



February 20, 2009

STIMULUS BILL SIGNED INTO LAW INCLUDES NEW COBRA PROVISIONS

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), commonly known as the Stimulus Bill. One of the provisions of ARRA results in modifications to the rules in relation to the Consolidated Omnibus Budget and Reconciliation Act (COBRA). The changes include (for certain individuals) subsidized COBRA premiums, an extended COBRA election period, and an employer's option to allow an individual to elect within certain restrictions a plan other than the one the individual was covered under at the time of the individual's qualifying event. Below is a brief summary of some of the highlights of the COBRA provisions contained in ARRA.

COBRA PREMIUM SUBSIDY AVAILABLE

ARRA provides that persons known as "assistance eligible individuals" will be considered to have paid the required COBRA premium if they pay 35 percent of the COBRA premium. The remaining 65 percent will be paid on their behalf generally by the former employer who will be reimbursed by the government in the form of a credit to payroll taxes owed by the employer to the Internal Revenue Service. Any amounts owed to the employer or other provider of the subsidized 65 percent of the premium in excess of the amount that can be taken as a credit against payroll taxes will be reimbursed in the form of a refund.

Note: The amount that an individual receives as a COBRA premium subsidy, assuming he/she is eligible, will not be considered taxable income to the individual. In addition, the premium subsidy cannot be considered as additional income or resource in determining eligibility for any federal or state public benefit program.

An assistance eligible individual is a person who is eligible for and elects COBRA coverage and who was involuntarily terminated from employment on or after September 1, 2008 and on or before December 31, 2009.

SUBSIDY INCOME LIMITATIONS: If the individual's modified adjusted gross income in any year in which the subsidy is received exceeds \$145,000 (for single tax filers) or exceeds \$290,000 (for married filing jointly tax filers), he/she is not eligible to receive the subsidy. Individuals who have or anticipate their modified adjusted gross income will exceed the limits for any year in which they are subsidy eligible may irrevocably waive their rights to the subsidy. Failure to make such waiver where ineligible due to exceeding the income limitations for the subsidy will result in a recapture of the subsidy by the Internal Revenue Service when the individual files his/her tax return.

Note: If the individual's modified adjusted gross income in any year in which the subsidy is received is between \$125,000 and \$145,000 if filing single or is between \$250,000 and \$290,000 if married and filing jointly, he/she is eligible to receive a partial subsidy.

PERIOD OF PREMIUM SUBSIDY

The 65 percent subsidy is available until the earliest of the following events: (1) nine (9) months after the first day of the first month that the subsidy begins; (2) the first date that the individual becomes ELIGIBLE for coverage under any other group health plan including Medicare, except as noted below; (3) the date which the individual's COBRA coverage entitlement is exhausted or is terminated for failure to pay the required premium timely.



It is important to note that eligibility for coverage under the following types of plans (or a combination of) will NOT cause loss of eligibility for the COBRA subsidy:

Dental, vision, counseling, referral services, or coverage of treatment that is provided in an employer on-site medical facility (consisting primarily of first-aid, wellness and preventive care). In addition, an individual may be eligible and covered under a health flexible spending arrangement without causing a loss of COBRA subsidy eligibility.

An individual is considered to be eligible for coverage under a group health plan as of the first date on which the individual could be covered under the plan.

Duty of Assistance Eligible Individuals - If an assistance eligible individual becomes eligible for coverage under a plan that would disqualify them in relation to receiving the COBRA premium subsidy, ARRA requires them to notify the plan. **Failure to provide the plan with notice may result in a penalty being assessed to the ineligible individual receiving the subsidy in the amount of 110 percent of the subsidy received.** It is the responsibility of the Department of Labor (DOL) to release guidance in relation to when and how that notice must be provided. However, at the time of this writing, the DOL has not yet issued the required guidance.

Review of Denials of Premium Assistance - Where an individual requests the COBRA subsidy and the group health plan denies that request, the individual has the right to appeal the denial to the appropriate governmental agency. ARRA requires that a determination of the individual's appeal must be decided "within 15 business days after receipt of such individual's application for review." All determinations made by the responsible governmental agency are final and "a reviewing court shall grant deference to such...determination."

