of employment (for reasons other than gross misconduct) or a reduction in hours of employment. In addition, spouses and dependents experience qualifying events leading to their loss of health insurance coverage in the event of (i) the death of the covered employee, (ii) divorce or legal separation from the employee, (iii) the employee’s becoming eligible for Medicare, and (iv) the end of a child’s dependency under a parent’s health insurance policy.¹² Retiring employees must also have certain COBRA rights including instances where a former employer terminates the retiree health plan in bankruptcy reorganization under Chapter 11. If an individual is not covered under the employer’s health plan at the time of a qualifying event, the individual is not entitled to elect COBRA coverage.

⁹ Kinzer, *supra* note 3, at 1-2.

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.* at 3.

Continuation coverage must be identical to that provided to “similarly situated non-COBRA beneficiaries.”¹³ The term “similarly situated” is intended to ensure that beneficiaries have access to the same options as those who have not experienced a qualifying event.

C. *Duration of COBRA coverage*

COBRA coverage varies depending on the qualifying event.¹⁴

(i) When a covered employee experiences a termination or reduction in hours of employment, the continued coverage for the employee and the employee’s spouse and dependent children must continue for 18 months.

(ii) Retirees who lose retiree health insurance benefits due to the bankruptcy of their former employer may elect COBRA coverage that can continue until their death. The spouse and dependent children of the retiree may continue the coverage for an additional 36 months after the death of the retiree.

(iii) For all the other qualifying events listed above (death of employee, divorce or legal separation from employee, employee’s becoming eligible for Medicare, the end of a child’s dependent status under the parents’ health policy), the coverage for the qualified beneficiaries must be continued for 36 months.

A different set of rules apply to disabled individuals.¹⁵ If the Social Security Administration makes a determination that the date of an individual’s onset of disability occurred during the first 60 days of COBRA coverage or earlier, the employee and the employee’s spouse and dependents are eligible for an additional 11 months of continuation coverage. This is a total of 29 months from the date of the qualifying event (which must have been a termination or reduction in hours of employment). This provision was designed to provide a source of coverage while individuals wait for Medicare coverage to begin. After a determination of disability, there is a five-month waiting period for Social Security disability cash benefits and another 24-month waiting period for Medicare benefits.

Under some conditions, COBRA coverage can end earlier than the full term.¹⁶ Although coverage must begin on the date of the qualifying event, it can end on the earliest of (i) the first day for which timely payment of the premium is not made; (ii) the date on which the employer ceases to maintain any group health plan; (iii) the first day after the qualified beneficiary becomes actually covered (and not just eligible to be covered) under another employer’s group health plan,¹⁷ unless the new plan excludes

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *But see Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998) (holding that a plan may not deny COBRA coverage to an eligible beneficiary on the grounds that he is covered under another group health plan at the time of his COBRA election).

coverage for a preexisting condition; or (iv) the date the qualified beneficiary is entitled to Medicare benefits. In most cases, the Social Security Administration makes its disability determination later than within the first 60 days of COBRA coverage; however, the date of the disability onset can be set retroactively to a date within the first 60 days.¹⁸

If an individual is receiving COBRA benefits and becomes eligible for Medicare during the 18 month period, COBRA regulations allow COBRA benefits to terminate.¹⁹ In this case, the retiree's covered family members are eligible for 36 months of COBRA coverage under the Health Insurance Portability and Accountability Act of 1996²⁰ ("HIPAA") and the new health plan cannot impose a preexisting condition limitation.

D. *Notice requirements*

COBRA imposes certain notice requirements.²¹ At the time an employee first becomes covered under a health plan, the plan administrator must provide written notification to the employee and his or her spouse regarding COBRA rights if a qualifying event should occur. This is referred to as the "initial notice." Thereafter, upon the occurrence of a qualifying event, the following notices are required:

(i) The employer must notify the plan administrator of the event within 30 days of the death of the employee, a termination, a reduction in hours, the employee's becoming entitled to Medicare, or the beginning of bankruptcy proceedings.

(ii) Within 14 days of receiving the employer's notice, the plan administrator must notify, in writing, each covered employee and his or her spouse of their right to elect continued coverage.

(iii) The employee must notify the employer or plan administrator within 60 days of a divorce or legal separation of a covered employee or a dependent child's ceasing to be a dependent of the covered employee under the policy.

(iv) COBRA beneficiaries who are determined by the Social Security Administration to have been disabled within the first 60 days of COBRA coverage must notify the plan administrator of this determination in order to be eligible for the additional 11 months of coverage. They must provide this notice within 60 days of receiving the Social Security Administration's decision.

A qualified individual must choose whether to elect COBRA coverage within an election period.²² This period is 60 days from the later of two dates: the date coverage would be lost due to the qualifying event or the date that the beneficiary is sent notice of

¹⁸ Kinzer, *supra* note 3, at 4, n. 4.

¹⁹ *Id.* at 5.

²⁰ Pub. L. No. 104-191 (Aug. 21, 1996).

²¹ Kinzer, *supra* note 3, at 6.

²² *Id.* at 6.

his right to elect COBRA coverage. The beneficiary must provide the employer or plan administrator with a formal notice of election. Coverage is retroactive to the date of the qualifying event. The employee or other affected person may also waive COBRA coverage. If that waiver is then revoked within the election period, COBRA coverage must still be provided. However, coverage begins on the date of the revocation rather than the date of the qualifying event. The Trade Act of 2002²³ provided for a temporary extension of the election period for those individuals who qualified for the Health Coverage Tax Credit (“HCTC”). Under the provision, if qualified individuals who did not elect COBRA coverage during the regular election period can elect continuation coverage within the first 60-day period beginning on the first day of the month when they were determined to have met the qualifications of the HCTC.

E. *Paying for COBRA coverage*

Employers are permitted to charge 100% of the premium (both the portion paid by the employee and the portion paid by the employer, if any), plus an additional 2% administrative fee.²⁴ For disabled individuals who qualify for an additional 11 months of COBRA coverage, the employer may charge 150% of the premium for these additional months.²⁵ The plan must allow a qualified beneficiary to pay for the coverage in monthly installments, although alternative intervals may also be offered.

Some states require insurers to offer group health plan beneficiaries the option of converting their group coverage to individual coverage.²⁶ Conversion enables individuals to buy health insurance from the employer’s plan without being subject to medical screening. Under HIPAA, a person moving from the group to the individual insurance market is guaranteed access to health insurance coverage either under federal requirements or an acceptable alternative state mechanism. The beneficiary must have exhausted all COBRA coverage before moving to the individual market. Although the policy must be issued, the premium might be higher than the premium under a group plan. Despite the higher premiums, the conversion option may be attractive to a person who would otherwise have difficulty obtaining health insurance because of a major illness or disability.

F. *COBRA penalties*

Group health plans are subject to an IRS excise tax for each violation involving a COBRA beneficiary.²⁷ In general, the tax is \$100 per day per beneficiary for each day of the period of noncompliance. ERISA also contains civil penalties of up to \$100 per day for failure to provide the employee with the required COBRA notifications. State and local plans covered under the PHSA are not subject to the same financial penalties provided under the tax code or ERISA. However, state and local employees do have the right to bring an “action for appropriate equitable relief” if they are “aggrieved by the

²³ Pub. L. No. 107-210 (Aug. 6, 2002); see Kinzer, *supra* note 3, at 6.

²⁴ Kinzer, *supra* note 3, at 6.

²⁵ *Id.* at 6-7.

²⁶ *Id.* at 7.

²⁷ *Id.* at 7.

failure of a state, political subdivision, or agency or instrumentality thereof” to provide continuation health insurance coverage as required under the act.

