

# TECH FLEX

FEBRUARY 2009

ISSUE II

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## **STIMULUS BILL SIGNED INTO LAW INCLUDES NEW COBRA PROVISIONS**

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), formerly commonly known as the Stimulus Bill. One of the provisions of ARRA results in modifications to the rules in relation to the Consolidated Omnibus Budget and Reconciliation Act (COBRA). The changes include (for certain individuals) subsidized COBRA premiums, an extended COBRA election period, and an employer's option to allow an individual to elect within certain restrictions a plan other than the one the individual was covered under at the time of the individual's qualifying event. Below is a brief summary of some of the highlights of the COBRA provisions contained in ARRA.

### **COBRA PREMIUM SUBSIDY AVAILABLE**

ARRA provides that persons known as "assistance eligible individuals" will be considered to have paid the required COBRA premium if they pay 35% of the COBRA premium. The remaining 65% will be paid on their behalf generally by the former employer who will be reimbursed by the government in the form of a credit to payroll taxes owed by the employer to the Internal Revenue Service. Any amounts owed to the employer or other provider of the subsidized 65% of the premium in excess of the amount that can be taken as a credit against payroll taxes will be reimbursed in the form of a refund.

Note: The amount that an individual receives as a COBRA premium subsidy, assuming he/she is eligible will not be considered taxable income to the individual. In addition, the premium subsidy cannot be considered as additional income or resource in determining eligibility for any federal or state public benefit program.

An assistance eligible individual is a person who is eligible for and elects COBRA coverage and who was involuntarily terminated from employment on or after September 1, 2008 and on or before December 31, 2009.

**SUBSIDY INCOME LIMITATIONS:** If the individual's modified adjusted gross income in any year in which the subsidy is received exceeds \$145,000 (for single tax filers) or exceeds \$290,000 (for married filing jointly tax filers), he/she is not eligible to receive the subsidy. Individuals who have or anticipate their modified adjusted gross income will exceed the limits for any year in which they are subsidy eligible may irrevocably waive their rights to the subsidy. Failure to make such waiver where ineligible due to exceeding the income limitations for the subsidy will result in a recapture of the subsidy by the Internal Revenue Service when the individual files his/her tax return.

Note: If the individual's modified adjusted gross income in any year in which the subsidy is received is between \$125,000 and \$145,000 if filing single or is between \$250,000 and \$290,000 if married and filing jointly, they are eligible to receive a partial subsidy.

### **PERIOD OF PREMIUM SUBSIDY**

The 65% subsidy is available until the earliest of the following events: (1) nine (9) months after the first day of the first month that the subsidy begins; (2) the first date that the individual becomes ELIGIBLE for coverage under any other group health plan including Medicare, except as noted below; (3) the date which the individual's COBRA coverage entitlement is exhausted or is terminated for failure to pay the required premium timely.

It is important to note that eligibility for coverage under the following types of plans (or a combination of) will NOT cause loss of eligibility for the COBRA subsidy:

Dental, vision, counseling, referral services, or coverage of treatment that is provided in an employer on-site medical facility (consisting primarily of first-aid, wellness and preventive care). In addition, an individual may be eligible and covered under a health flexible spending arrangement without causing a loss of COBRA subsidy eligibility.

An individual is considered to be eligible for coverage under a group health plan as of the first date on which the individual could be covered under the plan.

**Duty of Assistance Eligible Individuals** - If an assistance eligible individual becomes eligible for coverage under a plan that would disqualify them in relation to receiving the COBRA premium subsidy, ARRA requires them to notify the plan. **Failure to provide the plan notice may result in a penalty being assessed to the ineligible individual receiving the subsidy in the amount of 110% of the subsidy received.** It is the responsibility of the Department of Labor (DOL) to release guidance in relation to when and how that notice must be provided. However, at the time of this writing, the DOL has not yet issued the required guidance.

**Review of Denials of Premium Assistance** - Where an individual requests the COBRA subsidy and the group health plan denies that request, the individual has the right to appeal the denial to the appropriate governmental agency. ARRA requires that a determination of the individual's appeal must be decided "within 15 business days after receipt of such individual's application for review." All determinations made by the responsible governmental agency are final and "a reviewing court shall grant deference to such...determination."

## **EXTENSION OF ELECTION PERIOD**

ARRA provides a second chance for certain individuals who have not elected continuation coverage under COBRA as of the ARRA date of enactment but would be an assistance eligible individual if that election were in effect. This extension of the election period begins on the ARRA enactment date and ends 60 days from the time the individual is notified of their rights to the extended election period.

