

EMPLOYEE BENEFITS ALERT

The American Recovery and Reinvestment Act of 2009 (also known as "ARRA" or the economic stimulus package), signed by President Obama on February 17, 2009, provides a temporary subsidy of COBRA premiums for certain terminated employees equal to 65% of the COBRA premium for nine months.

The premium assistance applies to all private and public sector group health plans currently subject to COBRA, and to continuation coverage under similar federal and state laws. The subsidy is clearly available for medical coverage, but presumably also applies to any health coverage (including dental, vision, EAP, etc.) other than health FSA coverage.

Eligibility For Subsidy

To qualify for the subsidy, an employee must be involuntary terminated between September 1, 2008 and December 31, 2009. An "assistance eligible individual" (AEI) is defined in the same way as a "qualified beneficiary" for purposes of COBRA, which generally includes the employee, the employee's spouse, and the employee's dependent children who are covered under the plan as of the date of the qualifying event.

Thus, even if the covered employee does not elect COBRA, a covered spouse or covered child of the covered employee who is involuntarily terminated will qualify for the subsidy if they elect to continue COBRA coverage. Certain high income individuals are not eligible for the subsidy. The "high income" test is whether the person's modified adjusted gross income (MAGI) exceeds certain limits. MAGI is specifically defined by the new law. For single filers, the amount phases out ratably for MAGI between \$125,000 and \$145,000. For joint filers, the amount phases out ratably for MAGI between \$250,000 and \$290,000.

Individuals who would be AEIs as a result of an involuntary termination on or after September 1, 2008 and before enactment of the Act, but failed or have yet to make a COBRA election, or who elected COBRA on or after September 1, 2008 and lost it prior to February 17, 2009, are entitled to a special election period and prospective COBRA continuation coverage. COBRA coverage elected during this extended election period will begin on the first period of coverage after February 17, 2009 but the COBRA period is still measured from the date of the qualifying event (i.e., termination of employment).

Notice of the special election period must be received by the AEI within 60 days of the Act's enactment along with any forms to establish their eligibility for the premium subsidy. AEIs then have 60 days more in which to elect COBRA coverage.

Payment of the Subsidy

The initial payor of the 65% subsidy is the employer. The employer will then recover the subsidy through a credit against the employer's liability for employment taxes. If this credit is insufficient, the employer qualifies for a direct payment from the federal government, in the same way as an overpayment of employment taxes.

If a plan sponsor is not able to implement this premium subsidy to meet the March 1, 2009 effective date, subsidy-eligible individuals who pay the full COBRA premium for either March or April coverage will either be refunded the 65% subsidy amount by the employer or credited the subsidy against the individual's future COBRA premiums.

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Termination of the Subsidy

The subsidy will end at the end of the nine-month period, but may end earlier under special circumstances. However, the length of time that COBRA continuation coverage must be made available to a qualified beneficiary will not change. The COBRA period is always determined from the date of the qualifying event, not from the date of electing the premium subsidy.

An AEI's entitlement ends if they merely become eligible for certain other group health coverage or for benefits under Medicare. Thus an AEI may lose their subsidy if they become eligible for other coverage, yet still be entitled to continue coverage under COBRA if they do not elect the other coverage.

Electing Different Coverage

Generally, COBRA qualified beneficiaries are entitled to elect coverage under the plan of benefits that covered them at the time of the qualifying event. The new law permits (but does not require) plan sponsors to allow subsidy-eligible qualified beneficiaries to elect coverage (that differs from the employee's pre-termination option) under plans that cost the same or less than their current coverage if those benefits are offered to current active employees. Qualified beneficiaries have 90 days to decide whether to change their coverage.

Notices

Employers must explain the availability of the premium subsidy when they give COBRA election material to qualified beneficiaries who lose coverage before December 31, 2009, and to those who had a qualifying event on or after September 1, 2008, whether or not they had elected COBRA at that time. Notice must be provided to those who had a qualifying event before the date of enactment by April 18, 2009.

The Department of Labor is to release model notices this month. These model notices may be used by employer to notify participants of the subsidy.

Additional Information

The Department of Labor has published a general fact sheet regarding the COBRA subsidy, which is available at <http://www.dol.gov/ebsa/newsroom/fsCOBRAPremiumReduction.html>

The IRS released a FAQ on the payroll tax credit, which is available at: <http://www.irs.gov/newsroom/article/0,,id=204505,00.html>

*The **Employee Benefits Alert** is intended to keep readers current on matters affecting employee benefits, and is not intended to be legal advice. If you have any questions, please call **Kathryn A. English** at 412.566.1226, **Michael J. Herzog** at 412.566.6130, **Brandon Richards** at 412.566.1263, **John J. Kearns, III** at 412.566.2075, **Sandra R. Mihok** at 412.566.1903, **Paul M. Yenerall** at 412.566.1944, or any other attorney with whom you have been working.*