G. *Pre-existing limits under HIPAA Title I*

HIPAA Title I establishes a series of rules relating to health plan portability, including limitations on a group health plan’s ability to impose pre-existing conditions. Code § 9801 (and the parallel provisions of ERISA and the PHSA) provides that a group health plan may impose a pre-existing condition exclusion for no more than 12 months after a participant or beneficiary’s enrollment date. This 12-month period is further reduced by the aggregate period of creditable coverage (which includes periods of coverage under another group health plan). For this purpose, a period of creditable coverage can be disregarded if, after the coverage period and before the enrollment date, there was a 63-day period during which the individual was not covered under any creditable coverage. The Act’s COBRA premium assistance rules modify these rules in certain respects as outlined below.

II. COBRA Premium Assistance

A. *The reduced COBRA premium*

Under the Act’s COBRA subsidized premium assistance rules,²⁸ each “assistance eligible individual” is treated as having paid the full amount of the premiums for his or her COBRA continuation coverage for a period of up to nine months if he or she pays 35% of the premium. (While the Act refers to these payments as “premium assistance,” they have also come to be known and referred to as the “COBRA subsidy.” These terms are used interchangeably in this outline.) The employer, plan, or carrier (depending on the nature and source of the health care continuation obligation) must pay the remaining 65% of the cost of the COBRA continuation coverage. Model notice forms and an accompanying set of questions and answers issued March 19, 2009²⁹ by the Department of Labor clarify that qualified beneficiaries must file an election declaring themselves as assistance eligible individuals in order to receive premium assistance payments. The system thus requires an “opt-in.” As explained in greater detail below, the plan, employer, or carrier is allowed to recoup the subsidy generally through the mechanism of a tax credit against employment taxes.

(1) Assistance eligible individual defined

An “assistance eligible individual” is any qualified beneficiary who elects COBRA continuation coverage and (i) whose loss of group health plan coverage is (or was) on account of an involuntary termination of employment other than by reason of gross misconduct; (ii) who is (or was) eligible for COBRA coverage during the period beginning September 1, 2008 and ending December 31, 2009; and (iii) who elects coverage in accordance with the requirements of COBRA and the Act.³⁰ Under the Act,

²⁸ ARRA, §§ 3000-3001.

²⁹ See *infra* Part II.I.

³⁰ ARRA, § 3001(a)(3).

“qualified beneficiary” is defined with reference to ERISA Section 607(3); accordingly, individuals who are defined as “qualified beneficiaries” under a state “Mini-COBRA” statute, but would not be considered “qualified beneficiaries” under ERISA, are not eligible to for the premium assistance.³¹ An assistance eligible individual can be *any* qualified beneficiary associated with the relevant covered employee.³² For example, a dependent of an employee who is covered immediately prior to a qualifying event can be an assistance eligible individual. As such, he or she can independently elect COBRA in the manner provided under present law and independently receive a subsidy. Moreover, the subsidy for an assistance eligible individual continues after an intervening death of the covered employee.

Eligibility is measured based on the occurrence of the involuntary termination, and not the date that coverage is lost. Thus, where termination occurs before September 1, 2009, but the loss of coverage occurs after that date, neither the covered employee nor his or her qualified beneficiaries are eligible for premium assistance.³³

Any other individual or entity, e.g., a parent or guardian, or a state agency or charity (other than the assistance eligible individual’s employer), may make COBRA premium payments on behalf of an assistance eligible individual. If the employer pays any portion of the employee’s premium payment, then that payment is generally treated the same as an employer severance payment, which reduces the amount on which the subsidy is based. (See Section II.C. below for a discussion of the coordination of employer severance and the determination of the subsidy amount).

An individual may be an assistance eligible individual more than once. For example, an individual becomes an assistance eligible individual as the result of a loss of coverage due to voluntary termination on April 1, 2009. On July 1, 2009, the individual ceases to be an assistance eligible individual by virtue of his eligibility under his spouse’s plan. On November 1, 2009, the individual again loses coverage due to his spouse’s involuntary termination of employment. The individual is allowed up to nine months of premium assistance with respect to each of the April 1, 2009 and November 1, 2009 involuntary terminations.³⁴

(2) COBRA continuation coverage defined

For purposes of the Act’s subsidy requirements, the term “COBRA continuation coverage”³⁵ means health care continuation coverage provided under:

³¹ See Center for Medicare & Medicaid Services, Helpful Information About State Continuation Coverage (“Mini-COBRA” Programs) and the American Recovery and Reinvestment Act of 2009 (ARRA), at 3 (Q&A 7), available at http://www.cms.hhs.gov/COBRAContinuationofCov/Downloads/Helpful_Information_State_COBRA_ARRA.pdf (last visited Apr. 14, 2009).

³² See I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 10).

³³ See *id.* at __ (Q&A 13).

³⁴ See *id.* at __ (Q&A 17 and 43).

³⁵ ARRA, § 3001(a)(10)(B).

(a) ERISA § 601 (but not ERISA § 609 relating to medical child support orders). This reference includes private sector group medical, dental, and vision plans (as well as, presumably, Health Reimbursements Accounts), but it excludes small plans;

(b) Title XXII of the PHSA. This reference picks up the plans and arrangements described in item (a) above when maintained by governmental employers;

(c) Code § 4980B. These plans will be similar to those described in (a) above;

(d) 5 U.S.C. § 8905a (i.e., the Federal Employees Health Benefit Plan); or

(e) a state program that provides comparable continuation coverage (i.e., state mini-COBRA laws).³⁶

COBRA continuation coverage does not, however, include coverage under a health flexible spending account maintained under a cafeteria plan.

(3) “Premium” defined

The Act refers to, but does not define, the term “premium.” The Department of Labor has clarified that premiums include the 2% administrative charge.³⁷ Thus, for example, if the month cost of continuation coverage is \$1,000, and the employer or plan tacks on the full 2% administrative charge permitted by law, then the “premium” against which the 65% subsidy is measured is \$1,020.

The “premium” is determined net of the subsidy.³⁸ Thus, if the employer agrees to pay 100% of the cost of COBRA coverage for the first two months following involuntary termination during the period beginning September 1, 2008 and ending December 31, 2009, then the subsidy during the first two months is zero.

(4) Treatment of “non-federal dependents”

The Act defines the term “assistance eligible individual” with reference to eligibility for “COBRA continuation coverage.” The term “COBRA continuation coverage” is defined to mean continuation coverage provided by the Federal COBRA rules. To be an assistance eligible individual, an individual must therefore be eligible for “COBRA continuation coverage” as defined in ERISA, the Code, the PHSA, or under the FEHBP. It matters not whether a plan extends COBRA-like rights to domestic partners, same-sex spouses, or other non-Federal dependents. So, while a plan is free to extend

³⁶ See, e.g., M.G. L. c. 176J, § 9 (requiring Massachusetts small groups with 2 to 19 employees to provide health care continuation coverage in a manner similar COBRA).

³⁷ See Department of Labor, Model COBRA Continuation Coverage Election Notice, Mar. 20, 2009, available at <http://www.dol.gov/ebsa/COBRAGeneralNoticeFullVersion.doc>; see generally *infra* Part II.I.

³⁸ See I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 20).

COBRA-like rights to a non-Federal dependent, these individuals are not entitled to the benefit of the Act's premium assistance.