**Effective Date of COBRA Coverage under the Extended Election Period** - Any COBRA continuation coverage elected by an individual during an extended election period will "commence with the first period of coverage beginning on or after the date of enactment" of ARRA. Consequently, subsidies are not available for a period prior to ARRA enactment. **Example:** An individual who was involuntarily terminated on September 1, 2008 and offered COBRA, but did not elect COBRA should be offered a second chance to enroll in COBRA as a result of ARRA. If the individual timely elects the second offer of COBRA coverage, his/her coverage will begin on March 1, 2009 (assuming the plan provides coverage on a monthly basis).

**Length of COBRA Time Period** - Although COBRA coverage elected under the extension of the election period is effective as of the first period of coverage commencing after ARRA becomes law, the amount of time allowed under COBRA is measured from the date of the original qualifying event. **Example:** An individual's employment ended (along with loss of coverage) on September 1, 2008 and the individual was not covered under COBRA on date of ARRA enactment. The individual elects COBRA under the extended election provision. The COBRA coverage will begin on March 1, 2009 and end 18 months from September 1, 2008 (i.e., March 1, 2010). The actual amount of time the individual is covered under COBRA is the 12 month period beginning March 1, 2009 and ending as of March 1, 2010. (Note: The individual is eligible for the nine months subsidy period from March 1, 2009 through November 30, 2009).

**Preexisting Condition Impact** – The 63-day break in coverage in relation to preexisting conditions will be disregarded with respect to an individual who elects COBRA under the extended COBRA election period.

## **EMPLOYER PROVIDED NOTICES REQUIRED**

**General Notice** - ARRA mandates that when employers provide the required COBRA Election Notice to individuals who lost coverage under their plan due to an involuntary termination, the employer must also include information in relation to the availability of the premium subsidy. In addition, if the employer has elected to allow individuals the option to enroll in a different coverage option than what the individual had at the time of involuntary termination of employment, the individual must be notified of that option as well. **The**

**employer may include the additional information by modifying their existing COBRA Election Notice or by including a separate document sent with the required COBRA Election Notice.**

**Specific Notice Requirements-** Below is a list of specific information required to be included in the revised COBRA Election Notice or in a separate document accompanying the required COBRA Election Notice.

1. The forms necessary to establish the individual's eligibility for the COBRA premium subsidy.
2. The name, address, and telephone number of the plan or other party where the individual can receive information relating to the COBRA premium subsidy.
3. A description of the extended election period.
4. Information on the individual's responsibility to notify the plan in the event that he or she is no longer eligible for the COBRA subsidy (i.e. eligible for coverage under another group health plan including Medicare, unless an exception applies) and the penalty (110% of subsidy received) associated with failure to notify plan of ineligibility.
5. A description, displayed in a prominent manner, of the individual's right to the COBRA premium subsidy and the conditions surrounding that subsidy.
6. If the employer has elected the option of permitting the individual to enroll in a plan that is different to the one he/she was covered under at the time of the original qualifying event, a description of such option.

**Extended Election Period Notice** – In the case of any assistance eligible individual that became entitled to elect COBRA continuation coverage prior to the date of the enactment of ARRA, the plan (or an entity on its behalf) within 60 days of the enactment of ARRA must provide a notice which includes the specific requirements noted above.

**Model Notices** – ARRA requires that the DOL and Health and Human Services (HHS) create and provide model notices designed to meet the applicable notice requirements not later than 30 days after the enactment of ARRA.

### **REFUND OF EXCESS PREMIUMS PAID BY INDIVIDUAL DURING SUBSIDY PERIOD**

Where an individual qualifies for the COBRA premium subsidy in any month for which that individual has paid in excess of the 35% premium, the entity that the COBRA "payment is payable" must either (1) refund the amount in excess of the 35% COBRA premium required or (2) provide a credit to the individual that reduces one or more subsequent payments that the individual would be required to pay for COBRA coverage for future months. For example, a COBRA premium for an individual is \$1,000 for March of 2009 and the employee paid the full amount. The individual subsequently elects the subsidy effective back to March 1 and as a result must only pay \$350 for the March premium. The employer may (1) refund the individual \$650 or (2) credit \$650 toward the individual's future COBRA premiums.

**However**, unless it reasonable for the employer to believe that the credits will be applied toward COBRA premiums within 180 days, the employer must refund the credit back to the individual within 60 days. Further, if at any time during the 180 day period, the employer no longer believes that the credit will be used for COBRA premiums during that 180 day period, the employer must refund any remaining credit to the individual within 60 days of coming to that determination.

## **REIMBURSEMENT OF THE COBRA SUBSIDY**

The person to whom premiums are payable under COBRA is entitled to be reimbursed the 65% subsidy paid on behalf of the assistance eligible individual. In cases where the employer's plan is subject to COBRA, ARRA identifies that entity as being the employer notwithstanding the fact that the actual premiums may be received by a third-party, such as a third-party administrator, on the employer's behalf.

