

BENEFITS ALERT 2009-01

To All Clients & Friends of FBMC
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From Trish Neely, CFCI
Chief Compliance Officer
850-425-6200 X2444
tneely@fbmc-benefits.com

Re **ARRA – The American Recovery
And Reinvestment Act of 2009**

The purpose of this Alert is to provide you with a brief overview covering many of the broad areas of relief followed by a more detailed discussion of those areas of the legislation which have a direct impact upon the flexible benefit plans that we administer on your behalf. Since ARRA requires **immediate** attention by employers and administrators with regard to health plan administration we will discuss some of the next steps that you and we must consider for immediate action.

Overview

When President Obama signed the American Economic Recovery and Reinvestment Plan (the "Act") into law on February 17, 2009 (enactment date) it became by all accounts one of the largest pieces of legislation in U.S. history. In his address to the nation following enactment, the President made it clear that no single piece of the legislation will meet the demands of our struggling economy, we must address them all. (See the whitehouse.gov/blog for the full address.)

The Act contains tax breaks for individuals and businesses, direct aid to states and individuals, and billions of dollars targeted to modernize and improve the nation's infrastructure. It is designed to revive the economy and create or save over 3.5 million jobs.

In the largest category: **Tax Relief**, employers have already received instructions to reduce the amount of taxes withheld in accordance with the provisions of ARRA as soon as possible and no later than

April 1st. From the Whitehouse.gov blog the President announced that ARRA will start having an impact in the form of the quickest and broadest tax cut in history:

"Because of what we did, 95% of all working families will get a tax cut -- in keeping with a promise I made on the campaign. And I'm pleased to announce that this morning, the Treasury Department began directing employers to reduce the amount of taxes withheld from paychecks -- meaning that by April 1st, a typical family will begin taking home at least \$65 more every month. Never before in our history has a tax cut taken effect faster or gone to so many hardworking Americans." President Obama

Congress and the President's package of federal spending and tax cuts is divided up as follows according to Recovery.gov:

\$288 Billion	Tax Relief
\$111 Billion	Infrastructure & Science
\$ 81 Billion	Protecting the Vulnerable
\$ 59 Billion	Healthcare
\$ 53 Billion	Education & Training
\$ 43 Billion	Energy
\$ 8 Billion	Other

Recovery.gov is a website set up to permit taxpayers to follow the money.

The IRS released new withholding tables to assist employers and payroll vendors. The \$400 payroll tax cut for individuals and \$800 for couples, at an overall cost of \$116 billion is the costliest item in the plan according to an article by Benjamin and Goldman on Bloomberg.com. The authors also noted that retirees, disabled veterans and others who don't pay payroll taxes will get a \$250 payment. (continued on page 2)

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The bill also includes a one-year correction

to the alternative minimum tax, costing \$70 billion, which will prevent some taxpayers from having to pay extra income taxes this year.

In the category of **Infrastructure**, 30 pages of the Act are devoted to Health Information Technology (not a surprise if you followed candidate Obama's healthcare reform initiatives and campaign speeches). Steve Lieber, President of Health Information Management Systems Society called ARRA, "the most important legislation to ever impact health IT." According to Lieber, the amount of funding related to HIT, which is about \$20 billion, is an unprecedented one-time investment.

For our clients in the health care sector, the Act contains incentives for hospitals that adopt and use certified electronic health record (EHR) technology.

As I mentioned in the most recent Quarterly Review, Congress reached its tipping point on the volume of privacy and security breaches which have been headlining newspapers, e-zines and blogs. The Act expands the scope of HIPAA's privacy and security provisions to better protect consumers.

For our clients and friends in the education sector, the Act earmarks funds for modernization of classrooms. From the US Department of Education Website:

"This historic law [ARRA] provides more than \$100 billion dollars over the next two years to save education jobs, send young people to college, modernize America's classrooms, and advance education reforms."

There are \$10 billion in tax breaks for businesses, including faster write-offs for equipment purchased in 2009 and incentives for companies that produce and invest in renewable energy resources such as solar and wind power.

The stimulus plan provides for renewable energy projects, highway construction, broadband Internet access, high-speed rail projects and scores of other modernization programs.

The 81 billion to **protect the vulnerable**

includes the government subsidy of COBRA discussed in more detail below.

Also in this category I will mention that the Act places new restrictions on executive compensation and corporate governance for any entity that has or will receive financial assistance. The President in his address following enactment of ARRA stated that there will be "21st Century Rules of the Road." No more excessive expenditures, excessive bonuses, entertainment or transportation costs expensed by companies who are being bailed out at taxpayers' expense.

The 53 billion for **Education & Training** will target both workers and businesses with "trade adjustment" assistance and funds for worker retraining.

Of concern to proponents and detractors alike is that the Act raises the debt limit to about \$12 trillion with the cost spread over the next 10 years. According to estimates by the Congressional Budget Office, the legislation increases the budget deficit to \$185 billion in fiscal 2009, which ends Sept. 30th. The biggest impact at approximately \$400 billion will come in fiscal year 2010.

