

February 16, 2009

## Congress Establishes Premium Subsidy for COBRA Beneficiaries

*Congress has approved a \$787 billion economic stimulus package, which the president is expected to sign on February 17. The American Recovery and Reinvestment Act of 2009 (ARRA) will make a number of changes affecting employee benefits. Chief among these is a notable expansion of the COBRA rules to create a nine-month, 65% federal subsidy of the COBRA premiums payable by certain terminated employees. As a result of this legislation, employers and plan administrators will immediately face significant new notification and premium payment responsibilities.*

### COBRA Premium Subsidy

Effective almost immediately, the new legislation creates a federal COBRA premium subsidy for covered employees (and qualifying dependents) involuntarily terminated from their jobs between September 1, 2008 and December 31, 2009 and otherwise eligible for COBRA during this period. The subsidy will cover 65% of the premium, will last for nine months, and will apply to premiums paid for periods of coverage beginning on or after March 1, 2009. The subsidy will not be available once the individual becomes eligible for coverage under another group health plan or Medicare or otherwise is no longer eligible for COBRA. (The subsidy period does not extend the period of COBRA coverage that would otherwise apply to that individual.) Subsidies may not be applied to payments for health flexible spending accounts.

### Immediate Impact

Within 60 days of the bill's enactment (i.e., the date the president signs the legislation) employees who were involuntarily terminated on or after September 1, 2008 and were entitled to COBRA coverage before the date of the bill's enactment must be notified of the availability of the premium subsidy and (if not already enrolled) that they will have a new period to enroll for COBRA coverage. The new enrollment period starts on the day of enactment and ends 60 days after notification. If the individual elects COBRA during this period, the coverage becomes effective as of March 1, 2009.

Because the new legislation will become effective so quickly, many individuals who are eligible for the new COBRA premium subsidy may pay their full COBRA premiums for months in which they are eligible for a subsidy. To rectify this, these individuals may receive a refund of their overpayments for March and/or April (or apply the overpayments as a credit against future premiums). Thus, individuals who have already paid their March and/or April COBRA premiums at the 102% of premium rate could become eligible for the new COBRA subsidy program as of March 1 and receive a refund of the difference in premiums for March and, if necessary, April.

## New Notices

Individuals who experience a COBRA qualifying event during the period beginning September 1, 2008 and ending December 31, 2009 must be notified of the availability of the premium subsidy and, if applicable, of the choice of new coverage options (as described below). This new information will become part of the standard COBRA notice for qualifying events for the duration of the subsidy. The notice must include:

- A description of the subsidy
- A description of the extended election period available to subsidy-eligible individuals who do not have a COBRA coverage election in place as of the date of enactment
- A description of the individual's obligation to inform the plan if he or she becomes eligible for Medicare or another group health plan
- The forms necessary for establishing eligibility for the subsidy
- Contact information for the plan administrator
- A description of alternative COBRA coverage options, if the employer elects to provide these

The legislation directs specified government agencies to develop model notices for this purpose within 30 days of the bill's enactment.

## Payment Structure

Under the new rules, eligible individuals will be responsible for paying only 35% of the COBRA premium with the employer paying the remaining 65% of the premium that corresponds to the government's subsidy. Employers then recoup the 65% share from the federal government by claiming a credit against their federal payroll taxes (including income tax withholding) or, if necessary, through a direct payment from the government. The COBRA premium on which the subsidy is based is the premium actually charged to the individual (and thus does not include any amounts currently being picked up by the former employer).

Employers will need to file a report to accompany the claim for credits. The report must include an attestation of the involuntary termination of the covered employees, the calculation of the offsets, a report of estimated offsets for the next reporting period, the TINs of covered employees, the amount of the subsidy provided to each individual, and information as to whether the subsidy provided was for individual or family coverage.

