

COBRA Provisions of the 2009 Stimulus Bill (The American Recovery and Reinvestment Act of 2009)

March 11, 2009

The economic stimulus legislation (The American Recovery and Reinvestment Act of 2009 (“ARRA”)) was signed into law by President Obama on February 17, 2009 (the “Enactment Date”). It provides a number of health-related provisions, including a COBRA premium subsidy for employees who are involuntarily terminated between September 1, 2008, and December 31, 2009.

The Subsidy is intended to assist eligible individuals to keep their health care coverage by reducing their COBRA premium payments. Employers subject to COBRA and small employers subject to state continuation coverage have new responsibilities under the ARRA. References to COBRA coverage includes state continuation coverage unless otherwise noted.

Eligibility For the Subsidy

1. Who is eligible for the Subsidy?

An Assistance Eligible Individual (“AEI”) is one who is (or was) covered under and who loses (or lost) coverage because the AEI’s employment ended due to an **involuntary termination** between September 1, 2008, and December 31, 2009.

Note: It is important to look at the date of the qualifying event, i.e., the involuntary termination, and not the date the employee was first eligible for COBRA. For example, if an employee was involuntarily terminated on 8/1/08, but was able to continue group coverage until 8/31/08, electing COBRA on 9/1/08, this employee would not be eligible for the subsidy as their involuntary termination occurred prior to 9/1/08.

2. What is an “involuntary termination”?

Although “involuntary termination” is not defined under COBRA, the ARRA does not appear to distinguish between reductions-in-force and other types of involuntary terminations. Therefore, it appears that any termination of employment that was not voluntary on the part of the employee, including termination for poor performance other than gross misconduct, would be covered by this provision.

3. Are Dependents eligible for the Subsidy?

Yes. The definition of AEI is tied to the definition of a “qualified beneficiary” under ERISA, and includes the employee, the employee’s spouse (as defined by federal law) and the employee’s dependent child (as defined by the plan) that are covered under the plan as of the date of the Qualifying Event. Thus, even if the covered employee does

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not elect COBRA, the covered spouse or covered child of the employee that experienced a Qualifying Event will qualify for the Subsidy if they elect to continue COBRA coverage.

Note: The definition of AEI does not include same-sex domestic partners or any other person who is not a covered spouse defined by federal law or a covered dependent child. Clarification is needed on whether those individuals who do not meet the definition of a “qualified beneficiary” under COBRA but are provided continuation coverage will be eligible for the subsidy.

4. Are individuals who declined COBRA coverage before the Enactment Date still eligible?

Yes. If an individual was involuntarily terminated on or after September 1, 2008, but declined COBRA coverage, that employee may now elect COBRA coverage and receive the Subsidy. Such individuals must be offered a special election period to elect COBRA coverage. (See Special Election Notice Period, below.)

5. Are individuals who lost COBRA coverage after electing such coverage before the Enactment Date eligible for the Subsidy?

Yes. If an individual was involuntarily terminated on or after September 1, 2008, and lost COBRA coverage after initially electing coverage (e.g., they were unable to pay a premium), that individual must be offered a special election period to elect COBRA coverage. (See Special Election Notice Period, below.)

6. What is the Special Election Period?

Individuals who were involuntarily terminated on or after September 1, 2008, and who were offered but lost or did not elect COBRA will have a special, additional 60-day election period. The 60-day election period begins on the date that notice is provided to the eligible individual about the special election period.

Note: Clarification is needed as to whether the special election period automatically applies to state continuation coverage, or whether individual states must decide to allow this second opt-in opportunity.

7. Does the special election period extend the COBRA continuation coverage?

No. This special election period does not extend the period of COBRA continuation coverage beyond the original maximum required period (generally 18 months after coverage was originally lost).

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8. When does COBRA coverage begin if elected during the special election period?

Any COBRA continuation coverage elected during the special election period begins on the first period of coverage following the date of enactment (which for most plans will be March 1, 2009). It does not include any period prior to the date of enactment.