HIPAA

With the frequency in the news of breaches to consumers' personally identifiable information or protected health information, it was only a matter of time before Congress decided to crack down severely to stem the tide of unfortunate privacy and security incidents.

The Act expands the scope of HIPAA's privacy and security provisions and applies the standards for administrative, physical and technical safeguards to business associates as well as the policies, procedures and documentation requirements in certain sections of the Health Insurance Portability and Accountability Act (HIPAA). The Secretary of Health and Human Services will issue further guidance to Business Associates within the next year and will update annually.

Importantly for employers, business associates, and individuals and the courts, the Act defines a breach as *“the unauthorized acquisition, access, use or disclosure of PHI which compromises the security, privacy, or integrity of PHI maintained by or on behalf of a person. A breach does not include the unintentional acquisition by an employee or agent of the covered entity or business associate if such access was made in good faith and if such information is not further acquired, accessed, used or disclosed by such employee or agent.”*

The Act applies the privacy provisions of each applicable requirement of section 45 CFR 164.504(c) to business associates and extends civil and criminal penalties to business associates who violate the privacy provisions. We are awaiting model language by CMS in order to update the current Business Associate/Confidentiality agreements to include the new language.

Parity for Transportation Fringes

ARRA Section 1151 amends Section 132(f) to increase the exclusion amount for commuter transit benefits and transit passes to be equal to the \$230 exclusion amount currently available under Section 132 for parking benefits. The amendment applies to months beginning on or after the date of enactment - February 17, 2009, and before January 1, 2011.

Our benefit partner **WiredCommute** has updated **all** company profiles and participant shopping carts/orders to reflect the new pre-tax limit. All participants with Transit orders were sent an email by **WiredCommute** explaining the increase in the pre-tax limit with the effective benefit month.

COBRA Subsidy

ARRA Section 3001 provides for premium assistance for COBRA benefits. The assistance is in the form of a Government “funded” COBRA premium subsidy equal to 65% of the cost an individual pays for

COBRA coverage.

The subsidy applies to non-MFSA health coverages that were in effect by either the employee or his/her qualified beneficiaries as of the involuntary termination qualifying event. It applies to employees (and their COBRA eligible beneficiaries) who were involuntarily terminated (for any reason other than gross misconduct) beginning **9/1/2008 through 12/31/2009**. This group is referred to as Assistance Eligible Individuals (AEI).

The subsidy is not geared toward highly compensated individuals earning more than \$145K (or \$290K if filing jointly). Individuals earning more than \$125K but less than \$145K (or > \$250K but < \$290K filing jointly) receive a reduced subsidy. If the full subsidy is accidentally received, it is collected from the individual by the government during preparation of year end income taxes.

The subsidy is prospective and applies to an individual’s premiums for periods of coverage beginning on or after the enactment date.

The maximum subsidy is for 9 months. However, it will end sooner if 1) the individual becomes **eligible for** other coverage; or 2) the individual’s COBRA coverage otherwise ends.

The law requires a special election period for all AEIs who initially declined coverage or who dropped it or lost it (e.g. due to non-payment of premiums).

There are two important notes here. First, the COBRA clock starts ticking based upon the date of the qualifying event. In other words, Section 3001 does not extend the 18-month coverage period beyond that which would have been required under the applicable COBRA provision at the time of the qualifying event. So an individual who did not initially enroll in COBRA is not able to enroll now and receive the full 18 months of coverage – he/she receives only the “remaining” months of coverage under COBRA.

Second, any gap in coverage is **not**

considered a break in coverage for pre-existing conditions. The *“period beginning on the date of the qualifying event, and ending with the first period of coverage beginning on or after 2/17/2009, shall be disregarded”* for purposes of establishing any gap in coverage.

For an Assistance Eligible Individual (AEI) who is currently on COBRA, the subsidy automatically goes into effect for coverage periods following enactment. Any pre-payment will be recalculated and a credit applied to future payments or refunded in accordance with the Act.

Section 3001(B) permits individuals to enroll in coverage different than coverage under the plan in which such individual was enrolled at the time of the qualifying event if:

- 1) the employer permits enrollment in different coverage (we do not recommend this);
- 2) the premium for such different coverage is equal to or less than coverage at the time of the qualifying event;
- 3) the different coverage is also offered to active employees; and
- 4) the different coverage is not limited to dental, vision, counseling, referral services, flexible spending arrangements, or any combination.

Under the Act’s COBRA subsidy rules, an assistance eligible individual is treated as having paid the full COBRA premium to the extent he/she pays 35%. The Government will then reimburse employers for the remaining 65% using an offset in payroll taxes. An employee (and his/her eligible dependents) is eligible for the premium reduction if the employee involuntarily terminated employment between September 1, 2008 and December 31, 2009. The Act also mandates an extended election period for employees and their eligible dependents who became entitled to COBRA as a result of an involuntary termination between September 1, 2008 and February 16, 2009 but who failed or have yet to make a COBRA election or who elected COBRA and lost it prior to the Enactment Date.

