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## LEGAL UPDATE 2009

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## Introduction

- The Previous 6 Months
  - The near collapse of the world's economic system
  - Dramatic changes in our real estate, banking and investment systems
  - The transformative 2008 Presidential election

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## Introduction

- The Results
  - Significant impact on our economic system
  - Fundamental changes to the relationship between employers and employees
  - New laws, new regulations, greater threat of union organizing, and a whole new environment will confront employers as we enter the 2d decade of the 21st Century

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## Introduction

- Examples
  - Increase funding for DOL Enforcement
    - OSHA and FLSA
    - Whistleblower protections
  - Increased funding and emphasis on enforcement of civil rights law
    - "To strengthen civil rights enforcement against racial, ethnic, sexual preference, religious and gender discrimination"

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## Today's Program

- The Employee Free Choice Act
- Changes to federal and state COBRA law
- New genetic protection laws
- The amendments to the ADA
- Broader anti-retaliation laws
- Proposed new gay rights and paid leave law
- Workers' Comp changes

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## The Employee Free Choice Act

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## Employee Free Choice Act

What is it?

- An Amendment to the National Labor Relations Act Intended to:
  - 1) Eliminate secret ballot elections;
  - 2) Compel Mediation and Binding Arbitration into the collective bargaining process;

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## Employee Free Choice Act

- 3) Increase penalties against employers who commit unfair labor practices before and after the negotiation of the first collective bargaining agreement.

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## Employee Free Choice Act (EFCA)

Why are Labor unions pushing for EFCA?

- 1) To limit or eliminate the time an employer has to campaign against the union. Unions have historically won 58% of secret ballot elections with a showing of interest between 30% and 50%; in 2008 unions won 66.8% of all secret ballot elections.

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## Despite Election Success, Unions have Drastically Declined:

- Unions represented 35% of private sector employees in 1948, today they represent only 7.4% of private sector employees.
- Today, Unions still represent 36.8% of employees working for the government.

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## Employee Free Choice Act (EFCA)

- 2) To allow unions to openly pressure individual employees to sign authorization cards as other employees and the union will know who does and who does not support the union;

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## Employee Free Choice Act (EFCA)

- 3) To eliminate an employee's opportunity to change their opinion about the union after hearing the pros and cons regarding unionization from employers;
- 4) To levy heavy monetary penalties for unfair labor practices and thereby "chill" the employer's willingness to campaign against the union;

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### Employee Free Choice Act (EFCA)

- 5) To mandate that the union and the employer come to their first collective bargaining agreement within a period of 120 days;
- 6) Provide for mandatory arbitration at the election of the union, thereby imposing a collective bargaining agreement.

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### Secret Ballot Elections

- Currently: a labor union must make a "interest showing" of at least 30% of employees in the specified bargaining unit in order to file a petition for an election with the NLRB; (or)
- Can present the employer with signed recognition cards indicating that at least 51% of the employees in the specified unit want the union;

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### Secret Ballot Elections

- The employer may voluntarily recognize and bargain with the union, or the employer may reject the card showing;
- A union can file a petition for a secret ballot election with the NLRB.

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### Secret Ballot Elections

- If an election petition is filed, the NLRB requires the employer to submit a voter eligibility list containing eligible employee names and addresses to the NLRB and union 10 days before the scheduled election;

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### Secret Ballot Elections

- If necessary, through a hearing at which the union and the employer presents evidence, the NLRB will determine which employees are eligible to vote in the election:

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### Secret Ballot Elections

- Employees are determined eligible to vote according to the "Steiny Daniels" test.
- Supervisors are exempt from the NLRA.

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### Secret Ballot Elections

- Unless there is a hearing, within 38 to 42 days of the date of the filing of the election petition, the NLRB will hold a secret ballot election at a location determined by the parties;
- During this time, the employer and the union are allowed to campaign for and against the union;

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### Secret Ballot Elections

- The employer may campaign against the union during company time and present true and factual statements regarding the reasons for not selecting against union representation;
- The employer is permitted to share its views regarding union representation with employees;

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### Secret Ballot Elections

- The union may campaign during break times or after work and may also visit employees at their homes;
- Neither the union nor the employer may threaten, coerce, or otherwise intimidate any employee regarding his or her vote for union representation;

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### Secret Ballot Elections

- The employer may not retaliate or terminate any employees based on their union desires;
- The employer may not promise increased benefits or wages, or otherwise induce the employee in anyway not to vote for the union.

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### The Secret Ballot Election

- An election is conducted by a Board Agent from the NLRB;
- The employer and the union have the right to have an observer present to ensure the election is run properly;
- Employees enter private voting booths set up by the Board agent and cast a vote for or against the union;

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### The Secret Ballot Election

- The votes are deposited in a ballot and are tallied by the Board agent and the observers immediately after the election is done;
- If the union receives 50% + 1 or more of the votes of the bargaining unit, the unit is certified and bargaining must commence within a reasonable time;

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## The Secret Ballot Election

- If 50% or more of the votes of employees in the bargaining unit are against the union, the employer wins the election.
- If the union wins, employer must bargain in good faith for 1 year, less than 34% of negotiations result in a contract.

