

# American Recovery and Reinvestment Act

## COBRA Subsidy Effective March 1, 2009

The American Recovery and Reinvestment Act (the Act) was signed into law by President Obama on February 17, 2009. The Act includes a subsidy for COBRA premiums for a period up to nine months for certain employees that were involuntarily relieved from their job from September 1, 2008 through December 31, 2009.

The COBRA subsidy covers 65% of the applicable COBRA premium, initially covered by the employer or the insurer and recouped through payroll tax credits. The remaining 35% will be the responsibility of the qualified beneficiary. The COBRA subsidy becomes effective March 1, 2009 and imposes new COBRA administration and notice requirements on plan sponsors, in addition to those involved with the reimbursement process.

The information provided within this document is intended to provide initial guidance to plan sponsors. It is for informational purposes only and is not intended to interpret laws or regulations or to address specific client situations. This document will be revised as additional information becomes available from insurance carriers and government entities.

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### DATES of IMPORTANCE

- 2/17/09: President Obama signed the American Recovery and Reinvestment Act
- 3/1/09: COBRA subsidy becomes effective
- 3/19/09: Deadline for government to publish model notices
- 4/18/09: Deadline for providing notice of subsidy rights to “Assistance Eligible Individuals” (AEIs)

Please note that additional guidance is anticipated from the Department of Treasury, Department of Labor, and Department of Health and Human Services; however, it is unclear when that guidance will be published.

### CONTINUATION LAWS & PLANS AFFECTED

The COBRA subsidy applies to all COBRA-eligible group health plans sponsored by an employer, including those subject to state continuation of coverage laws, i.e. CalCOBRA. Health flexible spending accounts offered under a cafeteria plan are not eligible for the COBRA subsidy.

### SUBSIDY ELIGIBILITY

Per the American Recovery and Reinvestment Act, those eligible for the COBRA subsidy are referred to as “Assistance Eligible Individuals” (AEIs).

### INVOLUNTARY TERMINATION

The COBRA subsidy is available to qualified beneficiaries that are eligible for COBRA continuation coverage due to the involuntary termination of the covered employee’s employment. Involuntary termination must occur between September 1, 2008 and December 31, 2009.

**IMPORTANT:** If the covered employee chooses not to elect COBRA, a covered spouse or child of the employee qualifies as an AEI. However, qualifying events that occur after involuntary termination do not add beneficiaries to COBRA subsidy coverage.

The law does not currently define the term “involuntary termination,” so employers should be prepared to address disputes over whether a departure or other event was involuntary.

**FOR EXAMPLE,** it is unclear whether an employee who voluntarily leaves to avoid being laid off, or who voluntarily goes to part-time status to avoid being laid off, would be eligible for the subsidy. It is anticipated that the relevant federal agencies will provide additional guidance to help answer such questions. In the meantime, there may be guidance from some state employment programs that can help distinguish between voluntary versus involuntary terminations.

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## INCOME LIMITS

It should be noted that an employer may treat all AEIs as eligible for the COBRA subsidy regardless of their income. However, AEIs do have the right to waive the COBRA subsidy and pay the required COBRA premium in full. Waiver of the COBRA subsidy is permanent and applies to all periods of coverages regardless of the tax year. The table below reflects the eligible income ranges and the impact the COBRA subsidy will have to the AEI's income tax liability.

Adjusted Gross Income	Eligible for Subsidy?	Is the Subsidy Added to Insured's Income Tax Liability?
Less than: \$250,000 (joint filer) OR \$125,000 (all others)	Yes	No
Between: \$250,000-\$290,000 (joint filer) OR \$125,000 - \$145,000 (all others)	Yes	Yes. A percentage (to be announced) of the COBRA subsidy received will be appended to their income tax liability.
Greater than: \$290,000 (joint filer) OR \$145,000 (all other filers)	Yes	Yes. The total COBRA subsidy received will be appended to their income tax liability.

## SUBSIDY AMOUNT

- The subsidy amount is 65% of the total COBRA premium. The individual will be responsible for the remaining 35%.
- Covered individuals may be charged the full premium during the months of March and April; permitting employers and insurers time to comply with requirements imposed by the subsidy program. The employer or insurer must repay their 65% portion of the premium to the individual within 60 days, or may credit the individual for the 65% portion if the credit can be used up within 180 days from the date of overpayment.
- If an employer has independently decided to directly subsidize COBRA premiums i.e. severance package, the employer may be significantly penalized. See below for examples of how the subsidy will work.

**COBRA EXAMPLE:** if the applicable premium is \$1,000 and the employer (or COBRA administrator) charges \$1,020 (the 102% allowed by law), the individual will be required to pay 35% of the \$1,020 (\$357) and the employer will pay the balance (\$663).

**CALCOBRA EXAMPLE:** if the applicable premium is \$1,000 and the insurance carrier charges \$1,100 (the 110% allowed by law), the individual will be required to pay 35% of the \$1,100 (\$385) and the employer will pay the balance (\$715).

**SEVERANCE EXAMPLE:** if the COBRA premium is \$1,020 and the employer agreed to pay 70% of that amount (\$714), the former employee's share would be \$306. When applying the new law, the former employee's 35% is then calculated on the premium amount they are actually paying – 35% of \$306 (\$107.10). This means the employer must pay a total of \$912.90 (\$1,020 minus \$107.10 OR \$714 plus 65% of \$306) but they will only receive a payroll tax credit of \$198.90 (65% of \$306).

