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## The American Recovery and Reinvestment Act: What Employers Need to Know

By: Jennifer Brown Shaw and Becki D. Graham

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act ("ARRA") into law. The stated purpose of the ARRA, often referred to simply as the "stimulus bill," is to improve our economy by, among other things, creating and saving jobs, improving affordable health care, providing tax relief, and improving the nation's infrastructure.

The ARRA affects employers in a number of ways. Most notably, it significantly amends the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), which provides workers and their families who lose their group health plan benefits the ability to continue benefits for a limited period of time. The ARRA also contains provisions relating to the employment of HI-B workers, executive compensation, unemployment compensation, HIPAA, whistleblower protections for employees of contractors that receive ARRA funds, and certain tax credits. We briefly summarize each of these provisions below.

### COBRA Premium Subsidy and Related Employer Tax Credits

Congress passed COBRA in 1986 to provide employees and their dependents the ability to temporarily continue group health care coverage for up to 18 months after a "qualifying event," such as termination or reduction in hours. Until the ARRA became law, the employee was responsible for paying the entire premium for continued coverage—generally up to 102% of the applicable

premium while the employee was working.

The ARRA makes several temporary modifications to COBRA, the most significant of which is the implementation of a federal subsidy to reduce the cost to employees of COBRA premiums.

Eligibility and Coverage. Under the ARRA, individuals (and their qualifying beneficiaries) who are "involuntarily terminated" between September 1, 2008, and December 31, 2009, will be eligible for a 65% reduction in their COBRA premiums. There is an interesting debate among commentators about the definition of "involuntarily terminated," particularly when there is a mutual decision to end the employment relationship.

Covered employers are responsible for subsidizing the premium and then taking an appropriate tax credit. Importantly, the subsidy requirement applies not only to employers subject to federal COBRA, but also to smaller employers covered under an equivalent state law, such as Cal-COBRA. As predicted, some employers have chosen to cancel health insurance coverage altogether rather than provide the subsidy. Similarly, certain employers that agreed in the past to pay COBRA benefits as part of a separation package have eliminated that aspect of the package. After all, the thought goes, if the government will pay, why should the employer?

Congress recognized that some individuals who became eligible for

COBRA before the enactment of the ARRA may have declined coverage due to its cost. Accordingly, the ARRA provides for an extended COBRA election period for eligible individuals who did not initially elect coverage. These individuals have up to 60 days from notification of the extended period to elect COBRA continuation coverage.

Notably, certain "high income" individuals with adjusted gross incomes exceeding \$125,000 (\$250,000 if filing a joint tax return) will not be eligible for the COBRA subsidy.

Premium Reduction Period. Eligible individuals will receive a premium reduction for up to nine months, unless their COBRA coverage period expires or they become eligible for other types of health care coverage before the nine-month period ends.

Notice Requirements. Employers must comply with specific notice requirements under the new provisions. Any individuals eligible for COBRA coverage between September 1, 2008, and December 31, 2009, must receive a notice describing their rights. Any individuals who became eligible for COBRA before February 17, 2009, must receive the notice no later than April 18, 2009. Also, in certain circumstances, employers also must inform individuals of their right to enroll in a different health benefit plan.

The Secretary of Labor will provide sample notices by March 19, 2009.

Employer Tax Credits. Employers may recover subsidized COBRA premiums by either offsetting their payroll tax deposits or claiming the subsidy as an overpayment on the tax return at the end of each quarter. The Internal Revenue Service recently revised Form 941 for this purpose.

Interestingly, employers may not claim a credit until they receive the 35% payment from the individual. Also, employers must report the number of individuals to whom they provided the subsidy. While employers are not required to submit any documentation to the IRS, they must retain the appropriate documentation to support any claimed credits.

Tips for Implementation. The new COBRA rules are extensive and complicated. As such, employers should partner with counsel experienced in benefits law regarding compliance questions. Employers must tend to a number of items, including amending their current COBRA forms, creating a retention policy for documents that support claimed tax credits, and assessing how the new rules apply to employees involuntarily terminated prior to the effective date of the ARRA.

Additional information regarding the changes to COBRA can be found on the Department of Labor's website at <http://www.dol.gov/ebsa/cobra.html> and on the IRS's website at [http://www.irs.gov/newsroom/article\\_0,,id=204708,00.html](http://www.irs.gov/newsroom/article_0,,id=204708,00.html).

### Restrictions on the Use of HI-B Workers

Under the ARRA, employers that receive funds from the Troubled Asset Relief Program ("TARP") (a 2008 law passed to address the subprime mortgage crisis) will be limited in their ability to use HI-B workers. For the next two years, such employers must actively recruit U.S. workers before employing HI-B workers. That includes situations in which

employers are seeking to replace workers previously laid off.

### Limitations on Executive Compensation

The ARRA also limits executive compensation for employers that receive TARP funds. Among other things, the ARRA limits bonuses and certain "excessive" or "luxury" expenditures. Employers subject to this provision should become familiar with the new restrictions and modify their practices accordingly.

