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February 27, 2009

COBRA PREMIUM ASSISTANCE AFTER THE STIMULUS BILL

QUESTIONS AND ANSWERS

The following Questions and Answers are from the Fennemore Craig Webinar "COBRA Premium Assistance After the Economic Stimulus Bill" presented on Wednesday, February 25, 2009.

1. QUESTION:

If COBRA premiums are collected by an agent of the employer (such as a third party COBRA administrator), who gets the reimbursement? And if the employer collects the COBRA premiums and then sends them to the insurance company, who gets the reimbursement?

ANSWER:

In both cases, the employer must submit the entire premium to the insurance company and make up the 65% difference in the premium not paid by the COBRA participant. The employer can then claim that amount as a credit against its payroll taxes. **Note: the IRS clarified this point in questions and answers it published on February 26, 2009. The seminar (slide 15) indicated that in the case of all fully insured group health plans the insurer would claim the reimbursement. This is true only for fully insured group health plans that are subject to the new premium assistance requirements but are not subject to COBRA (some states apply COBRA-like requirements to group health plans not otherwise subject to COBRA). As the IRS Q&A makes clear, however, in the case of any group health plan subject to COBRA, it is the employer's responsibility to pay the 65% subsidy (to the insurer in an insured plan) and the employer claims the reimbursement.**

2. QUESTION:

You mentioned that the employer must provide COBRA notice to all employees with a qualifying event since Sept. 1, 2008. Does this include those employees who would not be eligible for premium assistance (e.g., voluntary resignation)?

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ANSWER:

Yes, the supplemental notices have to go to everyone with a qualifying event between September 1, 2008 and December 31, 2009, even if they are not eligible for premium assistance or the extended election right.

3. QUESTION:

COBRA participants generally pay 102% of the employee premium, which includes a 2% administration fee. If someone who is eligible for the premium assistance subsidy pays 35% and 65% is subsidized (adding up to 100%), what happens to the 2% administrative fee?

ANSWER:

The 65/35 calculation is made from the full COBRA premium, which may include the 2% administrative fee, if it is charged. For example, if the employee premium is \$300, and the COBRA premium is \$306 (102% of \$300), the subsidized employee premium would be 35% of \$306, or \$107.10, and the subsidy would be 65% of \$306, or \$198.90.

4. QUESTION:

Does the recipient get reimbursed for all premiums paid dating back to Sept 1, 2008?

ANSWER:

No, the premium assistance is effective for coverage periods starting after February 17, 2009.

5. QUESTION:

An employee who was laid off at the end of January signed the COBRA enrollment form on 2/17/09 and dated her check 2/17/09, but we didn't receive the check in the mail until 2/20/09. Are they eligible for the premium assistance?

ANSWER:

The facts you give do not *preclude* her from being eligible for the assistance, if she meets the other requirements (mainly an *involuntary* termination of employment).

6. QUESTION:

We are reducing employees' work hours to 30 hours per week. This makes them ineligible for benefits. Are they eligible for premium assistance?

ANSWER:

These people may qualify for COBRA due to a reduction in hours of employment, but will not qualify for the premium assistance because they have not had an *involuntary*

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termination of employment. They will, however, need to be given the supplemental notices that will have to be given to all COBRA qualified beneficiaries.

7. QUESTION:

A union employee was offered a position which was about 200 miles from his present location. He declined, which is considered a voluntary termination according to the bumping rules of the union contract. Would this still be considered involuntary in regards to these COBRA rules?

ANSWER:

This is one of those unclear situations where the documents say termination was voluntary but the circumstances say it may have been involuntary. You could consider using the DOL's expedited appeal process.

8. QUESTION:

If someone who was involuntarily terminated back in September elects COBRA during the extended election period, do they owe the 35% back premium back to September or does coverage begin now?

ANSWER:

Coverage begins as of the first coverage period beginning after February 17. So it is not retroactive to September in your example.

9. QUESTION:

If you send an old qualifying event letter to someone after 2/17/09 and it does not include new information, can you treat those people the same as people who experienced an event prior to 2/17/09 and grant them a new 60-day election period?

