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LAMB & BARNOSKY, LLP

ATTORNEYS AT LAW

MEMORANDUM

TO: OUR EMPLOYER CLIENTS

FROM: LAMB & BARNOSKY, LLP

**RE: THE AMERICAN RECOVERY AND REINVESTMENT ACT:
COBRA PREMIUM REDUCTION**

DATE: APRIL 8, 2009

As part of the economic stimulus package, the American Recovery and Reinvestment Act of 2009 ("ARRA"), the health plan continuation coverage provisions of the Consolidated Omnibus Business Reconciliation Act of 1985 (commonly referred to as "COBRA") are modified to provide for a temporary COBRA premium reduction and additional election opportunities for continuation health benefits. ARRA requires employers to provide employees involuntarily terminated on or after September 1, 2008 with notice of their rights to premium reductions before **April 18, 2009**, as detailed below. ARRA's requirements also apply to continuation coverage pursuant to New York State's mini-COBRA requirements for employers with 20 or fewer employees.

Who is eligible for premium reduction?

An assistance eligible individual (AEI) is a person who becomes eligible for COBRA continuation coverage at any time during the period between September 1, 2008 and December 31, 2009 due to the involuntary termination of employment for reasons other than gross misconduct and who elects the coverage. In order to be a qualified beneficiary, the individual must be covered under the group health plan on the day before the involuntary termination (except in the case of children born or adopted during certain periods).

An involuntary termination means a severance from employment due to the employer's independent exercise of its unilateral authority to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing service. Examples of involuntary terminations include a layoff or furlough, or a termination for reasons other than gross misconduct. An involuntary termination does not include an absence from work due to illness or

disability, the death of an employee or a retirement unless the employee would have been terminated if he declined to retire.

Individuals who become eligible for COBRA continuation coverage as a result of retirement, voluntary termination of employment, death, divorce or loss of dependent status are not eligible for the subsidy.

What is the premium reduction?

An AEI will only be required to pay 35% of his or her COBRA premium. The employer is required to pay the remaining 65% of the COBRA premium, which the employer may then recover by claiming the subsidy amount as a credit on IRS Form 941. A revised Form 941 can be found on the IRS website, www.irs.gov, which allows for the credit.

The subsidy applies only to premiums paid as of the first period of COBRA coverage beginning on or after February 17, 2009. Therefore, the subsidy does not apply to premium payments made by AEIs for any period of coverage prior to February 17, 2009. An AEI who paid the full COBRA premium prior to February 17, 2009 is not entitled to be reimbursed for his or her payment. However, if an AEI pays the full COBRA premium for a period of coverage on or after February 17, 2009, that individual is entitled to apply the overpayment as a credit towards subsequent premium payments, as long as it is reasonable to believe that the credit can be used within 180 days of the overpayment. Otherwise, the employer must reimburse the AEI for the overpayment within 60 days of receipt.

The maximum length of time an AEI may pay the reduced premiums is nine months.

When is the premium reduction eliminated or reduced?

ARRA provides that an AEI will no longer be eligible for premium reductions upon the earliest of:

- nine months after the first day of the of the first month for which the ARRA premium reduction provisions apply to the individual; or
- the first date the AEI becomes eligible for coverage under Medicare or any other group health plan (other than a health flexible spending account, health reimbursement account, on-site clinic or certain limited-scope coverage); or
- the date the individual ceases to be eligible for COBRA continuation coverage.

ARRA requires an AEI to notify the plan in the event (s)he is no longer eligible for the premium reduction.

An AEI with a modified adjusted gross income of up to \$125,000 (\$250,000 for joint filers) for the taxable year in which the premium reduction is received is entitled to the full reduction. An AEI with a modified adjusted gross income between \$125,000 and \$145,000 (\$250,000 and \$290,000 for joint filers) may have to repay a portion of the premium reduction. If an AEI's modified adjusted gross income exceeds \$145,000 for individuals (\$290,000 for joint filers), the full amount of the premium reduction will be recaptured through an increase in the individual's Federal income tax liability. An individual may elect to permanently waive the right to premium reduction.

What plans does the premium reduction cover?

The premium reduction is available for COBRA continuation coverage of any group health plan (e.g., vision, dental, health), except a flexible spending arrangement offered under a Section 125 cafeteria plan. The premium reduction is also available for continuation coverage pursuant to New York State mini-COBRA requirements.

What are the plan administrator notice obligations?

The plan administrator must comply with ARRA's new notice requirements. The U.S. Department of Labor has issued model COBRA notices which can be found at www.dol.gov/ebsa/COBRAModelNotice.html. You will also find the notices attached to this memorandum.

- 1. Notice for COBRA qualified beneficiaries who are or would be an AEI but are not enrolled in COBRA coverage (including those who either did not elect COBRA coverage or who elected but subsequently discontinued COBRA coverage) with qualifying events that occurred during the period from September 1, 2008 through February 16, 2009.**

The plan administrator must send a "Notice in Connection with Extended Election Periods" to any AEI who was involuntarily terminated between September 1, 2008 and February 16, 2009 and who either did not elect COBRA continuation coverage, or who elected COBRA coverage but subsequently discontinued the coverage. This notice must be provided on or before April 18, 2009. A copy of the notice is annexed as Appendix A.

These individuals are given a special enrollment period, which does not begin until they have been provided with notice of their rights under this special election. These individuals have 60 days from receipt of the notice to elect COBRA coverage. Pursuant to a recent amendment to New York State law, this special election period must also be provided to AEI's who are eligible for continuation coverage pursuant to New York State law.

2. **Notice for COBRA qualified beneficiaries who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, and who either have not yet been provided with an election notice or who were provided an election notice of or after February 17, 2009 that did not include the additional information required by the ARRA.**

The plan administrator is required to provide COBRA qualified beneficiaries (not just AEIs) who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, and who either have not yet been provided with an election notice or who were provided an election notice of or after February 17, 2009 that did not include the additional information required by the ARRA with a "General Notice." A copy of this notice is annexed as Appendix B. Individuals who became eligible for continuation coverage pursuant to New York State Law must be provided with an "Alternative Notice," a copy of which is annexed as Appendix C.

COBRA qualified beneficiaries who experienced a qualifying event on or after September 1, 2008, and who have elected and maintained COBRA coverage, should be provided with an "Abbreviated General Notice" on or before April 18, 2009. These individuals will then have 60 days from receipt of the Notice to elect the premium subsidy. A copy of the notice is annexed as Appendix D.

Who determines whether an individual is an AEI?

An individual who submits a completed continuation of coverage form within 60 days of receipt of the form is deemed to have elected coverage. The plan administrator must then determine whether the individual qualifies as an AEI for purposes of the subsidy. An individual who is determined not to be an AEI may appeal the denial to the United States Department of Labor.

Are employees permitted to change coverage to a lower cost medical plan?

Employers have the discretion to offer an AEI the option to enroll in a different, lower cost medical plan provided that the employer offers the different coverage to active employees at the time the election is made. The individual may only elect this coverage if the premium is the same or less than the premium for coverage at the time of the COBRA qualifying event. This election must be made within 90 days of the AEI's receipt of a COBRA election notice.