

MEMORANDUM
2009-5
COBRA Premium Subsidy Frequently Asked Questions
February 26, 2009

In the last few days we have received numerous questions regarding the COBRA premium subsidy requirements contained in the American Recovery and Reinvestment Act of 2009 (ARRA). Although many of the answers to these questions appear in the actual text of the new law, some of these questions can only be answered with any certainty upon publication of additional official guidance. We expect that guidance by mid-March. The purpose of this Memorandum is to provide answers drawn from the law itself. With respect to others we will provide our best answer based on what we know today. In these instances, if necessary, we will publish additional information.

Which Business Organizations are Subject to the New law?

- 1) **Federal Law.** The law applies generally to all plan sponsors with group health plans subject to federal COBRA: Employers or organizations with 20 or more employees on a typical business day in the preceding calendar year.
- 2) **Church Exception.** The law does not apply to church plans.
- 3) **State Law.** The law applies to all comparable continuation of health coverage provisions under state law. Since California COBRA is applicable to groups with 2-19 employees and since its rules, with minor exception are the same rules as federal COBRA, the law applies to Cal-COBRA. Similarly, small group health care continuation laws in other states may be subject to the new subsidy rules.

Who is an Assistance Eligible Individual?

- 1) **Assistance Eligible Individuals.** Assistance Eligible Individuals (Eligible Individuals) are any Qualified Beneficiary who becomes eligible for COBRA coverage on or after September 1, 2008 and before January 1, 2010 through involuntary termination of employment which results in the loss of coverage. This includes spouses and dependents of employees covered under the health plan at the time of the Qualifying Event who would also lose coverage due to the Qualifying Event. If the covered employee dies while on COBRA, coverage will remain in place for the remaining Qualified Beneficiaries. It's important to note that the Qualifying Event relates only to loss of coverage as a result of loss of employment.
- 2) **Pre-September Terminations.** An individual whose COBRA Qualifying Event and loss of coverage was prior to September 1, 2008 who elects COBRA is not eligible for the subsidy even though he/she is on COBRA as of September 1, 2008.
- 3) **WARN Act.** Individuals who have been notified pursuant to the WARN Act prior to September 1, 2008 but whose employment terminates after September 1, 2008 will be eligible for the subsidy.
- 4) **Severance Agreements.** Employees who terminate pursuant to a severance agreement may or may not be eligible for the subsidy dependent upon the date specified in the severance agreement as the date employment terminates. Some agreements also provide health care continuation coverage for a fixed period at the employer's cost. Others provide for a temporary subsidy only if the employee elects COBRA. For periods after March 1st, the premium payable will only be 35% of the employee's remaining contribution amount.
- 5) **Bargaining Agreements.** Some union bargaining agreements specify an employer provided or subsidized period of health coverage following termination of a union member's employment. If the termination occurs on or after September 1, 2008 and before December 31, 2009, then it is likely that the individual will be eligible for the subsidy based on the timing and amount of the

union extended coverage. The individual's premium will be 35% of the remaining contribution amount.

- 6) **Domestic Partners.** Since federal law does not recognize domestic partners as an eligible class for purposes of COBRA, the subsidy will not be available to the domestic partners of eligible individuals. Since the subsidy is being provided pursuant to federal law, the subsidy also will not be available under state law COBRA rules even though the state law mandates continuation coverage for domestic partners.
- 7) **Trade Assistance Act Recipients (TAA).** The TAA subsidy is increased from 65% to 80% through December 31, 2010. However, the Secretary of Treasury may postpone this change until August 17, 2009 (6 months after enactment). We will discuss all the changes to this law in a separate update.

What Constitutes an Involuntary Termination?

- 1) **Termination of Employment.** Despite the regular COBRA rules which also would provide COBRA coverage to individuals who lose health coverage as a result of a reduction in work hours, the new COBRA law applies only to individuals (and eligible family members) who terminate employment and lose health coverage as a result. We previously wrote that the new law may extend to individuals who lose coverage due to reduction in work hours. IRS officials have provided informal clarification that the new rule is only applicable to individuals whose loss of coverage is as a result of termination of employment.
- 2) **Eligible for Unemployment.** The basic rule is the termination would be considered "involuntary" if the employee becomes eligible for unemployment.
- 3) **Involuntary Termination.** The following is a list of terminations which are considered involuntary:
 - a) Non-satisfactory job performance;
 - b) Elimination of position;
 - c) Mutual agreement that the employee should resign for the good of the parties;
 - d) Individuals on disability;
 - e) Teachers contract: Not rehired for next school year;
 - f) Mass reduction in work force (end of WARN period); and,
 - g) Project employees on completion of project

What Constitutes Gross Misconduct?