**COBRA Subsidy Paid by Employer** - The COBRA premium subsidy paid by the employer is treated as a credit toward its payroll tax liability as of the date that the assistance eligible individual's premium payment is received, in an amount equal to the COBRA subsidy amount paid by the employer.

**Overstatement of COBRA Subsidy** - If the amount of COBRA premium subsidy paid is overstated by the employer, the overstated amount will treated as an underpayment of payroll taxes and "may be assessed and collected ... in the same manner as payroll taxes." Consequently, it would appear that the penalties associated with underpaying payroll taxes would apply in the case of overstatements by the employer in relation to COBRA subsidy paid.

**Reimbursement Dependent on Payment of Remaining Premium** - The COBRA premium subsidy paid by the employer may not be claimed as a credit towards payroll taxes due by the employer "until after the reduced premium... has been received."

**Employer Reporting** - Each employer that claims the subsidy as a payroll tax credit may be required to submit reports as directed by the government when claiming reimbursement for the COBRA premium subsidy. The required reports may include the following:

1. An attestation of involuntary termination of employment for each individual who reimbursement of the subsidy is being claimed.
2. A report of the amount of payroll tax credit claimed as reimbursement for the payroll tax reporting period and the estimated reimbursement amount for the subsequent payroll tax reporting period.
3. A report containing the tax identification number (i.e. social security number) for each individual for whom the subsidy reimbursement is being claimed and a designation with respect to each covered employee as to whether the subsidy reimbursement is for coverage of 1 individual or 2 or more individuals.

## **OPTION TO ENROLL IN DIFFERENT PLAN**

Generally, an individual who is COBRA eligible is only allowed at the time of electing COBRA to enroll in the plan they had on the day prior to the event which caused the termination of coverage. However, under ARRA, the employer has an option to allow an individual to elect a coverage that is different than what he/she had prior to termination of employment subject to the following criteria:

1. The employer must have elected the option to allow individuals to elect coverage other than the plan in which they were enrolled at the time of the qualifying event.
2. The premium for the different coverage cannot exceed the premium for coverage in which the individual was enrolled at the time the qualifying event occurred.
3. The different coverage is coverage that is also offered to active employees of the employer at the time of the election in the different coverage is made.
4. The different coverage is not coverage that provides only dental, vision, counseling or referral services (or a combination of such services), a health flexible spending account or coverage that provides treatment in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care.

**Period to Elect Option** – Where the employer provides the different coverage option, the individual offered that option, has up to 90 days to enroll in different coverage. The 90 day time period is measured from the date the individual was provided with the notice informing the individual of his or her rights to elect a different coverage.

## **GOVERNMENT OUTREACH**

ARRA requires that the DOL and HHS provide an outreach program consisting of public education and enrollment assistance relating to the COBRA subsidy. The goal of the program is to educate employers, group health plan administrators, public assistance programs, states, insurers and “other entities as determined appropriate.” The initial efforts of the outreach will focus on individuals electing COBRA continuation coverage and the provision of the information relating to the COBRA subsidy. The outreach efforts will include information provided on the DOL and HHS websites.

## **GOVERNMENT REPORTS**

Under the new law, the Secretary of the Treasury is required to submit “interim reports” to the certain Congressional committees. A final report must also be submitted to the committees as “soon as practicable” after the last period of COBRA continuation coverage for which a COBRA subsidy is paid.

For a copy of the ARRA legislation impacting COBRA, please click the link provided below and proceed to section titled Title III Premium Assistance for COBRA Benefits:

[American Recovery and Reinvestment Act of 2009](#)

## **TRADE ADJUSTMENT ACT COBRA PROVISIONS MODIFIED IN FINAL STIMULUS BILL**

The provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) enacted into law on February 17, 2009 included changes to the Health Care Coverage Tax Credit (HCTC) as contained in the Trade Adjustment Act of 2002 (TAA). Specifically, the ARRA changed the TAA and HCTC to include an increased tax credit amount, an expanded definition of eligible individual and qualified health insurance and also extended the length of coverage under COBRA for certain HCTC eligible individuals through 2010.

### **Increased HCTC:**

Effective May 1, 2009, through the end of 2010, the HCTC premium subsidy to purchase qualified health insurance will increase from the current level of 65% to 80%.

### **Expanded Definition of Eligible Individual:**

ARRA loosened the definition of an eligible TAA recipient to eliminate the requirement that an individual be enrolled in a training program if the individual is receiving unemployment compensation. It also expanded the TAA program to include service sector and public agency workers who have lost employment.

### **Expanded Definition of Qualified Health Insurance**

The ARRA also expanded qualified health insurance to include coverage funded by voluntary employees' beneficiary association (VEBA) trusts that are created in bankruptcy proceedings where an employer's retiree medical obligation is eliminated and replaced with a separate VEBA trust.

