

# BENEFITS BULLETIN

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## COBRA PREMIUM SUBSIDY AND EMPLOYER RESPONSIBILITIES



by Elizabeth Latchana

The American Recovery and Reinvestment Tax Act of 2009 (the "Act") was signed into law on February 17, 2009. This new law dramatically affects employers whose group health plans are subject to COBRA, which includes virtually all employers who employed 20 or more employees on 50% of its typical business days during the preceding calendar year.

As an employer who is potentially impacted by this legislation, prompt attention must be paid to the substantial requirements under the Act and its affect on COBRA. Specifically, the Act provides a 65% government subsidy toward COBRA coverage to employees who are *involuntarily terminated* between September 1, 2008 and December 31, 2009, as well as their family members who are eligible for COBRA due to such termination.

Significantly, the employer must first provide this 65% payment toward the COBRA premium and then be reimbursed by the government. Additionally, the Act imposes numerous COBRA notice and other obligations on plan administrators and employers. Immediate action is required as the subsidy portion of the Act becomes pertinent for periods of coverage beginning on or after February 17th (i.e., March 1, 2009 for those plans using a calendar month for their COBRA periods of coverage).

### Individuals Eligible for the Subsidy

Individuals who are eligible for the subsidy are called assistance eligible individuals ("AEIs"). An AEI includes any qualified beneficiary who is eligible for COBRA as

a result of the covered employee's involuntary termination (for reasons other than gross misconduct) which took place between September 1, 2008 and December 31, 2009.

However, AEIs can lose eligibility for the subsidy if they become eligible for Medicare or eligible for other group health plan coverage (including coverage under a spouse's plan, but specifically excluding only dental, vision, counseling or referral services, or on-site medical facilities of an employer primarily for first-aid, prevention or wellness services). Additionally, high income individuals may lose a portion of or all of their subsidy.

Specifically, the subsidy is phased out through additional taxation for taxpayers with a modified adjusted gross income for the calendar year of more than \$125,000 (or \$250,000 if married filing jointly). Additional taxation is capped by the full amount of the subsidy for taxpayers whose modified adjusted gross income reaches \$145,000 (or \$290,000 in cases of a joint return). Taxpayers reaching these thresholds can permanently waive their right to a subsidy to avoid this issue. In such case the taxpayer would simply pay the full COBRA premium charged.

### Subsidy Coverage and Duration

The government will provide the 65% subsidy toward any coverage to which COBRA is applicable (ie, medical, dental, vision), except for health flexible spending accounts. The subsidy is not retroactive to when COBRA coverage was, or could have been, elected by the AEI. Instead, it will continue for a maximum period of nine (9) months for periods of coverage beginning on or after February 17, 2009 (ie, March 1st or thereafter for most plans).

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## STIMULUS PACKAGE REQUIREMENTS - *continued*

Specifically, the subsidy terminates at the earlier of:

- a.) 9 months
- b.) Eligibility for other group health plan coverage as discussed above
- c.) Medicare eligibility
- d.) The end of the maximum COBRA coverage period required by law, or
- e.) For those electing COBRA during the special election period, the end of the COBRA period starting from the initial time period when the AEI could have elected COBRA.

An AEI who does not notify the employer of (b) or (c) above is subject to a penalty of 110% of the premium reduction received for disqualifying months.

### Special Election Period

A special election period exists for AEIs whose qualifying event occurred on or after September 1, 2008 but who were not covered under COBRA as of February 17, 2009. The employer must provide them with notice of their special election right by April 18, 2009. The AEIs will then have 60 more days after receiving this notice to elect coverage. This COBRA coverage, however, will not be retroactive to the date of the involuntary termination. It will only take effect as of the first day of the first period of coverage beginning on or after February 17, 2009. (Any resulting gap in coverage will be disregarded for purposes of determining the 63 day period which would affect one's creditable coverage subjecting him/her to pre-existing condition exclusions). Additionally, the COBRA coverage will not be extended and will instead terminate at the same point it would have if the AEI had elected COBRA when it was first made available.

