

**Subject: Stimulus Package Modifies COBRA, HIPAA & Other Welfare Benefit Provisions**

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Elite Group

E-Alert

*The following summary of the American Recovery and Reinvestment Act of 2009 (ARRA) was provided by Ballard Spahr Andrews & Ingersoll. At this time, numerous employee benefit organizations such as the National Association of Health Underwriters, The American Benefits Council as well as the Compliance Departments of COBRA Administrators such as Ceridian are all working with the Department of Labor to obtain further guidance regarding the specific next steps and employer requirements.*

*The Department of Labor indicated that model notices should be available by March 19, 2009 and it is anticipated that considerable guidance will be forthcoming in the weeks to come. We will continue to monitor this important change and provide additional updates on the new requirements.*

**Stimulus Package Modifies COBRA, HIPAA, and Other Welfare Provisions**

The American Recovery and Reinvestment Act of 2009 (ARRA) makes substantial, but temporary, changes to the rules governing the continuation of health coverage under COBRA and a number of other modifications affecting welfare benefit plans.

**COBRA**

ARRA aims to make health coverage more affordable for employees who lose their jobs by lowering the cost of COBRA coverage for many individuals. Any qualifying individual whose employment is involuntarily terminated between September 1, 2008, and December 31, 2009, and who is eligible for continuation coverage under COBRA because of the termination will be able to continue health coverage at only 35 percent of the ordinary COBRA premium for up to nine months. Employers (and, in certain cases, insurers) will subsidize the remaining 65 percent, but have the right to recover the

subsidy amount from the federal government through a credit on their payroll tax deposits.

**Affected Plans.** The new subsidy rules apply to plans that are subject to COBRA, certain federal government plans, and plans that are exempt from COBRA but subject to comparable requirements for health coverage continuation under state law. For convenience, this memorandum refers to the continuation of coverage under all of these plans as COBRA coverage. Health flexible spending arrangements provided through a cafeteria plan are exempt from the requirements.

**Discount Period.** The discount period begins with the first month of coverage after ARRA is signed into law and lasts up to nine months, but may be shorter. ARRA does not extend the maximum period of COBRA coverage beyond its ordinary expiration date. The discount will end when the COBRA coverage itself ends. In addition, the discount will end when an individual becomes eligible for coverage under Medicare or another group health plan (other than a plan that offers certain types of limited benefits, such as a dental plan or health flexible spending account). ARRA applies penalties against individuals who fail to provide appropriate notice when they become eligible for other coverage.

**Second Chance to Elect.** Those who are eligible for the discount, but who did not previously elect COBRA coverage, must be afforded a period of at least 60 days to elect continuation coverage. The coverage will be effective as of the first day of the month after ARRA is signed into law (March 1). The maximum period for coverage will be measured from when it would have begun if COBRA had been elected when initially offered.

**Notice Requirements.** Plan administrators must modify or supplement the COBRA notices they provide when a qualifying event occurs. The notice must include specified information regarding the opportunity for a premium discount. Plan administrators must also alert those who have already elected COBRA and those who are eligible for the discount but have not elected COBRA of their rights under ARRA. This notice must be provided within 60 days after ARRA is signed. The government is required to issue model notices within 30 days of that signature.

**Corrections.** If a claim for a discount or for continuation coverage under ARRA is denied, the claimant has the right to request that the federal government rule on his or her eligibility on an expedited basis. If an individual pays a full premium when the discount should have applied, the individual is entitled to reimbursement of (or credit against future premiums for) the excess payment.

**Reimbursement.** An employer may obtain reimbursement for its subsidy from the federal government through a reduction in the amount that it deposits in payroll taxes, including wage withholding amounts and FICA contributions (both the employer and employee portions). An employer must file applicable reports to support the reduction. Where payroll taxes are not sufficient to support the amount of the subsidy, a credit or refund will apply. Insurers must follow similar procedures.

**Other Rights.** The new law provides that employers may allow individuals who qualify for the discount to change coverage to an option that is no more expensive. If an employer chooses to allow these changes, it must notify employees of this opportunity.

**Higher-Income Individuals.** For individuals who have annual income of more than \$125,000 (if single) or \$250,000 (if married), some or all of the subsidy will be recaptured through their individual tax filings. Such individuals may permanently elect not to be treated as eligible for the subsidy.

**Comments.** ARRA does not include provisions found in the House bill that would have vastly expanded the right to continue COBRA coverage for individuals who lose coverage on account of a

termination of employment or reduction in hours after attaining age 55 or completing 10 years of service with an employer. The House version would have made this change permanent. Despite intense debate, these provisions moved swiftly through Congress and leave numerous questions unanswered. We will stay tuned for the model notices and other implementation guidance.

#### **OTHER CHANGES**

ARRA includes other provisions that affect health and other welfare benefit arrangements. For example:

**Qualified Transportation Fringe Benefits.** ARRA increases the monthly limit on benefits for transit passes and vanpools to the same amount as the limit for qualified parking. For 2009, that means an increase from \$120 to \$230 per month. This increase will be in effect from March 2009 through December 2010.

**Government Health Programs.** ARRA makes various changes to governmental programs, including Medicare, Medicaid, and the Children's Health Insurance Program (CHIP). Other recent legislation has introduced significant changes to CHIP insofar as it relates to employer-sponsored benefits. Various details of those rules, which will allow states to pay part of the premiums for qualifying dependent coverage and may require employers to offer certain special enrollment rights, are still being worked out. We plan to address these matters in a future e-alert.

For more information, please contact your Elite Group Representative.

1. Under prior HIPAA rules, "Covered entities" were the only entities directly subject to HIPAA's requirements. There are only three types of covered entities: health plans, health care clearinghouses (certain entities involved in the translation of data to and from a HIPAA-approved form), and most health care providers. "Business associates" were subject to certain of HIPAA's rules only indirectly, through contracts with covered entities. Business associates are typically vendors who obtain protected health information in the course of providing services on behalf of covered entities, like third party health plan administrators, who process claims for a self-funded group health plan.

The recommendation and opinions provided by The Elite Group, LLC are based on general human resource management fundamentals, practices, principals, and are not legal opinions or guaranteed outcomes. Elite does not conduct legal research; we recommend as part of a team approach to management that clients consult with legal counsel of their choice to address legal concerns related to human resource issues.

**Elite Group**

610.280.4350

[elialert@elitegrp.com](mailto:elialert@elitegrp.com)



191 Sheree Blvd

Suite 200

Exton, PA 19341