### **Extended COBRA Coverage for Certain HCTC-Eligible Individuals Through 2010**

In addition, the ARRA provides an extended COBRA period for HCTC-individuals who experience certain COBRA qualifying events. Specifically, in event of termination (other than for gross misconduct) or reduction in hours, COBRA coverage must continue until (1) the death of the PBGC-individual (and in the case of the surviving spouse or dependent child, 24 months after the death of the PBGC-individual), and (ii) for the entire period an individual is otherwise TAA-eligible. **However, the extension of COBRA as described above is not required to be provided beyond December 31, 2010.**

As a way of background, on August 6, 2002, the TAA was signed into law. This legislation expanded the benefits available to workers who lose their jobs as a result of import competition or transfer of production to other countries. **One of these benefits comes in the form of a tax credit.** Specifically, an eligible individual may take a federal income tax credit for up to a specified percentage (currently 65%) of the premiums for COBRA coverage, or other qualified health insurance. This benefit is available to the qualifying individual and his or her qualifying family members.

For more information in relation to the HCTC, please click on the link to the October 2002 Tech Flex provided below:

## [October 2002 Tech Flex](#)

For a copy of the ARRA legislation impacting the HCTC, please click the link provided below and proceed to section titled Part VI - Health Care Coverage Improvement:

### [American Recovery and Reinvestment Act of 2009](#)

## **INCREASE IN TRANSIT BENEFITS PROVIDED IN STIMULUS PACKAGE**

As part of the American Recovery and Reinvestment Act of 2009 (ARRA) signed into law by President Obama on February 17, 2009, available benefits under § 132(f) of the Internal Revenue Code in relation to transit benefits will be increased.

Specifically, the provisions of ARRA provide parity for transit benefits in relation to the benefits allowed for parking. As a result, effective with “months beginning on or after the date of enactment” of ARRA, the maximum monthly benefit for transit (currently \$120) will be increased to \$230 to equal the maximum monthly amount allowed for parking for 2009. As the bill was enacted on February 17, 2009, the effective date for the increased transit limit is March 1, 2009.

In addition, ARRA provides that the parity between transit and parking will remain in place for the 2010 tax year as well. Therefore the maximum limits for transit and parking benefits will be the same next year. HOWEVER, the parity provision does not extend past December 31, 2010. Absent any legislation to the contrary, the transit benefit limits beginning January 1, 2011 may again be less than those provided for parking benefits.

For a copy of the ARRA legislation impacting transit benefits, please click the link provided below and proceed to Part VI titled Parity for Transportation Fringe Benefits:

### [American Recovery and Reinvestment Act of 2009](#)

## **STIMULUS BILL MODIFIES HIPAA PRIVACY AND SECURITY RULES**

The American Recovery and Reinvestment Act of 2009 (ARRA) enacted on February 17, 2009, mandates significant modifications to the privacy and security requirements imposed on health plans, business associates, and other vendors of personal health records under the Health Insurance Portability and Accountability Act (HIPAA). The privacy regulations imposed under HIPAA set out rules regarding the use and disclosure of an individual’s health information by “covered entities” which include health care providers and insurance carriers. The HIPAA security rules require that covered entities in possession of an individual’s health information generally referred to as protected health information (PHI) must ensure the confidentiality, integrity, and availability of all electronic PHI records that the entity creates, receives, maintains, or transmits. In addition, covered entities must protect against reasonably anticipated threats or hazards to the security or integrity of electronic PHI.

ARRA created enhanced responsibilities of covered entities subject to the HIPAA rules and assigned responsibility to businesses that provide services to the covered entities referred to as “business associates.” Specifically, ARRA extends certain privacy and security obligations directly to business associates, establishes additional disclosure requirements in relation to

electronic health records and provides stronger enforcement and penalties associated with violation of the requirements. In addition, there were modifications in relation to the accounting of disclosure of PHI, restrictions on the sale of PHI and marketing practices. Please find below a brief summary of some of the modifications to HIPAA as a result of ARRA.

**Note: Many of the provisions become effective on February 17, 2010, but other provisions become effective on varying dates.**

### **HIPAA Security and Privacy Rules Imposed on Business Associates**

Currently, the HIPAA privacy and security rules apply to covered entities, which are defined as health plans, health care providers and health care clearinghouses. Where a health plan utilizes an outside third party to perform services in relation to the plan, the third party known as a business associate must agree via a business associate agreement to protect the health information in its possession under the same requirements as the covered entity. However, the business associate is not directly subject to the HIPAA rules nor is the business associate subject to the civil and criminal penalties that may be imposed for HIPAA violations.

ARRA mandates that the HIPAA privacy and security rules imposed on covered entities must also be imposed on business associates as well. In addition, ARRA requires that business associate agreements currently in effect must be amended to include any new privacy or security requirements as mandated under ARRA.