### Increased Unemployment Compensation Benefits

With the enactment of the ARRA, individuals who receive benefits through regular unemployment compensation, Trade Readjustment Allowances, Disaster Unemployment Benefits, Emergency Unemployment Compensation, or Extended Benefits will receive \$25 more a week until December 31, 2009. In addition, any federal income tax on the first \$2,400 of federal unemployment benefits is suspended for 2009.

### Changes to HIPAA

The ARRA expands the privacy and security measures required under the Health Insurance Portability and Accountability Act ("HIPAA"). Widely misunderstood by many employers, HIPAA generally seeks to protect individuals' health information. Some of the most notable changes include expanding HIPAA coverage to the "business associates" of entities currently subject to HIPAA's rules, requiring covered entities and business associates to report breaches of protected health information, creating a new enforcement authority to bring actions for damages or injunctions to enforce the HIPAA rules, and increasing the civil penalties for HIPAA violations.

While non-health care employers have relatively few obligations under HIPAA, all employers should consult with benefits counsel to ensure they

are in full compliance with the new rules.

### Whistleblower Protections for State and Local Government Contractors

To promote accountability, the ARRA protects "whistleblowers" who report alleged misuse of ARRA funds. Specifically, state and local government contractors (federal contractors are exempt) that receive ARRA funds are prohibited from discharging, demoting, or otherwise discriminating against an employee for reporting (a) instances of gross mismanagement of a contract or grant, (b) waste of agency funds, (c) public health or safety dangers, (d) abuse of authority related to the implementation or use of covered funds, or (e) a violation of any laws related to the contract or grant.

The federal Investigator General will review whistleblower complaints. If a complaint is substantiated, the appropriate federal agency director will order the contractor to take affirmative action to stop the retaliatory conduct, pay the subject employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' and expert witnesses' fees) the employee incurred in connection with bringing the complaint, and/or, if applicable, reinstate the employee to his or her former position and provide the employee compensation and other employment benefits the employee would have received if the retaliatory conduct had not taken place.

If a complaint is not substantiated through the ARRA's administrative process, the "whistleblower" may bring an action for damages in federal court. In addition, the agency director may file a civil action for enforcement of any issued order, subjecting the contractor to compensatory and punitive damages.

In addition, employers receiving ARRA funds must post a notice of "whistleblower" rights and remedies.

As of the date of this article, there is no indication regarding where employers can obtain a copy of the notice.

### Making Work Pay Tax Credit

The ARRA establishes a number of tax credits, including the Making Work Pay credit. This earned income tax credit is the lesser of 6.2% of an individual's earned income or \$400 (\$800 for joint tax returns). The credit applies to the 2009 and 2010 tax year, and will be spread out over employee paychecks. The credit begins to phase out for individuals whose adjusted gross income is between \$75,000 and \$95,000 (between \$150,000 and \$190,000 for joint tax returns).

The IRS recently released new tax withholding tables that incorporate the new credit. According to the IRS, employers should begin using the new tables no later than April 1, 2009. The new tables can be found at <http://www.irs.gov/pub/irs-pdf/n1036.pdf>. The IRS will also post instructions outlined in Publication 15-T on its website ([www.irs.gov](http://www.irs.gov)) during the week of March 9, 2009.

Employers should work with their payroll staff or vendors to ensure the new credit is properly applied.

### Tax Credits for Hiring Unemployed Veterans and Disconnected Youth

Section 51 of the Internal Revenue Code permits employers to claim a work opportunity tax credit for wages paid to certain "target group" employees. The ARRA expands this credit for the 2009 and 2010 tax years to make it available to employers who hire unemployed veterans and "disconnected youth."

A "disconnected youth" is an individual between the ages of 16 and 25 who lacks a sufficient number of basic skills, and has not attended school or been regularly employed within six months of being hired by the employer. An "unemployed veteran" is someone who was discharged five years prior to being hired and received unemployment benefits for more than four weeks in the prior year.

Employers should assess whether they have hired any individuals in these target groups to take advantage of the new credit.

### Increased Commuter Benefits

The ARRA temporarily increases the mass transit and vanpool benefits employers may provide to their employees. Through December 31, 2010, employers may claim an increased tax deduction for paying certain employee commuting expenses. Alternatively, employees may fund their own commuting expenses as part of a qualified transportation fringe benefits plan and exclude such expenses from their gross income. For 2009, the maximum exclusion amount will increase from \$120 to \$230.

Employers who wish to offer the increased benefits should amend their plan documents accordingly and notify employees of the change.

### Conclusion

Most of the ARRA's provisions became effective on February 17, 2009. Therefore, employers should work quickly to evaluate how the ARRA will affect their operations and take the necessary steps to ensure compliance.

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Jennifer Brown Shaw is a partner at Shaw Valenza LLP. Her practice includes providing regular advice and counsel to private and public sector employers. She also develops and presents seminars on legal issues in the workplace for management and non-supervisory employees.

[jshaw@shawvalenza.com](mailto:jshaw@shawvalenza.com)



300 Montgomery Street, Suite 788  
San Francisco, California 94104  
Tel: (415) 983-5960  
Fax: (415) 983-5963

520 Capitol Mall, Suite 630  
Sacramento, California 95814  
Tel: (916) 326-5150  
Fax: (916) 497-0708

[www.shawvalenza.com](http://www.shawvalenza.com)