- 1) **Case Law.** The COBRA rules contain no definitive definition of gross misconduct. Case law tends to define it as "almost" criminal behavior acts such as embezzlement, fraud, grand larceny and the like.
- 2) **Lesser Offenses.** Similarly, not showing up for work, tardiness, or verbal abuse of co-workers in and of themselves in most cases are not severe enough to be treated as gross misconduct despite their being offensive. A breach of confidence would not be gross misconduct; however, a breach of the terms of a confidentiality agreement would be, under most circumstances.

Can High Income Individuals Receive the Subsidy?

- 1) **Assistance Eligible.** Although they may be otherwise eligible for assistance, if they receive a subsidy it will be recovered through their individual income tax filings, as a tax liability.
- 2) **Standards.** Here are the rules:
 - a) Individuals whose modified adjusted gross income exceeds \$125,000 (\$250,000 for joint filers) in the year in which they receive the subsidy will undergo a subsidy reduction;
 - b) If income exceeds \$145,000 (\$290,000 for joint filers) then zero subsidy;

- c) If subsidies paid, then adjustments made on taxpayers income tax filing;
- d) The decision to accent the subsidy is at the discretion of the employee not the employer.
- 3) **Waiver.** High income individuals can elect to waive the subsidy by providing written notice, thus avoiding the income tax issues. It is important to note that the waiver operates for both tax years if the subsidy is payable in the second year. The waiver cannot be unwound.

What is the Subsidy?

- 1) **In General.** An Employer subsidizes 65% of COBRA premium (102% of plan rate) for up to nine months beginning on or after March 1, 2009 (66.3 / 35.7).
- 2) **Effect of Employer Voluntary Subsidies.** In the event that the employer has agreed to subsidize COBRA for a period of time (such as a part of a RIF under the WARN Act) the employee's premium will be 35% of the balance due for periods beginning on March 1, 2009 for the remaining periods. If the employer's voluntary subsidy ceases, then the eligible individual will remit 35% of the full COBRA amount due.
- 3) **Calculating the Full COBRA Premium.** To calculate the COBRA premium, the employer / insurer would use the following factors:
 - a) Rate Class: Single, employee + 1, employee + family, etc.
 - b) COBRA Benefit Election: Medical only, Medical plus dental, vision, etc.

Although regular COBRA allows IRC Section 125 Health Care Expense Accounts to be included, the new law does not.

- 4) **Voluntary Plans.** Even though the employee may pay the full cost of an employer sponsored health plan, eligible individuals will only need to pay 35% of the full COBRA premium (102%).
- 5) **State Law Continuation of Health Care Plans.** It is becoming clear that the intent of Congress is to ease the burden on small group employers. California, as well as other states with similar plans, provides that the insurance carriers collect COBRA premiums. As a result, it is the insurance carrier who pays the 65% at the time the eligible individual pays his /her 35%. To the extent the carriers cannot use credits against payroll taxes, the federal government will provide reimbursement to the carriers.
- 6) **Mini-Meds.** To the extent that the mini-med plan constitutes a health care plan subject to COBRA, the new subsidy law will apply as it does for regular group health plans.

What is Alternative Coverage?

- 1) **In General.** Employers are not required to offer a health plan alternative in lieu of the health plan coverage in effect for the eligible individual at the time of the Qualifying Event.
- 2) **Requirements.** The alternative plan must meet the following requirements:
 - a) Premium must be less than the premium for the coverage available as COBRA, AND
 - b) Must be a Plan currently offered to active employees, AND
 - c) A plan for these purposes does not include:
 - i) A plan providing only dental, vision, counseling or referral services (or a combination of the foregoing);
 - ii) A health FSA; or,
 - iii) Coverage for treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of that type of care).

When does the Subsidy Begin or End?