EXTENSION OF ELECTION PERIOD

ARRA provides a second chance for certain individuals who have not elected continuation coverage under COBRA as of the ARRA date of enactment but would be an assistance eligible individual if that election were in effect. This extension of the election period begins on the ARRA enactment date and ends 60 days from the time the individual is notified of his/her rights to the extended election period.

Effective Date of COBRA Coverage under the Extended Election Period - Any COBRA continuation coverage elected by an individual during an extended election period will "commence with the first period of coverage beginning on or after the date of enactment" of ARRA. Consequently, subsidies are not available for a period prior to ARRA enactment.

Example: An individual who was involuntarily terminated on September 1, 2008 and offered COBRA, but did not elect COBRA should be offered a second chance to enroll in COBRA as a result of ARRA. If the individual timely elects the second offer of COBRA coverage, his/her coverage will begin on March 1, 2009 (assuming the plan provides coverage on a monthly basis).

Length of COBRA Time Period - Although COBRA coverage elected under the extension of the election period is effective as of the first period of coverage commencing after ARRA becomes law, the amount of time allowed under COBRA is measured from the date of the original qualifying event.



Example: An individual's employment ended (along with loss of coverage) on September 1, 2008 and the individual was not covered under COBRA on the date of ARRA enactment. The individual elects COBRA under the extended election provision. The COBRA coverage will begin on March 1, 2009 and end 18 months from September 1, 2008 (i.e., March 1, 2010). The actual amount of time the individual is covered under COBRA is the 12 month period beginning March 1, 2009 and ending as of March 1, 2010. (Note: The individual is eligible for the nine-month subsidy period from March 1, 2009 through November 30, 2009).

Preexisting Condition Impact – The 63-day break in coverage in relation to preexisting conditions will be disregarded with respect to an individual who elects COBRA under the extended COBRA election period.

EMPLOYER PROVIDED NOTICES REQUIRED

General Notice - ARRA mandates that when employers provide the required COBRA Election Notice to individuals who lost coverage under their plan due to an involuntary termination, the employer must also include information in relation to the availability of the premium subsidy. In addition, if the employer has elected to allow individuals the option to enroll in a different coverage option than what the individual had at the time of involuntary termination of employment, the individual must be notified of that option as well. **The employer may include the additional information by modifying its existing COBRA Election Notice or by including a separate document sent with the required COBRA Election Notice.**

Specific Notice Requirements- Below is a list of specific information required to be included in the revised COBRA Election Notice or in a separate document accompanying the required COBRA Election Notice.

1. The forms necessary to establish the individual's eligibility for the COBRA premium subsidy.
2. The name, address, and telephone number of the plan or other party where the individual can receive information relating to the COBRA premium subsidy.
3. A description of the extended election period.
4. Information on the individual's responsibility to notify the plan in the event that he/she is no longer eligible for the COBRA subsidy (i.e. eligible for coverage under another group health plan including Medicare, unless an exception applies) and the penalty (110% of subsidy received) associated with failure to notify the plan of ineligibility.
5. A description, displayed in a prominent manner, of the individual's right to the COBRA premium subsidy and the conditions surrounding that subsidy.
6. If the employer has elected the option of permitting the individual to enroll in a plan that is different than the one he/she was covered under at the time of the original qualifying event, a description of such option.

Extended Election Period Notice – In the case of any assistance eligible individual that became entitled to elect COBRA continuation coverage prior to the date of the enactment of ARRA, the plan (or an entity on its behalf) within 60 days of the enactment of ARRA must provide a notice which includes the specific requirements noted above.



Model Notices – ARRA requires that the DOL and Health and Human Services (HHS) create and provide model notices designed to meet the applicable notice requirements not later than 30 days after the enactment of ARRA.

REFUND OF EXCESS PREMIUMS PAID BY INDIVIDUAL DURING SUBSIDY PERIOD

Where an individual qualifies for the COBRA premium subsidy in any month for which that individual has paid in excess of the 35 percent premium, the entity that the COBRA “payment is payable” must either (1) refund the amount in excess of the 35 percent COBRA premium required or (2) provide a credit to the individual that reduces one or more subsequent payments that the individual would be required to pay for COBRA coverage for future months. For example, a COBRA premium for an individual is \$1,000 for March of 2009 and the employee paid the full amount. The individual subsequently elects the subsidy effective back to March 1 and as a result must only pay \$350 for the March premium. The employer may (1) refund the individual \$650 or (2) credit \$650 toward the individual’s future COBRA premiums.