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## Under EFCA:

- This secret ballot process is eliminated.
- Bargaining must commence upon showing that 50% + 1 employee have signed representation cards.
- A CBA will be reached with the Union within 120 days through mediation and binding arbitration.
- Agreement reached will be effective for a minimum of two years.
- Up to \$20,000 fine for EACH unfair labor practice an employer commits during organizing and first contract.
- Triple backpay damages for employees who suffer an adverse employment actions under (8)(a)(3).

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## Labor Unions Agenda for 2009:

- Pass EFCA;
- Pass Respect Act, changing definition of supervisors;
- Repeal Executive Order outlawing PLA's on federally funded projects;
- Government black listing of labor law violators;
- Repeal of "Right to Work" Act.

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## Employer Non-Discrimination Act (ENDA)

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## Employer Non-Discrimination Act (ENDA)

1) ENDA

- ❖ ENDA is legislating pending Congress
- ❖ If passed, ENDA would create new protected class for actual or perceived sexual orientation.
- ❖ Current law
  - ❖ unprotected under federal and Ohio law; and
  - ❖ 6th Circuit protects sexual stereotypes treating such situations as discrimination based on gender.

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## GENETIC INFORMATION NON-DISCRIMINATION ACT

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## Genetic Information Non-Discrimination Act

- Effective November 21, 2009
- Applies to employers with 15 or more employees


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## Genetic Information Non-Discrimination Act

### What is Genetic Information?

Generally, genetic information is information regarding an individual's genetic predisposition to developing a disease in the future.



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## Genetic Information Non-Discrimination Act

### Genetic Information Includes:

- Genetic tests of an individual
- Genetic tests of family members of an individual
- The manifestation of disease or disorder in family members of such individual.

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## Genetic Information Non-Discrimination Act

### GINA's requirements

- No discrimination on the basis of genetic information
- No limitation on employment on the basis of genetic information
- Cannot ask for or obtain genetic information


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## Genetic Information Non-Discrimination Act

### Record Keeping

- Must keep any medical records containing genetic information separate and confidential
- Non-disclosure of genetic information



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## Genetic Information Non-Discrimination Act

### When may an employer request or use genetic information?

- FMLA Request
- Wellness programs
- Work place monitoring program

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## Genetic Information Non-Discrimination Act

What should an employer be doing to prepare?

- Review their policies for dealing with medical information
- Add a disclaimer on the document requests to healthcare professionals stating:  
"Please do not provide any genetic information in response to this request other than the name of a genetic disease, if applicable."

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## NEW COBRA PREMIUM SUBSIDY LAW

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## American Recovery and Reinvestment Act


- Overview
  - Enacted on February 17, 2009
  - 65% Subsidy for up to nine months of COBRA Coverage for those who were involuntarily terminated.
  - Subsidy begins on the first period of coverage following the date of enactment.
    - If the Plan sells COBRA coverage daily, February 17, 2009 was the first period of coverage.
    - If the Plan sells coverage monthly, March 1, 2009 was the first period of coverage.

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## Available Guidance

- Government publishes guidance on the COBRA Premium Subsidies:
  - <http://www.dol.gov/ebsa/COBRA.html>
  - <http://www.ohioinsurance.gov/ConsumServ/COBRA.htm>



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## Assistance Eligible Individuals (AEIs)

- Eligible for COBRA coverage at any time between September 1, 2008 and December 31, 2009;
- Elects that coverage; and
- The qualifying event was covered under employee's involuntary termination of employment during that same period.

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## Assistance Eligible Individuals (AEIs)

- Former employee who was involuntarily terminated;
- Spouse or dependant of such former employee;
- Involuntary termination and loss of coverage must occur on or after September 1, 2008;
- Involuntary termination and loss of coverage must occur prior to December 31, 2009; and
- An involuntary termination of an employee following another qualifying event, such as divorce, does not satisfy the requirements qualifying the spouse to be an AEI.

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## Assistance Eligible Individuals (AEIs)

- Definition of an involuntary termination

Although ARRA does not define involuntary termination the IRS has provided guidelines explaining what the term means.

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## Assistance Eligible Individuals (AEIs)

- Involuntary termination

IRS states that "Involuntary termination means a severance from employment due to the independent exercise of the unilateral authority of the employer 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 services."

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## Assistance Eligible Individuals (AEIs)

- Involuntary termination
  - If an employee is terminated for Gross Misconduct he or she is not considered to be involuntarily terminated
  - No set definition of Gross Misconduct
  - Heavy penalties if employer is wrong

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## Assistance Eligible Individuals (AEIs)

- **Determined to be Gross Misconduct**
  - Flight attendant throws object at co-worker and calls her a racial epithaph.
  - Teacher arrested for sex crimes but not convicted.
  - Clerk at a grocery store using promotional gift cards to buy food at the store.
  - Bank employee caught stealing.
  - Voluntary intoxication; but be careful because this a question of fact.