## LENGTH OF SUBSIDY

The maximum subsidy period is nine months, ending when:

- Nine months expires, following the acceptance of the subsidy or
- The individual's maximum COBRA period expires or
- The individual becomes eligible for coverage under another group health plan or
- The individual becomes eligible for coverage under Medicare

**IMPORTANT:** Written notice must be provided by the AEI as soon as they become eligible for other group health coverage or Medicare. Failure to do so will result in a penalty of 110% of the subsidy received after becoming eligible for other coverage.

**EXAMPLE** (using an 18-month COBRA eligibility period): if a person was involuntarily terminated on September 16, 2008 and did not elect COBRA at that time, yet subsequently elects it on May 1, 2009 under the second-chance provision of the new law, their maximum COBRA eligibility period will begin on October 1, 2008 (the first day following last day of coverage as an active employee) and will expire March 31, 2010. The COBRA subsidy will expire December 31, 2009, assuming they have not become eligible for other coverage during this time.

## PAYING FOR THE SUBSIDY

Pending confirmation from the Department of the Treasury, the insurer, not the employer, is responsible for subsidizing AEIs participating in state continuation coverage plans, whereas the employer is responsible for those participating in COBRA (Federal) plans.

### RECOUPING THE SUBSIDY

The entity to which premiums are payable is the entity that is eligible for the payroll tax credit. The entity may recoup the COBRA subsidy by claiming an equivalent refundable credit against the requirement to make deposits or payments of payroll taxes. If the amount exceeds the payroll tax liability, the Internal Revenue Service (IRS) will provide a credit or refund.

**IMPORTANT:** The payroll tax credit is not earned on the date the plan sponsor pays their portion of the premium. It is earned only when the plan sponsor has received the reduced COBRA premium payment from an AEI. Therefore, plan sponsors must take measures to ensure they do not claim the payroll tax credit before they actually receive the AEI's COBRA premium payment since a premature claim may result in the IRS assessing a penalty for late deposit of payroll taxes.

### REPORTING REQUIREMENTS

The employer will be required to submit reports to the IRS, in a time and manner to be determined, that includes:

- An attestation of the involuntary termination of employment of each person for whom subsidy reimbursement is claimed
- The amount of payroll taxes offset by the reimbursement
- The tax identification numbers of all covered employees
- The amount of the subsidy reimbursed with respect to each covered employee, and
- The type of coverage (EE or EE+1) associated with the subsidy

### NOTIFICATION REQUIREMENTS

COBRA election notices distributed to individuals becoming eligible for the COBRA subsidy between September 1, 2008 through December 31, 2009 must be modified to accommodate the requirements of the American Recovery and Reinvestment Act as it pertains to the COBRA subsidy. The new requirements are as follows:

- Availability of a premium reduction through means of the COBRA subsidy and an explanation of the eligibility requirements
- A description of an AEI's obligation to provide notification to the plan of their eligibility for other group health plan coverage or eligibility for benefits under Medicare and the penalty for failing to provide such notice
- Contact information (including name, address and phone number) of the plan administrator and any other person maintaining information in connection with the COBRA subsidy, i.e. COBRA administrator
- A description of a qualified beneficiary's right to reduced premium and any condition on entitlement to the reduction in premium
- A description of the extended election period (specific to individuals involuntarily terminated between September 1, 2008 and February 17, 2009 – see *SPECIAL ELECTION PERIOD* below)
- The option, if the employer chooses to make available, to enroll in different coverage under the employer's plan including a description of the other available coverage options (see *ALTERNATIVE COVERAGE OPTION* below)

**IMPORTANT:** Since the Department of Labor has until March 19, 2009 to publish model notices, employers may choose to revise their notices once the model notices have been issued.

### SPECIAL ELECTION PERIOD

There is a special COBRA election period available for individuals who would otherwise qualify as an AEI but did not elect COBRA when it was initially offered (or elected and later dropped coverage). COBRA qualified beneficiaries who were involuntarily terminated between September 1, 2008 and February 17, 2009 must receive a revised notice including the details listed in *NOTIFICATION REQUIREMENTS*, no later than 60 days after enactment of the new law (by April 18, 2009).

These notices must include a description of the extended election period (60 days) that is being made available and must also explain that the maximum COBRA coverage period will be measured from the original date of their qualifying event, regardless of the date they elect COBRA.

**IMPORTANT:** The period for which an AEI was without health coverage, beginning on the date of the COBRA qualifying event and ending with the first period of coverage under the new rules (March 1, 2009) will be disregarded for purposes of determining whether the AEI had a 63-day break in coverage under the creditable coverage rules.

### ALTERNATIVE COVERAGE OPTION

Under the new law, an employer has the option to allow AEs to enroll in COBRA coverage that is different from the coverage held at the time of the qualifying event. In order for this option to become available,

- The employer must make the option available
- The premium associated with the alternative coverage must not be greater than the premium associated with the current coverage
- The alternative coverage must be offered to active employees, and
- The alternative coverage must not be a standalone vision or dental plan, a health FSA or HRA plan or an onsite medical facility

### NEXT STEPS

Employers should begin preparing for the implementation of the new rules, including:

- Considering offering alternative coverage options
- Gathering information on individuals that terminated employment on or after September 1, 2008
- Determining which of the terminated individuals currently have COBRA coverage
- Determining which individuals are not covered by COBRA and are entitled to a second chance to elect COBRA under the new law
- Modify COBRA notices to include the requirements per the new law
- Distributing modified COBRA notices to qualified beneficiaries that are eligible for the COBRA subsidy no later than April 18, 2009
- Distributing modified COBRA notices to qualified beneficiaries with qualifying events going forward
- Tracking qualified beneficiaries receiving the subsidy and comply with the proper reporting requirements as defined by the IRS
- Maintaining waivers from individuals choosing not to receive the COBRA subsidy
- Coordinating efforts with entities needing to capture and share information, such as the insurance carrier and/or COBRA administrator

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