

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 AND ITS IMPACT ON THE WORKPLACE

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On February 17, 2009 President Obama signed the American Recovery and Reinvestment Act of 2009 ("ARRA" or "Recovery Act") which contains a number of entitlements and obligations affecting the workplace. In order to comply with their new obligations and understand the benefits available to employees or former employees, employers should familiarize themselves with the ARRA promptly. Below is a summary of some of the various employment-related provisions from the ARRA.

1. COBRA Subsidy.

a. What is it?

The ARRA provides for a 65% COBRA premium subsidy for certain "assistance eligible individuals." An "assistance eligible individual" is a COBRA "qualified beneficiary" who meets all of the following requirements:

- a. Is eligible for COBRA continuation coverage at any time during the period between September 1, 2008 and December 31, 2009;
- b. Elects COBRA coverage (when first offered or during the additional election period provided for under the ARRA); and
- c. Has a qualifying event for COBRA coverage that is the employee's involuntary termination during the period of September 1, 2008 and December 31, 2009.

The premium subsidy (or premium reduction) applies to periods of health coverage beginning on or after February 17, 2009 and lasts for up to 9 months. Individuals who are eligible for other group health coverage (e.g. under a spouse's plan) or Medicare are not eligible for the premium subsidy. The subsidy also is not available to employees (or their dependents) who have an adjusted gross income of more than \$125,000 (\$250,000 for joint filers) in the year in which they would receive a subsidy.

As a result of the subsidy, eligible individuals pay only 35% of their COBRA premiums and the remaining 65% is paid by the former employer who then has the right to seek reimbursement through a tax credit.

b. What if a previously terminated employee didn't elect COBRA?

The ARRA provides for a special 60-day election period for those eligible individuals who previously lost coverage and did not elect COBRA. The 60-day period begins on the date that notice is provided to the eligible individual about the special election period. The special election period does not extend the period of COBRA continuation coverage beyond the original

maximum required period and, in most cases, COBRA continuation coverage elected pursuant to the special election period begins on the first period of coverage following the date the ARRA was enacted (i.e. March 1, 2009).

c. How are eligible individuals notified?

Employers have 60 days from the date the ARRA passed to notify affected former employees and their eligible dependents that they have a right to elect COBRA and receive the subsidy. In addition to a regular COBRA notice, a supplemental notice is required to be given to affected employees to provide information about the subsidy. The DOL is preparing a model of such supplemental notice.

d. How do employers get reimbursed for the subsidy?

Employers are permitted to claim the COBRA subsidy on line 12a of their IRS Form 941 (the quarterly employment tax return). Employers are not required to file any other documents or information with the Form 941 but must maintain separate supporting documents to justify the claimed credit (e.g. information regarding receipt of the assistance eligible individual's 35% share of the premium, copies of invoices from the insurance carrier and proof of timely payment of the full premium, attestation of involuntary termination, including the date of such termination for each covered employee whose involuntary termination is the basis for eligibility of the subsidy, proof of eligibility for COBRA coverage during the 9/1/08 – 12/31/09 period, records of the SSN's of all covered employees and the amount of the subsidy reimbursed for each, and any other relevant documents). The IRS has issued information notices to explain how employers can seek reimbursement and such notices can be obtained on the IRS website.

2. Unemployment Benefits.

The ARRA extends the Emergency Unemployment Compensation Act of 2008 (EUC) which was set to expire on March 31, 2009. The EUC will now be in place through December 31, 2009. The EUC went into effect last June and provided for an additional 13 weeks of federally-funded unemployment benefits to eligible unemployed individuals nationwide who had already collected all regular state benefits for which they were eligible. In November 2008, the EUC was expanded to 20 weeks of benefits, and was also amended to provide for a second tier of 13 additional weeks of benefits for individuals in states with high unemployment rates. Additionally, benefit payments are increased by \$25 per week through December 31, 2009 for individuals receiving regular unemployment compensation, extended benefits, or benefits under the EUC. The ARRA also provides for a temporary suspension of taxation on the first \$2,400 of unemployment benefits in 2009.

