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*****EMPLOYMENT LAW ALERT*****

**CHANGES TO COBRA UNDER
THE AMERICAN RECOVERY & REINVESTMENT ACT**

By: S. Whitney Rahman

On February 17, 2009, President Barack Obama signed the American Recovery and Reinvestment Act (“ARRA”), which contains changes that affect any business covered by the Consolidated Omnibus Budget Reconciliation Act of 1986 (“COBRA”).

The ARRA allows assistance eligible individuals to have health care coverage under COBRA as long as the individual pays 35% of the health care coverage. Assistance eligible individuals must meet the following criteria: (a) is a qualified beneficiary under COBRA; (b) who is eligible for COBRA at any time from September 1, 2008 through December 31, 2009; (c) elects COBRA coverage; and (d) the qualifying event for COBRA coverage was the involuntary termination of the covered employee’s employment between September 1, 2008 and December 31, 2009.

An individual who meets this criteria may enroll for coverage under any plan offered by the employer, even if it is different from the plan the employee had while employed, as long as:

- (1) the employer has determined that it will allow its employees to enroll in different coverage;
- (2) the premium does not exceed the premium the individual had at the time the qualifying event

occurred; (3) the coverage chosen is also offered to active employees when the election is made; and (4) the different coverage is NOT either: (a) coverage that only provides dental, vision, counseling or referral services, or some combination of these services; (b) a flexible spending arrangement; (c) coverage for services provided in-house by the employer, such as first aid, prevention and wellness services or similar services. Individuals have 90 days after being notified of a different plan option to elect such coverage.

There is a phase-out of the subsidy for high-income individuals and their dependents. Thus, taxpayers with a modified adjusted gross income in excess of \$125,000 (\$250,000 if filing jointly) will have a percentage of the reimbursement counted as taxable income. High-income individuals may waive their rights to receive a subsidy and therefore not subject themselves to a recapture of the amounts by making a permanent election to waive the right to the premium assistance and notifying the entity to whom premiums are reimbursed of the election.

The subsidized COBRA payment will be made until the earliest of the following dates: (1) nine months after the first day of the first month the individual is eligible and makes their 35% payment; or (2) the day after the expiration of the maximum period of applicable COBRA coverage under previously existing COBRA provisions; or (3) the first day the individual is eligible for coverage under another group health plan, or is eligible for social security benefits.

An individual must notify the group health plan upon becoming eligible for another group health care plan or social security. If the individual fails to perform this obligation, he or she must pay a penalty of 110% of the premium reduction provided after the termination of their eligibility, unless the failure is shown to be due to reasonable cause and not willful neglect.

Individuals who are assistance eligible, but whose time to elect COBRA has passed, may elect coverage at any time from the date of the ARRA until 60 days after they have received notice of their rights as required under the ARRA. Coverage will begin with the first period of

coverage beginning on or after the date of the ARRA, but may not continue beyond the period of time for which the person otherwise would have been eligible for COBRA benefits.

COBRA notices must be revised to contain an additional notification to the recipient outlining the availability of premium reduction, and the option to enroll in different coverage if allowed by the employer. Specific COBRA notices sent to eligible individuals upon the occurrence of a qualifying event must include:

- a. The forms necessary to establish eligibility for premium reduction;
- b. The name, address and telephone number to contact the plan administrator and any other person maintaining relevant information in connection with the premium reduction;
- c. A description of the extended election period;
- d. A description of the obligation of the individual to notify the plan upon eligibility for another health care plan or social security, and the penalty for failure to notify;
- e. A description, displayed prominently, of the individual's right to a reduced premium and any conditions on entitlement to the reduced premium;
- f. A description of the option to enroll in different coverage if the employer allows it.

For individuals who became eligible for COBRA and received their COBRA notices before the ARRA was signed, additional COBRA notices must be provided to them within 60 days of the date of the ARRA. Various government agencies are to draft model notices within 30 days of the date of enactment.

Employers, multi-employer group health plans or, in certain cases, insurers will be eligible for reimbursement for premium payments as a credit against payroll taxes, including wage withholding and FICA payments. To the extent that the amount paid exceeds payroll taxes

paid, the amount will be credited or refunded as if it were an overpayment of payroll taxes. If a person entitled to reimbursement overstates the reimbursement due, and is paid accordingly, it will be treated and collected as an underpayment of payroll taxes. Reimbursements cannot be claimed until the payment has been made.

The ARRA also includes reporting requirements that will be outlined in greater detail in regulations. These requirements will include: (1) an attestation of involuntary termination of employment for each employee used as the basis for the recovery of a reimbursement; (2) a report of the amount of payroll taxes offset for the reporting period and the estimated offsets of such taxes for the next reporting period; and (3) a report containing the taxpayer identification number of all covered employees, the amount of subsidy reimbursed with respect to each covered employee and qualified beneficiaries, and a designation as to each covered employee of whether the subsidy reimbursement is for coverage of one individual, or of two or more individuals.

If you have any questions about the ARRA, COBRA, or any other aspect of employment or labor law, please feel free to contact Whitney Rahman or John Roland at (610) 372-5588, or by e-mail at swrahman@rolandschlegel.com or jroland@rolandschlegel.com.