But how is the subsidy to be applied in the case of a family unit that includes same-sex spouses, civil union partners, and non-dependent children? Notice 2009-27 adopts an "incremental" borrowed from earlier guidance relating to the Health Coverage Tax Credit.³⁹ Under the incremental approach, where there is no additional cost for the coverage provided to the non-Federal dependent, then the full subsidy is available. For example, X has a family plan that covers X, X's domestic partner, and X's two children. The cost for family coverage would not change if coverage was limited to X and X's children. Because there is no additional cost for X's domestic partner, X may claim the subsidy based on the full cost of family coverage. Where the cost would be affected, the amount against which coverage is determined is based only on the incremental cost. Thus, for example, if (i) Y has individual-plus-one coverage for Y and her domestic partner, (ii) the cost of individual-plus-one coverage is \$1,000/month, and (iii) the cost of individual coverage is \$600/month, then the subsidy would be based on \$600/month (i.e., the cost of covering Y alone).⁴⁰

(5) "Involuntary termination"

In Notice 2009-27, the IRS generally defines "involuntary termination" as "a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services."⁴¹ The determination of whether a termination is "involuntary" is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services and the employee had knowledge that he or she would be terminated, the termination is involuntary. More specifically, the Notice sets forth the following situations which are likely to constitute an "involuntary termination":⁴²

- The employer's failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services.
- An employee-initiated termination from employment, if the termination from employment constitutes a termination for good reason due to employer action that causes a material negative change in the employment relationship for the employee.

³⁹ See I.R.S. Notice 2005-50, 2005-27 I.R.B. 14, 15-16 (Q&A A-3).

⁴⁰ See I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 23, 25).

⁴¹ *Id.* at __ (Q&A 1).

⁴² *Id.* at __ (Q&A 1-2, 4-7, 9).

- An involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment, resulting in a loss of health coverage.
- An employee's voluntary termination in response to an employer-imposed reduction in hours, if the reduction in hours is a material negative change in the employment relationship for the employee.
- An employer's action to end an individual's employment while the individual is absent from work due to illness or disability (but mere absence from work due to illness or disability before the employer has taken action to end the individual's employment status is not an involuntary termination).
- Retirement, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's services, and the employee had knowledge that the employee would be terminated.
- A termination for cause.⁴³
- Resignation as the result of a material change in the geographic location of employment for the employee.
- A termination elected by the employee in return for a severance package (a "buy-out") where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee's group will be terminated.

An "involuntary termination" generally does not include:⁴⁴

- A mere reduction in hours, if the reduction in hours is not a reduction to zero. However, an employee's voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee.
- A work stoppage as the result of a strike initiated by employees or their representatives (however, a lockout initiated by the employer is an involuntary termination).

⁴³ For purposes of Federal COBRA, if the termination of employment is due to "gross misconduct" of the employee, the termination is not a qualifying event and the employee and other family members losing health coverage by reason of the employee's termination of employment are not eligible for COBRA continuation coverage. Generally, a denial of COBRA based on "gross misconduct" requires a fairly high level of misconduct, and whether "gross misconduct" exists should be reviewed carefully on a case-by-case basis in light of all applicable facts and case law.

⁴⁴ I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 1, 3, 8).

- Qualifying events such as divorce or a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan (such as loss of dependent status due to aging out of eligibility).
- Death of an employee or absence from work due to illness or disability.

B. *Subsidy-eligible COBRA continuation coverage*

Continuation coverage that qualifies for the subsidy is not limited to coverage required to be offered under the Federal COBRA rules. Rather, it also extends to continuation coverage required under State laws that require continuation coverage comparable to the Federal rules to be accorded to participants in fully insured arrangements.⁴⁵ These requirements are imposed on insurance carriers, not employers. (Due to ERISA’s preemption provisions, which preempt or override state laws that relate to employee benefit plans, states are not permitted to impose these requirements on employers or plans.⁴⁶ They are generally free, however, to regulate carriers under the “insurance saving clause,” which is an exception to the general preemption standard.) The reference here is to state “mini-COBRA” laws that typically apply to groups of under 20 employees. The extension of the subsidy requirements only apply to state laws that are comparable to the Federal COBRA rules. To be comparable, the right generally must be to continue substantially similar coverage as was provided under the group health plan (or substantially similar coverage as is provided to similarly situated beneficiaries) at a monthly cost based on a specified percentage of the group health plan’s cost of providing coverage.

The subsidy applies to *any* group health plan that is otherwise subject to COBRA.⁴⁷ Thus, in addition to medical coverage, this would include stand-alone dental and vision plans and Health Reimbursement Arrangements, but does not include health flexible spending accounts.⁴⁸ This result flows from the Act’s definition of “group health plan,” which is not limited to medical plans but includes dental and vision arrangements among others. While this rule is simple to state, it is not simple to apply. A medical FSA can be an FSA under some circumstances. Under Code § 106(c), a medical FSA is health coverage under which the maximum amount reimbursed is within a specified corridor (i.e., up to 500% of the value of coverage). For purposes of applying this rule, the maximum amount that is reasonably available is the HRA balance.⁴⁹

As a practical matter, medical FSAs that are funded entirely through elective deferrals will not be eligible for the subsidy, but Health Reimbursement Accounts (HRAs) that are fully employer-paid will be eligible. HRAs that are funded with both employee elective deferrals and employer contributions will need to be scrutinized under these rules to determine whether they are subsidy eligible. Subsidies will not be available for an HRA that provides benefits of less than 5 times the employee contribution.

⁴⁵ *Id.* at __ (Background).

⁴⁶ *See* 29 U.S.C. § 1144(a) (2006, as amended).

⁴⁷ ARRA, § 3001(a)(10)(F).

⁴⁸ I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 27).

⁴⁹ *Id.* at __ (Q&A 37).

Notice 2009-27 clarifies that retiree coverage can, in some cases, be treated as COBRA coverage for which premium assistance is available. Where the retiree coverage does not differ from the coverage provided to active employees, it will be treated as COBRA coverage for subsidy purposes, even where the amount charged to retirees is higher than that charged to active employees.⁵⁰ Where, however, retiree coverage is offered under a different group health plan, then the availability of the subsidy depends on when termination occurred: Individuals involuntarily terminated on or after February 17, 2009 are not entitled to the subsidy. Nor are individuals who terminate on or after September 1, 2008 and before February 17, 2009 where entitlement to coverage under the retiree plan continued until February 17, 2009. But where the individual is no longer eligible to elect retiree coverage as of February 17, 2009, the subsidy is available.

The Act includes an expedited 15-day review process under which an individual may request review of a group health plan's denial of treatment as an assistance eligible individual.⁵¹ The Department of Labor will generally determine the form and manner of the review process in consultation with the IRS. The Secretary of Health and Human Services will establish rules governing plans that are required to provide coverage under some other law (e.g., state mini-COBRA laws). The Department will apply a "de novo standard of review" (which means that neither side's position is granted any special deference) and its decision is "final." In the event the DOL's decision is appealed, the reviewing court is directed to grant deference to the DOL's decision.

C. *Duration of eligibility*

COBRA premium assistance under the Act is not coterminous with COBRA coverage. Availability of and access to premium assistance is based on "periods of coverage," a term that was introduced by the Act and elaborated on in subsequent IRS guidance. While the concept appears simple, it is anything but.

(a) *Period of Coverage*

Eligibility for the subsidy generally begins as of the "first period of coverage" during which a qualified beneficiary first satisfies the requirements of an assistance eligible individual.⁵²

A "period of coverage is a one month or shorter period with respect to which an assistance eligible individual is billed for COBRA coverage."⁵³ Where (as is typically the case, a plan bases its COBRA coverage on full calendar months, "periods of coverage" are months, and the first period of coverage commencing after the enactment of the Act begins March 1, 2009. If a plan instead bases its billing for COBRA coverage on the anniversary of an individual's COBRA qualifying event, then period of coverage are based on the anniversary dates. Alternatively, some plans bill for "stub" periods, i.e., the period commencing with the date of the qualifying event and ending on the last day of the

⁵⁰ *Id.* at __ (Q&A 28).

⁵¹ ARRA, § 3001(a)(5).

⁵² *Id.* at § 3301(a)(4)(B)(i).

