



COBRA NEWS UPDATE

Department of Defense Appropriations Act for Fiscal Year 2010 Act Extends ARRA COBRA Premium Subsidy

As many of you may already know, Congress has passed and the President has signed into law the Fiscal Year 2010 Department of Defense Appropriations Act (DOD), which also includes important new changes to the COBRA premium subsidy that was created by the American Recovery and Reinvestment Act of 2009 (ARRA). The changes made by the Act (HR 3326) were signed into law by the President on December 19, 2009 and are retroactive to the original February 17, 2009 ARRA enactment date.

Here are the Highlights of the important changes made by the 2010 DOD Act:

1. **Extension of the Eligibility Period.** ARRA provided a COBRA premium subsidy for certain employees (and their families) who were involuntarily terminated between 9/1/08 and 12/31/09. The eligibility period has been extended for an additional 2 months-through 2/28/10.
2. **Extension of Duration of Premium Subsidy.** Under ARRA, assistance eligible individuals (AEIs) were entitled to a subsidy for up to 9 months of their COBRA maximum coverage period. The maximum period for receiving the COBRA premium subsidy has been extended for an additional 6 months, to 15 months.
3. **Additional Notification Requirements.** Notification of the changes made by the Act must be provided within 60 days after the date of enactment (that is, by 2/17/10) to: (1) individuals who are assistance eligible individuals on or after 10/31/09, and (2) individuals who have a COBRA qualifying event of termination of employment (voluntary or involuntary) on or after 10/31/09. In addition, notification of the changes must be provided consistent with COBRA's normal election timing rules to individuals who have a qualifying event after 12/19/09 (the date of the enactment).
4. **Transition Period Rules.** Special rules are included for treatment of AEIs who exhausted their full 9 months of premium assistance before the period was extended to 15 months. These individuals fall into 2 groups. The first group—those who dropped COBRA after their original 9 month subsidy period ended—must be permitted to maintain their COBRA coverage by retroactively paying premiums that were due during their “transition period.” (The term “transition period” appears to mean any period of coverage beginning before 12/19/09 during which an AEI would have been eligible for premium assistance had the extension been available earlier.) Such individuals must make payment by 2/17/10 or, if later, 30 days after notice of the extension is provided by their plan administrator. The second group—those who paid an unsubsidized premium during their transition period—must be provided with a refund or credit against future premiums. Plan administrators must provide a notice of the extended subsidy, including information about the right to make retroactive payments, to both groups of individuals within the first 60 days of the individual's transition period.
5. **Eligibility Based on Timing of Qualifying Event.** The Act clarifies that for purposes of an individual's eligibility for the subsidy, as well as the timing of notices, the qualifying event is what matters, rather than eligibility for COBRA. That means the qualifying event must occur on or before 2/28/10.

COBRA in General

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amends sections of the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code and the Public Health Service Act (PHSA). COBRA requires group health plans to offer certain individuals, who would otherwise lose their group health plan coverage as a result of a specific qualifying event (such as employment termination or certain changes in family status) the opportunity to continue their group health plan coverage for a specified period of time at applicable group rates.

Note: COBRA does not generally apply to plans sponsored by employers with less than 20 employees on 50% of the typical business days in the prior year. (Part-time employees are counted as a fraction of an active employee.) Many states have similar requirements for small group plans providing benefits through an **insurance company** such as

California State's Cal-COBRA law. Although **self-funded** plans are regulated and must be offered for continuation coverage under federal **COBRA**, they are **exempt** from **state** law and need not be offered.

Changes to ARRA as Amended by the DOD Act of 2010

COBRA Premium Subsidy

ARRA provides for a federal **subsidy of 65%** of the total (**102%**) COBRA continuation coverage premiums for qualified beneficiaries receiving COBRA continuation coverage due to the covered employee's **involuntary termination of employment** between 9/1/09 and 2/28/10. These individuals are referred to as "Assistance Eligible Individuals" or "AEI".

