



COBRA Subsidy in Stimulus Package for Involuntarily Terminated Employees

By Robert B. Fitzpatrick, Robert B. Fitzpatrick PLLC, Washington, DC



Overview

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1, S. 1) (the "Act"), which, among other things, amends the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") to provide a government subsidy of up to 65 percent of the COBRA premiums (including state and D.C. "mini-COBRA" coverage) to certain eligible individuals, known as "assistance eligible individuals".¹ These funds will be reimbursed by means of a payroll tax credit to the employer (in the case of a self-funded plan), the plan (in the case of a multi-employer plan), or the insurer (in the case of an insured plan). The "assistance eligible individuals" will only be required to pay 35 percent of the total cost of their former health insurance premium.² Prior to the passage of this new subsidy, terminated employees were responsible for 100% of their health insurance premium if they wished to maintain COBRA coverage. The COBRA subsidy applies to individuals, and their spouses and dependents, who are eligible for the COBRA due to an involuntary termination from employment from September 1, 2008, through December 31, 2009.³ The COBRA subsidy applies for a maximum of nine (9) months of coverage beginning on March 1, 2009. If a group health plan refuses to treat a former employee as an "assistance eligible individual", the Act requires the Department of Labor to expeditiously review said denial. Under this provision, the Department of Labor is required to make its determination within 15 business days of the date it receives the individual's application for review.⁴ The Act does not extend the otherwise applicable COBRA coverage period, nor does it adopt the proposal in the House bill to continue coverage through Medicare eligibility.

Eligibility

An individual is eligible for the COBRA premium subsidy if he/she is involuntarily terminated between September 1, 2008, and December 31, 2009, elects COBRA coverage (when first offered or during the Special Election Period described below), and has a modified adjusted gross income not exceeding \$145,000 per year (\$290,000 for couples filing jointly).⁵ The subsidy is phased out starting at modified adjusted gross income of \$125,000 (\$250,000 for couples filing jointly). Employees terminated for gross misconduct continue to be ineligible for COBRA and the subsidy.

Special Election Period

Any eligible individual who became eligible for COBRA coverage on or after September 1, 2008, but did not elect to receive COBRA coverage at that time, is eligible for the COBRA premium subsidy and must be given notice of his/her opportunity to elect coverage. This extended election period begins on the date of the Act's enactment and ends no sooner than 60 days after an extended election notice is provided to the individuals.⁶ The Act requires employers to locate former employees who previously declined COBRA and provide notice of the right to COBRA coverage with the government subsidy.⁷ If an eligible individual elects COBRA continuation coverage during the special extended election period, COBRA coverage will commence with the first period of coverage beginning on or after the enactment of the Act.⁸ However, for purposes of determining the maximum COBRA coverage period, the date of the individual's involuntary termination of employment (or the date of the loss of coverage resulting from such termination, if applicable) will continue to be treated as the "qualifying event."⁹ This means that the COBRA continuation coverage period available to an individual who makes an election during the extended election period will be determined based on the date of the qualifying event as described above. For example, an assistance eligible individual terminated on September 30, 2008, who makes a timely election during the extended election period, generally will be entitled to COBRA continuation coverage *prospectively* beginning March 1, 2009, though the 18-month maximum coverage period is measured from October 1, 2008.

COBRA Subsidy

The government subsidy is not paid to the individual electing COBRA coverage. Rather, eligible individuals (or anyone else on behalf of the individual other than the individual's employer) are to pay 35 percent of the required COBRA premium. The entity that provides the coverage and collects the individuals' premiums must cover the remaining COBRA premium (*i.e.*, 65 percent). That entity thereafter will receive reimbursement through a payroll tax credit in a manner depending on the type of plan it offers. If the group health plan is a multi-employer plan, the plan will be entitled to reimbursement. If the group health plan is not a multi-employer plan and some or all of the coverage is not provided by insurance, the employer will be entitled to reimbursement. If the group health plan is not a multi-employer plan and all of the coverage is provided by insurance, the insurer will be entitled to reimbursement.¹⁰

The COBRA subsidy ends on the earliest of the date the individual becomes eligible for health coverage under another group health plan or Medicare, nine (9) months after the first day of the first month to which the COBRA subsidy applies, or the end of the maximum COBRA coverage period required by law. Recipients of the COBRA subsidy are required to notify their former employers of the events that would cause the subsidy to cease. Failure to provide this notice, absent reasonable cause and willful neglect, will result in a penalty on the individual of 110 percent of the premium reduction provided.¹¹

If an employer has offered to pay a terminated employee's COBRA premiums as part of a

severance agreement, the employer loses the right to a tax credit and/or reimbursement. Likewise, if an employer pays an employee's entire COBRA premium, the employer is not entitled to a tax credit or reimbursement.

Many employers currently provide a COBRA subsidy to employees who are involuntarily terminated pursuant to the terms of their severance plans or individual agreements. Given that the Act requires the individual to pay 35 percent of the premium for the reimbursement to be claimed, it is not clear whether the reimbursement is available if the eligible individual pays less than 35 percent of the premium.