⁵³ I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 30).

month, in which case the stub period is treated as a full period of coverage.⁵⁴ Therefore, a stub period for which a qualified beneficiary is separately charged is a separate period of coverage. (In their informal remarks on the subject, IRS personnel have acknowledged that this rule could lead to an inequitable result, and it may therefore be changed.)

Where a plan requires that COBRA continuation coverage be paid for based on a calendar month, the plan cannot pro-rate the premium for a partial month of coverage.⁵⁵ But if a plan requires an individual who loses coverage other than on the last day of the month to pay a pro-rata portion of the monthly premium for the first partial month of coverage, then the first period of coverage is the individual's first partial month of coverage. (Note that a different rule applies in the case of the special election described in Section II.D. below.)⁵⁶

(b) Commencement

For an employee who was already on COBRA by reason of an involuntary termination on or after September 1, 2008, coverage will commence March 1, 2009 in the case of a plan that bills for COBRA based on full-month cycles (which is the case for most plans). In the case of an assistance eligible individual who is eligible for the special election opportunity described in Section II.D below, this will be the first period of coverage to which the election applies (i.e., March 1, 2009). For an employee who involuntarily terminates after February 17, 2009 and before January 1, 2010, the subsidy will commence on the date that his or her COBRA coverage commences under the general, pre-Act rules. Where a plan bills for the stub period in the month that an individual is involuntarily terminated, eligibility for the subsidy in the case of an involuntary termination between February 17 and February 27, 2009 will commence before March 1, 2009.

To be eligible for premium assistance under the Act, both the involuntary termination *and* the loss of coverage must occur during the period from September 1, 2008 through December 31, 2009. Thus, if involuntary termination occurs in December 2009 but coverage is not lost because of an employer-provided severance program under which health plan coverage is continued for a period of three months on the same terms and at the same price as provided to active employees, the loss of coverage would not occur until after December 31, 2009. The terminated employee in this instance would not be eligible for the subsidy.

(c) Termination

An assistance eligible individual's eligibility for COBRA premium assistance under the Act ceases on or after:⁵⁷

⁵⁴ *Id.*

⁵⁵ *Id.* at __ (Q&A 31).

⁵⁶ *Id.* at __ (Q&A 32).

⁵⁷ ARRA, § 3001(a)(2).

(1) the first date that the assistance eligible individual is eligible for coverage under any other group health plan, except that eligibility for coverage under another group health plan does not terminate eligibility for the subsidy if the other group health plan:

(i) provides only dental, vision, counseling, or referral services (or a combination of the foregoing);

(ii) is a health flexible spending account or health reimbursement arrangement; or

(iii) provides treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of such care).

(2) when the assistance eligible individual first becomes *eligible* for benefits (whether he or she actually enrolls is irrelevant) under title XVIII of the Social Security Act; or

(3) the earlier of nine months after the first day of the first month that the subsidy becomes available to the individual, or the date following the expiration of the maximum period of continuation coverage required under the applicable COBRA continuation coverage provision. Thus, the maximum period for which the subsidy can be provided is nine months.

Note that the Act does not change any time periods set forth under a state “Mini-COBRA” law. Accordingly, *e.g.* if a state Mini-COBRA law provides for a six month maximum length of continuation coverage, that maximum limit is not changed by the Act.⁵⁸

Where an assistance eligible individual becomes eligible for coverage under another group health plan or Medicare, the Act requires the individual to notify the group health plan in writing.⁵⁹ Failure to do so results in a penalty equal to 110 percent of the subsidy provided after termination of eligibility. This penalty only applies, however, if the subsidy in the form of the premium reduction is actually provided to a qualified beneficiary for a month that the beneficiary is not eligible for the reduction.⁶⁰ There is no requirement that the employer refund any subsidy for which a covered employee is ineligible, nor is the employer entitled to any portion of the penalty.⁶¹

Importantly, the conditions under which eligibility for the COBRA subsidy cease differ from the conditions under which the underlying COBRA continuation rights cease. While mere eligibility for Medicare, for example, is sufficient to end the right to the

⁵⁸ See Helpful Information About State Continuation Coverage, *supra* note 31, at 3 (Q&A 5).

⁵⁹ ARRA, § 3001(a)(2)(C).

⁶⁰ *Id.* at § 3001(a)(13)(A) (amending I.R.C. § 6720C(a)).

⁶¹ See I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 42).

subsidy, actual Medicare enrollment is required to terminate COBRA coverage. Similarly, an assistance eligible individual may enroll in a group health plan that includes a preexisting condition limitation, thereby retaining the right to COBRA coverage but, at the same time, giving up the right to the subsidy under the Act.

(d) Coordination with Employer Severance Payments

Notice 2009-27 clarifies the rules relating to the coordination of employer severance payments and other subsidies with the Act's premium assistance rules. The general rule is that COBRA rights commence with, and the period of COBRA coverage is measure from the date of, the qualifying event.⁶² Code § 4980B(f)(8) contains an exception to this rule, however, under which a plan can elect to have the COBRA period commence with the loss of coverage (if later than the qualifying event). This right is sometimes referred as a "deferred loss of coverage." The subsidy is based on the commencement of the COBRA period taking into account Code Section 4980B(f)(8). Thus, as a matter of plan design, employers can provide that the Act's premium subsidy follows a period of severance, but if the plan is silent in the matter, the employer's severance payments will reduce or eliminate the subsidy. The following examples from the notice illustrate how the rules work:⁶³

Example 2. The employer requires active employees to pay \$200 per month for health coverage. For involuntarily terminated employees, the severance benefits include continued health coverage at the cost of \$200 per month for six months after termination. After the six-month severance period, the terminated employee must pay \$1,000 per month for the remainder of the COBRA continuation coverage. The employer considers the loss of coverage to occur on the last day coverage is in effect before the severance benefits begin to take effect; that is, the employer considers the six-month severance period to be part of the terminated employee's COBRA continuation coverage period, during which the employer pays \$800 toward the cost of the terminated employee's COBRA continuation coverage.

For the first six months, an assistance eligible individual is entitled to COBRA continuation coverage upon the timely payment of \$70 (35 percent of \$200); for the next three months, the individual is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000). The employer's resulting payroll tax credit is \$130 (65 percent of \$200) for the first six months and \$650 (65 percent of \$1,000) for the next three months.

Example 3. Same facts as Example 2, except that the employer considers the loss of health coverage and the beginning of the terminated employee's COBRA continuation coverage period to occur at the end of

⁶² Treas. Reg. § 54.4980B-7, Q&A 7.

⁶³ I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 20, Examples 2 and 3).

the six-month severance period. For the first six months after termination of employment, the terminated employee is not eligible for COBRA continuation coverage and is not an assistance eligible individual. The employee therefore pays \$200 for coverage, and no subsidy applies. The employee elects COBRA continuation coverage at the end of the six-month period and is an assistance eligible individual. For the next nine months, the individual is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000). The employer's resulting payroll tax credit is \$650 (65 percent of \$1,000).

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination (that is, 12 months after the end of the six-month severance period). If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage (i.e., 24 months after the involuntary termination).

While employers are likely to welcome this result, the notice's approach is perhaps not as flexible as they might prefer. The deferred loss of coverage cannot be invoked at will. It must, rather, be adopted as a matter of plan design and reflected in the plan documents. Moreover, it is critically important for employers and other plan sponsors to make certain that the health insurance carrier (in the case of a fully-insured plan) or stop-loss insurer (in the case of a self-funded plan) has agreed to the deferred loss of coverage under Code Section 4980B(f)(8). Otherwise, an employer could inadvertently end up self-insuring a benefit (or being without stop-loss coverage) at the end of the COBRA term.

Notice 2009-27 also permits employers to change their severance arrangements in order to take advantage of the subsidy. Thus, for example, an employer could drop its severance arrangement to the extent that it covers COBRA premiums, and it can even substitute taxable severance pay, without running afoul of the rules.⁶⁴ Employers who previously charged less than the full COBRA premium amount are also free to increase the premium in order to take full advantage of the subsidy.