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## Assistance Eligible Individuals (AEIs)

- **Determined not to be Gross Misconduct**
  - Teacher terminated for mere allegations of theft and other improprieties where the school could not prove the allegations in court.
  - Employee terminated for revealing confidential information, even where employee knew that this could lead to his termination.
  - Employee terminated for failing to follow up with patient care on several occasions, failing to notify patients of test results, mislabeling a blood requisition with the wrong patient name and filing lab results in the wrong patient chart.

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## Assistance Eligible Individuals (AEIs)

- The IRS has stated that it is unlikely that the Government would attempt to claim that an individual who was offered COBRA and the subsidy was terminated due to "Gross Misconduct."

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### Assistance Eligible Individuals (AEIs)

- Involuntary termination
  - Employee-initiated termination from employment constitutes an involuntary termination from employment for the purposes of the premium reduction if such action was in response to a "material negative change" in the employment relationship.

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### Assistance Eligible Individuals (AEIs)

- Involuntary termination
  - Reduction in hours causes employee to quit;
  - Material change in geographic location of employment.

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### Assistance Eligible Individuals (AEIs)

- Involuntary termination
  - Reduction in hours, in and of itself, is not an involuntary termination
  - Keep in mind that such an employee would still be entitled to COBRA coverage without the subsidy.

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### Assistance Eligible Individuals (AEIs)

- Involuntary termination
  - Absence from work due to illness or disability (Non-FMLA employer) which results in a loss of coverage and is a qualifying event under COBRA, is not an involuntary termination entitling an employee to the subsidy.

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### Assistance Eligible Individuals (AEIs)

- Involuntary termination
  - If an employee elects to resign or retire prior to being laid off, it constitutes an involuntary termination

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### Eligibility

- Eligibility for subsidy continues until the earliest of:
  - The date the beneficiary's COBRA coverage rights expire under existing law;
  - The date the beneficiary becomes eligible for coverage under any other group health plan or Medicare; or
  - The 9 months after the first day of the month the premium reduction provisions applies to the beneficiary.

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## Eligibility

- An AEI is eligible for up to nine months of premium reduction for each involuntary termination.
  - i.e. Employee is involuntarily terminated and elects COBRA; subsequently, his spouse is hired by a company and the Employee is eligible under the spouse's plan. The spouse is then involuntarily terminated. All of this happens prior to December 31, 2009. The Employee is eligible for nine more months of the subsidy.

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## Special Election Period

**Group 1:** those affected by involuntary termination back to September 1, 2008 who are not on COBRA coverage as of February 17, 2009;

**Group 2:** those affected by termination close to February 17 (i.e. December 2008/January 2009)

**Group 3:** those affected by involuntary termination back to September 1, 2008 who are on COBRA coverage as of February 17, 2009.

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## Special Election Period

- Special election does not apply to employers who have less than 20 employees or employers covered by Ohio Mini-COBRA
- An individual's maximum benefit period of 18 months is not extended and still runs from the date of the qualifying event

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## Special Election Period – Group 1

- May elect the subsidy any time after February 17, 2009 (before notice is given), but must elect within 60 days after notice is given.
- Special election period applies to those qualified beneficiaries who elected COBRA due to a post September 1, 2008 involuntary termination but who dropped continuation coverage prior to February 17, 2009.

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## Special Election Period – Group 1

- Even if you are aware that an AEI has other coverage, they must receive notice of the special election period;
- An AEI might be able to elect COBRA under the special election period even if he or she has other coverage and is not eligible for the subsidy;
- If a person elects under the special election period, coverage is retroactive to post February 17, 2009 periods of coverage (generally March 1, 2009).

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## Special Election Period – Group 1

- Period between qualifying event and new coverage is not treated as a break in coverage;
- Grace period for payment of premium during special election period is the 45-day period as under normal COBRA rules; and
- Notice that with the 60-day notice period, plus the 60-day election period, plus the 45-day grace period, AEIs might be paying in September 2009 for coverage back to March 1, 2009.

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## Special Election Period – Group 2

- Normal COBRA election period is retroactive to the qualifying event date;
- Subsidy election is not retroactive beyond the first period of coverage following February 17, 2009;
- This can create confusion in notices where plan has to explain two different 60-day periods that apply for different purposes; and
- DOL notice does not anticipate Group 2 and would have to be amended by the employer to clarify this issue.

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## Special Election Period – Group 3

- These AEIs are on COBRA coverage on February 17, 2009 and were involuntarily terminated during the relevant time period.
- If they paid the full amount for the first two coverage periods following February 17, 2009 (March and April 2009) then either (1) refund the subsidy to the AEI and claim a credit for the refund; or (2) apply the credit to future premiums within 180 days.

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## Special Election Period – Group 3

- If an AEI is not discovered until after he or she has paid for more than two periods of coverage, presumably AEI gets a refund for all of the periods and not just the first two periods after February 17, 2009.

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## Choice of Plans

- An employer can choose to offer a plan that is different from the one in which the former employee was enrolled when the involuntary termination occurred as long as:
  - 1) The premium for the different coverage is not higher than the premium for the plan in which the employee was enrolled when terminated; and
  - 2) The employer offers the different coverage to active employees at the time the beneficiary accepts.