## Eligible Employees

To be eligible for the subsidy, an employee must be terminated, or have been terminated, from his or her employer during the period starting September 1, 2008 and ending December 31, 2009. Employees must have been terminated involuntarily and not for reasons of gross misconduct. Qualifying dependents of these terminated employees may also be eligible for a subsidy. The subsidy will not be available once the individual becomes eligible for coverage under another group health plan or Medicare or otherwise is no longer eligible for COBRA. An individual will be required to notify the plan of a loss of COBRA entitlement due to eligibility for other health plan coverage and will be penalized for the failure to do so.

Individuals with annual income exceeding \$145,000 per year, and couples with income exceeding \$290,000 per year, are not eligible for the subsidy; the subsidy is phased out starting at \$125,000 for individuals and \$250,000 for couples. Individuals who receive subsidies during a year in which they exceed these income limits must repay the subsidy; the repayments are captured on the individual's income tax return. Individuals may make a permanent election to waive the subsidy.

## **New COBRA Coverage Option**

At the option of the employer, an individual eligible for this special subsidy may elect a different COBRA health coverage option from the one in which he or she had been enrolled at the time of termination of employment. This other coverage must be one of the options offered by the employer to active employees, not be more expensive than the option in which the individual had been enrolled, and not be a health flexible spending account (or certain other forms of limited coverage). Eligible individuals have 90 days after notification to elect this different form of COBRA coverage.

## **Other Continuation Coverage**

Similar subsidy rules will apply to governmental plans and to continuation coverage comparable to that required under COBRA but mandated by state law for group health plans not subject to COBRA (such as those run by small employers with fewer than 20 employees).

## **Responsible Government Entities**

In general, the Department of Labor will have primary responsibility for drafting the notices and other rules necessary to implement the new legislation. The Departments of Treasury and Health and Human Services share some responsibilities. It is clear that these government agencies are working diligently to provide guidance on these new COBRA rules; representatives of these entities have not, however, been able to give us a specific answer as to when they would be able to provide the necessary guidance to respond to the many unanswered questions raised by this new legislation.

## **Top Ten Action Items**

With the effective date of the COBRA subsidy not even two weeks away, employers will quickly need to address the administrative, payroll, and other systems changes necessary to accommodate this revision of the COBRA rules. The immediate action items will differ depending on whether the employer's health plan is insured or self-funded and whether the employer administers COBRA in-house or uses a COBRA administrator. In general, however, employers and/or plan administrators will need to do the following:

1. Identify individuals eligible for COBRA who were terminated on an involuntary basis on or after September 1, 2008 and dependents of these individuals who previously became eligible for COBRA.
2. Revise and update COBRA communications materials, placing a priority on creating a notice for those terminated employees immediately entitled to a new COBRA enrollment period.
3. Notify eligible individuals within 60 days of the bill's enactment of their new COBRA election period and of the availability of the premium subsidy (and, if applicable, other COBRA coverage options).
4. Coordinate with the employer's payroll and systems staff personnel to revise systems and other procedures for paying the government's 65% share of the COBRA premium and for reflecting the revised charges on premium statements sent to participants.
5. Coordinate with payroll and systems personnel to revise systems and other procedures for obtaining reimbursement of these amounts from the federal government.
6. Coordinate with payroll and systems personnel to revise systems and other procedures for determining participant premium overpayments and crediting the payments to future premiums or returning the overpayments directly to the participant.

7. Develop processes, procedures, and systems changes necessary to end the subsidy when the individual no longer is able to claim it and to reinstate the 100% COBRA premium charge if the individual continues to be eligible for COBRA after termination of the subsidy.
8. Determine whether the employer wishes to allow the former employee to switch to alternative health coverage for COBRA purposes.
9. If the employer currently pays for some portion of COBRA premiums, determine whether these payments should be restructured.
10. If significant reductions in force have been made since September 1 or may be made in the near future, determine how these new rules will affect COBRA claims experience and administrative costs for self-funded plans. If necessary, perform the actuarial calculations necessary to revise future plan rates.

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