The premium subsidy applies to periods of health coverage beginning on or after February 17, 2009 (generally effective March 1, 2009) and lasts for up to nine (15) months.

The subsidy applies to all COBRA-eligible group health plans sponsored by an employer with the exception of health flexible spending accounts. This subsidy is available not only for COBRA coverage, but also for insurance company state-mandated continuation coverage. It is not available, however, for coverage under a health flexible spending arrangement (FSA).

Subsidy Eligibility

The definition of a qualified beneficiary includes the covered employee, the covered employee's spouse (as defined by federal law), and the covered employee's dependent children (as defined by the plan). Qualified beneficiaries have separate election rights under COBRA. Therefore, even if the covered employee does not elect COBRA, a covered spouse or covered child of the involuntarily terminated covered employee will qualify as an AEI.

An "Assistance Eligible Individual" is the employee or a member of his/her family who:

1. who has experienced a COBRA qualifying event and loss of coverage at any time between 9/1/08 and 2/28/10 (the date of the qualifying event should be used in determining an individual's eligibility for premium assistance and not the date of the qualifier's COBRA eligibility);
2. elects COBRA coverage; and
3. is eligible for COBRA as a result of the employee's **involuntary termination** between 9/1/08 and 2/28/10.

Those who are not eligible are any individuals that:

1. experienced a voluntary termination, or any other type of COBRA qualifying event (divorce, child ceasing to be a dependent, death of an employee, reduction of work hours, termination due to gross misconduct etc.)
2. modified gross adjusted income exceeds \$145k per year (single); \$290k per year (joint) in the tax year in which the premium assistance is received, then the amount of the premium reduction must be repaid.
3. become **eligible** under another group plan or entitled to Medicare (regardless of enrollment into that plan)

How the Subsidy Works

The ARRA treats assistance eligible individuals who pay 35 per cent of their COBRA premium as having paid the full amount. The premium reduction (65 percent of the full premium) is reimbursable to the employer, insurer or health plan as a credit against certain employment taxes (form 941 has been revised). If the credit amount is greater than the taxes due, the Secretary of the Treasury will directly reimburse the employer, insurer or plan for the excess. (This will be handled in the same way as an overpayment of employment taxes.) Employers may not apply for reimbursement until the premium payment is received from the COBRA participant.

Under ARRA the premium subsidy applies to periods of coverage beginning on or after February 17, 2009. A period of coverage is a month or shorter period for which the plan charges a COBRA premium. The premium subsidy started on March 1, 2009 for plans that charge for COBRA premium coverage on a calendar month basis. Recognizing that plan sponsors may not be able to implement this premium subsidy in time to meet the original ARRA March 1st effective date, the bill contained a special provision for dealing with subsidy-eligible individuals who pay the full COBRA premium for either March or April coverage. The plan's sponsoring employer must either refund the 65% subsidy amount to the individual or credit the subsidy against the individual's future COBRA premiums.

Under the 2010 DOD Act special rules are included for treatment of AEs who exhausted their full 9 months of premium assistance before the period was extended to 15 months. These individuals fall into 2 groups. The first group—those who dropped COBRA after their original 9 month subsidy period ended—must be permitted to maintain their COBRA coverage by retroactively paying premiums that were due during their “transition period.” (The term “transition period” appears to mean any period of coverage beginning before 12/19/09 during which an AEI would have been eligible for premium assistance had the extension been available earlier.) Such individuals must make payment by 2/17/10 or, if later, 30 days after notice of the extension is provided by their plan administrator. The second group—those who paid an unsubsidized premium during their transition period—must be provided with a refund or credit against future premiums. Plan administrators must provide a notice of the extended subsidy, including information about the right to make retroactive payments, to both groups of individuals within the first 60 days of the individual’s transition period.