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## Choice of Plans

- The beneficiary cannot be required to accept this alternative coverage; and
- This provision does not apply to small employer health plans (less than 20 employees).

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## Calculating the Subsidy

- Subsidy is 65% of the premium for COBRA coverage that the AEI would otherwise have to pay.
  - Subsidy does not apply to extended, non-COBRA or non-Mini-COBRA coverage; and
  - The subsidy includes the 2% administrative fee.

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## Calculating the Subsidy

- If employer otherwise subsidizes coverage, the 35% is based on what the employee has to otherwise pay.
  - If AEIs effectively pay nothing due to employer reimbursement of the 35% and employer claims 65% credit, there is a problem; and
  - If AEIs pay one amount when they are subsidy-eligible and another amount if they are not, there is a potential problem.

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## Calculating the Subsidy

- Example 1. Assume federal COBRA rules apply and qualified beneficiary is an AEI, then if the COBRA applicable premium (with the 2% charge) is \$1,000, AEI is required to pay \$350 (35% of \$1,000); Employer gets payroll credit of \$650.

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## Calculating the Subsidy

- Example 2. Assume COBRA premium (including 2%) is \$1,000, Employer has a severance policy whereby Employer charges \$200 per month to purchase COBRA; AEI only pays \$70 (35% of \$200); Employer credit is \$130 (65% of \$200).

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## Calculating the Subsidy

- Example 3. COBRA premium (including 2%) is \$1,000; due to severance policy, Employer charges \$0 during limited period; AEI pays nothing during limited period, and thus, no subsidy or reimbursement during limited period; limited period counts against the nine months of subsidy entitlement.

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## Calculating the Subsidy

- Example 4
- Under a group health plan, 102% of the applicable premium for COBRA continuation coverage is \$1,000 per month. Prior to February 17, 2009, the plan charged \$400 per month (40% of the full amount) for COBRA continuation coverage.
- The plan changes its policy and requires \$1,000 (the full amount) for COBRA continuation coverage for periods of coverage beginning on March 1, 2009.
- In addition, beginning March 1, 2009, the employer provides a taxable severance benefit of \$600, per month to employees who are AEIs.
- The premium reduction is based on \$1,000 for the coverage beginning on March 1, 2009, and thus the individual is entitled to COBRA coverage upon timely payment of \$350.

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## Calculating the Subsidy

- Example 5.
- Same facts as previous slide, except that, beginning on March 1, 2009 instead of providing a taxable severance benefit, the employer reimburses employees who are AEIs for the \$350, and the employer excludes that amount from the employees' gross income.
- Consequently, the \$350 is treated as paid by the employer, and because there is no non-employer payment, the premium reduction is not available, and no payroll tax credit is available to the employer.

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## Calculating the Subsidy

- Example 6.
- During the premium reduction period, the plan has an open enrollment period during which it allows active employees and qualified beneficiaries to add spouses and dependents to the health coverage.
- An AEI has individual coverage, but during the open enrollment period he adds a spouse and a dependent child.
- His former premium was \$450 per month, of which under ARRA he was required to pay \$157.50. Now with adding his spouse and dependant his premium is \$1000 per month.

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## Calculating the Subsidy

- Example 6 Cont.
- The spouse and child are not AEIs and therefore cannot receive the subsidy.
- The AEI is entitled to the premium reduction with respect to \$450 payment.
- Thus, the individual is entitled to COBRA continuation coverage upon timely payment of \$707.50 (\$550 + \$157.50). The employer's resulting tax credit is 292.50 (65% of \$450).

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## Notice Requirements

- DOL Model Notices
  - 1) "General Notice" (Full Version) provide to all qualified beneficiaries who experienced or experiences a qualifying event between September 1, 2008 and December 31, 2009.
  - 2) "General Notice" (Abbreviated Version) provide to all qualified beneficiaries who are on COBRA as of February 17, 2009 and are entitled to the subsidy.
  - 3) "Notice of Extended Election Period" provided to AEIs (qualified beneficiaries who experienced and involuntary termination from September 1, 2008 through February 16, 2009) and potential AEIs who can elect coverage during the special election period.

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## Notice Requirements

- Ohio Department of Insurance Model Notices
  - 1) "Continuation Coverage Election Notice" provide to those individuals who are entitled to Ohio Mini-COBRA Benefits going forward. 12 months of coverage for employers whose health insurance contract is renewed on or after April 2, 2009. 6 months of coverage for employers who reviewed their contract before April 2, 2009.
  - 2) "Current Recipient Continuation Coverage Alternative Notice" provide to those individuals already receiving Ohio Mini-COBRA benefits.

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## Paying the Subsidized Premium

- 35% premium subject to applicable COBRA premium payment rules, including grace period for payment.
- If not paid full and on time, COBRA coverage may terminate.

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## Paying the Subsidized Premium

- Insignificant underpayment rules apply based on the 35% premium payment amount. (If a qualified beneficiary underpays the premium by an insignificant amount, the plan must either accept the amount as payment in full or seek the rest of the payment. Before canceling the COBRA coverage the plan must send a notice and give the qualified beneficiary at least a 30 day grace period from the date of the notice to pay the balance of the premium (a shortfall is insignificant if it is no greater than the lesser of \$50 or 10 percent of the required amount)).

