

New COBRA Obligations Effective March 1, 2009

President Obama has now signed into law the American Recovery and Reinvestment Act, the economic stimulus bill passed by Congress earlier this month. The Act contains several provisions that will significantly impact COBRA coverage under employer group health plans. ***The COBRA changes go into effect March 1, 2009.*** Employers will have to move very quickly to address these important new requirements.

BACKGROUND

COBRA, a federal law enacted in 1985, requires group health plans to permit employees and certain covered dependents who lose coverage as a result of the employee's termination of employment to elect to continue that coverage for up to 18 months. Eligible individuals must pay the full cost of continued coverage plus an administrative fee of up to 2%.

NEW COBRA PREMIUM SUBSIDY

The Act provides for a federal subsidy to help certain "assistance eligible individuals" pay their premiums for COBRA continuation coverage. The subsidy will:

- cover 65% of the COBRA premium for the employee and any eligible dependents,
- be available for up to nine months,
- apply to premiums for COBRA coverage beginning on or after March 1, 2009.

Coverage pursuant to state "mini-COBRA" laws is also eligible for the subsidy. (Some states, including New York, have laws that are similar to COBRA and that apply to situations not covered by the federal law - for example, plans of employers with fewer than 20 employees.) An "assistance eligible individual" is an employee or previously covered dependent who lost coverage due to an *involuntary* termination of employment (other than for than gross misconduct) during the period from September 1, 2008 through December 31, 2009.

The subsidy must initially be paid by the employer, but the employer will be reimbursed for any subsidy payments by offsetting them against its payroll taxes.

EXAMPLE

If the regular COBRA premium for single coverage is \$400 per month, the eligible employee would only pay \$140 (35%) for each of the first nine months, and the remaining \$260 initially would be covered by the employer; the employer could then claim a credit against its payroll tax payments equal to \$260 for each month it advanced the subsidy.

Eligibility for the subsidy ends after nine months, or when the former employee or dependent becomes eligible for coverage under another group health plan or Medicare, if sooner. The employee or dependent must notify the employer when he or she becomes eligible for this other coverage.

The premium subsidy is not taxable income; however, recipients with modified adjusted gross annual income over \$145,000 (or over \$290,000 for couples filing joint tax returns) must repay the subsidy through an addition to their income tax obligations. Partial repayment will be due from a recipient whose modified adjusted gross annual income is between \$125,000 and \$145,000 (or between \$250,000 and \$290,000 for joint filers).

Because the Act takes effect so quickly, many individuals who are eligible for the new COBRA subsidy may pay their full COBRA premiums for a period (for example, the months of March and April) during which they are eligible for a subsidy. If this happens, the employer must either refund the overpayments for March and April to the eligible individual, or apply the overpayments as a credit against future COBRA premiums.

LOWER COST COVERAGE OPTION

An employer may choose to permit eligible individuals to change to a different health plan option when they elect COBRA coverage, as long as the premium for the alternative coverage is less than or the same as the premium for regular COBRA coverage. (Under COBRA, eligible individuals generally only have the right to elect the same coverage they had before the COBRA qualifying event, and to change that option only during the plan's annual open enrollment.) The employer is not required to offer a lower cost option. No employer should give this option serious consideration before consulting with its health plan's insurers and administrators.

NEW COBRA NOTICE REQUIREMENT AND ELECTION PERIOD

The Act requires employers to provide a supplemental COBRA notice to all individuals who become entitled to elect COBRA for any reason during the period beginning on February 17, 2009 (the date of enactment), and ending on December 31, 2009, and also to all individuals (employees and dependents) who became eligible to elect coverage due to an involuntary termination during the period from September 1, 2008, through February 16, 2009.¹ The supplemental notice must describe the new premium subsidy and the right to change coverage options, if applicable, and must also include certain other information. For those individuals who became entitled to elect COBRA on or after September 1, 2008 and before February 17, 2009, the employer must provide the notice by April 18, 2009.

NOTE: The Act is unclear on this point, but it's possible that the supplemental notice must also be given to individuals who became eligible for COBRA coverage for other reasons during the period from September 1, 2008, through February 16, 2009. For now, we recommend that employers concentrate on individuals who became eligible due to an involuntary termination during this period. We expect that the IRS or the Department of Labor will quickly provide clarification as to whether other individuals must also receive this notice.



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ADMISSIONS INFORMATION

by state, follows respective attorney name

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A failure to timely provide the new notice is a violation of the COBRA notice rules, which could subject the employer to a penalty of \$110 for each day that the notice is late. Excise taxes could also be imposed for a notification failure.

In addition, an individual who had the right to elect COBRA coverage as a result of an involuntary termination on or after September 1, 2008 and before February 17, 2009, but who wasn't receiving COBRA coverage as February 17, 2009 (either because he did not elect COBRA coverage or did elect it and then gave it up), must be given another opportunity to elect COBRA. The new election period must extend for not less than 60 days after the individual receives the supplemental notice. Such coverage, if elected, would go into effect on March 1, 2009.

WHAT EMPLOYERS SHOULD DO NOW

Employers who sponsor group health plans must move very quickly to address the new COBRA requirements. The exact steps each employer should take will differ depending on whether the plan is insured or self-insured and whether the employer administers COBRA "in-house" or uses a third party COBRA administrator. The following are some actions that the employer or COBRA administrator will need to consider:

- ◆ The employer or administrator must identify former employees who were involuntarily terminated on or after September 1, 2008, and dependents of these former employees, who previously became eligible for COBRA. These individuals must receive the required supplemental COBRA notice no later than April 18, 2009, and they may be entitled to another COBRA election opportunity. (See "New COBRA Notice Requirement and Election Period", above.)
- ◆ The employer or administrator must update its basic COBRA "qualifying event" notice to reflect the new premium subsidy and the other important changes under the Act.
- ◆ The employer or administrator must coordinate with the employer's payroll vendor and its own human resources and accounting personnel to develop procedures for paying the 65% share of the COBRA premium and obtaining reimbursement through the payroll tax offset, and for processing any required reimbursements to eligible individuals for premium overpayments.

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