(e) Cafeteria Plan Contributions

Amounts deducted from employees' pay under a cafeteria plan election are treated as "employer" contributions. This is so because employee deferrals are made under a salary reduction agreement—the employee agrees to a reduction in salary in a specified amount and the employer agrees to contribute a like amount toward the

⁶⁴ *Id.* at __ (Q&A 21, 22).

purchase of some qualified benefits (medical coverage, in this instance).⁶⁵ Thus, amounts contributed toward COBRA under cafeteria plan election (made, for example, in connection with termination) would reduce the subsidy in the same manner as any other direct employer payment toward COBRA coverage.

D. *Special COBRA election opportunity*

The Act provides a special 60-day election period for certain qualified beneficiaries who are eligible for a reduced premium but who had not elected COBRA continuation coverage as of February 17, 2009.⁶⁶ This special election period only applies to an individual who is not covered under COBRA on February 17, 2009, but who would otherwise be an assistance eligible individual during the period beginning February 17, 2009 and ending 60 days following the receipt of notice of his or her right to elect coverage. This right also extends to a qualified beneficiary who elected COBRA coverage before, but who is no longer enrolled on, February 17, 2009 (e.g., because the qualified beneficiary was unable to continue paying the premium). This special election right does not, however, extend the period of COBRA continuation coverage beyond the original maximum required period. COBRA continuation coverage elected by a qualified beneficiary during the special 60-day extended election period is required to begin with the “first period of coverage” beginning on or after February 17, 2009.

Notice 2009-27 establishes a series of rules governing coverage periods under the special election rules. Where a plan requires coverage to be paid on a monthly basis, coverage will commence as of March 1, 2009. But where coverage is based on a monthly period computed from the date of the loss of coverage, the first period of coverage is similarly determined. For example, if the last day of coverage was October 3, 2008, then the first period of coverage after February 17, 2009 is the period March 4, 2009 through April 3, 2009.⁶⁷

Beneficiaries of state mini-COBRA programs are not eligible for the extended election opportunity unless a state chooses to provide it.⁶⁸

E. *Pre-existing conditions*

Under HIPAA’s health insurance portability rules, group health plans may impose a pre-existing condition exclusion for no more than 12 months after a participant or beneficiary’s enrollment date. This 12-month period is reduced by the aggregate period of creditable coverage (which includes periods of coverage under another group health plan). A period of creditable coverage can be disregarded if, after the coverage period and

⁶⁵ See, Prop. Treas. Reg. § 1.125-1(r) (72 Fed. Reg. 43,938) (Aug. 6, 2007). (“the term *employer contributions* means amounts that are not currently available (after taking section 125 into account) to the employee but are specified in the cafeteria plan as amounts that an employee may use for the purpose of electing benefits through the plan. A plan may provide that employer contributions may be made, in whole or in part, pursuant to employees’ elections to reduce their compensation or to forgo increases in compensation and to have such amounts contributed, as employer contributions, by the employer on their behalf.”).

⁶⁶ ARRA, § 3001(a)(4)(A).

⁶⁷ I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 48, 49).

⁶⁸ See Helpful Information About State Continuation Coverage, *supra* note 31, at 2 (Q&A 4).

before the enrollment date, there was a 63-day period during which the individual was not covered under any creditable coverage

The Act contains rules designed to coordinate the HIPAA creditable coverage and break-in-service rules with the 60-day special election period, the effect of which is to ignore certain lapses in coverage for purposes of preventing plans from imposing pre-existing conditions.⁶⁹ Under these rules, where a qualified beneficiary elects COBRA continuation coverage under the extended election period, the period beginning on the date of the original qualifying event and ending with election of COBRA under the special election rules described above is disregarded for purposes of determining the 63-day period under the rules that limit group health plans from imposing pre-existing condition limitations.

F. *Special enrollment rights*

Plans are permitted to provide special enrollment rights to assistance eligible individuals to allow them to change coverage options under the plan in conjunction with electing COBRA continuation coverage.⁷⁰ Specifically, an assistance eligible individual is permitted, within 90 days after the receipt of notice, to elect to enroll in coverage under a plan offered by the employer or union that is not the same as the plan in which the assistance eligible individual was enrolled at or on the day before his or her qualifying event. This other coverage is treated as COBRA continuation coverage for all purposes, including the premium subsidy for assistance eligible individuals. This 90-day election period is independent of other election periods under the Act.

Under these special enrollment rights, the assistance eligible individual must only be offered the option to change to any coverage option offered to employed workers that provides the same or lower health insurance premiums than the individual's group health plan coverage as of the date of the covered employee's qualifying event.⁷¹ If the individual elects a different coverage option under this special enrollment right, this is the coverage that must be provided for purposes of satisfying the COBRA continuation coverage requirement.

The other coverage that may be made available to assistance eligible individuals is subject to the following limitations:

- (i) the plan sponsor must first choose to make such coverage available;⁷²
- (ii) the other coverage is also offered to the active employees at the time the election is made;⁷³ and

⁶⁹ ARRA, § 3001(a)(4)(C).

⁷⁰ *Id.* at §§ 3001(a)(1)(B)(i)-(ii).

⁷¹ *Id.* at § 3001(a)(1)(B)(ii)(II).

⁷² *Id.* at § 3001(a)(1)(B)(ii)(I).

⁷³ *Id.* at § 3001(a)(1)(B)(ii)(III).

(iii) the other coverage must not provide only dental, vision, counseling, or referral services (or a combination of such services); nor may it be a health flexible spending account, or coverage under an on-site medical facility maintained by the employer that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of such care).⁷⁴

G. *Reimbursement of group health plans*

The Act obligates the U.S. Treasury to reimburse the “person to whom premiums are payable.”⁷⁵ A “person” includes any governmental entity for this purpose. The “entity to which premiums are payable” is:⁷⁶

- (i) in the case of multiple employer plan, the plan;
- (ii) in the case of a single-employer plan that is otherwise subject to the Federal COBRA rules, the employer that sponsors the plan; and
- (iii) in the case of coverage mandated under a State mini-COBRA law, the carrier issuing the coverage.

No credit may be claimed until the entity has received the reduced premium payment from the assistance eligible individual.⁷⁷ Where the entity has liability for income tax withholding from wages or FICA taxes with respect to its employees, the entity is reimbursed by treating the amount that is reimbursable to the entity as a credit against its liability for these payroll taxes. Where the credit amount exceeds the amount of the entity’s liability for these payroll taxes, the regulators are directed to establish a mechanism whereby the reimbursement is made directly from the Treasury. Conversely, any overstatement of the reimbursement to which the person is entitled and any amount paid by the IRS as a result of an overstatement will be treated as an underpayment of payroll taxes by that person, and may be assessed and collected by the IRS in the same manner as payroll taxes.

Persons entitled to reimbursement must submit such reports (at such time and in such manner) as the IRS determines, including:⁷⁸

- (i) an attestation of involuntary termination of employment for each covered employee on the basis of whose termination entitlement to reimbursement is claimed;
- (ii) a report of the amount of payroll taxes offset for the reporting period and the estimated offsets of such taxes for the subsequent reporting period in connection with COBRA subsidy reimbursements; and

⁷⁴ *Id.* at §§ 3001(a)(1)(B)(ii)(IV)(aa)-(cc).

⁷⁵ *Id.* at § 3001(a)(12)(A) (amending I.R.C. §§ 6432(a)-(b)).

⁷⁶ *Id.* at § 3001(a)(12)(A) (amending I.R.C. §§ 6432(b)(1)-(3)).

⁷⁷ *Id.* at § 3001(a)(12)(A) (amending I.R.C. § 6432(c)(3)).

