

UPDATE: COBRA Subsidy: What It Means For Employers

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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1, S. 1) (the "Act"), which, among other things, amends the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

The Act provides:

- for a government subsidy of **up to 65 percent** of the COBRA premiums (including state "mini-COBRA" coverage) to certain eligible individuals (known as "assistance eligible individuals");
- that the COBRA subsidy applies only to individuals who are eligible for COBRA due to an involuntary termination from employment from September 1, 2008, through December 31, 2009; and
- that the COBRA subsidy applies for a maximum of nine (9) months of coverage (beginning on March 1, 2009).

The Act **does not** extend the otherwise applicable COBRA coverage period, nor does it adopt the proposal in the House bill to continue coverage through Medicare eligibility.

Employers should expect that these provisions will result in more COBRA-qualified former employees electing coverage under employer plans. Employers also should expect increased administration, since the Act imposes notice requirements (and potential penalties for non-compliance) and has administrative implications for almost all employers that require actions to be taken in **March/April 2009**. A general overview is provided below.

Eligibility

An individual is eligible for the COBRA premium subsidy if he or she:

- is **involuntarily** terminated between September 1, 2008, and December 31, 2009;
- elects COBRA coverage (when first offered or during the Special Election Period described below); and
- has modified adjusted gross income **not** exceeding \$145,000 per year (\$290,000 for couples filing jointly) – the subsidy is phased out starting at modified adjusted gross income of \$125,000 (\$250,000 for couples filing jointly).

Special Election Period

Any eligible individual who became eligible for COBRA coverage on or after September 1, 2008, but did not elect to receive COBRA coverage, is eligible for the COBRA premium subsidy and must be given a second chance to elect COBRA coverage.

COBRA Subsidy

The government subsidy is not paid to the individual electing COBRA coverage. Rather, eligible individuals (or anyone else on behalf of the individual other than the individual's employer) are to pay 35 percent of the required COBRA premium. The entity that provides the coverage and collects the individuals' premiums must cover the remaining COBRA premium (*i.e.*, 65 percent). That entity thereafter will receive reimbursement through a payroll tax credit, as follows:

- The **plan** will be entitled to reimbursement if the group health plan **is** a multi-employer plan;
- The **employer** will be entitled to reimbursement if the group health plan is **not** a multi-employer plan, and is:
 - subject to federal COBRA (as opposed to state "mini-COBRA" laws),
 - or**
 - fully or partially self-insured;
- The **insurer** will be entitled to reimbursement if the group health plan:
 - is **not** a multi-employer plan,
 - is **not** subject to federal COBRA (for example, plans subject to state "mini-COBRA"), and
 - is fully insured.

The COBRA subsidy ends on the earliest of:

- the date the individual becomes **eligible** for health coverage under another group health plan or Medicare;
- nine (9) months after the first day of the first month to which the COBRA subsidy applies; or
- the end of the maximum COBRA coverage period required by law.

Many employers currently provide a COBRA subsidy to employees who are involuntarily terminated pursuant to the terms of their severance plans or individual agreements. Given that the Act requires the individual to pay 35 percent of the premium for the reimbursement to be claimed, it is not clear whether the reimbursement is available if the eligible individual pays less than 35 percent of the premium.

Notice Requirements

On or before **April 18, 2009**, employers must provide notice advising of the availability of the COBRA premium subsidy to:

- all individuals who became entitled to elect COBRA coverage during the period beginning on September 1, 2008, and ending on the day before enactment (February 16, 2009); and
- any individual who became eligible for the Special Election Period described above.

All individuals who have a COBRA qualifying event between February 17, 2009, and December 31, 2009, must receive an updated COBRA notice (or the inclusion of a separate document with the COBRA notice) reflecting the availability of the COBRA premium subsidy. This must be provided within the usual COBRA notice deadline (generally 44 days after the qualifying event).

The Department of Labor is required to provide model notices no later than **March 19, 2009**.

The Act also provides that employers may allow (but are not required to allow) an individual eligible for the COBRA premium subsidy to elect a different COBRA coverage option from the one the eligible individual originally elected at the time of termination from employment. If offered, however, the other option cannot be more expensive than the option which the individual originally elected and must be an option offered to active employees.

Action Items

The COBRA provisions in the Act are effective for most employer-sponsored health plans beginning March 1, 2009. Accordingly, employers should immediately begin to:

- Revise and update COBRA communication materials.

- Provide written notice as required by the Act to individuals who are eligible for the subsidy by April 18, 2009.
- Identify individuals entitled to the special enrollment period and provide notice allowing them to elect to receive the COBRA coverage and the premium subsidy.
- Implement administrative procedures to provide the subsidy (as applicable) and obtain the payroll tax credit.
- Decide whether to allow eligible individuals to change their health plan options.
- Develop procedures to reinstate the 100 percent COBRA premium charge if the individual continues to be eligible for COBRA coverage after termination of the subsidy.
- Review severance plans and other agreements that provide an employer paid COBRA subsidy in light of the new government subsidy.

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