The premium subsidy for an individual ends upon **eligibility** for other group coverage (or Medicare entitlement), after fifteen (15) months of the reduction, or when the maximum period of COBRA coverage ends, whichever occurs first. Individuals paying reduced COBRA premiums must inform their plans if they become eligible for coverage under another group health plan or Medicare. If an individual does not meet the qualifications and continues coverage under the subsidy program when they become eligible for other group coverage or Medicare, they may be subject to a **penalty of 110%** of the amount of the subsidy received **after they were no longer eligible** to receive it.

Note: This standard differs from the standard under which **COBRA coverage** may be terminated. Termination of COBRA coverage is permissible only when an individual **actually obtains** coverage under another employer health plan, or becomes entitled to Medicare benefits. Thus, a terminated employee who becomes eligible for other employer coverage-but declines to enroll in that coverage-will lose the COBRA premium subsidy, but **not the right** to maintain his or her COBRA coverage.

Income Limits

If an individual’s modified adjusted gross income for the tax year in which the premium assistance is received exceeds \$145k (or \$290k for joint filers), then the amount of the premium reduction during the tax year must be repaid. For tax payers with adjusted gross income between \$125k and \$145k (or \$250k and \$290k for joint filers), the amount of the premium reduction that must be repaid is reduced proportionately. Individuals may permanently waive the right to the premium reduction but may not later obtain the premium reduction if their adjusted gross incomes end up below the limits.

Expedited Review of Denials of Premium Reduction

Individuals who are denied treatment as assistance eligible individuals and thus are denied eligibility for the premium subsidy (whether by their plan, employer or insurer) may request an expedited review of the denial by the U.S. Department of Labor. The Department must make a determination within 15 business days of receipt of a completed request for review. The application for review of the denial of COBRA premiums is available on the Department of Labor website at www.dol.gov/ebsa/cobra.

Special COBRA Election Opportunity

Individuals involuntarily terminated from September 1, 2008 through February 16, 2009 who did not elect COBRA when it was first offered **or** who did elect COBRA, but are no longer enrolled (for example because they were unable to continue paying the premium) have a new election opportunity.

This second election period begins on February 17 and ends 60 days after the plan provides the required notice. This special election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee’s involuntary termination). COBRA coverage elected in this special election period begins with the first period of coverage beginning on or after February 17, 2009, generally effective March 1, 2009. This **special election** period opportunity **does not** apply to insurance company plans sponsored by employers with less than 20 employees subject to State law.

Under the 2010 DOD Act COBRA participants who have reached the end of their reduced premiums and have terminated from COBRA, will be permitted to re-enroll on the plan retroactively. The participant will have until 2/17/09 or 30-days from the date of the letter regarding the DOD extension (if the 30 day grace period extends past 2/17/09) to make up premium payments.

ARRA Break in Coverage Ignored

Any break in coverage between the qualifying event and the date that coverage begins is ignored for purposes of the 63-day break for purposes of imposing pre-existing conditions under the group health plan.

Election of Different Coverage

If an employer offers additional coverage options to active employees, the employer may (but is not required to) allow AEI eligible individuals to switch the coverage that they had when they became eligible for COBRA. To retain eligibility for the ARRA premium subsidy, the different coverage must have the same or lower premiums as the individual's original coverage. The different coverage can not be coverage that provides only dental, vision, a health flexible spending account, or coverage for treatment that is furnished in an onsite facility maintained by the employer. If the employer chooses to offer this option, an AEI must elect to change his or her coverage within 90 days of the receipt of the COBRA election notice. This provision is **optional** and an employer is not required to make this option available.

ARRA Notice Requirements

ARRA required employers to modify their COBRA election notices or provide separate, supplemental notices to all individuals who become entitled to elect COBRA continuation coverage during the period beginning on September 1, 2008 and ending on December 31, 2009. The notices had to include all of the following:

1. An explanation of the eligibility requirements for the COBRA subsidy.
2. The name, address, and phone number of the plan administrator if the individual has questions or requires more information.
3. A description of the qualified beneficiary's obligation to notify the plan if he or she becomes eligible for coverage under another group health plan or Medicare, and a description of the penalty for failure to notify the plan.
4. A description of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium.
5. A description of the election of different coverage options described above (if the employer chooses to offer this option to the AEIs).