⁷⁸ *Id.* at § 3001(a)(12)(A) (amending I.R.C. § 6432(e)).

(iii) a report containing the taxpayer identification numbers of all covered employees, the amount of subsidy reimbursed with respect to each covered employee and qualified beneficiaries, and a designation with respect to each covered employee with respect to the type of coverage (e.g., individual or family coverage).

The IRS is authorized to issue regulations or other guidance as may be necessary or appropriate to carry out the reimbursement provisions, including the reporting requirement or the establishment of other methods for verifying the correct payments and credits.⁷⁹ In addition, the IRS must issue regulations or guidance with respect to applying the reimbursement provisions to group health plans that are multi-employer plans.

In Information Release 2009-15,⁸⁰ the IRS provided initial guidance to employers and plan sponsors on how to claim credit for the COBRA medical premiums they pay for their former employees. The credit will be reported and reconciled on a newly revised IRS Form 941. In addition, the IRS made clear that employers must maintain supporting documentation for the credit claimed, including: (i) documentation of receipt of the employee's 35 percent share of the premium; (ii) 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; and (iii) a declaration attesting to the former employee's involuntary termination. This information need not be filed with the Form 941; it need only be maintained to audit purposes.⁸¹

In an April 9 industry conference, IRS representatives announced the development an audit program aimed at ensuring that credits claimed on an employer's Form 941 relating to employer-subsidized COBRA health care are properly reported. Where violations are detected, refunds or offsets can be frozen pending an examiner's review and the submission of additional information as required. Where this occurs, the IRS will issue a new "Notice CP 269C," which tells employers of the condition, and explains the next steps that will be taken. The case will then be assigned to an examiner, who will follow up with the employer within 30 days.

H. *Income exclusion and limitations*

The COBRA subsidy is excluded from the gross income of assistance eligible individuals whose income is below certain established thresholds. In addition, the subsidy is not to be considered as income or resources in determining the recipient's eligibility for, or the amount of, any public benefits (e.g., aid to families with dependent children) provided under federal or state law.⁸²

⁷⁹ *Id.* at § 3001(a)(12)(A) (amending I.R.C. § 6432(f)).

⁸⁰ Feb. 26, 2009.

⁸¹ Internal Revenue Service, COBRA Questions and Answers: Reporting and Documentation, at RD-1, <http://www.irs.gov/newsroom/article/0,,id=205376,00.html> (last visited Apr. 14, 2009).

⁸² ARRA, § 3001(a)(6).

Access to the subsidy is subject to an income limitation based on “modified adjusted gross income.”⁸³ Modified adjusted gross income for this purpose means a taxpayer’s adjusted gross income, increased by any amounts excluded from his or her gross income under the foreign earned income exclusion, the exclusion for income from U.S. possessions, or the exclusion for income from Puerto Rico.⁸⁴ Specifically, the benefits of the subsidy are unavailable to individuals with modified adjusted gross incomes for years in which the subsidy is received (i.e., either 2009 or 2010) of \$145,000 (or \$290,000 for joint filers).⁸⁵ For taxpayers with adjusted gross income between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium subsidy is reduced proportionately.⁸⁶ The mechanism for repayment is an increase in the taxpayer’s income tax liability for the year. Individuals who would be subject to income limits are permitted to make a permanent election to waive the right to the premium subsidy for all periods of coverage, in which case the premium subsidy cannot later be claimed as a tax credit or otherwise recovered, even if the individual later determines that the income threshold was not exceeded for a relevant tax year.⁸⁷

Employers may not refuse the premium assistance to an individual based on the likelihood that the individual will exceed these income thresholds.⁸⁸ Rather, it is up to an individual whose income exceeds the appropriate thresholds to either decline the premium assistance in the first place, or self-report and pay the tax penalty. In informal remarks before a payroll industry conference, representatives of the IRS said that the agency will not require that the subsidy be reported on Form W-2 but is considering whether to require that employers provide this information on some other form (e.g., Form 1099-MISC or 1099-H).⁸⁹ This will give individual taxpayers affected by the income limitations the information required to adjust their income tax for the year accordingly.

I. *Notice requirements*

The Act establishes certain additional COBRA notice requirements outlined below. There will be instances where the Federal COBRA notice requirements do not apply, e.g., where continuation coverage is provided under a state mini-COBRA law. In these instances, the Department of Labor (in consultation with the IRS and the Department of Health and Human Services) must establish substitute notice rules. Within 30 days of the Act’s enactment (i.e., by March 19, 2009), the Department of Labor, in consultation with the IRS and the Department of Health and Human Services, must prescribe models for the required additional notices in the case of group health plans regulated by the Code and ERISA.⁹⁰ Similar obligations are imposed on the Office of

⁸³ *Id.* at § 3001(a)(15) (amending I.R.C. § 139C(b)(1)).

⁸⁴ *Id.* at § 3001(a)(15) (amending I.R.C. § 139C(b)(4)).

⁸⁵ *Id.* at § 3001(a)(15) (amending I.R.C. §§ 139C(b)(1)-(2)).

⁸⁶ *Id.*

⁸⁷ *Id.* at § 3001(a)(15) (amending I.R.C. § 139C(b)(3)).

⁸⁸ I.R.S. Notice 2009-27, 2009-__ I.R.B. __, __ (Q&A 45).

⁸⁹ Alison Bennett, *New COBRA Payment Reporting Will Not Be Required on Form W-2, IRS Officials Say*, BNA Daily Tax Report, March 23, 2009, at G-1.

⁹⁰ ARRA, § 3001(a)(7)(D)(i).

Personnel Management in connection with the FEHBP.⁹¹ On March 19, 2009, the Department of Labor Employee Benefits Security Administration issued model notices under the Act, along with a helpful set of questions and answers.⁹²

(a) Basic notice requirements

The Act's COBRA notice requirements⁹³ are designed to supplement and be part of a group health plan's ongoing COBRA compliance until December 31, 2009. In addition to the basic COBRA notice requirements of pre-Act law, notices and election forms given that the time of a qualifying event must also include the following additional information:⁹⁴

(i) The forms necessary for establishing eligibility for COBRA premium assistance.

(ii) The name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with COBRA premium assistance.

(iii) A description of the extended election period (described in Section II.D above).

(iv) A description of the obligation of the qualified beneficiary to notify the plan in the event he or she obtains coverage under another group health plan or eligibility for benefits under Medicare, and the penalty for failure to so notify the plan.

(v) A description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium.

(vi) A description of the option of the qualified beneficiary to enroll in different coverage if the employer permits such beneficiary to elect to enroll in such different coverage (see Section II.F above).

(b) DOL initial guidance and model forms

⁹¹ *Id.* at § 3001(a)(7)(D)(ii).

⁹² Publication of Model Notices for Health Care Continuation Coverage Provided Pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA) and Other Health Care Continuation Coverage, as Required by the American Recovery and Reinvestment Act of 2009, Notice, 74 Fed. Reg. 11,971-73 (Mar. 20, 2009).

⁹³ ARRA, § 3001(a)(7).

⁹⁴ *Id.* at § 3001(a)(7)(B).

In its March 2009 guidance,⁹⁵ the Department interpreted the Act to contain the following three separate notice requirements:

(1) A “General Notice”

The General Notice is the notice that is provided in connection with a qualifying event, and it is required to be sent by plans that are subject to the Federal COBRA rules. This includes private sector plans with more than 20 employees. The notice must be provided to *all* qualified beneficiaries, not just covered employees, who have experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event.

(2) An “Alternative Notice”

The Alternative Notice is required to be sent by group health insurance issuers/carriers that offer group health insurance coverage under state mini-COBRA laws. Like the General Notice, the Alternative Notice must be provided to *all* qualified beneficiaries, not just covered employees, who have experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event.

