

Quick Action Required for COBRA Administration and Compliance

February 27, 2009

Executive Summary

Beginning March 1, 2009, individuals eligible for COBRA coverage as a result of involuntary termination on or after September 1, 2008, and before January 1, 2010, need to pay only 35% of their regular COBRA premiums. For self-insured plans, the employer generally has to pay the other 65% and then claim credit for this amount against future payroll tax payments. An eligible individual can take advantage of this 65% subsidy for nine months. Group health plans are required to provide notice of this subsidy to eligible individuals by April 18, 2009.

COBRA Subsidy

President Obama signed the American Recovery and Reinvestment Act of 2009 (the "Act") into law on February 17, 2009. The Act adds a COBRA subsidy intended to help individuals and their families who have lost their jobs to maintain their health care coverage. As additional guidance, the IRS has posted a Q&A for employers on its website at: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>.

How Does the Subsidy Work?

Reduction of COBRA Premiums. Starting March 1, 2009, eligible individuals will be required to pay only 35% of their COBRA premiums to continue group health plan coverage.

Subsidy Provided to Group Health Plans. Group health plans receive the remaining COBRA premiums from the employer or, in some cases, the insurer. The employer or insurer then treats the amount subsidized as payroll taxes already paid. If the subsidy exceeds the payroll taxes, the excess is treated as an overpayment of payroll taxes, and the government will refund the excess.

Duration of the Subsidy. An eligible individual may begin taking advantage of the subsidy on the later of the date he or she qualifies for COBRA coverage and March 1, 2009. The subsidy will end for each eligible individual on the earliest of:

- becoming eligible for Medicare or another group health plan;
- nine months from the first day of the month that he or she began paying reduced COBRA premiums;
- the day COBRA coverage would otherwise end for the individual; and
- for a late COBRA enrollee, the date COBRA would have ended had COBRA been elected when first available.

Who Qualifies for the Subsidy?

Involuntarily Terminated Employees and Their Families. An individual who was involuntarily terminated (but not for gross misconduct) between September 1, 2008, and December 31, 2009, may qualify for the subsidy. The individual must also be eligible for COBRA and elect it. If an otherwise eligible person did not elect COBRA within the required period after his or her termination of employment, he or she must be given a second election opportunity.

Adjusted Gross Income Phase-Out. If an otherwise eligible individual has an adjusted gross income ("AGI") of \$125,000 if filing a single income tax return (or \$250,000 if filing jointly) in the year of the subsidy, the amount of the subsidy phases out. No subsidy is available for an individual with an AGI of \$145,000 (or \$290,000 if married filing jointly).

Eligible Individuals Currently on COBRA. An eligible individual who is currently on COBRA may begin paying a lesser premium on the first period after February 17, 2009 (presumably, March 1, 2009). If he or she has already paid the full COBRA premium for this period, the group health plan can either refund the excess or credit the excess to future COBRA premiums. Special rules apply if the credit would not be used within 180 days of the original date the premium was paid.

Eligible Individuals Who Did Not Elect COBRA Coverage. An eligible individual who otherwise meets the eligibility criteria but who did not elect COBRA coverage has a second opportunity to elect COBRA. This election period begins on February 17, 2009, and ends 60 days after the group health plan sends a notice of the continuation coverage rights under the Act to him or her. The Department of Labor will provide a model notice for use by plan administrators no later than March 19. If such an individual elects COBRA coverage under the new rules, coverage would begin on the later of March 1, 2009, and the date health plan coverage ceased after the individual's termination of employment.

Although the election period is extended for a late enrollee, the COBRA coverage period is not. An enrollee's coverage will end when it would have ended had he or she elected COBRA coverage when it first became available due to his or her termination of employment. The subsidy will end after nine months irrespective of whether COBRA coverage continues.

What Coverage Is Available to an Eligible Individual?

Regular Health Plan Coverage. Generally, a qualified beneficiary may elect continuation coverage for those health plans in which he or she was enrolled immediately before the qualifying event. The same is true under the Act.

Alternative Health Plan Coverage. In addition to the coverage generally available under COBRA, the Act permits alternative coverage options. Under the Act, employers may, but are not required to, offer alternative coverage for eligible individuals. This alternative coverage must:

- be made available by the employer;
- have premiums that are less than or equal to the premiums of the coverage in which the qualified individual had been enrolled upon his or her termination of employment;
- be offered to active employees; and
- offer more than the minimal coverage described in the Act.

What Are the Group Health Plan's Responsibilities?

Determine Who Is Eligible. Employers must review personnel files to determine who was involuntarily terminated from employment after August 31, 2008, and whether such individuals were covered under the employer's group health plan while they were employees.

Determine Whether Other Coverage Will Be Available. Employers should examine their existing health plan alternatives and determine whether lower-cost coverage should be offered to eligible individuals.

Provide Notices. By April 18, 2009, group health plans must provide new COBRA notices to eligible individuals who are current COBRA participants, did not elect COBRA, or are newly eligible for COBRA.

The notice must describe the:

- availability of premium reductions, which must be displayed in a prominent manner;
- option to enroll in alternative coverage, if applicable;
- plan administrator's contact information to answer any questions;
- extended election period, if applicable; and
- individual's obligation to notify the group health plan when coverage under Medicare or another group health plan is available.

Refund or Credit any Excess COBRA Premiums Already Paid. If a person on COBRA has already paid the full premium for March or later, the plan should determine whether the premium should be refunded or applied toward future premiums. The plan should also notify the individual of its determination.

What Are an Eligible Individual's Responsibilities?

Determine Whether the AGI Phase-Out Applies. As discussed earlier, the subsidy does not apply if an eligible individual's AGI exceeds certain levels. Because the health plan does not know each individual's tax situation, the eligible individual should determine whether AGI would preclude or limit his or her participation in the program. An individual who receives the subsidy but whose AGI exceeds the limit must report it in taxable income on his or her Form 1040.

Elect COBRA Coverage. An eligible individual has 90 days from the date of the notice described above to elect COBRA coverage.

Inform the Group Health Plan When You Become Eligible for Medicare or Other Group Health Insurance. An individual who becomes eligible for Medicare or other group health insurance that includes medical coverage is no longer eligible for the COBRA subsidy. This individual must provide written notice to the group health plan of such coverage. The Act does not require that he or she actually elect to participate in the new group health plan or Medicare in order to lose entitlement to the subsidy; rather, it requires only that he or she be eligible to participate.

What Else Should Employers Know?

Preexisting Conditions and Breaks in Coverage. For any individual who elects COBRA coverage after termination of employment, the period between his or her last day of employment and March 1, 2009, will not count toward the 63-day break in coverage period for purposes of excluding preexisting conditions.

Reporting. Employers that receive the subsidy will be required to report:

- an attestation that each qualified employee had been involuntarily terminated;
- the amount of payroll taxes offset by the subsidy and an estimate of future payroll taxes that will be offset; and
- each covered person's taxpayer identification number, the amount of the subsidy attributable each covered person, and a designation as to whether the subsidy was for one or two or more individuals.

Another Point to Keep in Mind: HIPAA Notice

Most large health plans (those with receipts in excess of \$5 million) must remind participants of the notice of privacy practices early this year. These plans were required to first issue a notice by April 13, 2003. HIPAA requires health plans to inform participants that the HIPAA privacy notice is available and how to obtain it. This reminder must occur at least once every three years.

If the health plan is self-insured, the employer should issue the reminder. If the health plan is fully insured, the insurance company should issue the reminder.

For further information, please contact any member of our Employee Benefits and Executive Compensation Practice: <http://www.kattenlaw.com/employeebenefits/> (click "Professionals").

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