

Legislative Brief

COBRA Premium Subsidy: The American Recovery And Reinvestment Act of 2009



On February 17, 2009, President Obama signed into law H.R. 1, the **American Recovery and Reinvestment Act of 2009 (ARRA)**. Among many other provisions designed to encourage economic recovery, Title III of ARRA expands the federal Consolidated Omnibus Budget Reconciliation Act (COBRA) Continuation Coverage to provide a **65 percent federal subsidy** toward an eligible worker's COBRA premium for **up to 9 months**. The provisions in ARRA providing this subsidy are effective as of the date of the President's signing. A brief summary of the newly enacted COBRA subsidy follows.

What Is The COBRA Subsidy?

Eligible workers will receive a 65 percent subsidy toward their COBRA continuation premium for up to 9 months. The Treasury Department will administer the subsidy, providing employers or health plans, if they administer COBRA benefits, with a credit against payroll taxes for the cost of the subsidy.

Who Is Eligible For the COBRA Subsidy?

Individuals who have been involuntarily terminated from employment between September 1, 2008 and December 31, 2009 and who have annual incomes of less than \$125,000 (single) or \$250,000 (joint filers) for the taxable year in which the subsidy is received (i.e., either 2009 or 2010) are eligible for the COBRA premium assistance, along with their families. If the premium subsidy is provided to an individual whose income exceeds \$145,000 (single) or \$290,000 (joint), then the amount of the premium subsidy for all months during the taxable year must be repaid. For taxpayers with income between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium subsidy for the taxable year that must be repaid is reduced proportionately.

The COBRA changes affect both the federal COBRA provisions and the Public Health Service Act program that provides similar extension benefits for public programs. In addition, however, the subsidy provisions apply to state continuation coverage that is comparable to federal COBRA. That would include so-called "mini-COBRA" state laws that cover groups below the 20 employee threshold for COBRA. To be comparable, the state continuation law must allow the individual to continue substantially similar coverage as was provided under the group health plan at a monthly cost that is based on a specified percentage of the group health plan's cost of providing such coverage. Reference to "COBRA" throughout this memo will also refer to the state programs that meet those requirements.

A group health plan or insurer must refund the individuals any COBRA premiums that subsidy-eligible persons paid on or after the date of enactment in excess of 35% of the premium. This may be in the form of a reimbursement payment or credit against future premium payments due.

An individual who does not receive a subsidy that he/she believes appropriate may appeal the plan's determination to the Department of Labor for private plans or to the Department of Health and Human Services for public plans covered under the Public Health Services Act. The relevant agency must rule on the appeal within 15 business days. Individuals whose appeal is denied may sue under ERISA.

Legislative Brief

COBRA Premium Subsidy: The American Recovery And Reinvestment Act of 2009

Eligibility for the Subsidy - Income Test

The subsidy is adjusted based on income. Joint filers with \$250,000 or more of modified adjusted gross income and all other filers with \$125,000 or more of modified adjusted gross income are not eligible for the full subsidy. The subsidy is phased out completely for persons with modified adjusted gross incomes of \$290,000 joint or \$145,000 for other filers. The subsidy is not considered income as long as the beneficiary meets the income tests. Excess amounts of subsidy over the amount the person is entitled to by income will be added to the person's tax on the person's federal tax return. The employer will not have to be concerned about the taxable effect on COBRA beneficiaries although a COBRA beneficiary may request that the employer not provide any subsidy.

For What Coverage Is The Subsidy Available?

The federal subsidy is available for COBRA continuation coverage and for state programs providing comparable continuation coverage. The subsidy is not available for coverage under a health flexible spending arrangement.

What Is The Effective Date Of The COBRA Subsidy?

These provisions are effective for periods of coverage beginning after the date of the enactment of ARRA. For group health plans using calendar months as the period of coverage, the subsidy applies beginning **March 1, 2009**. Additionally, eligible individuals who pay 100 percent of the premium required for COBRA for any month during the first 60-day coverage period after enactment will be reimbursed.

If someone had declined COBRA previously and elects to take advantage of the premium subsidy program, would the coverage be retroactive as far back as September 1, 2008?

No. If an individual elects to participate in this program the coverage will become effective no earlier than March 1, 2009. There is no retroactive provision.

What about pre-existing conditions?

Individuals who elect COBRA coverage under the premium subsidy program shall not be subject to the 63-day break in coverage rule for purposes of determining pre-existing conditions.

Does this extend COBRA coverage for those eligible for the premium subsidy?

No, it does not. The original COBRA coverage dates and continuation requirements, such as timely premium payment, still apply.

When would the temporary premium assistance end?

