

## **Stimulus Bill Enacts New COBRA Subsidy Provisions**

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The American Economic Recovery and Reinvestment Plan of 2009 (commonly referred to as a Stimulus Plan) was signed into law on February 17, 2009. The Plan imposes two new COBRA compliance obligations on employers who provide COBRA coverage: 1) a COBRA premium subsidy and 2) a "second chance" COBRA election period. This new law applies to all public and private health insurance plans currently subject to COBRA and the requirements are generally effective for COBRA premiums charged on or after March 1, 2009.

The subsidy for COBRA premiums is available for "Assistance Eligible Individuals" (AEIs). An AEI is any employee or dependent who loses coverage under a group health insurance plan as a result of an "involuntary termination" of employment between September 1, 2008 and December 31, 2009. An AEI is eligible for the COBRA Subsidy if the individual is otherwise entitled to COBRA and is not eligible for either Medicare or other group coverage.

The COBRA Subsidy allows AEIs who pay 35% of their COBRA premiums to be treated as if they paid the full amount of the health insurance premium. The remaining 65% of the AEI's health insurance premium is funded through a Federal payroll tax credit available to employers. It is important to note the Subsidy is only applicable for the amounts actually paid by the AEI or paid on behalf of the AEI by someone other than the employer. For example, if an employer pays 100% of a former employee's health insurance premium, the employer cannot claim any COBRA Subsidy credit for the amount paid on the employee's behalf.

The new COBRA Subsidy applies only to premiums for health insurance coverage beginning on or after March 1, 2009. The COBRA Subsidy is available for up to nine months, but will end earlier if the AEI becomes eligible for other group coverage, Medicare, or when the AEI's maximum COBRA period expires. The COBRA Subsidy is also subject to income limitations, for AEIs whose adjusted gross income falls between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers). In these circumstances, the Subsidy will be recaptured as an additional Federal income tax to the AEI, to the extent adjusted gross income limitations are exceeded. In order to avoid the additional tax, AEIs must be given the opportunity to waive their right to the COBRA Subsidy.

Employers are obligated to provide notice of the COBRA Subsidy to all AEIs who become qualified COBRA beneficiaries between September 1, 2008 and December 31, 2009. This will include any AEI who has become eligible for COBRA since September 1, 2008.

The new COBRA regulations also require a "Second Chance" COBRA Election for AEIs who either 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 premiums). These individuals must be given an additional opportunity to elect coverage. Under the new rules, the "Second Chance" COBRA Election Notice must be provided by April 18, 2009. However, April 18, 2009 is a Saturday, so, for most employers, the notice should be sent out by April 17, 2009.

The Department of Labor has been ordered to provide additional guidance and sample forms by March 17, 2009. In the meantime, employers should consider doing the following:

1. Identify individuals who were COBRA eligible as of September 1, 2008 due to an “involuntary termination” of employment. Keep in mind this group of individuals may change if the Department of Labor issues further guidance defining exactly what constitutes an “involuntary termination.”
3. Set up procedures for determining participant premium overpayments and crediting overpayments to future premiums or returning the overpayments directly to the participants.
4. Set up procedures for reporting and crediting for the Federal payroll tax.
5. Develop the processes and procedures necessary to end the COBRA Subsidy when the participant is no longer eligible to claim it and reinstate 100% COBRA premium charges if the individual continues to be eligible for COBRA at the expiration of the Subsidy.
6. In light of the Subsidy, review Severance Agreements which subsidize COBRA premium payments by the employer.
7. If you have a self-insured health insurance plan, consider whether it would be better to work with legal counsel now to send out notices, rather than waiting for the Department of Labor to provide election notices, to decrease the risk of adverse selection.

*This article should not be construed as legal advice and is intended for general informational purposes only. If you have any questions regarding this article, you should consult your legal counsel.*