



Labor & Employment Alert
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STIMULUS BILL MAKES IMPORTANT CHANGES TO COBRA

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On February 17, President Obama signed into law The American Recovery and Reinvestment Act of 2009. The Act contains many provisions aimed at stimulating the economy, but also makes important changes to COBRA and HIPAA. The changes to COBRA include a nine-month 65% federal subsidy and new notice requirements. These far-reaching new provisions are effective immediately, and require immediate attention by employers.

Background

The law we now refer to as COBRA was originally signed into law on April 7, 1986, as part of the Consolidated Omnibus Budget Reconciliation Act of 1985. It requires group health plans to allow "qualified beneficiaries" to elect continuation of group health plan coverage if one of the following qualifying events occurs:

- Death of a covered employee
- Termination other than by reason of gross misconduct
- Reduction of hours
- Divorce or legal separation
- Medicare eligibility
- A dependent child ceasing to be a dependent child
- Employer bankruptcy

The scope of continuation coverage under COBRA is required to be identical to that provided to similarly situated beneficiaries under the plan. Continuation coverage commences on the date of the qualifying event. The period of coverage continues for 18 months in the event of termination or reduction in hours. Other qualifying events trigger 36 months of continuation coverage. An 18 month continuation period could be extended to 29 or 36 months under certain circumstances.



The employer must notify the employee and the qualified beneficiaries of their rights to continue health coverage. The qualified beneficiaries have an election period of at least 60 days in which to elect continued coverage. Each qualified beneficiary is entitled to a separate election.

The plan may require payment of a premium for any period of continuation of coverage, not to exceed 102% of the "applicable premium" for such period. There is a grace period of at least 30 days, longer in some cases. Payment for coverage during the period preceding the election can be made retroactively within 45 days of the date of the election.

The Stimulus Bill Provides a 65% Federal Subsidy: COBRA Gets a New Meaning

Prior to the stimulus package, eligible employees electing COBRA paid up to 102% of the premium or cost of coverage. The employer had no responsibility for paying any part of the premium unless it voluntarily agreed to do so.

Effective March 1, 2009, for most plans¹, the Act provides a subsidy of 65% of the COBRA premium for certain eligible employees for up to nine months. The subsidy applies to "COBRA continuation coverage" which is now defined to include not only "old" COBRA coverage under the original federal COBRA law, but *any* group health plan coverage subject to continuation coverage under federal or comparable state law with certain limited exceptions related to flexible spending accounts.

How Does the Stimulus Subsidy Work and Who is Eligible?

In order to be eligible for the subsidy, the individual must be entitled to COBRA continuation coverage because of *involuntary* termination of employment other than by reason of gross misconduct *between September 1, 2008 and December 31, 2009*.

Under the old rules, it did not matter whether the employee was voluntarily terminated or was discharged. The new rule restricts the subsidy to those involuntarily terminated other than for gross misconduct. Examples of involuntary terminations that would qualify for the subsidy are:

- performance-based discharges.
- termination for any misconduct that does not rise to the level of "gross misconduct."
- reductions in force/layoffs/plant shutdowns.

¹ calendar month plans



Instead of paying 102% of the cost, the new law provides that the employee pays only 35% of premium owed by the employee after the employer subsidy, if any. Depending on the plan, either the employer, the insurer or the multi-employer plan pays 65% of the unsubsidized premium. The paying entity is entitled to receive a dollar for dollar tax credit for its premium cost by an offset against payroll taxes (income and FICA payments). The subsidy reimbursement is not available until after the qualified beneficiary's 35% payment is received. While the employer must report its subsidy payments on the quarterly Form 941, it may make more frequent payroll deposits that are reduced by the amount of subsidy paid out. This will allow the employer to offset subsidy payments more frequently than once per quarter.

What Should Employers Seeking Reimbursement Do?

In addition to submitting the Form 941, the Act requires employers seeking reimbursement to submit certain other information. However the Internal Revenue Service has issued guidance asking employers to maintain this information on file rather than submitting it. The information to be kept on file includes:

- Information on the receipt, including dates and amounts, of the assistance eligible individuals' 35% share of the premium of a covered employee.
- In the case of an insured plan, copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA.
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals.
- Attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from September 1, 2008, to December 31, 2009), for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.
- Proof of each assistance eligible individual's eligibility for COBRA coverage at any time during the period from September 1, 2008, to December 31, 2009, and election of COBRA coverage.
- A record of the SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for 1 individual or 2 or more individuals.
- Other documents necessary to verify the correct amount of reimbursement.



Duration of the Subsidy

The federal subsidy is available for up to nine months until the earlier of 1) nine months after the first day of the first month the subsidy is available; 2) the qualified beneficiary becomes eligible for coverage under another group health plan or Medicare, or 3) COBRA coverage would otherwise end.

This nine-month period runs concurrently with COBRA coverage and does not serve to extend the COBRA continuation period. If the second qualifying event occurs within the nine-month period, the other qualified beneficiaries are eligible for the subsidy through the end of the nine-month period.

A qualified beneficiary's failure to notify the plan of eligibility for other coverage will result in a 110% excise tax penalty. Certain high-income individuals must repay the subsidy through the tax system when filing their income tax returns. They may also waive the subsidy if they choose.

New Notice Requirements and "Second Chance" Notices

The Department of Labor has issued new model notices which are intended for different categories of individuals:

- The Model General Notice (Full Version) should be sent to all qualified beneficiaries who experienced a qualifying event between September 1, 2008 and December 31, 2009 who either have yet to receive a COBRA notice or received a COBRA notice on or after February 17, 2009 that did not include the additional premium subsidy information. Going forward, these notices must be provided within the same time period in which the COBRA Administrator was previously required to provide notice.
- The Model General Notice (Abbreviated Version) should be sent to all qualified beneficiaries who experienced a qualifying event on or after September 1, 2008 and elected and are currently enrolled in COBRA continuation coverage.
- The Model Alternative Notice is meant for employers who are not covered by COBRA, because they have fewer than 20 employees, but do fall within a state continuation coverage statute. This notice should be sent to all those who would receive the Model General Notice (Full Version) if the employer was covered by COBRA.



- The Model Extended Election Notice should be sent to all qualified beneficiaries who are assistance eligible individuals, terminated between September 1, 2008 and February 16, 2009 and who either declined COBRA coverage or enrolled in coverage and subsequently discontinued that coverage. This notice gives these individuals another opportunity to elect COBRA coverage retroactive to March 1, 2009 with the premium assistance. This notice must be provided by April 18, 2009 and will give those who receive it an additional 60 day election period. For those who had family coverage but elected COBRA on an individual basis, their qualified beneficiaries must be given this notice and another opportunity to enroll.

The model notices will all have to be adjusted to fit each employer and each plan. Each notice contains a form where the qualified beneficiary can request to be treated as an assistance eligible individual. The qualified beneficiaries must complete this form to be eligible for the subsidy. The Employer, insurer or multi-employer plan will make the initial decision whether those who apply are assistance eligible individuals. Participants can appeal this decision to the Department of Labor, and the Department is required to provide them with a decision within 15 business days.

Model notices were issued by the Department of Labor on March 19. You can find a link to these notices on our website at: www.mhtl.com

For questions about pending or proposed laws or regulatory enforcement priorities, and how they will affect your operations, please contact Katherine Hesse or Brian Fox or the attorney assigned to your account.

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