**Effective Date: This provision becomes effective on February 17, 2010.**

### **Breach Notification Requirements**

Under the current rule, a health plan is required to mitigate any harmful effects in the case of a security breach. These mitigation strategies could include reviewing its privacy and security procedures, imposing sanctions on workforce members or documenting its response to a complaint. However, there is currently no specific requirement under HIPAA that an individual whose PHI has been breached must be notified. Breach is defined as the unauthorized acquisition, access, use, or disclosure of PHI that compromises the security or privacy of such information.

Under the provisions of ARRA, a covered entity is required to notify any individual upon the discovery by the covered entity that the individual's PHI has been breached. Specifically, notification of the breach must be made without reasonable delay but no later than within 60 days of discovery (or from the date when the breach reasonably should have been discovered). A business associate upon discovery of the breach of an individual's unsecured PHI must notify the covered entity of the breach and must include the identification of each individual whose unsecured PHI has been breached.

The breach notification must advise the individual whose PHI was breached the following information:

- Brief description of what occurred, including the date of the breach and the date of the discovery of the breach.

- Description of information breached such as full name, SSN, date of birth, home address, or account number.
- The steps individuals must take to protect themselves from potential harm as a result of the breach.
- Brief description of what the covered entity is doing to investigate the breach, to mitigate losses, and to protect against further breaches.
- Provide contact procedures for individuals to ask questions or learn additional information in relation to the breach. The procedures must include a toll-free telephone number, an email address, Web site, or postal address.

Notice to an individual whose PHI was breached must be provided in written notification sent by first class-mail, or IF specified as a preference by the individual, via email. Information may be provided in one or more communications as information becomes available.

**Media Notice** – Where the PHI or more than 500 residents of that State or jurisdiction has been breached, notice must be provided to “prominent media outlets serving a State or jurisdiction.”

**Health and Human Services (HHS) Notification** - Covered entities must notify HHS of PHI that has been breached. If the breach impacts 500 or more individuals, notification to the HHS must be immediate. If the breach impacted less than 500 individuals, the covered entity must maintain a log of the breaches and submit to HHS annually. Where the breach involves the unsecured PHI of more than 500 individuals, the HHS will post on its website, a list that identifies each covered entity involved with the breach.

**Effective Date:** ARRA requires that interim final regulations in relation to the duty to be notified must be issued by Health and Human Services (HHS) within 180 days of February 17, 2009. The requirement to notify would apply to breaches discovered on or after 30 days of those regulations being issued.

### **Minimum Necessary Standard**

Under HIPAA, a covered entity is only allowed to disclose or use PHI to the amount necessary to accomplish the required administrative function. ARRA stipulates that a covered entity will only be considered to be adhering to the “minimum necessary standard” if it limits (to the extent possible) uses, disclosures and requests of PHI to a “limited data set” to extent practicable until such time when the HHS issues guidance on what constitutes “minimum necessary.” Where the “limited data set” provision is not practicable for the disclosure of PHI, “the covered entity or business associate disclosing such information shall determine what constitutes the minimum necessary to accomplish the intended purpose of such disclosure.”

ARRA requires that the HHS must issue guidance on what constitutes “minimum necessary” no later than 18 months as measured from February 17, 2009.

## Heightened Enforcement

ARRA significantly increases the civil monetary penalties for violations of the HIPAA privacy and security standards. The new law mandates the following civil penalty amounts as based on the type of violation:

Where a person is unaware of a violation (and by exercising due diligence would not have known), the minimum penalty is \$100 per violation with a cap of \$25,000 for violations of an identical requirement during a calendar year. The maximum penalty is \$50,000 per violation with a cap of \$1.5 million for violations of an identical requirement during the calendar year.

If the violation is due to “reasonable cause,” there is a minimum penalty per violation of \$1,000, with a cap of \$100,000 for violations of an identical requirement during a calendar year. The maximum penalty is \$50,000 per violation with a cap of \$1.5 million for violations of an identical requirement during the calendar year.

When the violation is based upon “willful neglect”, the minimum penalty is \$10,000 per violation, with a cap of \$250,000 for violations of an identical requirement during a calendar year. The maximum penalty is \$50,000 per violation with a cap of \$1.5 million for violations of an identical requirement during the calendar year.

For a copy of the ARRA legislation impacting HIPAA, please click the link provided below and proceed to Subtitle D titled Privacy:

[American Recovery and Reinvestment Act of 2009](#)

## **CHILDREN’S HEALTH INSURANCE PROGRAM EXPANDED**

On February 4, 2009, the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) legislation was enacted. CHIPRA expands the Children's Health Insurance Program (CHIP) which is a program designed to provide health insurance to uninsured children and teens who are not eligible for or enrolled in a state Medicaid or state child health plan. CHIPRA enhances CHIP in three main ways.