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## Paying the Subsidized Premium

- What if a non-AEI sends in 35% of applicable premium thinking the subsidy was available when it's not (i.e. the qualifying event was divorce; not termination)? Can the plan terminate coverage?
  - Subsidy not available and applicable premium is significantly underpaid.
  - Was payment due to ambiguous notices?
  - Consider working with such a qualified beneficiary and providing a reasonable time to make full payment.

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## Paying the Subsidized Premium

- In determining whether an AEI has paid the 35% of the premium, payments on behalf of the individual by another person (other than the employer with respect to which the involuntary termination occurred) are taken into account. For example, some or the entire 35% share of the premium could be paid on behalf of the individual by a parent, guardian, State agency, or charity.

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## Record keeping

- dates and amounts of payments
- In the case of an insured plan, a copy of the invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA; and
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to AEIs.

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## Record keeping

- Attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from September 1, 2008, to December 31, 2009);
- Proof of each AEI's eligibility for COBRA or State continuation coverage at any time during the period from September 1, 2008, to December 31, 2009, and election of COBRA or state continuation coverage; and
- A record of SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for 1 individual or 2 or more individuals.

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## Record keeping

If an employer has claimed a payroll tax credit for the premium reduction, it is not required to refund the IRS the excess premium reduction received as a credit merely because the AEI failed to provide notice that he or she is no longer eligible for the premium reduction due to eligibility for coverage under any other group health plan or Medicare. (If you as the employer know about the eligibility the IRS has indicated that this rule will not apply, but it is unclear of how the IRS will treat such an employer who has knowledge).

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## Record keeping

If an AEI who is eligible for other coverage continues to receive the subsidized COBRA coverage he or she may be subject to a Federal tax penalty of 110% of the premium reduction improperly received. The employer who received the credit against the payroll taxes in the amount of the excess premium reduction has no rights to the penalty payment.

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## Reimbursement

- The premium receipts forgone by the employer because of the payment of the assistance will be treated as payment of payroll taxes (income tax withholding and FICA taxes).
- Form 941 has been revised to allow reimbursement claims.

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## Reimbursement

- If the amount of reimbursement owed exceeds that amount of payroll taxes, the IRS will credit or refund the excess as if it were a tax overpayment
- Overstatements of reimbursements will be treated as underpayment of payroll taxes and will be assessed and collected accordingly.

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## High Income Individuals

- High income individuals (based on modified adjusted gross income (AGI)) are not eligible for the subsidy;
- High income individuals are still AEIs and still claim a credit. They just have to repay it when they file their returns;
- If modified AGI exceeds \$145,000 (single) or \$290,000 joint filers then such individuals will have to pay back the entire amount; and
- If an AEI's modified AGI is between \$125,000 and \$145,000, or \$250,000 and \$290,000 for joint filers there is a "phase out provision" in ARRA. They will have to repay a portion of the subsidy as taxes.

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## High Income Individuals

- Employers claiming payroll credit:
  - Do not have to track income; high income individuals are still AEIs;
  - AEIs are allowed to permanently waive subsidy;
  - Waivers may apply to high income individuals as well as lower income individuals; and
  - Lower income individuals might waive for the 80% Trade Adjustment Act COBRA credit applicable to who lose jobs due to foreign competition and are eligible for trade adjustment assistance benefits.

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## Ohio Mini-COBRA

- Applies to employers with less than 20 employees;
- Former rules regarding who is eligible for Ohio Mini-COBRA.
  - eligible for unemployment benefits at that time of their separation;
  - continuously insured under a group policy during the 3 month period preceding the termination of employment; and
  - not covered or eligible for Medicare or under other group coverage.

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## Ohio Mini-COBRA

- For employers whose health plan contracts are being renewed after April 2, 2009 entitlement to unemployment compensation is no longer required to receive Ohio Mini-COBRA benefits. Now a former employee must demonstrate that he or she did not voluntarily terminate his or her employment and the termination of the employment was not a result of gross misconduct. (2) and (3) in the previous slide are still applicable under the amendments.

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## Ohio Mini-COBRA

- The big change in the law is that it extends benefits from six months to twelve months. This change is applicable if your company has its health insurance plan contract renewal on or after April 2, 2009.
- The amendments also provide that on January 1, 2010, the Ohio Mini-COBRA law will revert back to its former provisions whereby an employee must be entitled to unemployment compensation and the maximum period of benefits is six-months.

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## Ohio Mini-COBRA

- Health insurance companies and not the employers are entitled to reimbursement from the government. However, small employers will have to provide their insurance companies with the following information to verify the former employee's eligibility for the subsidy:
  - Attestation of involuntary termination, including the date of the involuntary termination for each former employee whose involuntary termination is the basis for eligibility for the subsidy;
  - Proof of each former employee's eligibility for state continuation coverage and election of state continuation coverage; and
  - Request to receive the subsidy.

