

## Financial and Economic Crisis – Law Firms

# American Recovery And Reinvestment Act Of 2009 Imposes Significant COBRA Changes

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With great fanfare, the American Recovery and Reinvestment Act of 2009 (the "Act") was signed by President Obama on February 17, 2009. Although many of the provisions of the Act relate to increased government spending or income tax credits, employers and human resource personnel should be aware of the potential ramifications of certain changes made through the Act to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Under the applicable provisions of the Act, employees whose employment is terminated during the 2009 calendar year, and those employees whose employment was terminated in the latter part of the 2008 calendar year, may be entitled to a financial subsidy of their COBRA premium payments, with such subsidies being paid by their former employer. Because of the potential financial ramifications of such subsidy payments, employers will need to take such continued costs into account as part of the employment termination costs. In addition, and as the Act imposes certain notice requirements upon employers, any employer who terminates the employment of (or who has recently terminated the employment of) an employee will need to ensure that the company's COBRA administration is compliant with current applicable federal law.

Under the applicable provisions of COBRA, an employee and his/her dependents who are covered under a company-sponsored group health insurance plan are permitted to elect to continue health insurance coverage following the termination of the employee's employment with the plan sponsor, provided that the company typically employs at least twenty (20) individuals. In general terms, such continued group health coverage (if properly and timely elected by the terminated employee) will continue for a period of at least eighteen (18) months provided (i) that the covered individual makes timely payments of all required group health insurance premiums; and (ii) the covered individual does not elect to be covered under another health insurance policy or plan. The COBRA regulations permit an employer to require a covered individual to pay the entire cost of the insurance premiums during the continuation period, along with an administrative fee.

The aforementioned provisions of the Act dramatically impact the cost structure of the COBRA continuation coverage premiums for certain eligible individuals. Specifically, if an employee of an employer (which is subject to the COBRA continuation coverage provisions) is involuntarily terminated between September 1, 2008 and December 31, 2009, the employee will be deemed to have paid the entire premium amount associated with COBRA continuation coverage if he/she pays 35 percent of such premium amount on a monthly basis during the continuation period. Under the applicable provisions of the Act, the employer that sponsors the group health plan under which a COBRA continuation coverage election is made must subsidize the remaining portion of the monthly premium (65 percent) during the applicable period. The Act provides that such subsidies must continue for a period that is the lesser of: (i) nine (9) months from

the employee's employment termination date; and (ii) the date upon which the covered individual becomes eligible for coverage under another group health plan or similar arrangement.

The Act provides that the subsidized portion of the COBRA continuation coverage insurance premiums by an employer will be "reimbursed" to the company through the crediting of a payroll tax payment by the company in an amount equal to the amount of the COBRA continuation coverage premium subsidy.

In addition to the subsidy provisions, the Act also provides for an extended 60-day election period for certain qualified beneficiaries (i.e., employees, spouses and dependents) who are eligible for subsidized COBRA coverage. Specifically, an individual who did not have a valid COBRA continuation coverage election in effect on the date of enactment of the Act, but who otherwise would have been eligible to receive a COBRA subsidy benefit if the Act had been in effect, has 60 days from the date that he/she is provided with the appropriate notice of this COBRA subsidy (as discussed below), commencing as of the effective date of the Act (February 17, 2009). A qualified beneficiary who elected COBRA coverage before the effective date of the Act, but who ceased receiving continued health insurance coverage as of the effective date of the Act due to non-payment of premiums, is entitled to elect COBRA continuation coverage during this extended election period. However, nothing in the Act is intended to permit a qualified beneficiary to elect to receive COBRA continuation coverage beyond the statutorily mandated dates for such coverage (i.e., beyond the date that is 18 months after the employee's employment termination date, unless a subsequent qualifying event occurs).

As noted above, the Act provides that applicable COBRA notice provisions will only be met if the COBRA notice that is provided to the terminated employee (as well as spouse and dependants, if applicable) includes notification of the availability of the aforementioned premium payment subsidy, and a description of the manner in which a covered individual may elect to enroll in different coverage options, if so permitted under the terms of the group health insurance plan. The additional notification requirement may be met either by amending the plan's existing notice forms or by including a separate document with this notice. Details regarding the information that must be included in the premium subsidy notice is found in the Act, and model forms of such a notice are required to be issued by the United States Department of Labor by March 17, 2009. However, the Act provides that penalties may be assessed against an employer that fails to satisfy its COBRA premium subsidy notice requirements currently.

Under the general provisions of the Act, the amount of COBRA continuation coverage premium subsidy payments made on behalf of a qualifying individual will not constitute additional taxable income to the recipient. However, in the event that the recipient individual's taxable income for the calendar year exceeds certain limits (\$150,000 for an individual taxpayer; \$250,000 for joint taxpayer), the amount of his/her COBRA continuation coverage premium subsidy may (in whole or in part) be deemed to be taxable income in the year in which it is received.