ANSWER:

No. They do not get a new 60 day election period. But you will still need to supplement the notice you previously gave them with a supplemental notice informing them of the premium assistance.

10. QUESTION:

Should you hold off on sending notices until letters are updated?

ANSWER:

That is a judgment call. In most cases, no - you should continue sending out notices and then supplement them later. But at some point (when you are within a few days of finalizing your supplemental notices) you may want to hold new notices and combine them with supplemental notices in a single mailing.

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11. QUESTION:

What constitutes "reasonable cause" for purposes of the exception to the penalty for failure to give notice of one of the triggers that end premium assistance?

ANSWER:

"Reasonable Cause" will be whatever the DOL decides it is. Usually in these types of situations, the offending party writes a letter explaining why they have reasonable cause (something like "I did not know, I am sorry") and endeavors to show the DOL that they did not willfully neglect the requirements of the law.

12. QUESTION:

If someone has to claim Premium assistance on their tax return, does the company report this on W2 or 1099?

ANSWER:

Neither. It will be reported for all recipients in the reports the IRS will require (probably quarterly, but that has yet been determined).

13. QUESTION:

Are H2A temporary worker and foreign workers that do not pay payroll taxes excluded from premium assistance? Does the fact that they are temporary workers have any bearing on their eligibility?

ANSWER:

Whether someone pays payroll taxes or is a temporary worker does not have any bearing on whether they are eligible for premium assistance. Remember, the people you take withholding from are current employees, whereas the COBRA recipients who will receive premium assistance are former employees and their qualified beneficiaries. If someone qualifies for COBRA and was involuntarily terminated after 9/1/08, elects COBRA, and pays their 35% share, they are eligible for premium assistance.

14. QUESTION:

We have an employee that was terminated because he had exhausted his FMLA time with the company and was still on leave of absence. He received his COBRA election on 1/1/09 and has paid for two months. Is he eligible?

ANSWER:

I take this question as asking whether a failure to return from work after exhausting FMLA leave is an involuntary termination of employment. In most cases, the answer is probably "No". But as with so many other things, the particular circumstances matter.

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This might be one of those times where the best option is for the individual to appeal the plan administrator's denial of eligibility for assistance.

15. QUESTION:

Can an individual expand the amount of their coverage from employee only to family coverage or to include dependents?

ANSWER:

Nothing in this new law authorizes someone to change coverage from single to family coverage as a result of being eligible for premium assistance.

16. QUESTION:

What happens if it turns out that someone is not eligible for the reimbursement due to their MAGI exceeding the limits - will the IRS come back to the employer who took the reimbursement? Or will the IRS obtain the dollars from the former employee?

ANSWER:

The IRS will recover the amount of the assistance from the individual by increasing the amount of the tax they owe when they file their tax return. The IRS will not go back to the employer.

17. QUESTION:

What if someone wants to short-pay their COBRA premium to 35% before new notices regarding the availability of assistance is available, i.e. is short-pay an automatic election to opt for the subsidy?

ANSWER:

It is not necessary for someone to "opt in" to the subsidy. If someone who is eligible for assistance pays 35% of the premium for a period of coverage starting after February 17, 2009, they must be treated as having paid the full premium. It is necessary to elect COBRA coverage before you can be eligible for the assistance.

18. QUESTION:

If part of a separation/severance agreement indicates the employer will pay for the employee's COBRA for 3 months, does the individual then get 9 more months of subsidized assistance at the end of those three months, since the employer does not get to take a tax credit for the 3 months it pays in full?

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ANSWER:

This is not directly addressed in the legislation, but my take on the legislation is that an individual would be eligible for 9 months of premium assistance after receiving 3 months of COBRA from their former employer.

19. QUESTION:

Do you know of anyone putting a notice together that employers can use or are employers required to just create their own, making sure they include what's mandatory?

ANSWER:

We have prepared notices, and the Department of Labor is required to publish model notices within 30 days after February 17, 2009. Due to the complexity of the new law, we believe any model notices will need to be tailored to work with current notices.