For example, if an employee lost coverage on September 1, 2008, and declined COBRA coverage, the individual could elect coverage from the date of enactment forward, but the maximum period of coverage would end on February 28, 2010 (i.e., 18 months from the original loss of coverage). In addition, any medical expenses incurred between September 1, 2008 (the date coverage ceased) and March 1, 2009 (the date COBRA coverage begins under this election) would not be eligible for reimbursement under the employer's medical plan.

9. If an individual declined or lost COBRA coverage after September 1, 2008, but prior to the Enactment Date, is that considered a break in coverage?

No. For those who elect coverage through the special election period, any gap in coverage arising after September 1, 2008, but prior to the Enactment Date is not considered a break in coverage for purpose of HIPAA's creditable coverage rules.

10. Are there income limitations on eligibility for the Subsidy?

Yes. Employees whose adjusted gross income (AGI) is between \$125,000 and \$145,000 (\$250,000 to \$290,000 for married couples filing jointly) will see a declining subsidy. Those employees whose adjusted gross incomes are above the top end of the declining subsidy range (i.e., above \$145,000 for single filers and married filing separately and \$290,000 for joint filers) will not receive any subsidy. If an individual receives this subsidy, and his/her applicable AGI exceeds the subsidy limit, the individual will be required to return the subsidy to the government (by adding it to his/her tax liability) when he/she files his/her tax return. Importantly, although a high-paid employee may waive the subsidy, the burden of determining income eligibility for the subsidy is on the employee, not the employer.

11. Who decides whether the employee is eligible for the Subsidy?

Only the employee can determine whether he or she is eligible for the Subsidy. Unless the employee furnishes a waiver to the employer stating he or she is permanently waiving rights to the subsidy, the employer must pay the Subsidy, even if the employer knows the employee's income exceeds the income cap.

12. When does eligibility end?

AEIs are entitled to the COBRA Subsidy for up to nine months after the first day of the first month for which the Subsidy applies. However, if the AEI becomes eligible for other group health coverage (including a group health plan maintained by a new

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employer of the individual or a plan maintained by the employer of the individual's spouse), fails to pay his or her portion of the premium, or qualifies for benefits under Medicare, entitlement to the Subsidy ends.

13. What must the COBRA Subsidy recipient do when accepting new coverage?

Individuals who are eligible for the COBRA subsidy and who become eligible for another group health plan or Medicare are required to notify their prior employer that they are no longer eligible for the COBRA subsidy. If they fail to notify the employer and continue to receive the subsidy, they will be subject to a tax penalty of 110% of the subsidy when they file their tax returns. The reporting burden rests on the individual, not the employer.

Payment and Reimbursement of the Subsidy

1. How much is the COBRA subsidy? How much does the AEI have to pay?

The subsidy is equal to 65% of the monthly COBRA premium required to be paid by the AEI. The AEI must pay 35% of the amount charged to the beneficiary.

2. Who pays the 65% of the premium not paid by the AEI ?

The entity who pays the 65% of the premium owed by the AEI, and is therefore entitled to reimbursement from the federal government, varies depending on the arrangement of coverage:

- In the case of a multi-employer plan (such as a Taft-Hartley plan), it is **the plan**.
- In the case of any other employer-sponsored plan subject to ERISA's, the Code's or the PHSAs' COBRA provision, or any other employer-sponsored plan not subject to those rules (e.g., a Church plan) that is fully or partially self-insured, it is **the employer/plan sponsor**.
- In the case of a state continuation coverage plan that is comparable to federal COBRA, it is **the insurer**.

3. How is the Subsidy calculated if the employer chooses to subsidize a portion of the AEI's COBRA premium payments?

The ARRA specifically states that the AEI is deemed to have paid 100% of the premium so long as the AEI, or anyone other than the AEI's employer, pays 35% of "such premium." Thus, the AEI is deemed to have paid 100% of the premium as long as the AEI pays 35% of whatever the AEI's premium obligation is as determined by the plan.