First, CHIPRA provides increased opportunities for states to subsidize employee premiums for employer-sponsored coverage of qualifying children.

Second, CHIPRA requires employer health plans to offer a special enrollment period to eligible employees or children who have lost coverage under CHIP or Medicaid coverage or become qualified for state-based premium assistance.

Third, CHIPRA states that employers must notify employees of premium assistance opportunities and disclose plan information to states on request. Please note that under this law, **the federal government has one year to issue a model employee notice and 18 months to publish a model disclosure form. Employer notice and disclosure obligations are effective as of the first plan year beginning AFTER the models have been released by the federal government. The remainder of the law is generally effective on April 1, 2009.**

## **Premium Subsidy Assistance**

Under the new legislation, a state may elect to offer a “premium assistance subsidy” for “qualified employer-sponsored coverage” to all targeted “low-income children” who are eligible under the plan. However, the child or child’s parents must voluntarily elect the subsidy and the state may not require the subsidy election as a condition of receipt of child health assistance. Whether a child is a low-income child depends on the family income and number of children in the family as determined by the state of residence.

The term premium assistance subsidy means with respect to a targeted low-income child: the amount equal to the difference between the employee contribution required for enrollment only of the employee coverage and the employee contribution required for enrollment of the employee and the child LESS any applicable premium cost-sharing applied under the state child health plan.

“Qualified employer sponsored-coverage” is a group health plan or health insurance coverage offered through an employer:

- that qualifies as creditable coverage under the Public Health Services Act;
- for which the employer contribution toward any premium for the coverage is at least 40%; and
- that is offered to all individuals in a manner “that would be considered a nondiscriminatory eligibility classification” under Internal Revenue Code Section 105(h).

**It is important to note that a qualified employer-sponsored coverage does NOT include a health care flexible spending account or a high deductible health plan whether or not associated with a health savings account.**

## **Special Enrollment Period under Group Health Plan**

CHIPRA requires that a group health plan must permit an employee or a dependent of employee who is eligible, but not enrolled, to enroll under the plan if either of the two conditions is met:

1. The employee or dependent is covered under a Medicaid plan or under a state child health plan and the coverage is terminated due to loss of eligibility AND the employee requests coverage under the group health plan not later than 60 days after the loss of eligibility.
2. The employee or dependent becomes eligible for assistance for coverage under the group health plan, Medicaid plan or state child health plan AND the employee requests coverage under the group health plan not later than 60 days after the employee or dependent is determined to be eligible for assistance.

## **Notice to Employee Obligations of Employer**

The new rules require that each employer that maintains a group health plan in a state that provides medical assistance under a state Medicaid plan or state child health plan via premium assistance for the purchase of coverage under a group health plan must provide each employee

with a written notice which informs the employee of opportunities currently available in the state in which the employee resides for premium assistance. In order to comply with this obligation, the employer may use any state-specific model notice developed.

An employer may provide the model notice applicable to the state in which an employee resides along with the furnishing of materials notifying the employee of health plan eligibility (i.e. new hire packet), or via materials provided for the plan's open enrollment or when a copy of the Summary Plan Description is provided.

**Note: CHIPRA mandates that Health and Humans Services (HHS) must develop and provide national and state-specific notices to enable employers to meets its notice obligations no later than February 4, 2010. The notice to employee requirement will become effective for plan years commencing following the date notices are first provided by HHS.**

### **Employer Obligations to Respond to State Inquiries**

In the case of a participant or beneficiary of a group health plan who is covered under a state Medicaid plan or state child health plan, CHIPRA requires that the plan administrator of the group health plan must upon request from the state, disclose sufficient information to determine the cost-effectiveness of the state providing medical or child health assistance through premium assistance for the purchase of coverage under the employer's health plan.

**Note: HHS and the Department of Labor (DOL) are required to develop and provide a model disclosure notice to be used by employers for responses to state inquiries within 18 months of February 4, 2009. States may not request the model disclosure form until the first plan year which commences after the date the model notice is initially provided by the HHS and DOL.**

CHIPRA provides that the failure of the employer to meet its obligations in relation to either the new employee notice or state disclosure may result in civil penalties of up to \$100 per day.

For a copy of CHIPRA, please click on the link provided below:

[Children's Health Insurance Program Reauthorization Act of 2009](#)

### **DHS ISSUES FINAL HIPAA RULES ON CODE SETS AND ELECTRONIC TRANSMISSIONS**

The Department of Health and Human Service (HHS) has published two sets of final regulations modifying HIPAA's code sets and electronic transaction standards.