(3) A “Notice in Connection with Extended Election Periods”

The Notice in Connection with Extended Election Periods is the notice that applies to assistance eligible individuals (or individuals who would be assistance eligible individual had they elected COBRA continuation coverage) who (i) had a qualifying event at any time from September 1, 2008 through February 16, 2009, and (ii) either did not elect COBRA continuation coverage or who elected but subsequently discontinued COBRA. This notice must be provided by April 18, 2009.

The Notice in Connection with Extended Election Periods must be provided to such assistance eligible individuals. Those of these individuals already enrolled in COBRA coverage need not be provided with both a General Notice and a Notice in Connection with Extended Election Periods with duplicate content. Instead, plans are allowed to provide an “abbreviated General Notice” (discussed below), which will be deemed to satisfy both notice requirements.

Each of these notices must include, among other things, a prominent description of the availability of the premium reduction including any conditions on the entitlement; a model form to request treatment as an assistance eligible individual; the name, address, and telephone number of the plan administrator; a description of the obligation of

⁹⁵ Publication of Model Notices for Health Care Continuation Coverage Provided Pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA) and Other Health Care Continuation Coverage, as Required by the American Recovery and Reinvestment Act of 2009, Notice, 74 Fed. Reg. 11,971-73, at § II (Mar. 20, 2009).

individuals paying reduced premiums who become eligible for other coverage to notify the plan; and (if applicable) a description of the opportunity to switch coverage options. In addition, the Notice in Connection with Extended Election Periods must also include a description of the extended election period.

The Department issued the following four model notice packages⁹⁶:

(1) General Notice—Full version

This notice is the basic General Notice, which must be provided by plans subject to the Federal COBRA requirements. This version includes information on the premium reduction as well as information required in a COBRA election notice. As indicated above, the General Notice must be provided to all qualified beneficiaries (and not just covered employees) who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009 and who has not yet been provided with a COBRA. The General Notice is also appropriate where an individual was provided with a COBRA notice after February 17, 2009 that does not include the information required by the Act.

(2) General Notice—Abbreviated version

The abbreviated version of the General Notice includes the same information as the full version regarding the availability of the premium reduction and other rights under the Act, but does not include the COBRA coverage election information. This notice is intended for use in lieu of the full version in the case of individuals who experienced a qualifying event on or after September 1, 2008, have already elected COBRA coverage, and still have it.

(3) Alternative Notice

This notice is more in the nature of a template that can be adapted by state insurance regulators. It must be provided to persons who became eligible for continuation coverage under a State law. Since the COBRA premium assistance obligations relating to state mini-COBRA laws are imposed on carriers and not on employers, it would appear that carriers (and not employers) are obligated to provide the notices required by the Act. This approach is inconsistent with the practices in some states, Massachusetts included, where mini-COBRA notices are usually provided by employers.

(4) Notice in Connection with Extended Election

Plans subject to the Federal COBRA provisions must send the Notice in Connection with Extended Election Periods to the assistance eligible individuals described above.

(c) Penalties for violation

⁹⁶ The DOL's published notices are available at <http://www.dol.gov/ebsa/COBRAModelNotice.html> (last visited Apr. 14, 2009).

The failure to satisfy these additional notice requirements is treated as a violation of the basic COBRA notice requirements.⁹⁷

(d) Subsequent Department of Labor Clarifications

Despite the Department of Labor's efforts to establish clear rules implementing the Act's Notice requirements, questions lingered in the wake of its initial pronouncements in the matter. As a result, the Department found it necessary to revise the questions and answers posted to its website.⁹⁸ The Q&As, as revised following the publication of model notices, clarified the Act's notice requirements and provides a series of useful examples.

The Department begins by making clear that the full version of the General Notice must be provided to individuals who (i) are qualified beneficiaries (i.e., not just covered employees), (ii) experienced a qualifying event at any time from September 1, 2008 through December 31, 2009 (regardless of the type of qualifying event), and (iii) either (A) have not yet been provided an election notice, or (B) were provided an election notice *on or after February 17, 2009* that did not include the additional information required by the Act.⁹⁹ As a consequence, if a qualified beneficiary had a qualifying event before February 17, 2009 and was provided with the proper pre-Act COBRA notice, he or she need not be provided with a new, *full version* of the General Notice. These individuals will be entitled to the *abbreviated* General Notice, however, if they had previously elected and currently have COBRA coverage,¹⁰⁰ and they will be entitled to a Notice of Extended Election Period if they were terminated involuntarily. But a qualified beneficiary whose pre-Act qualifying event was, for example, divorce, aging out of dependent coverage, or voluntary termination of employment, is not entitled to a General Notice. (This position revises the position taken by the Department in its March 20, 2009 Federal Register notice, which said that all persons who have experienced any type of COBRA qualifying event must be provided with a notice of the changes made by the act.)

The Department also clarified that the Notice in Connection with Extended Election Periods must be sent to assistance eligible individuals who (i) had a qualifying event that was an involuntary termination of employment at any time from September 1, 2008 through February 16, 2009, and (ii) either did not elect COBRA continuation coverage, or elected but subsequently discontinued COBRA. For example, an individual who had an involuntary termination of employment on October 2, 2008 and who did not enroll in COBRA coverage is entitled to a Notice of Extended Election Period because his or her qualifying event was an involuntary termination of employment that occurred during the period between September 1, 2008 and February 16, 2009 and he or she did not elect COBRA coverage.¹⁰¹ This notice must include information regarding the Act's

⁹⁷ See *supra* Part I.F.

⁹⁸ The DOL's COBRA subsidy Questions and Answers are available at http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html (last visited Apr. 14, 2009).

⁹⁹ *Id.* at Q&A 14.

¹⁰⁰ *Id.* at Q&A 16.

¹⁰¹ *Id.* at Q&A 21.

additional election opportunity, as well as premium reduction information, and it must be provided by April 18, 2009. In contrast, an individual whose gets divorced on January 6, 2009 and who was timely provided with the proper COBRA notice and who does not elect COBRA is entitled to neither a General Notice nor a Notice in Connection with Extended Election Periods because his or her qualifying event was not an involuntary termination of employment.¹⁰²

The Department provided some helpful guidance where the COBRA qualifying event occurs before but close to February 17, 2009. For example, where an individual's qualifying event was an involuntary termination of employment that occurred on January 11, 2009, and where the plan provides a COBRA election notice on February 22 that does not describe the premium subsidy or other information required under Act, the individual must be provided with both a full General Notice and a Notice in Connection With Extended Election Periods. The plan in this instance may combine information to avoid duplication, but the information must make clear that (i) the individual has two separate election periods, (ii) each election period has a different coverage start date, and (iii) the individual is eligible for the premium reduction for periods of coverage beginning on or after February 17, 2009, regardless of which election period he or she chooses.¹⁰³

Lastly, the Department offered an example where coverage elections are split between medical and dental coverage. In this example, an individual was involuntarily terminated on January 24, 2009. Before the qualifying event the individual was covered under a medical plan and a dental plan. COBRA notices were provided on February 26, 2009 (i.e., an "old law" notice), and the individual elected coverage under the medical plan (which is still in force) but not the dental plan. The individual should get an abbreviated General Notice for the medical plan, and a Notice of Extended Election Period for the dental plan. While the plan may combine information to avoid duplication, it must make clear that the individual has the opportunity to elect COBRA for the dental plan and that both the medical and dental plan are eligible for the premium reduction for periods of coverage beginning on or after February 17, 2009.¹⁰⁴

J. *Coordination with health coverage tax credit*

The 2002 Trade Act provides for a refundable tax credit (the Health Coverage Tax Credit, or HCTC) of 65% of the amount paid for coverage and that of "qualifying family members" under COBRA continuation coverage and various state-based group health coverage for eligible coverage months beginning in the tax year.¹⁰⁵ To be eligible for the HCTC, a taxpayer must be an "eligible individual." The Act provides that for any month for which an assistance eligible individual receives a COBRA premium subsidy under the Act, he or she is eligible for the HCTC.¹⁰⁶

¹⁰² *Id.* at Q&A 22.

