

Benefit Brief



SUBJECT: New COBRA Requirements

DATE: March 9, 2009

This Benefit Brief is for employers who are subject to federal COBRA continuation coverage requirements (employed 20 or more employees on more than 50% of the typical business days during the previous year).

The American Recovery and Reinvestment Act of 2009 (ARRA) provides a 65% reduction in COBRA premiums for certain individuals who qualify for federal COBRA premium assistance. Because this is new legislation, there are still some questions to be answered and procedures to be developed. For now, employers should become familiar with the new requirements and prepare to implement them quickly.

What is the COBRA Premium Subsidy?

- The legislation creates a federal COBRA premium subsidy that pays 65% of COBRA premiums for qualified employees and their dependents who were involuntarily terminated between September 1, 2008 and December 31, 2009.
- The involuntarily terminated individual must pay 35% of the COBRA premium in order to qualify for the federal subsidy.
- If the COBRA premium is 102% of the plan cost, then the federal subsidy is 65% of 102% and the individual must pay 35% of 102%.
- The subsidy applies to individuals who were terminated back to September 1, 2008, but it is not retroactive. It will apply only to periods of coverage beginning on or after March 1, 2009.
- The premium subsidy is not considered taxable income or additional income when determining eligibility for any federal or state public benefit program.
- Individuals who request subsidized premium assistance from their group health plans and are denied may have the right to appeal with the Department of Labor (DOL). The process is currently under development.

Who is Qualified for the Subsidized Premiums?

- The subsidy applies only to employees who were involuntarily terminated from their jobs between September 1, 2008 and December 31, 2009, and their family members who are qualified beneficiaries. COBRA qualified beneficiaries, such as a dependent child of an employee, must be covered immediately prior to the qualifying event.
- The subsidy does not apply to employees who voluntarily resign, are terminated for gross misconduct, or who lose their health coverage due to a reduction in work hours.
- Qualified beneficiaries who are eligible for other group health plan coverage (such as through a spouse's employer) or Medicare cannot receive subsidized coverage.
- High-income individuals are eligible for the subsidy, but they must repay it. Single individuals with income over \$145,000 and married individuals with income over \$290,000 must repay the entire federal subsidy. A partial repayment is required for single individuals with income between \$125,000 and \$145,000, and for married individuals with income between \$250,000

and \$290,000. Repayment will occur on the individual's 2009 tax return. High-income individuals may waive the subsidy.

What is Eligible Coverage?

- All group health plans subject to COBRA are eligible for the subsidy, including medical, dental, vision, and HRAs. Health FSAs are not eligible for the subsidy.

When Does the Subsidized Coverage End?

- The subsidy is available for up to nine months, beginning on March 1, 2009 or the date the individual loses regular coverage under the plan, whichever is later. After the ninth month, the federal subsidy ends and qualified individuals must pay the full COBRA premium.
- Eligibility for the subsidy ends when a terminated individual is either offered other group health coverage (including under a spouse's employer) or becomes eligible for Medicare. This is different from regular COBRA rules, where termination of COBRA is permissible only when an individual actually *obtains* coverage under another group health plan or becomes *entitled* to Medicare benefits. So, a terminated employee who becomes eligible for other group health benefits but does not enroll in that coverage will lose the COBRA premium subsidy.
- The subsidy will also end if premiums are not paid.
- Qualified individuals are required to notify the plan administrator in writing when they become eligible for other coverage. Failure to provide notice could result in an excise tax penalty of 110% of the subsidy provided.
- If a second qualifying event (death, divorce, etc.) occurs within the nine-month period, other qualified beneficiaries get the federal subsidy through the end of the nine-month period.
- The subsidy period does not extend the period of COBRA coverage that would otherwise apply to an individual. In most cases, a total of 18 months of COBRA coverage is available, consistent with current law.

What is the Special Election Period?

- Plan administrators must provide a special 60-day COBRA election period to individuals who were eligible to elect COBRA due to an involuntary termination during the September 1, 2008 through December 31, 2009 time period, but did not elect COBRA.
- The special election period also applies to qualified individuals who elected COBRA coverage during this period but then let it lapse.
- The special election period ends 60 days after the individual receives the special election notice.
- If an individual elects COBRA coverage during the special election period, the coverage is effective retroactive to March 1. However, the maximum period of COBRA coverage continues to be measured from the date of the qualifying event, not March 1.
- The period of time between the date of the qualifying event and March 1 is not counted against the 63-day gap in coverage rule for purposes of determining periods of creditable coverage.

What is the Alternative Coverage Option?

- Employers may choose to allow eligible individuals to elect alternative coverage (coverage other than that in place on the date of the qualifying event).
- The alternative coverage must be a plan that is offered to active employees, and must have a premium that is the same or lower than the coverage in place on the date of the qualifying event.
- The alternative coverage must not be limited coverage (stand-alone dental, vision, counseling, or wellness that does not include medical).
- The individual has 90 days to elect the alternative coverage after receiving an enhanced or special notice.

How is an Employer Reimbursed?