#### **Code Sets**

The standard medical data code sets is modified by replacing the Ninth Revision of the International Classification of Diseases (ICD) with the Tenth Revision of the ICD, consisting of (1) Clinical Modification (ICD-10-CM) for diagnosis coding, and (2) Procedure Coding System (ICD-10-PCS) for inpatient hospital procedure coding. The rule on the ICD-10 code sets will be effective on October 1, 2013.

## Electronic Transaction Standards

These final regulations provide updated versions of the standards for electronic transactions originally adopted in the "Health Insurance Reform: Standards for Electronic Transactions," regulations released in the year 2000. Specifically, this regulation (1) replaces Accredited Standards Committee (ASC) Version 4010/4010A1 with an updated X12 standard, ASC Version 5010 for health care and health plan standards (referred to as the "covered transactions"), (2) replaces National Council for Prescription Drugs Programs (NCPDP) Version 5.1 with Version D.0 for retail pharmacy drug standards, and (3) adopts NCPDP Version 3.0 as the standard for the Medicaid pharmacy subrogation transaction. Generally, health plans must be compliant with the new transaction standards as of January 1, 2012, except small health plans have until January 1, 2013 to adopt the new standards.

Please find below, a link to the final code set and electronic transaction standards regulations:

[Final HIPAA Rules on Code Sets and Electronic Transmissions](#)

## **REVISED IRS TAX WITHHOLDING TABLES RELEASED**

The American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law by President Obama on February 17, 2009. One of the main components of ARRA was a provision of a \$400 "Making Work Pay" income tax credit (credit) for individuals or \$800 if married and filing jointly for the remainder of 2009 and 2010. The credit will be provided in the form of reduced withholding from the paychecks of employees.

The credit being provided is the lesser of (1) 6.2% of an individual's earned income or (2) \$400 for individuals or \$800 for married individuals filing jointly and is in effect for the 2009 and 2010 tax years. The credit is phased out at a rate of 2% of the individuals' modified adjusted gross income above \$75,000 for individuals or \$150,000 if married and filing jointly.

Modified adjusted gross income is defined as an eligible individual's adjusted gross income increased by any amount excluded from gross income because of the foreign earned income or housing cost exclusion or because of the exclusions for amounts earned in certain U.S. possessions and Puerto Rico.

Individuals with a modified gross income over \$95,000 (individual) or \$190,000 (married filing jointly) are ineligible for the tax credit.

**New Withholding Tables Released** - On February 21, 2009, the Internal Revenue Service (IRS) released the withholding tables designed to facilitate the provision of the tax credit. These tables are designed to reduce withholding so that the full amount of the credit for this year will be implemented during the remainder of 2009. Consequently, 12 months of reduced withholding will be accomplished in a less than 12-month period starting with the date the revised tables are in effect. When releasing the revised tables, the IRS stated the following: **"The IRS asks that employers start using these new tables as soon as possible but not later than April 1."**

For a copy of the IRS announcement, please click on the link provided below:

<http://www.irs.ustreas.gov/newsroom/article/0,,id=204521,00.html>

For a copy of the revised withholding tables, please click on the link provided below:

<http://www.irs.ustreas.gov/pub/irs-pdf/n1036.pdf>

## **IRS RELEASES REVISED FORM 941 AND INSTRUCTIONS**

As noted in the article above titled “Final Stimulus Bill Includes New COBRA Provisions”, the American Recovery and Reinvestment Act of 2009 (ARRA) provides that certain individuals who were involuntary terminated for the period beginning September 1, 2008 and ending on December 31, 2009 are eligible to receive a COBRA premium subsidy. Qualifying individuals will be required to pay 35% of the premium and the remaining 65% will be paid on their behalf generally by the former employer who will be reimbursed by the government in the form of a credit to payroll taxes owed by the employer to the Internal Revenue Service. Any amounts owed to the employer or other provider of the subsidized 65% of the premium in excess of the amount that can be taken as a credit against payroll taxes will be reimbursed in the form of a refund.

The Internal Revenue Service (IRS) recently released a revised Form 941 “Employer's Quarterly Federal Tax Return” and its Instructions to facilitate the claiming of the COBRA premium subsidy reimbursements by the employer. The Form 941 is used by employers to report wages, tips employees have reported to the employer, federal income tax withheld, social security and Medicare taxes withheld, the employer's share of social security and Medicare taxes, and advance earned income credit payments on a quarterly basis.

The revised IRS Form 941 Instructions provide the following guidance to employer's seeking a credit against payroll taxes based on COBRA premium subsidy payments.

The revised Form 941 Instructions specifically states:

### **12a. COBRA premium assistance payments**

Report on this line the COBRA premium assistance payments you made. Only report the premium assistance payments you made for the assistance eligible individuals who have paid their reduced premiums. This amount should be 65% of the total COBRA premiums for assistance eligible individuals without regard to the reduction. Do not include any amounts paid to you by the COBRA assistance eligible individuals. For COBRA coverage provided under a self-funded plan, COBRA premium assistance payments are treated as having been made for each assistance eligible individual who pays 35% of the COBRA premium.