1. **In General.** The subsidy has a duration of up to nine months from the first period of subsidy coverage. The first period must be no sooner than March 1, 2009 and no later than December 31, 2009.
2. **Elections.** For the subsidy benefit to start, the plan sponsor or plan administrator (TPA) must receive a completed election form from the eligible individual. It is not automatic. The first period subsidized will be the month following the date which the election is received.
3. **Special Rule.** If the eligible individual lost coverage on or after September 1, 2008 and before March 1, 2009 and paid COBRA premiums, then amounts paid for periods beginning March 1, 2009 or later will be subject to the subsidy, even though the election is made in within 60 days of the special subsidy notice. The individual can receive a credit for the amounts paid in excess of 35% or receive reimbursement at the discretion of the plan sponsor. If the individual was less than 6 months in which to use the credit, then the plan sponsor must reimburse the individual.
4. **Subsidy's Ending.** The subsidy will end upon the earliest of the following events:
 - a. Eligibility for another group health plan or Medicare;
 - b. Failure to pay 35% when due;
 - c. End of nine months of subsidy payments; or,
 - d. End of statutory COBRA eligibility;
5. **Duty to Report.** The eligible individual has a duty to report to the subsidy payer when he/ she first becomes eligible for other group coverage or Medicare (such as an open enrollment on his / her spouse's plans). Failure to report will result in tax penalty of 110% of the subsidy for each month of non-eligibility.
6. **Subsidy Rights Denied.** In the event that an individual is denied subsidy rights, the new law allows a direct appeal to either the Department of Labor (DOL) or to the Department of Health and Human Services (HHS) specifically for public agency plans. DOL and HHS must, in turn, rule on the appeal within 15 business days. If the appeal is denied, the individual could then sue under ERISA §502(a)(3) for treatment as a subsidy-eligible individual, but the Act provides that the reviewing court is required grant deference to DOL's or HHS's determination.

How does the Tax Credit Work?

- 1) **In General.** The plan sponsor may offset the full amount of the subsidy as a credit against income withholding as well as the employer and employee taxes paid to the federal government.
- 2) **Reports.** Employers will need to file a report to accompany the claim for credits. The report must include an attestation of the involuntary termination of the covered employees, the calculation of the credits, a report of estimated subsidies for the next reporting period, the SSNs of covered employees, the amount of the subsidy provided to each individual, and information as to whether the subsidy provided was for individual or family coverage. Regulations will provide details.
- 3) **Direct Reimbursement.** If the entity providing the 65% subsidy does not produce the W-2 or collect payroll taxes, the government will reimburse these entities directly. The regulations should provide details on the administration of this provision. The most common circumstances where the payer is not collecting payroll taxes include multi-employer (union) plans, and state continuation plans.

What are the New COBRA Subsidy Notice Requirements?

- 1) **In General.** Individuals who experience a COBRA Qualifying Event during the period beginning September 1, 2008 and ending December 31, 2009 must be notified of the availability of the premium subsidy and, if applicable, of the choice of new coverage options.
- 2) **Required Information:**

- a) A description of the subsidy;
 - b) A description of the extended election period available to subsidy-eligible individuals who do not have a COBRA coverage election in place as of the date of enactment;
 - c) A description of the individual's obligation to inform the plan if he or she becomes eligible for Medicare or another group health plan;
 - d) The forms necessary for establishing eligibility for the subsidy;
 - e) Contact information for the plan administrator;
 - f) A description of alternative COBRA coverage options, if the employer elects to provide these.
- 3) Model Notices. The DOL and HHS must provide model notices within 30 days of the law's enactment (February 17, 2009)
 - 4) Responsibility. The employer/ plan sponsor is responsible for producing the notice, even for small groups where the insurer does everything else.

When are Notices Due for Mailing?

- 1) In General. The notices must be mailed no later than 60 days following enactment to current assistance-eligible individuals. This makes the mailing deadline to be on or about April 18, 2009.
- 2) New Beneficiaries. Notices would be a part of the Qualifying Event / election notice and must be mailed within 44 days of the Qualifying Event or loss of coverage whichever is later.
- 3) Mailings. The mailing would be to the last known address of the affected individuals.
- 4) Recipients. The law specifically requires the notice be sent to all individuals who have COBRA rights as a result of an involuntary termination of employment between September 1, 2008 and December 31, 2009.
- 5) Election Due Date. Assistance-eligible individuals must make their elections no later than 60 days from the date they receive their special notice of subsidy option. In the event the employer offers an alternative plan, the assistance-eligible individual will have 90 days from the date the notice is received to make an election.
- 6) Premium Due Dates. Newly eligible COBRA beneficiaries must pay their 35% either within 45 days of their election or in the event the assistance-eligible individual is already on COBRA, then 35% premium would be due for the first monthly premium period following the election.

Once regulations are published we will provide you with additional information.

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