Finally, the ARRA contains a number of provisions to assist states in administering their unemployment programs. It provides that: (1) the extended unemployment benefits will be 100% federally funded through January 1, 2010; (2) states can get a waiver of interest due on loans received by state unemployment trust funds through December 31, 2010; and (3) that states can

obtain federal funds to help them administer their unemployment programs and reform such programs to provide greater coverage (e.g. to cover part-time employees).

3. Work Opportunity Tax Credit (WOTC).

The WOTC is a program designed to help move people from welfare into gainful employment and obtain on-the-job experience. It provides a tax credit to employers who hire members of targeted groups. The ARRA added unemployed veterans and disconnected youth who begin work in 2009 and 2010 to the targeted groups covered under the WOTC. Other targeted groups already recognized under the WOTC include: long-term TANF (Temporary Assistance and Needy Families) recipients; qualified food stamp recipients; residents of a federally designated empowerment zone, enterprise community, or renewal community, vocational rehabilitation referrals, a qualified ex-felon, and an SSI recipient.

In order to obtain a tax credit under the WOTC program, employers must obtain a certification that a new employee qualifies the employer for the tax credit. Certain IRS forms must be completed at the time the job offer is made and after the individual is hired. The forms and guidelines on their completion can be obtained from the IRS website.

4. Other Funding for Various Programs Administered by the DOL.

The ARRA also provides almost \$4 billion dollars for various programs administered by the DOL, including adult employment and training activities, youth activities including summer jobs, dislocated worker activities, grant programs for worker training and placement in high growth and emerging industry sectors, employment opportunities for low income seniors, and employment service grants to states.

5. Whistleblower Protections Under the ARRA.

The ARRA contains whistleblower protections that apply to non-federal employers ("Covered Entities") who receive funds under the ARRA. The provision appears to also cover private employers if they contract with entities receiving funds under the ARRA. Also, supervisors, managers, and agents of an employer appear to be at risk of individual liability under the language of the provision.

The whistleblower protections prohibit a Covered Entity from discharging, demoting, or otherwise discriminating against an employee for his or her disclosure to the Recovery Act Accountability and Transparency Board (RAAT Board), an inspector general at the Interior Department, another governmental agency, a grand jury, or a court, any of the following which the employee reasonably believes has or is taking place:

- a. Gross mismanagement of any agency contract or grant relating to covered funds;
- b. A gross waste of covered funds;
- c. A substantial and specific danger to public health or safety related to the implementation or use of covered funds;

- d. An abuse of authority related to the implementation or use of covered funds; or
- e. A violation of law, rule or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant awarded or issued relating to covered funds.

Employers who receive covered funds are required to post notices in the workplace to apprise employees of their rights under the new law.

An employee who believes he/she has been retaliated against may submit a complaint to the appropriate inspector general at the RAAT Board. There is no statute of limitations in the ARRA for making such complaint and the employee's burden of proof is relatively low. The employee must only show that the protected activity he/she engaged in was a "contributing factor" (not the "motivating factor") for the employer's retaliation. The inspector general shall investigate within 180 days from receipt of the complaint (unless extended) and either: 1) issue a report of his/her findings to the complainant, the employer, and the head of the appropriate agency; or 2) make a determination that the complaint is frivolous and/or does not relate to covered funds. The agency head will determine whether there is a sufficient basis to conclude that the employer has violated the Act by retaliating against the employee. If there is a sufficient basis, the head of the agency can take one or more of the following actions: 1) order the employer to take affirmative action to abate the reprisal; 2) order the employer to reinstate the employee to the position that he/she held before the reprisal (along with back pay, compensatory damages, and employment benefits); or 3) order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys fee and witness fees) that were incurred by the complainant for bringing the complaint.

Upon exhausting his/her administrative remedies, an employee also has the right to bring a civil action against a Covered Entity.

Finally, the ARRA expressly provides that waivers and releases of the rights and remedies provided for by the whistleblowing provisions are not permitted in any agreement, including pre-dispute arbitration agreements (unless contained in a collective bargaining agreement). The language of the provision also suggests that an employer may not be able to obtain such a waiver or release in a separation or settlement agreement. However, it is unknown whether the language would prohibit a voluntary agreement to arbitrate a whistleblower claim under the ARRA if both parties agree to do so after the claim has been made and a dispute exists.

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