### **12b. Number of individuals provided COBRA premium assistance on line 12a**

Enter the total number of individuals provided COBRA premium assistance payments reported on 12a.

For a copy of the revised Form 941 and Instructions, please click on the links provided below:

[Revised Form 941 Instructions](#)

[Revised Form 941](#)

In addition, the IRS released revised Form 941 (Schedule B) and its Instructions which is used by employers who are semiweekly schedule depositors.

For a copy of the revised Form 941 and Instructions (Schedule B), please click on the links provided below:

[Revised Form 941 Instructions \(Schedule B\)](#)

[Revised Form 941 \(Schedule B\)](#)

## **DHS RELEASES MODIFIED FORM I-9 AND THEN DELAYS ITS IMPLEMENTATION**

The Department of Homeland Security (DHS) is in the process of amending its regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers for completion of the Form I-9, Employment Eligibility Verification. All employers in the United States are responsible for completion and retention of Form I-9 for each individual they hire for employment in the United States. On the form, the employer must verify the employment eligibility and identity documents presented by the employee and record the document information on the Form I-9.

Under the new guidance, employers will no longer be able to accept expired documents to verify employment authorization on the Form I-9. This rule also adds a new document to the list of acceptable documents that evidence both identity and employment authorization and makes several technical corrections and updates. According to the DHS, "the purpose of this rule is to improve the integrity of the employment verification process so that individuals who are unauthorized to work are prevented from obtaining employment in the United States."

**Note: Although the revised I-9 rules were originally scheduled to be effective February 2, 2009, that effective date was delayed for 60 days until April 3, 2009. In its delay notification release, the DHS stated the delay will provide DHS with an opportunity for further consideration of the rule and also allows the public additional time to submit comments.**

Consequently the revised Form I-9 released may be modified once again. However, please find below a brief summary of the changes to the revised Form I-9 as they currently stand:

The most significant change in the current revised version of the Form I-9 is that all documents presented during the verification process must be unexpired. In addition, two documents have been added to List A (Documents that Establish Both Identity and Employment Authorization) on the List of Acceptable Documents as follows:

- A temporary I-551 printed notation on a machine-readable immigrant visa in addition to the foreign passport with a temporary I-551 stamp; and
- A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.

The following three documents under the current revised version effective April 3, 2009 are removed from List A of the List of Acceptable Documents:

- Form I-688, Temporary Resident Card;
- Form I-688A, Employment Authorization Card; and
- Form I-688B, Employment Authorization Card.

For a copy of the modified Form I-9 (subject to modification prior to April 3, 2009 effective date), please click on the link provided below:

[Form I-9, Employment Eligibility Verification](#)

## **2009 FORMS W-2 AND W-3 AND INSTRUCTIONS RELEASED**

The Internal Revenue Service (IRS) released the Form W-2 (Wage and Tax Statement) and Form W-3 (Transmittal of Wage and Tax Statements) along with the accompanying instructions for the tax year 2009.

The forms are essentially the same as those released for tax year 2008. However, the instructions did provide the following two items under the “**What’s New**” heading:

**Military differential pay.** Payments made after 2008 to former employees while they are on active duty for more than 30 days in the Armed Forces or other uniformed services are now treated as wages. Report these payments in box 1 of Form W-2.

**Reporting for nonqualified deferred compensation plans.** You are not required to complete box 12 with code Y (deferrals under nonqualified plans subject to section 409A).

For a copy of the 2009 Form W-2, please click on the link below:

[2009 Form W-2](#)

For a copy of the 2009 Form W-3, please click on the link below:

[2009 Form W-3](#)

For a copy of the 2009 Forms W-2 and W-3 Instructions, please click on the link below:

[2009 Forms W-2 and W-3 Instructions](#)

## **NEW YORK MODIFIES GARNISHMENT CALCULATION FORMULA**

Effective January 1, 2009, the calculation for determining the maximum amount of wages subject to an income execution (garnishment) in New York state has been modified to take into account the state minimum wage. Previously the calculation only took into account the federal minimum wage. Specifically, the statute was changed from “thirty times the federal minimum wage” to “**the greater of thirty times the federal minimum hourly wage or thirty times the state minimum hourly wage the labor law as in effect at the time the earnings are payable.**”

**Note: Currently the federal minimum wage is \$6.55 and the New York state minimum wage is \$7.15. When calculating the amount exempt from garnishment, the higher of the two minimum wages must be used.**

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***\*\*Please note that the information provided in this document is current as of the date it is originally published.\*\****