- The employer must receive the 35% payment from the involuntarily terminated individual before requesting reimbursement of the remaining 65% from the federal government.
- An employer will recover the 65% through a credit against payroll taxes. These taxes include federal income tax withholding and the employee and employer share of FICA. The employer can claim the credit on line 12a of IRS Form 941, which has been revised to allow the credit. The number of individuals receiving COBRA premium assistance is entered on line 12b. Form 941 is a quarterly federal tax return and is available on the IRS website.
- If the credit against employment taxes is insufficient to recover the full premium subsidy, the employer will qualify for a direct payment from the federal government. This will be handled in the same way as an overpayment of employment taxes.
- If a subsidy-eligible individual has already paid the full COBRA premium for March and/or April coverage, the employer will reimburse the 65% subsidy or provide a credit against future COBRA premiums.

Does an Employer Still Have to Pay Premiums to the Insurer?

- An employer with an insured plan still has to pay premiums to the insurer (unless the employer is not subject to COBRA but is required to provide state continuation coverage).

What Election Notices Should be Used?

- The DOL must issue model notices by March 19, 2009.
- Plan administrators must provide an *enhanced* COBRA election notice to **all** individuals who become entitled to elect COBRA between September 1, 2008 and December 31, 2009. This applies to all COBRA qualified individuals and all qualifying events, not just those who were involuntarily terminated. Enhanced notices must be provided per the regular COBRA election notice requirements.
- Plan administrators must provide a *special* COBRA election notice to individuals who were entitled to elect COBRA coverage before February 17, 2009. (*See What is the Special Election Period?*)
- The notices must be sent to individuals within 60 days of enactment (by April 18, 2009).
- Failure to provide notices could result in ERISA penalties.

What Do Employers Without a COBRA Administrator Need to Do Now?

- Prepare a list of all COBRA eligible individuals who were terminated since September 1, 2008. This includes employees who elected COBRA, employees who declined COBRA, and qualified dependents of both groups.
- Identify which of these individuals are entitled to the special enrollment period.
- Determine the correct premium payment for subsidy eligible individuals (35% of the COBRA premium).
- Develop a method for either applying the excess from any COBRA premiums already paid for March and/or April to future premiums or refunding the excess.
- Decide whether to offer alternative coverage. If yes, employers will need to furnish information regarding benefits and premiums as part of the COBRA administrative process.
- Develop a system to track the maximum nine months of available COBRA premium subsidy and the maximum COBRA coverage period for individuals who elect COBRA during the special enrollment period.
- Develop notices or wait for models from the DOL.
- Distribute notices no later than April 18, 2009. Use the same notice procedure you use for regular COBRA notices.
- Talk with insurers. Employers and multiemployer plans must begin paying 65% of the premium for fully-insured coverage. Discuss how and when this will be paid to the insurer.

What Do Employers With a COBRA Administrator Need to Do Now?

- Prepare a list of all COBRA eligible individuals who were terminated since September 1, 2008. This includes employees who elected COBRA, employees who declined COBRA, and qualified dependents of both groups. Share this information with the COBRA administrator.
- Ask the COBRA administrator if they will provide the notices and facilitate the special election period. Discuss what information they need from the employer.
- The additional COBRA requirements might result in additional fees from your administrator. Ask them about this.

Unanswered Questions

The DOL will issue additional guidance on the new requirements by March 19. These questions still need to be answered:

- What is involuntary termination? Most likely it includes terminations based on performance, misconduct (but not gross misconduct), general layoff, seasonal layoff, reductions in force, plant shutdown, strike, and acts of God.
- What is gross misconduct? COBRA does not define gross misconduct, and the courts have not agreed on a common standard to apply in gross misconduct cases.
- When must enhanced notices be provided to qualified beneficiaries who had a qualifying event before February 17, 2009 and already received a COBRA election notice?
- How does a plan administrator know when an individual becomes eligible for other coverage? Does a plan administrator have a duty to inquire about eligibility under other group health plans or Medicare?
- Should plan administrators make COBRA coverage available, even if they know the individual is eligible for coverage under another group (their spouse's) plan?
- Will federal subsidy amounts need to be recorded on Forms W-2 or 1099?
- When is alternative coverage effective (retroactive to March 1 or prospectively)?
- How does severance affect subsidy eligibility?

Additional Information Resources

- The DOL has a website dedicated to the COBRA premium subsidy, which includes a fact sheet. Additional guidance will be posted on this website as it is released. www.dol.gov/ebsa/COBRA.html
- The IRS has released a list of frequently asked questions about the COBRA subsidy, which is available at www.irs.gov/newsroom/article/0,,id=204708,00.html. For guidance on the rules for depositing employment taxes and reporting employment tax information, see IRS Publication 15 (www.irs.gov/pub/irs-pdf/p15.pdf). The new Form 941 (www.irs.gov/pub/irs-pdf/f941.pdf) and instructions (www.irs.gov/pub/irs-pdf/i941.pdf) are now available. The instructions explain how to complete lines 12a and 12b of Form 941.

If you have questions about the new COBRA requirements, please contact Danielle Omans at The Benecon Group at domans@benecon.com or at the number below.

This Benefit Brief is provided for informational purposes only and does not constitute legal advice. The Benefit Brief contains only a summary of the applicable legal provisions and does not purport to cover every aspect of any particular law, regulation or requirement. Depending on the specific facts of any situation, there may be additional or different requirements. Please use this Benefit Brief as a guide and not as a definitive description of your compliance obligations.