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For example, if the employer pays a portion of the individual's COBRA premium – say 80% on a \$1,000 premium – then the AEI only pays 35% of \$200 (\$70), and the other 65% (\$130) will be reimbursed to the employer. However, the employer is not reimbursed for the \$800 that the employer paid on the AEI's behalf. Note that if the employer did not opt to pay for part of the employee's premium, the AEI would pay 35% of \$1,000 (\$350), and the employer would be reimbursed the entire 65% not paid by the AEI (\$650).

4. How will the entity entitled to reimbursement be reimbursed for the COBRA Subsidy?

The entity entitled to reimbursement can claim reimbursement from the federal government for the COBRA premium subsidy through a reduction in its payroll withholding tax obligations. As of 2/20/09, the IRS released a revised Form 941, the form for employers' quarterly tax return on which employers report payroll taxes. The entity is to report "the premium assistance payments [the employer] made for the assistance eligible individuals who have paid their reduced premium." In addition, the entity must list the total number of individuals provided COBRA premium assistance payments. No additional information relating to the COBRA subsidy is required to be submitted with the Form 941; however, the entity claiming the credit must maintain supporting documentation of for the credit claimed. Additional guidance around the Form 941 continues to be released. We will provide updates as we receive them.

Recent Updates:

- On 2/26/09, the IRS released a specific set of Q&As on the process of reimbursement and the use of Form 941. <http://www.irs.gov/pub/irs-pdf/i941.pdf>

5. What supporting documentation must the entity entitled to reimbursement maintain?

In order to claim the credit, the entity entitled to reimbursement must maintain the following information (not considered an exhaustive list):

- Information on the receipt, including dates and amounts, of the assistance eligible individuals' 35% share of the premium.
- 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.

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- 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.

NOTE: When the entity entitled to reimbursement is not the employer, the employer will need to retain this information and provide it to the entity entitled to reimbursement.

6. What must entities entitled to reimbursement do about premiums paid prior to now?

Nothing. The subsidy is not retroactive, and the applicable entity entitled to reimbursement cannot take a credit against any premium payments before March 1, 2009. No credit or refund will be given for premiums already paid. The subsidy does not apply until the first payment is made after February 17, 2009.

7. When must the entity entitled to reimbursement claim the credit?

The entity entitled to reimbursement must claim the credit within the quarter the Subsidy was paid. Reimbursement may be claimed more frequently than quarterly (e.g., concurrently with the payroll cycle), but not less frequently (e.g., on a semi-annual or annual basis). Payment of the subsidy is treated as if it were paid to Treasury the day the individual's premium payment is received. Clarification is still required to determine who must receive the payment in order to start the quarterly reimbursement clock.

NOTE: The due date for filing the first quarter 2009 Form 941 has not been extended.

8. What if the entity entitled to reimbursement is unable to identify employees entitled to the Subsidy as of the Date of Enactment?

For the first 60 days after enactment, the entity entitled to reimbursement may continue to require the COBRA covered individual to pay the full COBRA premium for coverage. However, once this 60-day period expires, the entity entitled to reimbursement must either offset future subsidized premiums by the subsidy that applies to this period or directly refund the additional amounts to the covered individual.

9. I am a small group not subject to Federal COBRA, only state continuation. Who is responsible for paying the 65% and seeking reimbursement from the Government?
In the case of state continuation, BCBSNC will be responsible for paying the 65% and seeking reimbursement through payroll taxes. The employer will still be responsible for providing necessary information to BCBSNC regarding AEs listed above.

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Alternative COBRA Coverage (Special Enrollment)

1. *Can the employer offer alternative COBRA coverage?*

Yes. Many employers maintain their medical plans as part of a larger cafeteria plan and may allow employees to elect alternative COBRA coverage that meets the designated requirements described below.

2. *Are employers required to offer alternative COBRA coverage?*

No. Under this legislation, employers are permitted (but not required) to allow AEs to elect alternative COBRA coverage.