FBMC’s COBRA Action Plan

Assess system requirements. We have been in constant communication with our software vendor and outsourcing partner for the COBRA system that we use. The system can handle the recordkeeping for the subsidy since it already contains the fields necessary to handle. We are currently working through the mechanics of receiving the 65% premium subsidy from employers.

We will be setting up the rate structure for each eligible plan and the participant records for those eligible for the subsidy. We will be calculating the amount

Identify qualified beneficiaries. The most challenging aspect of the Act is the “retroactivity back to 9/1/2008 for employees involuntarily terminated”. We are able to identify everyone that had a qualifying event of termination of employment back to 9/1/2008; however, we do not know if the termination was voluntary or involuntary. We also do not have qualifying income levels for affected cases since historically this has had no bearing on the offering of COBRA. Since the Act excludes or reduces the subsidy based upon income, this is now a necessary piece of information. As a critical first step, we have begun running preliminary reports of all records with qualifying event dates going back to 9/1/2008 that we will **forward to clients for the needed input.**

The Department of Labor has 30 days to issue model language for the new Notice requirements; however, the plan sponsor/administrator has only 60 days to get out the Notice regarding the special election period. Therefore we have elected to begin **preparing our own notice(s)** related to the COBRA subsidy which includes the following categories:

- 1) For AEIs already on COBRA who experience a qualifying event between 9/1/2008 and 2/16/2009;
- 2) For AEIs who failed to elect, declined coverage, or lost coverage; and
- 3) AEIs who experience a qualifying event on or after 2/17/09 and before 12/31/2009.

Other notices include increased premium following the exhaustion of the 9-month premium assistance period or if the AEI

becomes eligible for other coverage.

Prepare subsidy waiver form for highly compensated employees as well as an attestation of eligibility form for all individuals who will be entitled to the subsidy.

Revise HIPAA Certificates of Creditable Coverage to include language that excludes any gap in coverage for purposes of HIPAA's pre-existing condition rules.

Establish credit/refund process for AEIs who pay more than the 35%.

Identify reports clients may need in fulfilling their reporting obligations to receive the governmental credit to payroll taxes.

Next Steps – What You Must Do

Work through the budgetary impacts of the subsidy – employers will front the 65% premium subsidy and will be reimbursed in the form of a credit toward payroll taxes.

Prompt payment to FBMC of the 65% premium is essential to assure timely payment to insurers.

There has been some question as to whether insurers will be reluctant to pick up coverage following a potential gap. All we can say is that they may be reluctant but this is a federal law that is not optional as long as the beneficiary meets all the COBRA requirements of the Act.

Special Enrollment. Determine if you wish to offer the ability to elect a different coverage option than the option in effect at the time of the involuntary termination. Because this is permissive and because we believe this will complicate an otherwise complicated process we do not recommend this option.

Review reports that we send and **provide** beneficiary and salary **information**. Delete anyone from the list who terminated voluntarily, or for gross misconduct.

Review any employee handbooks, internet or intranet sites which include **information**

regarding COBRA benefits and determine what (if any) changes may be needed.

Where FBMC Does **Not** Administer COBRA for Core Benefits

Work through the budgetary impacts of the subsidy – employers will front the 65% premium subsidy and will be reimbursed in the form of a credit toward payroll taxes. Prompt payment by employers to COBRA administrators is needed to assure timely payment to insurers.

Assess system requirements. Schedule time with your COBRA administrator to identify and assess any system changes.

This is a good time to **Identify specific reports you will need** to meet your reporting requirements to receive the payroll tax credit. **Establish credit/refund process** for AEIs who pay more than the 35%.

Or alternatively, **determine if your payroll administrator may have reports** which will help you track and maintain the payroll information to comply with the payroll tax reporting the government will require of you.

Identify qualified beneficiaries. Identify everyone that had a qualifying event of termination of employment back to 9/1/2008; this includes spouses and children. Bounce this list against salaries and exclude or reduce the subsidy accordingly.

Determine if you wish to offer a **special enrollment** which extends the opportunity for an AEI to elect a different coverage option than the option in effect at the time of the involuntary termination.

Determine if you will wait on the Department of Labor to issue **model notices** or if you prefer for your COBRA administrator or you to prepare the notices. The Department of Labor has 30 days to issue model language for the new Notice requirements; the notices must be sent within 60 days of enactment.

Prepare a **notice** or communication which provides **for increased premium** following the exhaustion of the 9-month premium assistance period or if your AEI becomes eligible for other coverage.

Prepare subsidy waiver form for highly compensated employees as well as an attestation of eligibility form for all individuals who will be entitled to the subsidy.

Coordinate with your COBRA administrator or your health providers to **revise HIPAA Certificates of Creditable Coverage** to include language that excludes the gap in coverage from 9/1/2008 for purposes of HIPAA's pre-existing condition rules.

Conclusion

This is what we know as of today's date. I will be in Washington DC the first week of March to learn more about the Act. Several IRS officials will be speaking at the ECFC Conference that I will be attending. You can expect to receive updates as frequently as we know more information.

In the interim, please direct any questions to me in writing via tneely@fbmc.com.

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