Those COBRA qualified beneficiaries who were involuntarily terminated between September 1, 2008 and February 17, 2009 had to be issued a revised notice including the information outlined above within 60 days of the enactment date. The notices must also describe the second 60-day COBRA election period and explicitly state that the maximum COBRA coverage period is still measured from the date of the original qualifying event.

Additional 2010 DOD Act Notice Requirements

In addition to the ARRA notice requirements listed above, the 2010 DOD Act requires an explanation of the ARRA provisions that were amended:

1. The Act changes the end date to whom should be offered COBRA premium subsidies from 12/31/09 to 2/28/10.
2. The Act extends the maximum period to receive COBRA subsidies from 9 to 15 months.
3. COBRA participants, who have reached the end of their reduced premiums and have terminated from COBRA, will be permitted to re-enroll on the plan retroactive. The Participant will have until 2/17/10 or 30 days from the date of the letter (if the 30-day grace period extends past 2/17/10) to make up premium payments.
4. COBRA participants who have exhausted their subsidy timeframe and who has made full premium payments will be notified of the subsidy extension and allowed to choose whether they want a refund of the overpaid premium or if they would like to the overpayment credited to future months.
5. The Act also clarifies that the date of the qualifying event should be used in determining an individual's eligibility for premium assistance and not the date of the qualifier's COBRA eligibility. Meaning, if an individual experiences a loss of coverage on 2/28/10, that they will be eligibility for premium assistance.

Notification of the changes made by the Act must be provided within 60 days after the date of enactment (that is, by 2/17/10) to: (1) individuals who are assistance eligible individuals on or after 10/31/09, and (2) individuals who have a COBRA qualifying event of termination of employment (voluntary or involuntary) on or after 10/31/09. In addition, notification of the changes must be provided consistent with COBRA's normal election timing rules to individuals who have a qualifying event after 12/19/09 (the date of the enactment).

Updated DOL Model Notices

ARRA required the Department of Labor (DOL), Treasury, and the Department of Health and Human Services to work together to provide a model notice within 30 days of the enactment date. DOL has also just issued notice that a new set of model notices incorporating information about the extension provisions of the 2010 DOD Act COBRA subsidy extension are now available at www.dol.gov/ebsa/cobramodelnotice.html.

Additional Information

Adding to the complexity are additional proposed changes to the ARRA COBRA premium subsidy that are included in Jobs for Main Street Act (HR 2847), recently passed by the house. These proposed changes include amount other things, an extension of eligibility for the program until June 30, 2010, and inclusion of certain reductions in hours as a qualifying event for assistance eligible individuals. The Senate is expected to turn to the Jobs Act COBRA extension in January, but it isn't clear at this point whether additional notification will be require if it is enacted.

It is important to note that although the American Recovery and Reinvestment Act and the amendments included in the Department of Defense Appropriations Act are now law, there may still be important guidance and further clarification of the law that will be forthcoming. The BEN-E-LECT COBRA Department is dedicated to providing compliant solutions to our clients. We are currently working to address the new requirements as well as monitoring ongoing guidance. We will issue additional information as it becomes available.

If your organization would like more information on how BEN-E-LECT can help you meet your COBRA needs, please do not hesitate to contact our office at (888) 886-7973.

For further information-For more guidance regarding COBRA and the new regulations, you may contact the U.S Department of Labor at (866) 487-2365 or go onto the internet at www.dol.gov/ebsa and click on COBRA Assistance.

For more information regarding the revised IRS 941 form and instructions on how to complete it, you can go online to the www.dol.gov/ebsa and click on the link to IRS information on COBRA Premium Reduction Information.