Because of the complexity of these newly enacted COBRA continuation coverage provisions, we recommend that all employers review their current COBRA group health

insurance practices to determine that they will satisfy all applicable provisions of the Act. In addition, group health plan sponsors that terminated the employment of employ-

ees since September 1, 2008 should determine whether COBRA continuation coverage premium subsidies should be offered to such recently terminated individuals.

## Book Review

### eDiscovery Plain & Simple

Fernando M. Pinguelo of Norris McLaughlin interviews co-author Allison Brecher, Senior Litigation Counsel and Director of Information Management and Strategy, Marsh & McLennan Companies, Inc.

**Pinguelo:** Thank you, Allison, for sitting down with me to discuss your new book *eDiscovery Plain & Simple*. Why the book and what do you expect your readers to take away from it?

**Brecher:** In early 2006, Marsh & McLennan Companies, Inc. appointed me to the role of managing electronic discovery. At that time, the federal court eDiscovery rule amendments had not yet been implemented and court decisions were being issued daily – or so it seemed – that imposed sanctions for document spoliation. With so many computer systems at the company to understand and with eDiscovery case law growing rapidly, it became difficult for me to apply legal principles to our day-to-day management of electronically stored information. I didn't really understand the intricacies of information technology when I started practicing in this area and I longed for a *Cliff's Notes*-type of guide about information technology for someone like me who did not have a computer science background. Also, judging by the number of calls I get from outside counsel and attorneys at other companies who are new to eDiscovery, I knew I was not alone in the search for such a resource.

So, I teamed up with my co-author, Shawanna Childress who brings with her over 15 years of expertise in Information Technology, to write *eDiscovery Plain & Simple*. *eDiscovery Plain & Simple* is the only book on the market that I've found that explains how computers operate and store data in a way that is designed for attorneys with little, if any, technical background. Our book offers strategies and practical suggestions to make discovery reasonable and cost-efficient.

**Pinguelo:** How do you approach teaching a subject like computers in a way that we can all understand?

**Brecher:** Before the federal court eDiscovery rule amendments, attorneys, particularly litigation practitioners, were generally accustomed to delegating document preservation and collection activities to a client's IT staff. The rule amendments changed all of that and imposed an obligation on counsel to actively manage that process throughout the course of a litigation matter. During the throes of litigation, with many looming deadlines, attorneys have little time to learn about a client's computer systems.

*eDiscovery Plain & Simple* explains – through the most basic terminology and visuals – how computers, servers, and peripherals operate and store data. In order to make this book as user-friendly as possible, technical concepts are explained in a basic fashion and photographs, screenshots, tips, and

Fernando M. Pinguelo, Partner of Norris McLaughlin & Marcus and Co-chair of its eDiscovery Group, founded the eDiscovery best practices blog e-Lessons Learned ([www.eLLblog.com](http://www.eLLblog.com)).



Fernando M. Pinguelo



Allison Brecher

checklists are interspersed throughout the book.

**Pinguelo:** Tell me a little bit about your backgrounds.

**Brecher:** I graduated from law school in 1996. Before and during law school, I worked as a field reporter/producer for several television news programs. I loved the challenge of investigating a story and putting it together in a clear and concise way. At Marsh, which I joined in 2002, I serve as Senior Litigation Counsel and Director of Information Management and Strategy. My dual roles here give me a unique perspective about eDiscovery – I help design my company's records management policies, advise our IT department about many information technology projects, and handle those responsibilities by drawing on my trial experience and assessing how certain projects will affect my company's liability risks.

Shawanna Childress is the co-founder and Worldwide Executive Director of Women in eDiscovery, a non-profit worldwide organization that brings together businesswomen interested in technology related to the legal industry. She is also an Associate Director at Navigant Consulting, Inc. She has more than 15 years of experience in the legal services industry including in the main areas of eDiscovery, litigation readiness, and data analysis with a focus on strategic consulting in support of all phases of litigation and investigations.

**Pinguelo:** Is there a more personal purpose or drive behind the book?

**Brecher:** Well, writing this book has been especially meaningful for me because a portion of the proceeds will be used to buy technology for schools for visually impaired and physically challenged children. My youngest daughter was born with a congenital vision impairment, so I know first-hand that there are so many children whose education and potential would be enhanced by the aid of closed circuit televisions, special keyboards, and other similar modifications in their classrooms.

**Pinguelo:** Thank you, Allison. I enjoyed reading *eDiscovery Plain & Simple* and found that you and Shawanna approach eDiscovery from a fresh, new perspective that is two parts law and one part technology. *eDiscovery Plain & Simple* guarantees you'll know more about computers than you thought imaginable and is a must-read for in-house counsel and those of us who assist them. Readers can purchase *eDiscovery Plain & Simple* by visiting [www.brecherchildress.com](http://www.brecherchildress.com), and the book will be available at amazon.com soon.

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