3. *What coverage may the employer offer as alternative COBRA coverage?*

In order for coverage to be offered as alternative COBRA coverage, the premium cost must be equal to or less than the premium cost for the plan in which they are currently participating and the alternative coverage must be available to active employees. Such alternative coverage cannot be limited to any of the following:

- dental, vision, counseling or referral services;
- health flexible spending arrangement; and/or
- coverage for services or treatment furnished in an on-site medical facility maintained by the employer that consists mainly of first-aid type services, prevention and wellness care, or similar care.

4. *Who do I contact at BCBSNC if I want to offer the special enrollment option?*

Please contact your account manager with any questions about the special enrollment option.

Notice requirements

1. *To whom must the employer send COBRA notices?*

The employer must send COBRA notices to all employees whose employment is terminated between September 1, 2008 and December 31, 2009.

2. *What notifications are required for employees who experienced an **involuntary** termination between September 1, 2008 and February 16, 2009?*

Employers must send a revised notice that includes the items mentioned below by April 17, 2009.

- Any necessary forms needed to establish eligibility for the COBRA Subsidy;

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- The name, address and phone number of the plan administrator, as well as any other person “maintaining relevant information in connection with such premium reduction”;
- A description of the qualified beneficiary’s obligation to notify the plan if the individual becomes eligible for subsequent coverage under another group health plan or under title XVIII of the Social Security Act (i.e., Medicare), and a description of the penalty for failing to notify the plan;
- A description “displayed in a prominent manner” of the qualified beneficiary’s right to a reduced premium and any conditions on entitlement to the reduced premium; and
- A description of the special enrollment option discussed above (if the employer chooses to allow such enrollment for AEs).

[NOTE: The first requirement noted above is to include with the election notice all forms establishing eligibility for the Subsidy; however, it is not clear from the Act what the purpose of the forms is or what should be included in them. One form might be a form confirming a highly paid individual’s waiver of the Subsidy.]

The notice must also describe the special election period for those who have yet to elect COBRA as of the Enactment Date and for those who elected COBRA and then discontinued coverage. The special election period continues for 60 days after the employee receives the election notice. For such individuals, the notice should also make clear that, while COBRA coverage begins on the first period of coverage commencing on or after the Enactment Date (March 1, in most cases), the COBRA duration (e.g., generally 18 months) is measured from the date of the original qualifying event.

A model notice will be developed by the Department of Health and Human Services by March 19, 2009.

3. What notifications are required for employees who experience an involuntary termination on or after the Enactment Date and prior to December 31, 2009?

Plan administrators must revise standard COBRA election notices sent to terminated employees to include the information listed above.

4. What special notification obligations apply to employers who offer alternative coverage?

In addition to the regular COBRA notice, the employer must give a supplemental notice to affected employees if the employer offers alternative COBRA coverage. The qualified beneficiary has 90 days to make this election. Although further guidance is necessary, it appears the 90 day extension (rather than the 60 day notice requirement

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in cases where no alternative coverage is offered) applies only to major medical coverage and not to other types of group health coverage not subject to the special enrollment rule such as dental, vision or Health FSA.

5. I am an insured group who selected a COBRA administrator through my contract with BCBSNC. Will the COBRA Administrator send out these notices?

You will be receiving a notification from Ceridian on the additional services they will be offering with regard to this legislation. Please refer to that notification for details. If you have not received this information please contact your Ceridian account manager at 1-800-790-9056. BCBSNC will be making any necessary changes to enrollment forms and benefit booklets.

6. I am an ASO group who contracts with a COBRA administrator through a separate contract. Will the COBRA Administrators send out these notices?

Please consult your COBRA administrator to determine whether your contract indicates who will send out the revised notices. BCBSNC will be consulting with you in order to make any necessary changes to enrollment forms and benefit booklets.

7. I am a small group not subject to Federal COBRA, only state continuation. Who will send out these notices to my employees?

BCBSNC will be providing model notices to you once the model notices are issued. It will remain the employer's responsibility to provide notices to your employees. BCBSNC will be making any necessary changes to enrollment forms and benefit booklets.

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