The Act also provides that employers may allow (but are not required to allow) an individual eligible for the COBRA premium subsidy to elect a different COBRA coverage option than the one the eligible individual originally elected at the time of termination from employment.¹² If offered, however, the other option cannot be more expensive than the option which the individual originally elected and must be an option offered to active employees.

Notice Requirements

On or before April 18, 2009, employers must provide notice advising of the availability of the COBRA premium subsidy to all individuals who became entitled to elect COBRA coverage during the period beginning on September 1, 2008, and ending on the day before enactment (February 16, 2009); and to all individuals who became eligible for the Special Election Period described above.¹³

Specifically, the notices must include:¹⁴

1. The forms necessary for establishing eligibility for the premium subsidy;
2. Contact information of the plan administrator and any other person with information regarding the premium subsidy;
3. A description of the extended election opportunity for those who previously declined COBRA continuation coverage;
4. A description of an assistance eligible individual's obligation to notify the plan when he or she becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for the failure to do so;
5. A prominent description of the qualified beneficiary's right to the COBRA subsidy and any conditions on such right; and
6. A description of the option to enroll in different coverage under the health plan, if applicable.

All individuals who have a COBRA qualifying event between February 17, 2009, and December 31, 2009, must receive an updated COBRA notice (or the inclusion of a separate document with the COBRA notice) reflecting the availability of the COBRA premium subsidy. This notice must be provided within the usual COBRA notice deadline (generally 44 days after the qualifying event).

The Department of Labor has provided model notices which can be accessed at <http://www.dol.gov/ebsa/COBRAModelNotice.html>

Action Items

The COBRA provisions in the Act are effective for most employer-sponsored health plans beginning March 1, 2009. Accordingly, employers should immediately begin to:

- Revise and update COBRA communication materials.
- Take prompt action to implement the new procedures. Some of the decisions and procedures to be made by employers and benefit administrators, such as the payroll and human resources departments, include:
 - Identifying eligible employees (and their covered dependents/spouses) who were covered by the group health plan and whose employment was involuntarily terminated since 9/1/2008, including their last known addresses.
 - Identifying which terminated employees are currently receiving COBRA coverage and which are entitled to the special enrollment period. According to the Department of Labor, plan administrators must provide notice about the premium reduction to individuals who have a COBRA qualifying event during the period from September 1, 2008 through December 31, 2009. Plan administrators may provide notices separately or along with notices they provide following a COBRA qualifying event. This notice must go to all individuals, whether they have COBRA coverage or not, who had a qualifying event from September 1, 2008 through December 31, 2009.
- Provide written notice as required by the Act to individuals who are eligible for the subsidy by April 18, 2009.
- Identify individuals entitled to the special enrollment period and provide notice allowing them to elect to receive the COBRA coverage and the premium subsidy.
- Implement administrative procedures to provide the subsidy (as applicable) and obtain the payroll tax credit.
- Decide whether to allow eligible individuals to change their health plan options.
- Develop procedures to reinstate the 100 percent COBRA premium charge if the individual continues to be eligible for COBRA coverage after termination of the subsidy.
- Review severance plans and other agreements that provide an employer paid COBRA subsidy in light of the new government subsidy.

¹ American Recovery and Reinvestment Act of 2009, H.R. 1, 111 th Cong. § 3001(a)(1)(A) and (a)(12) (2009). COBRA refers to sections Consolidated Omnibus Budget Reconciliation Act of 1985 that require employers to allow terminated employees to remain enrolled in the employer's health insurance plan for up to 18 months after the employee's termination. Under COBRA, employees are responsible for paying a portion of their health insurance premium. H.R. 1, § 3001(a)(1)(A) (2009).

²

H.R. 1, § 3001(a)(1)(A) (2009).

³

H.R. 1, § 3001(a)(3) (2009).

⁴

H.R. 1, § 3001(a)(5) (2009).

⁵

H.R. 1, § (a)(3) (2009).

⁶

H.R. 1, § 3001(a)(4)(A) (2009).

⁷

H.R. 1, § 3001(a)(7)(C) (2009).

⁸

H.R. 1, § 3001(a)(4)(B)(i) (2009).

⁹

H.R. 1, § 3001(a)(4)(B)(ii) (2009).

¹⁰

H.R. 1, § 3001(a)(12) (2009).

¹¹

H.R. 1, § 3001(a)(13) (2009).

¹²

H.R. 1, § 3001(a)(1)(B)(i) (2009).

¹³

H.R. 1, § 3001(a)(7)(A)(i) (2009).

¹⁴

H.R. 1, § 3001(a)(7)(B) (2009).

The ABA Health eSource is distributed automatically to members of the [ABA Health Law Section](#). Please feel free to forward it! [Non-members may also sign up to receive the ABA Health eSource.](#)