However, unless it is reasonable for the employer to believe that the credits will be applied toward COBRA premiums within 180 days, the employer must refund the credit back to the individual within 60 days. Further, if at any time during the 180 day period, the employer no longer believes that the credit will be used for COBRA premiums during that 180 day period, the employer must refund any remaining credit to the individual within 60 days of coming to that determination.

REIMBURSEMENT OF THE COBRA SUBSIDY

The person to whom premiums are payable under COBRA is entitled to be reimbursed the 65 percent subsidy paid on behalf of the assistance eligible individual. **In cases where the employer’s plan is subject to COBRA, ARRA identifies that entity as being the employer notwithstanding the fact that the actual premiums may be received by a third party, such as a third party administrator, on the employer’s behalf.**

COBRA Subsidy Paid by Employer - The COBRA premium subsidy paid by the employer is treated as a credit toward its payroll tax liability as of the date that the assistance eligible individual’s premium payment is received, in an amount equal to the COBRA subsidy amount paid by the employer.

Overstatement of COBRA Subsidy - If the amount of COBRA premium subsidy paid is overstated by the employer, the overstated amount will be treated as an underpayment of payroll taxes and “may be assessed and collected ... in the same manner as payroll taxes.” Consequently, it would appear that the penalties associated with underpaying payroll taxes would apply in the case of overstatements by the employer in relation to COBRA subsidy paid.

Reimbursement Dependent on Payment of Remaining Premium - The COBRA premium subsidy paid by the employer may not be claimed as a credit toward payroll taxes due by the employer “until after the reduced premium...has been received.”



Employer Reporting - Each employer that claims the subsidy as a payroll tax credit may be required to submit reports as directed by the government when claiming reimbursement for the COBRA premium subsidy. The required reports may include the following:

1. An attestation of involuntary termination of employment for each individual whose reimbursement of the subsidy is being claimed.
2. A report of the amount of payroll tax credit claimed as reimbursement for the payroll tax reporting period and the estimated reimbursement amount for the subsequent payroll tax reporting period.
3. A report containing the tax identification number (i.e. social security number) for each individual for whom the subsidy reimbursement is being claimed and a designation with respect to each covered employee as to whether the subsidy reimbursement is for coverage of 1 individual or 2 or more individuals.

OPTION TO ENROLL IN DIFFERENT PLAN

Generally, an individual who is COBRA eligible is only allowed at the time of electing COBRA to enroll in the plan they had on the day prior to the event which caused the termination of coverage. However, under ARRA, the employer has an option to allow an individual to elect a coverage that is different than what he/she had prior to termination of employment subject to the following criteria:

1. The employer must have elected the option to allow individuals to elect coverage other than the plan in which they were enrolled at the time of the qualifying event.
2. The premium for the different coverage cannot exceed the premium for coverage in which the individual was enrolled at the time the qualifying event occurred.
3. The different coverage is coverage that is also offered to active employees of the employer at the time of the election in which the different coverage is made.
4. The different coverage is not coverage that provides only dental, vision, counseling or referral services (or a combination of such services), a health flexible spending account or coverage that provides treatment in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care.

Period to Elect Option – Where the employer provides the different coverage option, the individual offered that option has up to 90 days to enroll in different coverage. The 90 day time period is measured from the date the individual was provided with the notice informing the individual of his/her rights to elect a different coverage.

GOVERNMENT OUTREACH

ARRA requires that the DOL and HHS provide an outreach program consisting of public education and enrollment assistance relating to the COBRA subsidy. The goal of the program is to educate employers, group health plan administrators, public assistance programs, states, insurers and “other entities as determined appropriate.” The initial efforts of the outreach will focus on individuals electing COBRA continuation coverage and the provision of the information relating to the COBRA subsidy. The outreach efforts will include information provided on the DOL and HHS web sites.

GOVERNMENT REPORTS

Under the new law, the Secretary of the Treasury is required to submit “interim reports” to certain Congressional committees. A final report must also be submitted to the committees as “soon as practicable” after the last period of COBRA continuation coverage for which a COBRA subsidy is paid.

For a copy of the ARRA legislation impacting COBRA, please click the link provided below and proceed to section titled Title III Premium Assistance for COBRA Benefits:

[American Recovery and Reinvestment Act of 2009](#)

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