

The New COBRA Subsidy: What You Should Know

Changes in COBRA obligate companies to notify departing employees (including those who left as far back as September 1, 2008) of a federal right to subsidized health care continuation. Under the American Recovery and Reinvestment Act of 2009 (ARRA) and the newly-issued administrative guidance and model notices, an employer must advance 65% of COBRA premiums for those employees involuntarily terminated between September 1, 2008 and December 31, 2009, who elect continuation. Read further to learn more about your obligations to notify and pay the subsidy as well as what you should be considering for your company.

1. What is the subsidy?

Under COBRA, covered employees (and their covered dependants) may extend their group healthcare coverage for up to 18 months after they are discharged. Before ARRA, a terminated employee was required to pay 100% of the healthcare premium plus up to a two percent administrative fee. Under ARRA, "assistance eligible individuals" are only required to pay 35% of the applicable COBRA premium (including the administrative fee). Employers that provide group health insurance must advance the remaining 65% of the applicable COBRA premium. These employers may then obtain reimbursement of the 65% premium subsidy as a credit against their quarterly federal payroll tax filings.

2. Who is an "assistance eligible individual?"

Individuals who are otherwise eligible for COBRA continuation coverage, who lost coverage under an employer-sponsored group health plan due to an involuntary termination of employment between September 1, 2008 and December 31, 2009, and who elect COBRA continuation coverage are "assistance eligible individuals" under ARRA. ARRA does not define an "involuntary termination," but it likely covers all involuntary terminations except those for gross misconduct. Individuals who voluntarily terminate their employment or who lose their dependant status (i.e. through a divorce) are not "assistance eligible employees."

3. How long does the subsidy last?

Generally, the subsidy is available for up to nine months, but ends once the maximum continuation coverage period under COBRA (usually 18 months) expires, or if the assistance eligible individual becomes eligible for coverage under any other group health plan, including Medicare or Medicaid.

4. What about persons who recently declined COBRA coverage or failed to pay their COBRA premiums prior to passage of the ARRA?

Employees who were involuntarily terminated between September 1, 2008 and February 17, 2009, but initially declined COBRA coverage or who previously failed to pay their COBRA premiums, must be given a second chance to elect subsidized COBRA coverage. ARRA's special election period began on February 17, 2009 and ends 60 days after the date that the employee receives notice of the subsidy.

5. Does the special election period change the maximum COBRA coverage period?

No. The maximum COBRA coverage period (generally 18 months) will not be extended as a result of the special election period, and a qualified beneficiary's 18-month period of COBRA eligibility will still be calculated using the original qualifying event date.

6. How do individuals learn about the special election period?

ARRA requires employers to locate former employees who previously declined COBRA coverage and notify them of their right to COBRA coverage with the subsidy. If an eligible individual elects COBRA continuation coverage during the special extended election period, the first period of coverage will commence on or after the enactment of the ARRA.

The New COBRA Subsidy: What You Should Know

Example	Election period ends (60 days after notice)	COBRA subsidy period ends (After nine months or once employee is eligible for other coverage)	COBRA continuation period ends (Typically 18 months after qualifying event)
Employee A was terminated on September 1, 2008. She timely elected COBRA coverage, but failed to pay her premiums, so her healthcare continuation coverage was terminated. On March 1, 2009, her employer provided her with notice of her "second chance" to elect COBRA coverage, this time with the federal subsidy.	April 30, 2009	December 2009 (or earlier)	March 2010
Employee B was terminated on December 1, 2008. He received notice of his right to COBRA healthcare continuation coverage. He declined COBRA coverage. On April 1, 2009, his employer provided him with notice of his "second chance" to elect COBRA coverage, this time with the federal subsidy.	May 31, 2009	December 2009 (or earlier)	June 2010
Employee C is terminated on June 1, 2009 and is immediately provided with notice of her rights to COBRA healthcare continuation coverage.	July 31, 2009	March 2010 (or earlier)	December 2010

7. What about persons who already paid the full COBRA premium?

Under ARRA, assistance eligible individuals who paid their full COBRA premium anytime after February 17, 2009 are entitled to employer reimbursement for the excess amount paid. Instead of providing the assistance eligible employee a refund, an employer may credit that amount against the employee's future COBRA premium payments (at 35%) as long as it is reasonable to expect the individual to use it within 180 days of the full premium payment.

8. Are there income limitations on who may receive the subsidy?

Assistance eligible individuals who have an annual income over \$125,000 (or \$250,000 in the case of joint return filers) and who receive a subsidy under ARRA will have their income tax liability increased by a percentage of or all of the subsidy amount for the tax year in which they receive the subsidy. In essence, the Internal Revenue Service recaptures the subsidy from these high-income individuals by increasing their tax liability.

The New COBRA Subsidy: What You Should Know

9. What are the notice requirements for employers?

The ARRA has two separate notice components. First, employers must amend their current COBRA election notices to include general information about (1) the availability of the premium subsidy; (2) the special election period; and, (3) if applicable, the option to enroll in different coverage. Specifically, the notices must include:

- a. The forms necessary for establishing eligibility for the premium subsidy;
- b. Contact information for the plan administrator and any other person with information regarding the premium subsidy;
- c. A description of the extended election opportunity for those who previously declined COBRA continuation coverage;
- d. 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;
- e. A prominent description of the qualified beneficiary's right to the premium subsidy and any conditions on such a right; and
- f. A description of the option to enroll in different coverage under the health plan, if applicable.

10. What should employers with group health plans do to ensure that they are in compliance with the COBRA provision in ARRA?

- a. Determine whether state or federal COBRA law applies. Employers with 20 or more employees must comply with the federal COBRA provisions. Employers with less than 20 employees must comply with Ohio's "mini-COBRA" statute. This client alert discusses ARRA as it applies to employers governed by federal COBRA law. The requirements under ARRA are not identical for employers covered by Ohio's mini-COBRA statute, but their employees are entitled to notice of the subsidy and may receive the subsidy.
- b. Review all terminations since September 1, 2008 (including severance arrangements) to determine which former employees are "assistance eligible individuals."
- c. By April 17, 2009, provide assistance eligible individuals who were involuntarily terminated since September 1, 2008 with notice of their rights to healthcare continuation coverage and their rights to the special election period.
- d. Ensure that all notices are updated to meet the minimum notice requirements of the new law.
- e. Coordinate with payroll vendors to confirm that the premium reimbursements will be treated as payroll tax credits.
- f. Train human resources personnel on new COBRA provisions.



The New COBRA Subsidy: What You Should Know

The Department of Labor has issued model notices for employers. If you have any questions about your business or need help finding those model notices, please contact one of Hahn Loeser's Labor & Employment Practice Area attorneys:

Steven E. Seasly
sseasly@hahnlaw.com
216.274.2234

Jennifer L. Fewell
jfewell@hahnlaw.com
216.274.2285

James M. Drozdowski
jmdrozdowski@hahnlaw.com
216.274.2553

Dawn R. Hays
drhays@hahnlaw.com
614.233.5122

Amie L. LaBahn
alabahn@hahnlaw.com
216.274.2337

Richard T. Prasse
rtprasse@hahnlaw.com
216.274.2233