



[HOME](#)

**In This Issue**

**This Week's Double Feature**

**DRI News**

**And The Defense Wins!**

**Legislative Tracking**

**Quote of the Week**

**DRI CLE Calendar**

**Links**

[About DRI](#)

[Annual Meeting](#)

[Membership](#)

[Membership Directory](#)

[News and Events](#)

[CLE Seminars and Events](#)

[Publications](#)

[DRI Europe](#)

[The Alliance](#)

[Archive](#)

## This Week's Double Feature

### The American Recovery and Reinvestment Act Is "Stimulating" Work for Human Resource Practitioners

By Kevin Nelson, *Huddleston Bolen LLP*

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA or Act). While the economic effects of the law could be months from fruition, the Act will provide an immediate stimulus to the workload of employment lawyers and human resource departments throughout the country. ARRA contains numerous measures that impact business, including significant changes to COBRA health coverage, increased unemployment benefits, new HIPAA regulations, expanded tax credits, and broad protection for whistleblowers, as well as additional regulation of businesses that have or will receive funds from the Troubled Asset Relief Program (TARP).

#### COBRA Provisions

The modifications to COBRA are the most significant employment-related changes in the Act. In the ARRA, Congress amended the COBRA rules to administer a temporary federal subsidy of COBRA premiums, create additional notice requirements, and alter payroll tax administration. These changes affect every employer that sponsors a group health plan and has or will terminate or lay off an employee between September 1, 2008 and December 31, 2009.

Under the Act, individuals qualifying for COBRA coverage will be required to pay only 35% of their COBRA premiums after February 17, 2009. The Act requires employers to advance the other 65% of the premium as a subsidy until the employer's payments can be recouped through reduced federal payroll tax.

Individuals qualify for the subsidy under the Act if they: (1) are or were otherwise eligible for COBRA continuation coverage; (2) lost coverage under their employer-sponsored group health plan due to an involuntary termination of employment between September 1, 2008 and December 31, 2009; AND (3) elect COBRA continuation coverage. The Act's language does not explain what constitutes an involuntary termination, but suggests that anything less than COBRA gross misconduct qualifies for the subsidy.

The subsidy is available for up to nine months but may end

sooner, such as when the maximum continuation coverage period under COBRA expires. To determine the maximum COBRA coverage period, the date of the individual's involuntary termination of employment will continue to be regarded as the "qualifying event."

Employers must immediately amend their COBRA election notices to include information about the availability of the premium subsidy and, if applicable, the option to enroll in different coverage. The Department of Labor recently posted customizable notices and forms on the Agency's website at: <http://www.dol.gov/ebsa/COBRAmodeInotice.html>. Additionally, the Act requires employers to locate former employees who previously declined COBRA and provide notice of their right to reconsider COBRA coverage in light of the government subsidy. These individuals are entitled to an extended election period that began on February 17, 2009 and ends no sooner than 60 days after an extended election notice is provided.

### **Unemployment Benefits**

In an effort to provide immediate assistance to unemployed workers, ARRA increases and expands unemployment benefits. The Act extends the Emergency Unemployment Compensation program through December 31, 2009, which provides up to 33 weeks of extended unemployment benefits to those who have exhausted their regular benefits. The Act also increases all weekly unemployment benefits by \$25 per week through 2009.

In addition, the Act provides additional financial incentives for states to "modernize" and reform their unemployment compensation schemes and expand eligibility. To be eligible for the incentives, the Act requires states to use workers' most recent wages when determining eligibility and to adopt at least two of these four provisions: (1) allow part-time workers to be eligible; (2) cover employees who leave their jobs for family-based reasons; (3) provide extended benefits during approved retraining; or (4) provide dependent allowances.

### **HIPAA Expansion**

ARRA also expands the Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules to include business associates of "covered entities" (e.g., health plans, health care providers, and health care clearinghouses). "Business associates" are defined as any person or entity that, on behalf of a covered entity, performs or helps perform a task that utilizes or discloses protected health information. Under ARRA, business associates are required to adhere to the HIPAA Privacy and Security Rules. They must immediately implement written security policies and procedures, and physical and technical security safeguards with regard to protected health information.

The Act also includes new notification requirements regarding security breaches, expanding HIPAA's Privacy and Security Rules to require covered entities and business associates to take affirmative steps after disclosures of protected health information. For individuals, ARRA requires written notification by

mail or e-mail "without unreasonable delay" and not later than 60 days after discovery of the breach. If an individual's current contact information is missing, notice of the breach is required to be posted on the company website and in other media. For security breaches involving more than 500 individuals, the Act requires a covered entity or business associate to notify the U.S. Department of Health and Human Services (DHHS), which will post the name of the covered entity or business associate on its website.

The Act also increases penalties and expands oversight for HIPAA violations. The amount of possible civil penalties ranges from \$100 to \$50,000 per violation. Additionally, DHHS is required to conduct "periodic" audits of both covered entities and business associates. ARRA also contains provisions that equip state attorneys general with the authority to bring enforcement proceedings against any covered entity or business associate whose HIPAA violations pose a threat to the citizens of their states and to recover attorneys' fees should the attorneys general prevail on the merits. Accordingly, the number of audits and enforcement proceedings is likely to rise.

### **Expanded Tax Credits**

ARRA expands the Work Opportunity Tax Credit (WOTC) to include two new categories of individuals: unemployed veterans and disconnected youth. This tax credit (40% of the first \$6,000 of wages paid) is available to employers if they hire employees that fall into specific categories. An individual qualifies as an unemployed veteran if s/he was discharged or released from active duty with the Armed Forces during the five-year period prior to hiring and received unemployment compensation for more than four weeks during the year before being hired. An individual qualifies as a disconnected youth if s/he is between the ages of sixteen and twenty-five and has not been regularly employed or attended school in the last six months.

### **Whistleblower Protection**

The MacCaskill Amendment to the Act protects whistleblowers who reveal mismanagement of funds, safety and health violations, or violations of law by entities that receive ARRA monies. It covers complaints made to the Recovery Act Accountability and Transparency Board, an inspector general, a government agency, court or grand jury.

The Act applies to all non-federal employers and suggests that an employer's supervisors, managers, and agents can be held individually liable.

The protection contained in the Act prohibits the covered entities from discharging, demoting, or otherwise discriminating against employees that make whistleblower complaints. Though the definition of "covered entities" is ambiguous, one may anticipate that litigation will quickly help refine the term.

### **TARP Restrictions**

Finally, ARRA includes restrictions on immigrant hiring and executive compensation for businesses that have or will accept TARP funds. The Act restricts TARP recipients from hiring foreign nationals in the H-1B (Specialty Occupation) visa status for a two-year period, unless the employer makes additional attestations that it has made a good faith effort to recruit a U.S. worker for the job and has offered the job to any qualified U.S. worker. The restrictions on executive compensation limit bonuses and prohibit golden parachute payments for certain senior and highly compensated employees. It also requires TARP recipients to adopt corporate policies to avoid rewarding excessive risk-taking, recover some executive bonuses, and reduce or eliminate luxury expenditures.

Since ARRA only passed recently, its impact on jobs, taxes, the role of government, and the world economy remains to be seen. Most of the Act's provisions, however, 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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