



American Recovery and Reinvestment Act COBRA Revisions

March 2009

New COBRA Subsidies Required Under Economic Stimulus Package

Under the American Recovery and Reinvestment Act of 2009 signed into law on February 17, 2009 (the "Recovery Act"), individuals whose employment is involuntarily terminated between September 1, 2008 and December 31, 2009, and their COBRA eligible beneficiaries (referred to as assistance eligible individuals), now have a right to employer-subsidized COBRA coverage under employers' group health plans. The subsidy is required regardless of whether the individuals currently have COBRA coverage. The new COBRA subsidy also applies when employees are eligible for continuation coverage under state laws comparable to the Federal COBRA law. Such state laws generally apply to smaller employers exempt from the Federal COBRA law due to their size (under 20 employees).

Because the law became effective immediately, employers must provide additional COBRA notices to assistance eligible individuals, letting them know of their right to the subsidy and their right to elect COBRA coverage (even if they did not previously elect continuation coverage). The Department of Labor is scheduled to issue a model notice no later than March 19, 2009 that can be used for this purpose.

The major provisions of the new COBRA subsidy are summarized below to help you understand how the subsidy works and employers' resulting obligations.

The COBRA Subsidy Generally

Under the new COBRA subsidy, assistance eligible individuals need pay only 35% of the COBRA premium they would otherwise be required to pay (rather than up to 102% of the non-COBRA premium) under COBRA for a nine-month period. The remaining 65% generally must be paid by the employer, who is later "reimbursed" by the Federal government through a tax credit.

Assistance eligible individuals include only employees (and their beneficiaries) who are eligible for COBRA (or state law continuation) coverage as a result of an involuntary termination of employment between September 1, 2008 and December 31, 2009. The subsidy is phased out for individuals whose income for the taxable year is between \$125,000 (\$250,000 if married) and \$145,000 (\$290,000 if married). Of course, at the time an employer is required to provide COBRA notice (or the revised notice required by the Recovery Act), neither the employer nor the assistance eligible individual may





know whether the income caps apply. Under the Recovery Act, employers still must provide such individuals with the subsidy. If the income caps apply, the individual's tax obligation for that tax year will be increased by the amount of the subsidy. However, assistance eligible employees may make a permanent election to waive the subsidy rather than receiving it and having the subsidy later charged as additional tax. Treasury will set the amount of time that an assistance eligible individual has to make such an election and provide a model waiver.

Individuals who receive the subsidy are entitled to it for nine months (or until the end of the COBRA coverage period, if earlier). The subsidy stops before the end of the nine months if the individual becomes eligible for coverage under any other group health plan or Medicare. The individual must notify the employer if the subsidy ceases to apply, or face a penalty (i.e., 110% of the subsidy amount).

If an individual did not previously elect COBRA (or state law continuation) coverage, but is otherwise an assistance eligible individual, the individual must be given a new opportunity to elect COBRA coverage and receive the subsidy. This special election rights lasts until 60 days after they receive the notification described below. For individuals electing COBRA coverage under this special election, the subsidy will apply beginning March 1, 2009.

An employer is not required to, but may (subject to certain conditions) allow assistance eligible individuals to elect COBRA coverage that is different from (and/or less costly and comprehensive than) the group health plan coverage that the individual had at the time employment ended. However, to do so, the premium for the different coverage cannot be more than the premium for the coverage the individual was enrolled in at the time of the termination of employment. The different coverage, if offered to assistance eligible individuals, also must be offered to the employer's active employees.

Employers may continue charging the full COBRA premium for up to two premium billing periods during which the subsidy applies while implementing the subsidy. However, employers who do so must later either reimburse the individual for the amount of the subsidy or credit such overpayment to future premiums.

Notice Requirements

Employers must give assistance eligible individuals a notice informing them of the COBRA subsidy and, if available, the option to enroll in different coverage. Specifically, the notice must include: (a) the forms for establishing eligibility for the subsidy; (b) the name, address and telephone number of the group health plan administrator and any other person maintaining relevant information about the subsidy; (c) a description of the extended election period; (d) a description of the assistance eligible individual's obligation to notify the employer of eligibility for subsequent coverage under a group health plan or Medicare, and the penalty for failing to do so; (e) a description of the assistance eligible individual's right to a subsidy and any conditions for entitlement to it; and (f) the option to elect different coverage, if the employer allows. For assistance eligible individuals who became entitled to elect COBRA before enactment of the Recovery Act, the notice must be provided by April 18, 2009





(within 60 days of February 17, 2009). The Department of Labor is scheduled to issue a model notice no later than March 19, 2009 that can be used for this purpose.

Reimbursement Mechanism

Generally, employers are responsible for paying 65% of assistance eligible individuals' COBRA premiums. After the employer receives the remaining 35% of the premium from the assistance eligible individual, the employer may deduct its portion of the premiums as a credit against its payroll taxes. If the credit exceeds payroll taxes, the employer will be credited or refunded the excess premiums as if it were an overpayment of taxes. Any employer seeking to deduct its portion of the premiums as a credit against its payroll taxes will be required to provide certain information to Treasury, at a time and in a form to be established by Treasury. Such information will include: (a) an attestation that the applicable employee's termination was involuntary; (b) a report of the payroll taxes that were offset for the reporting period and estimated offsets for the subsequent reporting period; and (3) a report with the social security number of all relevant employees, the amount of the reimbursement applicable to each such employee and his/her qualified beneficiaries, and whether such reimbursement was for one or more individuals.

Sanctions

Persons who contact the Department of Labor, claiming that they have been improperly denied their COBRA subsidy under the Recovery Act will have their claim decided by the Department of Labor within 15 business days. Administrators of group health plans who fail to comply with the notice requirements mandated by the Recovery Act will be subject to customary penalties under COBRA, including special damages of up to \$110 per day of non-compliance. The expedited claim process and the potentially significant penalties emphasize employers' need for compliance with the new COBRA notice and subsidy requirements under the Recovery Act.

Next Steps

Although the Departments of Labor and Treasury will be issuing additional notice information and may also be issuing additional guidance, employers should nonetheless take the following actions immediately:

- Determine whether your company currently has any employees (including dependents) eligible for the subsidy. This includes all employees who involuntarily terminated employment on or after September 1, 2008, regardless of whether your company currently provides them with COBRA coverage (i.e., regardless of whether the employees previously elected COBRA – or state law continuation – coverage).
- Decide whether the COBRA coverage offered will be limited to the coverage such employees had at the time of their termination or if you will be offering different (and less comprehensive) coverage.





- Establish mechanisms for tracking the nine-month period of the 65% subsidy and obtaining tax credits for these amounts.
- Establish mechanisms for ending the subsidy, including reinstating the normal premium charge, if applicable, at the end of the maximum nine-month subsidy period.
- Establish mechanisms for determining whether an assistance eligible individual has overpaid premiums and for refunding or crediting such overpayments.

If you have any questions regarding new COBRA subsidies and/or how the American Recovery and Reinvestment Act of 2009 may affect you or your business, please contact Rodney Brower at rodney.brower@crosslinpc.com or at (615) 320-5500. Employers may also follow this link to a special COBRA Q&A section of the I.R.S. website.

Under requirements imposed by the IRS, we inform you that, if any advice concerning one or more U.S. federal tax issues is contained in this communication (including any attachments), such advice was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any transaction or tax-related matter addressed herein.

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