



COBRA Provisions in the American Recovery and Reinvestment Tax Act of 2009 ("the Act") -- Effective February 17, 2009

The new law affects employers whose group health plans are subject to COBRA, which includes all employers with 20 or more employees.

The Act provides a 65% government subsidy of COBRA premiums to employees who are involuntarily terminated between September 1, 2008 and December 31, 2009. The subsidy also applies to health care continuation covered if required by states for small employers.

Employers must first provide payment and then be reimbursed by the government.

Details of the Act include:

- The government will provide a 65% subsidy for up to 9 months of the COBRA premium effective **March 1, 2009** for employees who have been involuntarily terminated (for reasons other than gross misconduct) between September 1, 2008 and December 31, 2009 and must be eligible for COBRA.
- The subsidy is not retroactive, but will continue for up to 9 months beginning on or after March 1, 2009.
- Persons who elected COBRA prior to the enactment of the Act (but on or after September 1, 2008) will be eligible to receive the subsidy prospectively from the dates of enactment through the maximum nine-month period. Otherwise, eligible persons who did not elect COBRA between September 1, 2008 and the date of enactment will have the opportunity to elect COBRA on a prospective basis with the maximum duration of the coverage dating from the date that they could have first elected COBRA. Employers or plans will have to provide notice to this group of individuals.
- A group health plan or insurer must refund the individuals any COBRA premiums that subsidy-eligible persons paid on or after the date of enactment in excess of 35% of the premium. This may be in the form of a reimbursement payment or credit against future premium payments due.
- The subsidy terminates at the earlier of (a) 9 months; (b) eligibility for other employer health coverage; (c) Medicare eligibility; (d) the end of the maximum COBRA coverage period required by law; or (e) for those elected COBRA during the special election period, the end of the COBRA period starting from the initial time period when the employees could have elected COBRA. A former employee who does not notify the employer of (b) or (c) above is subject to a penalty of 110% of the premium reduction.
- The employer pays 65% on the employee's behalf and is then reimbursed by the government.
- Employer reimbursement may be made by the employer taking a credit against its liability to deposit payroll taxes and federal income taxes withheld from the employees' compensation.



- The subsidy is based on income. Joint filers with \$250,000 or more of modified adjusted gross income and all other filers with \$125,000 or more of modified adjusted gross income are *not eligible* for the *full* subsidy. The *subsidy is phased out completely* for persons with modified adjusted gross incomes of \$290,000 joint or \$145,000 for other filers. The subsidy is not considered income as long as the beneficiary meets the income tests. Excess amounts of subsidy over the amount the person is entitled to by incomes will be added to the person's federal tax return. However, taxpayers reaching these thresholds can permanently waive their right to a subsidy to avoid this issue, thus the taxpayer would simply pay the full COBRA premium charged.
- If an employer allows, employees may elect coverage different than that in effect of termination. The new plan option must be made within 90 days of receipt of the COBRA election notice, must have the same or lower premiums and must be available to non-COBRA active employees under the plan.

The subsidy becomes effective March 1, 2009.

Within 60 days after the Act becomes law *Employers* must:

- Provide modified election notices or separate supplemental notices to all employees who became entitled to elect COBRA continuation coverage during the period beginning September 1, 2008 and ending on December 31, 2009.
 - ◆ the option to enroll in a different coverage,
 - ◆ forms needed for establishing eligibility for the subsidy,
 - ◆ duration of COBRA, and
 - ◆ information regarding the individual's obligation to notify the plan upon becoming eligible for another group health plan or Medicare.

(The Department of Labor, Treasury and Health and Human Services are working together to provide a model notice within 30 days of enactment.)

The former employees who have not yet elected COBRA will have 60 days after receiving this notice to elect coverage. However, the COBRA coverage *will not be retroactive*.

COBRA coverage *will not be extended* and will instead terminate at the same point if would have if the former employee had elected COBRA when it was made first available.

Failure of the Employer to provide notices would be a COBRA violation and subject to the standard COBRA penalties of up to \$110 a day under ERISA. Additionally, there could be adverse tax consequences under the Internal Revenue Codes, which can impose excise taxes of \$100 per day per notice on the plan administrator.

If you utilize a third party administrator for COBRA, you must contact them immediately to work on some of these matters; however, other decisions and procedures must be put into place by the employer and its payroll systems.

IF YOU HAVE QUESTIONS, PLEASE CONTACT JOHN W. SELTZER AT 412-246-0534.

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