COBRA premium assistance would end on the first date that an individual is eligible for coverage under any group health plan or Medicare. COBRA qualified beneficiaries receiving premium assistance must notify the group health plan in writing when they become eligible for other coverage, or face a penalty (110% of the premium reduction).

Even if a COBRA qualified beneficiary did not obtain other coverage of the type listed above, premium assistance would end the earliest of 9 months after the date of enactment of the stimulus package or at the end of the maximum period of continuation coverage.

Legislative Brief

COBRA Premium Subsidy: The American Recovery And Reinvestment Act of 2009

Do Any Special Enrollment Rights Exist?

Qualified individuals who initially decline COBRA coverage prior to the enactment of ARRA would be given an additional 60 days after they receive notice of the special election period to elect to receive the subsidy. The election period begins on the date of the enactment of ARRA. The special election opportunity is also available to a qualified beneficiary who elected COBRA coverage but who is no longer enrolled on the date of enactment, for example, because the beneficiary was unable to continue paying the premium.

In essence, these individuals have a new 60-day election period upon notification to participate in the premium subsidy program. They must be allowed to elect the same coverage as they would have had available at the time of their termination, or if the Employer agrees, they may be allowed to select from the same coverage currently available to active employees. However the full COBRA premium cannot exceed the premium which would have been in place upon their termination.

Federal COBRA law provides that a group health plan must allow an eligible individual to choose to continue with the coverage in which the individual is enrolled as of the qualifying event. However, ARRA allows group health plans to provide a special enrollment right to allow eligible individuals to elect different coverage under the plan in electing COBRA continuation coverage. Further, even though the premium subsidy is only for 9 months, the different coverage elected must generally be permitted to be continued for the applicable required period (generally 18 months or 36 months, absent a COBRA terminating event).

What Are The Notice Requirements?

COBRA notices must include information on the availability of the premium assistance and must be provided to all individuals who terminated employment during the applicable time period, not just to individuals who were involuntarily terminated. The Department of Labor has 30 days after the enactment of ARRA to issue model notices.

How Is The Subsidy Administered?

The "assistance eligible individuals" pay only 35% of their COBRA premiums otherwise charged under the group health plan. The remaining 65% of the COBRA premiums, which are paid by the employer (or by the plan, if a multiemployer plan), will be reimbursed through a payroll tax credit to the employer, to the plan (if plan is a multi-employer plan), or, in some limited cases, to the insurer. The credit will be taken on the Form 941 that is filed for the period during which the subsidized premium is paid, and the payment of the subsidized premium will be treated as a deposit of payroll taxes for purposes of, e.g., penalty computations. The Secretary of the Treasury is expected to issue further guidance concerning the tax credit. If the payroll tax credit does not reimburse the entity for the total amount of its subsidized COBRA expenses, then the remaining amount will be reimbursed by check from the Treasury.

Legislative Brief

COBRA Premium Subsidy: The American Recovery And Reinvestment Act of 2009

What do employers need to do NOW?

- Identify those individuals who have been terminated involuntarily since September 1, 2008.
- Within 60 days after the law is enacted (on or before April 18, 2009), notify them of their eligibility to enroll in COBRA continuation coverage which includes a premium subsidy, regardless of whether or not they previously declined COBRA continuation coverage.
- Current COBRA notices should either be amended, or a separate notification provided which should include:
 - (1) forms necessary for establishing eligibility for premium reduction;
 - (2) Plan Administrator's contact information;
 - (3) a description of the 60-day election period;
 - (4) explanation of the COBRA participant's responsibility for notification to the Plan if they become covered under another group health plan or Medicare, and the penalty for failure to do so (110% of premium), and
 - (5) a prominently displayed description of COBRA participant's right to a reduced premium and the applicable conditions for receiving the reduced premium.
- Determine which plan(s) to offer to COBRA premium subsidy participants.

Any assistance eligible employees that initially elected COBRA continuation coverage, but whose COBRA was terminated for nonpayment of premiums are also entitled to receive these new Notices, make new elections, and to take advantage of the premium subsidy.

Where Can I Get More Information?

The U.S. Department of Labor is required to issue model COBRA Notices that comply with the requirements of the ARRA within 30 days following enactment (i.e., by March 19, 2009).

For a copy of the new law, ARRA, see: <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00001>:

For general information regarding COBRA, see: <http://www.dol.gov/dol/topic/health-plans/cobra.htm>

Your Pritchard & Jerden representative is also available to assist you with any questions.

JMS 2/09

This Pritchard & Jerden Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

Content copyright © 2009 Zywave, Inc. Images copyright © Getty Images, Inc. All rights reserved.