

EMPLOYMENT LAW PRACTICE GROUP Alert

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Thomas J. Dillon III
Mahlon G. "Bud" Funk, Jr.
Chandra D. Lantz
Andrew M. Lohmann
J. Terry Parsley
Roderick W. Simmons
Paul A. Simpson
John W. Vaughan, Jr.
James L. Weinberg
Jennifer M. Becker
Sheila G. deLa Cruz
Broderick C. Dunn
Andrew P. Sherrod
C. Brandon Spalding

**HIRSCHLER
FLEISCHER**
ATTORNEYS AT LAW

The Edgeworth Building
2100 E. Cary Street
Richmond, Virginia 23223-7078
Phone: 804-771-9500
Fax: 804-644-0957

Mill Race North
725 Jackson Street, Suite 200
Fredericksburg, VA 22401-5720
Phone: 540-604-2100
Fax: 540-604-2101

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Immediate Action Required to Comply with COBRA Subsidy Created by Stimulus Plan

The American Recovery and Reinvestment Act of 2009 (the "Act"), signed into law on February 17, 2009, contains significant changes in COBRA health coverage terms, including providing certain employees with a temporary premium subsidy. Employers sponsoring covered group health plans must act quickly to ensure compliance with the requirements of the Act. Below is a brief outline of the central terms of this new subsidy program.

Subsidy Amount and Reimbursement.

The Act creates a 65% subsidy towards the amount an eligible individual must pay in COBRA health premiums. The employer must initially bear the cost of this subsidy, but will be reimbursed by the federal government for the subsidy amount through a credit against payroll taxes. If the subsidy amount exceeds payroll taxes, employers will receive a direct payment of the difference from the federal government. Employers must follow certain procedures before claiming the credit.

Eligibility. The subsidy applies to employees (and their qualified spouses and dependants) losing health coverage due to an *involuntary termination* of employment during the period commencing September 1, 2008 and ending on December 31, 2009 (these individuals are referred to as "assistance eligible individuals" or "AEIs"). "Involuntary termination" is not defined in the Act; therefore, eligibility may be unclear with respect to areas such as voluntary separation programs and constructive discharge assertions. The subsidy is reduced for AEIs with an annual adjusted gross income exceeding \$125,000 (\$250,000 for couples filing jointly) and eliminated for AEIs with an annual adjusted gross income exceeding \$145,000 (\$290,000 for couples filing jointly).

This Alert highlights some of the important terms of the Act, but is not an exhaustive discussion of all of the Act's requirements.

Timing. The subsidy is available to AEIs beginning as of the first period of coverage following enactment of the Act, which will be March 1, 2009 for group health plans that process COBRA premiums monthly. The subsidy does not apply retroactively; therefore, individuals who have been paying customary COBRA premiums prior to the passage of the Act are not entitled to any credits or reimbursements of those premiums.

Extended Election Period For Individuals Who Previously Waived or Terminated COBRA Coverage. Employers must notify all persons involuntarily terminated between September 1, 2008 and February 17, 2009 who either waived COBRA coverage or are no longer enrolled in COBRA as of February 17, 2009 that an extended enrollment period to elect COBRA coverage at the subsidized rate may be available. ***This notice must be provided to eligible persons on or before April 18, 2009.*** These individuals then have 60 days from the date of such notice to elect COBRA coverage.

Duration. The subsidy does not increase an AEI's maximum COBRA coverage period, which is determined as if the person had elected COBRA when initially eligible. An AEI will receive the subsidy until the *earliest* to occur of the date (i) that is nine months after the first day of the month in which the person was eligible for the subsidy, (ii) the person is eligible for other group health plan coverage or Medicare, or (iii) the expiration of the maximum period of continuation coverage under COBRA.

New Administrative Burdens. Specific information about the subsidy and the extended election period must be added to current COBRA notices or provided to employees in a separate document. The revised notice must be provided to all individuals who become entitled to elect COBRA during the period September 1, 2008, through December 31, 2009, and not just to those who were involuntarily terminated (presumably to give any terminated employee an opportunity to assert that their employment was "involuntarily" severed). The Department of Labor is required to issue a model notice by March 19, 2009. Employers must also adjust their accounting processes to implement the program.

This Alert highlights some of the important terms of the Act, but is not an exhaustive discussion of all of the Act's requirements. Please contact any of our employment section attorneys for additional details regarding the new COBRA provisions, including guidance regarding the new COBRA notice, claiming the subsidy reimbursement credit or the impact of the subsidy on employer severance programs.

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