¹⁰³ *Id.* at Q&A 23.

¹⁰⁴ *Id.* at Q&A 24.

¹⁰⁵ Pub. L. No. 107-210, § 201(a) (amending I.R.C. §§ 34-36).

¹⁰⁶ ARRA, § 3001(a)(14) (amending I.R.C. § 35).

Under the Act, the HCTC is increased to 80% with respect to petitions filed on or after May 18, 2009. In addition, the Act extends the HCTC and other Trade Act benefits to certain service sector employees.¹⁰⁷

K. *Reports*

The Act requires the Secretary of the Treasury to submit an interim report and a final report regarding the implementation of the Act's COBRA premium assistance provisions.¹⁰⁸ The interim report must include information about the number of individuals receiving assistance, and the total amount of expenditures incurred, as of the date of the report. In addition, a final report must be issued as soon as practicable after the last period of COBRA continuation coverage under the temporary subsidy. The final report must include similar information as provided in the interim reports, with the addition of information about the average dollar amount (monthly and annually) of premium reductions in the aggregate. The reports must be filed with the Committee on Ways and Means; the Committee on Energy and Commerce; the Committee on Health, Education, Labor and Pensions; and the Committee on Finance.

L. *Effective date*

The provision is effective for premiums for periods of coverage beginning on or after the date of enactment.¹⁰⁹ Recognizing that the Act leaves employers and plan sponsors little time to modify payroll and other systems to accommodate the Act's COBRA subsidy requirements, however, the Act provides a limited transitional rule where an assistance eligible individual pays the full premium amount required for COBRA for the first period, and the immediately subsequent period, to which the subsidy applies.¹¹⁰ Where (as will be the case with most plans) the first period of coverage after the Act's enactment is the month of March 2009, this limited transitional rule will apply during March and April 2009. Where an employer or plan sponsor avails itself of this limited transitional rule, it must:

(i) make a reimbursement payment to the assistance eligible individual for the amount of the premium paid in excess of the amount required to be paid; or

(ii) Provide credit to the assistance eligible individual for that amount in a manner that reduces one or more subsequent premium payments that the assistance eligible individual is required to pay for the coverage involved.

If, however, it is reasonable to believe that the credit for excess payment described in item (ii) will be used by the assistance eligible individual within 180 days,

¹⁰⁷ See United States Department of Labor: Employment & Training Administration, Upcoming Changes to Trade Adjustment Assistance: Questions and Answers for Participants, *available at* <http://www.doleta.gov/tradeact/> (last visited Apr. 14, 2009) (follow "Questions and Answers on Upcoming Changes to the TAA Program" hyperlink).

¹⁰⁸ ARRA, §§ 3001(a)(11)(A)-(B).

¹⁰⁹ *Id.* at § 3001(a)(12)(D).

¹¹⁰ *Id.* at § 3001(a)(12)(E).

then full payment must be made to the assistance eligible individual within 60 days. Also, if at any time during the 180-day period, it is no longer reasonable to believe that the credit will be used during that period, then payment equal to the remainder of the outstanding credit must be made to the assistance eligible individual within 60 days of that date.

M. *Outreach*

The Act directs the Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, to provide outreach consisting of public education and enrollment assistance relating to the Act's COBRA subsidy.¹¹¹ Outreach efforts are required to target employers, group health plan administrators, public assistance programs, States, insurers, and other entities as determined appropriate by such Secretaries. These efforts must include an initial focus on those individuals electing continuation coverage. Information on premium reduction, including enrollment, must also be made available on websites of the Departments of Labor, Treasury, and Health and Human Services.

N. *Coordination with state laws*

Some states have their own employer-funded COBRA subsidy programs that target low-income individuals. The Act says nothing about whether or how these programs interact with premium assistance payments under the Act. Because the Act's subsidies are ultimately paid by the government, however, there is no reason to provide employers with any credit for payments made to such a program. The more difficult question is whether amounts paid by the state will reduce the amount of the Federal premium assistance.

Massachusetts, for example, maintains a "Medical Security Program" ("MSP"), which provides health insurance coverage for individuals receiving unemployment assistance with family incomes of less than 400% of the federal poverty limit.¹¹² MSP is funded by employers through a surcharge on their unemployment insurance payments, and it has two programs, "direct coverage" and "premium assistance." As the name suggests, the MSP direct coverage program pays the entire cost of health care coverage on a fee-for-service basis. In contrast, the MSP premium assistance program reimburses unemployment assistance claimants for up to 80% of their health insurance continuation (i.e., COBRA) costs. Eligibility for premium assistance ends when unemployment insurance ends.

The Massachusetts Division of Unemployment Assistance, the state agency that administers MSP, has issued guidance establishing rules for the coordination of the Act's

¹¹¹ *Id.* at § 3001(a)(9).

¹¹² M.G.L. ch. 151A, § 14G(j); *see generally* Massachusetts Executive Office of Labor and Workforce Development, Division of Unemployment Assistance, Overview of Medical Security Program, <http://www.mass.gov/?pageID=elwdhomepage&L=1&L0=Home&sid=Elwd> (last visited Apr. 14, 2009) (follow "Division of Unemployment Assistance" hyperlink; then follow "Medical Security Program" hyperlink; then follow "Overview of Medical Security Program" hyperlink).

premium assistance rules and the MSP premium assistance program.¹¹³ For claimants who are eligible for COBRA premium assistance under the Act, MSP will continue to reimburse its claimants for 80% of their COBRA premiums. As a result, for any claimant receiving COBRA premium assistance benefit, MSP's contribution to the premiums will be reduced from 80% to 28%, and each enrollee's premium will be reduced from 20% to 7%.

III. Compliance Steps

Compliance with the Act's COBRA premium assistance rules will pose some challenges. The first, and most obvious and important, action is to identify those qualified beneficiaries (which includes spouses and dependents) eligible for COBRA by virtue of a qualifying event that was an "involuntary termination of employment" occurring between September 1, 2008 and February 16, 2009, who have not elected COBRA as of the Enactment Date or who elected but lost coverage.

The actual implementation of the subsidy will pose further problems. Employers will need to update their payroll and COBRA processing systems and procedures. And employers who rely on outside COBRA vendors will need to further coordinate their systems with their vendors.

Employers who have taken advantage of the two-month grace period (March and April in most cases) during which they required the qualified beneficiary to pay the full COBRA premium will need to establish a procedure to properly credit subsidy amounts to assistance eligible individuals who paid more than 35 percent during these months.

Employers and other plan sponsors will also need to determine whether they want to offer the ability to elect a different coverage option. Because this election involves added administrative burdens, there is little reason to expect that many employers will make this choice.

Also affected will be HIPAA certificates of creditable coverage for assistance eligible individuals who take advantage of the special election period. This is because a gap between the date of the qualifying event and the date coverage begins is not considered a break in creditable coverage for purposes of HIPAA's pre-existing condition limitation rules.

While not required by the Act, this is also a good time to review plan documents, summary plan descriptions, and accompanying communication materials to ensure compliance with requirements of prior law as well as with the Act.

¹¹³Massachusetts Executive Office of Labor and Workforce Development, Division of Unemployment Assistance, New Federal Subsidy for COBRA Premiums, <http://www.mass.gov/?pageID=elwdhomepage&L=1&L0=Home&sid=Elwd> (last visited Apr. 14, 2009) (follow "Division of Unemployment Assistance" hyperlink; then follow "Help With Health Insurance" hyperlink; then follow "New Federal Subsidy for COBRA Premiums" hyperlink).