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## Americans with Disabilities Act Amendment (ADAA)

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## ADAA

- Effective January 1, 2009
- Intent of amendments to "restore" the broad protections afforded by the original ADA
- Aimed primarily at two Supreme Court decisions that, in Congress' view, narrowly interpreted the definition of "disability"

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## ADAA

- The actual definition of "disability" same
  - Physical or mental impairment that substantially limits one or more major life activity
  - A record of such impairment
  - Being regarded as having such an impairment

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## ADAA

- The changes impact the bold terms:
  - Physical or mental **impairment** that **substantially limits** one or more **major life activity**
  - A record of such impairment
  - Being **regarded as** having such an impairment

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## ADAA

- The Supreme Court cases at issue
  - *Sutton v. United Airlines*
    - Pilot with severe but correctable myopia denied employment based on uncorrected visual acuity
    - ADA action dismissed because "disability" determined with regard to available corrective measures
    - One whose impairment corrected by medication or other measures did not have an impairment that substantially limited a major life activity

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## ADAA

- The Supreme Court cases at issue
  - *Toyota v. Williams*.
    - Assembly worker with carpal tunnel held not to be disabled because she could still perform general tasks/personal care
    - Impairment not substantially limiting because it did not prevent or severely restrict activities of central importance to most people's daily lives

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## ADAA

- Overriding *Sutton* and *Toyota*
  - ADAA Broadens Reach of Original ADA
    - The original ADA stated that disabled individuals are "a discreet and insular minority"
    - This language caused courts to interpret ADA narrowly in order to maintain the discreetness and insularity of this minority
    - Both *Sutton* and *Toyota* relied on the "discreet and insular" language

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## ADAA

- Overriding *Sutton* and *Toyota*
  - Congress struck this language from ADAA
  - New language: "The definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum terms permitted by the . . ." ADA
  - Will now ensure that many more individuals will be deemed "disabled"

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## ADAA

- Overriding *Sutton* and *Toyota*
  - Expands definition of "major life activities"
    - Original included caring for oneself, performing manual tasks, seeing, hearing, walking, standing, lifting, speaking, breathing, working
    - New includes eating, sleeping, learning, reading, concentrating, thinking, communicating, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive functions

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## ADAA

- Overriding *Sutton* and *Toyota*
  - Episodic impairments or impairments in remission must be considered in their active state for purposes of determining if a person is disabled
  - Mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability

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## ADAA

- Overriding *Sutton* and *Toyota*
  - Instructed EEOC to provide a more generous definition of the term "substantially limits"
  - Current EEOC regulations are all based upon *Sutton* and *Toyota*
  - Be mindful of more changes as the regulations are published

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## ADAA

- Changes to the "Regarded As" Prong
  - One is "regarded as" disabled if employer regards her as having an impairment, even if employer did not regard the impairment as substantially limiting a major life activity
  - Transitory, lasting 6 months or less, and minor impairments are excluded
  - "Regarded as" employees are not entitled to reasonable accommodations

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## ADAA

- Where Do Employers Go From Here?
  - Presume employee is disabled
  - Be certain to engage in the interactive process to determine whether reasonable accommodation exists
  - Monitor and eliminate evidence of discriminatory animus

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## ADAA

- Where Do Employers Go From Here?
  - Carefully handle performance issues
    - Work with supervisors to correctly address and document performance issues
    - Avoid "smoking gun" actions/references
    - Ensure explicit performance expectations, clear performance standards, accurate measures, reliable performance feedback
    - Uniform and consistent application

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## ADAA

- Where Do Employers Go From Here?
  - Adopt or review your ADA policy
  - Designate one or two persons to be the "go to" persons to work with disabled employees
  - Review/adopt job descriptions
  - Train, train, train

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## Fair Pay Act

- *Lilly Ledbetter v. Goodyear Tire* (2007)
  - Lilly sued claiming unequal pay practices based on sex under both Title VII and EPA.
  - She erroneously dismissed EPA claim
  - Court found that her Title VII claim time-barred and dismissed it
  - But she could have had a good claim under the EPA claim, if her attorney did not dismiss it

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## Fair Pay Act

- On 1.29.09, President Obama signed into law the Lilly Ledbetter Fair Pay Act
  - Creates new rules for the filing of pay discrimination charges with the EEOC
  - Can file charge under Title VII, ADEA, and ADA without regard to the normal 180/300-day statutory charge filing period
  - Results in greatly broadening rights of employees to challenge pay practices

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## Fair Pay Act

- An unlawful employment practice act occurs when:
  - A discriminatory compensation decision or other practice is adopted
  - An individual becomes subject to the decision or practice
  - An individual is affected by application of the decision or practice, including each time there is a payment of compensation

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## Fair Pay Act

- What does this mean?
  - Virtually eliminates limitations on pay discrimination charges
  - Irrelevant that decision occurred years ago
  - Lilly could have brought her claim even if the decision occurred years ago, so long as each subsequent paycheck is tainted by that decision