### Employer's Notice Requirements

The Act requires that the new COBRA notices advising of the subsidy be distributed by April 18, 2009 to all qualified beneficiaries who encountered a qualifying event,

of any kind, between September 1, 2008 and December 31, 2009. The notices must include the following:

- a.) information on the availability of the subsidy;
- b.) information on establishing eligibility for the subsidy;
- c.) contact information for the plan administrator;
- d.) a description of the special enrollment period; an option to enroll in other coverage if the employer so allows\*; and
- e.) information regarding the individuals' obligation to notify the plan upon becoming eligible for another group health plan or Medicare.

[\*If the employer allows, AEIs may elect coverage different than that in effect at the time of termination; however, the premium must not exceed the premium for the coverage enrolled in at the time of termination, the different coverage must also be offered to active employees, and the different coverage must not be: (a) only dental, vision, counseling or referral services; (b) a health FSA; or (c) coverage providing treatments in an on-site medical facility of the employer providing primarily first-aid and prevention services. AEIs have 90 days to make such an election.]

The Department of Labor issued four separate model notices for these purposes on March 19, 2009.

As the notices are likely being distributed closer to the April 18th deadline, any AEIs already receiving COBRA coverage will not yet have notice of the subsidy. Therefore, they will likely be paying 100% of the COBRA cost for March and April. In those cases, the employer or plan administrator must credit the 65% subsidized portion of the premium against future COBRA premiums which must be used within 180 days or refund the subsidized portion within 60 days.

### Employer Obtaining Government Reimbursement

As previously mentioned, the employer must first pay the 65% premium on the AEI's behalf and is then reimbursed by the government. Employer reimbursement

may be made by the employer taking a credit against its liability to deposit payroll taxes and federal income taxes withheld from all employees' compensation. This credit will be reported on the employer's quarterly tax return, Form 941, which has already been revised by the IRS to reflect the subsidy. However, the employee (or someone other than the employer) must pay 35% of COBRA before the employer can request reimbursement of the other 65%. Additionally, employers who do not charge the full COBRA premium will not be entitled to reimbursement of 65% of the maximum COBRA premium. Therefore, employers may want to revisit severance agreements or other arrangements in which they agreed to pay a portion of the COBRA premium.

### Employer Action

The subsidy became effective for periods of coverage beginning on or after February 17, 2009 (ie, March 1, 2009 for most plans). Therefore, employers have to update COBRA election notices and other communications to reflect the subsidy as soon as possible, and no later than April 18th.

Although the notices are sent to a larger population of qualified beneficiaries, including non-AEIs, employers must keep record of those employees (and resulting AEIs) who were involuntarily terminated between the relevant dates.

Additionally, employers must put procedures in place, including but not limited to:

- Proper distribution of the notices to the appropriate qualified beneficiary groups;
- Payment of the government's 65% of the subsidy;
- Reimbursement from the government;
- Crediting overpayments by AEIs who fully paid COBRA but are entitled to the subsidy within the first months of the Act;
- Offering a lesser alternative coverage to AEIs;
- Reviewing severance policies to revisit issue of any employer COBRA contributions;
- Allowing special enrollment periods;

- Adopting methods to allow permanent waiver of subsidies for those AEIs with modified adjusted gross income meeting the threshold levels;
- Monitoring the duration of COBRA and the subsidy;
- Formulating a compliance team, including COBRA administrators, payroll systems, benefits consultants, and/or legal counsel to ensure compliance.

Employers must also determine whether any covered employee has a non-forfeitable right to receive pension benefits directly from the Pension Benefit Guaranty Corporation or is a Trade Adjustment Assistance-eligible individual as the maximum COBRA period may be extended. There is much to do in a limited period of time. An employer who utilizes a third party administrator for COBRA purposes will be working closely with them on many of these matters; however, other decisions and procedures mentioned in this article must be put in place by the employer and its payroll systems.

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