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## Fair Pay Act

- What should you do?
  - Examine your record retention policies
    - Payroll records = 4 years
    - General employment records = 1 year
    - Evaluate risks of no documentation vs. benefits of prolonged retention to plaintiffs
    - Costs and logistics must also be evaluated
    - No single retention rule fits all business

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## Fair Pay Act

- What should you do?
  - Review your pay practices and policies
    - Starting pay, promotional pay and merit pay increases policies reviewed or created
    - Limit managers' discretion
    - Consider adoption of professional compensation schemes to do away with discretion
    - Ensure proper monitoring of all pay rates

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## Fair Pay Act

- What should you do?
  - Self-Audit
    - Statistical analysis of all pay decisions over past 2 years
    - Measure extent to which actual pay decisions adhere to written policies
    - Conduct annual self-audits
    - Protect results by working with attorney

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## Fair Pay Act

- What should you do?
  - Consider using releases in lay-off and termination cases
  - Be prepared for the EEOC to seek information on pay practices in almost every type of charge

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## Retaliation

- *Crawford v. Metro Gov't of Nashville*
  - Facts
    - The Employee Relations Director rumored to be sexually harassing employees
    - Crawford and others were interviewed and she related harassing encounters with him
    - No action taken against the alleged perp but Crawford and two others who were also interviewed fired

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## Retaliation

- *Crawford v. Metro Gov't of Nashville*
  - Held:
    - Title VII's anti-retaliation clause extends to employee who speaks out about discrimination not on her own initiative but in answering questions during her employer's internal investigation
    - "Oppose" defined as resisting or contending against and Crawford ostensibly disapproved of the sexually obnoxious conduct

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## Family Leave Insurance Act of 2009

- Introduced in House on March 25, 2009
- Would create a family leave insurance program giving eligible employees up to 12 weeks of paid family and sick leave in a 12 month period
- Adopts much of the FMLA, with certain exceptions

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## Family Leave Insurance Act of 2009

- Eligibility
  - Employers with 2+ employees
  - Employees working at least 625 hours in the 6 months prior to filing for leave
- Availability of Leave
  - Same reasons as the FMLA
  - Includes same-sex/domestic partners, including children of partnership

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## Family Leave Insurance Act of 2009

- Funding
  - Equal contributions of .2% of employees' wages
- Benefits
  - < \$20K = 100% of earnings
  - \$20K to \$30K = 75% of earnings
  - \$30K to \$60K = 55% of earnings
  - \$60K to \$97K = 40% of earnings
  - > \$97K = 40% of \$97K earnings

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## Family Leave Insurance Act of 2009

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- Secretary of Labor to establish program
- Employers may establish voluntary paid benefit plan and be exempt from Act
  - So long as benefits are at least equal to the Act's benefits

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## BWC - What Just Happened?

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## What Happened?

- The recent maneuvers by the BWC were a long time coming
- Group Rating began in 1991
- Actuarial studies done early on (as early as 1995 possibly) indicated group rating, the way it was run, was going to be a problem
- TPA's were threatened in 2001 that groups were going to be capped at a maximum discount of 70-75%
- Instead the BWC opted to give non-group discounts to employers not in a group
- That continued until July 1, 2007
- In July 2006 group rating discounts (the credibility table) started declining from a maximum of 95% to 93%; to a 90% in 2007; to an 85% in 2008 to the current 77% for 2009.

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## What Happened?

- In early 2007, the "Pinnacle Study" was released
- Pinnacle was an outside actuarial consulting firm hired by the BWC to review the group rating program as well as other programs offered by the BWC
- Pinnacle found that group rating was inequitable and indicated that non-group rated employers were funding the group rated employers
- Since that time the BWC has stepped up its "rate reform" and decided to work with outside stakeholders (TPA's, including CRM and group sponsoring associations) to come up with solutions
- Rate Reform meetings began as early as June 2007
- At that time a slow phase-in of reform was presented by the BWC and then modified based on feedback from outside stakeholders

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## What Happened?

- The original plan was to reduce credibility (or the maximum discount) to 77% beginning 7/1/09 and to 65% for 7/1/10
- Also approved was a 30% premium increase cap which limited Employer premiums from increasing no more than 30% due to the decrease in the credibility table
- That plan was approved by the BWC's Board in the Fall of 2008.
- During this same time, back in 2007, seven employers (non-group rated) in Cuyahoga County sued the BWC alleging that they were subsidizing group rated employers, that group rating was unconstitutional and that group rating was not being operated in accordance with the statute
- In November, 2008, Judge McMonagle issued a preliminary injunction stating that while group rating was constitutional, it was not being run in accordance with the statute, which specifically said that group rating should be "retrospective" and the BWC could not have a group program as of July 1, 2009

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## What Happened?

- According to the BWC, the statute contained a "typo" and should not have referenced "retrospective" group rating as that was not the intent of the program when it was adopted in 1991
- A bill that was pending legislatively was amended to also include revising the group rating statute to strike "retrospective" so group rating could continue as is for 7/1/09
- That bill did pass and the group rating section was revised and group rating was allowed to continue for the upcoming rating year.
- In a surprise move by the BWC, in January, 2009 they presented an "accelerated rate reform" plan to the Board
- This rate reform plan would decrease base rates by 25% on average, would remove all discount programs with the exception of group rating and group rating participants would be assessed with a surcharge

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## What Happened?

- The Board asked the BWC to further review that plan and advise at the February Board meeting what the impact would be to group members
- In February, the Board still was not satisfied with the plan and the BWC had to do more legwork
- During February and part of March the BWC worked again with outside stakeholders to obtain feedback on their new plan
- In the end, in March, 2009, the Board approved a plan that permitted a decrease in both base and expected loss rates and a group assessment factor (or surcharge) of 31.1% on all groups
- The Premium Discount Program was completely eliminated
- The Drug Free Workplace and Safety Council Programs were salvaged – however, group rated employers can no longer "stack" these discounts
  - If you're in a group, there is no additional discount for participating in DFWP or a Safety Council

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## What Happened?

- This was put through for a 'first reading' on March 20
- Final vote will be on April 30 – however, group applications will be filed on April 24
- This caused all group sponsors and TPAs to go back to the drawing board and reform groups based on the new data
- Some employers were no longer eligible due to decreases in expected losses
- Also groups under the lower discounts up to approximately 30% now made no economic sense due to the 31% surcharge being assessed – employers were better off NOT in a group

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## What Happened?

- Quotes were issued reflecting new rates
- Notices were issued if group rating was no longer a viable option
- Some employers did get the benefit of a 100% EMR cap – which means that the EMR from 2008 can no more than double (if a company was in a group with an 80% discount (EMR of .20) and was not eligible in 2009 due to claim losses, the 2009 EMR would be no more than .40 (or a 60% discount)
- There are restrictions on the 100% EMR cap:
  - Individual EMR has to be over 1.01
  - Must complete BWC's 10 Step Business Plan
  - Have to be in good standing with BWC (no lapses, no balances)

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## What's Next?

- Group rating will continue, although drastically changed, for 7/1/09
- BWC announced two new programs for 7/1/09
  - Deductible Program
  - Group Retrospective Rating
- There will be further changes to group as of 7/1/10
  - Group Continuity
  - Possible elimination of standard group rating to be replaced by only group retrospective rating
  - BWC to be in charge of forming groups
- A new rating system will be adopted as of 7/1/2011

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## What's Next?

- **Deductible Program**
  - Provides an upfront discount for taking on risk of claim losses
  - Employers can choose a level of deductible they wish to pay on each claim in a given policy year
  - Deductible levels at \$500, \$1000, \$2500, \$5000 and \$10000 per claim (includes indemnity and medical)
  - There is no cap on the amount for which the employer is responsible
  - Deductible limit can't exceed 25% of annual premium
  - Employer responsible for any claims incurred during a "deductible rate year" until the claim(s) reaches the deductible limit

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## What's Next?

- BWC pays the costs (comp and med) and will bill back employers monthly
- Discounts will range from 1.4 to 26% (dependent on level of deductible selected and industry classification)
- There can be a decent premium savings if you have effective claims management and safety controls in place
- Claims that are not timely and/or properly managed could cost more than premiums saved
- Cannot use \$15k and salary continuation

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## What's Next?

- Cannot use \$15k and salary continuation
  - This can cause a problem in future years when the claims are charged to the experience
  - Companies used to paying medical through the \$15k and paying salary continuation to avoid a reserve will not see that benefit
  - Any costs paid under the deductible WILL be charged to the experience and the company will be rated on those claims
  - One large claim can have a 4 year experience impact that could outweigh any savings incurred as part of the program

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## What's Next?

- Deadline to enroll in the program effective 7/1/09 is May 31, 2009.
- Enrollment is done annually – once enrolled for a rating year, a company cannot opt out until the next rate year
- This program cannot be combined with Retrospective Rating (Group or Individual) or Salary Continuation or \$15k Medical Only Program

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## What's Next?

- **Group Retrospective Rating**
  - Groups are formed through sponsoring organizations
  - Loss (performance) based program where losses are weighed against premiums paid
  - Employers in retro groups will pay their individual premium
  - Losses kept below the premium levels for the group members can result in a dividend to group members
  - Losses exceeding premium can result in an assessment

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## What's Next?

- Employers pay their premiums at individual rate as they normally would
- Claims incurred during that same year would be reviewed at 12, 24, and 36 months
- At each 12 month interval, premium would be compared to losses and dividends or assessments would be calculated
- Benefits are claims management and loss control to keep costs down

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## What's Next?

- Further benefit is the group can select a limit for exposure
- Downsides:
  - Loss development factors set by BWC seem high at this point – that could change – plan not formally approved until 4/30/09
  - There is risk that companies in group could have a bad claim and costs would be spread to entire group
- Deadline is June 26, 2009 – further information will be forthcoming for any company interested in program
- Depending on BWC parameters this could be a good program

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## What's Next?

- July 2010
  - Changes for next year are still pending
  - BWC hopes to have plan finalized by July or August of 2009
- July 2011
  - New rating system (NCCI Split Rating System) will be implemented
  - Frequency based instead of severity based
  - Safety and claims management will be even more important going forward

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