

# COBRA Briefing



# The American Economic Recovery and Reinvestment Plan's New COBRA Provisions

## FAQ for Employers and COBRA Plan Administrators

The COBRA amendments included in the recently passed American Economic Recovery and Reinvestment Plan require the attention of every HR professional responsible for benefits. The legislation provides a premium subsidy for health care continuation coverage under existing COBRA provisions for those who experienced an involuntary termination. It also provides for a new election period for individuals whose employment was involuntarily terminated on or after September 1, 2008. While some of the details have yet to be worked out, the changes take effect immediately, and all group health plans will need to take steps to comply. This COBRA briefing covers the top 11 COBRA changes necessary plus FAQs regarding these new COBRA provisions.

### Requirements of the American Economic Recovery and Reinvestment Plan

The American Economic Recovery and Reinvestment Plan (ARRA) provides a premium subsidy for health care continuation coverage under the existing provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA) and mandates an extension of the election period for individuals who were involuntarily terminated from their employment on or after September 1, 2008 but prior to February 17, 2009. Group health plans need to comply on or before April 18, 2009 with the Notice requirements in ARRA. This summary provides information about how WageWorks will assist COBRA clients with these obligations.

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## FAQs Regarding the Government's New COBRA Provisions

### 1. Who is eligible for premium assistance?

The following individuals are entitled to a premium reduction (referred to as "assistance eligible individuals" or "AEIs"):

- i. any COBRA qualified beneficiary that became eligible for COBRA continuation coverage during the period beginning September 1, 2008 and ending December 31, 2009;
- ii. who elected COBRA; and
- iii. whose qualifying event was an involuntary termination.

For the purpose of this FAQ, individuals who would be AEIs but for the fact that they have not yet elected COBRA are also referred to "AEIs". **This means that a Qualified Beneficiary who meets the above conditions (i) and (iii) but who declined COBRA, is in their election period, or let their coverage lapse is also considered an AEI.**

### 2. Who is eligible for an extended COBRA election period?

AEIs who, as of February 17, 2009, have not elected COBRA, or who elected COBRA but let it lapse prior to February 17, 2009 are entitled to an extended COBRA election period and must be sent a COBRA election notice that includes the additional notices explained further below.

### 3. What are the special enrollment rules?

All AEIs are entitled to elect a coverage option that is different from the coverage under the plan in which the individual was enrolled when the qualifying event occurred, *provided that the employer makes such an option available*. Employers are not required to offer any option other than the coverage in which the qualified beneficiary was enrolled at the time of the qualifying event. Employers that choose to allow AEIs to switch coverage options must make sure such coverage satisfies these additional mandatory requirements:

- the premium for the other coverage option(s) cannot exceed the premium for the coverage in which the qualified beneficiary was enrolled at the time of the qualifying event;

- the employer must be offering this “different” coverage to active employees;
- the “different” coverage cannot be limited to only dental, vision, counseling, and/or referral services; cannot be a health flexible spending arrangement; and cannot be 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; and
- The election period is at least 90 days. Note that this election period requirement is longer than the normal 60-day election period.

This provision creates significant complexities for employers, including additional reporting requirements and differing election periods. As a result, most employers will likely NOT offer different coverage options.

**4. When does the special extended election period begin, and when must election notices be provided?**

The special election period commenced on February 17, 2009 and it ends *60 days* after the election notice is provided. However, if the employer allows individuals to switch coverage options, it appears that the election period is increased from 60 to 90 days. In addition, this extension would only apply 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. We believe that this dual election period could create significant confusion and that this may be one reason plan sponsors decide to forgo adopting this special enrollment provision. In either case, the election notice must be provided within 60 days after the February 17<sup>th</sup> enactment date (on or before, *April 18, 2009*).

**5. How will the total COBRA coverage period be measured under the special extended election period rules?**

If elected, the COBRA coverage commences with the first period of coverage beginning on or after February 17<sup>th</sup> (which will be March 1, 2009 in most cases), and not back to the date of the event (unless the election is made within the AEI’s original election period); however, the COBRA period is measured from the date of the original qualifying event. So, for example, if an individual became eligible for COBRA on September 1, 2008 but did not elect COBRA until February 17<sup>th</sup>, 2009 (assume the first period of coverage would begin March 1, 2009), then measurement for the 18-month COBRA continuation coverage period (assuming no extensions apply) would begin on September 1, 2008, even though coverage did not become effective until March 1, 2009. The gap between the event and the coverage effective date is not considered a break in coverage for purposes of HIPAA’s pre-existing limitation rules.

**6. When does the period of premium assistance begin and end?**

For periods of coverage beginning on or after February 17, 2009 (most likely March 1, 2009), AEIs need only pay 35% of the total COBRA premium. AEIs are entitled to the premium assistance for up to nine months; however, their entitlement ends if they become *eligible* for other group health coverage or for benefits under title XVIII of the Social Security Act (*i.e.*, Medicare). Thus, an AEI may lose the subsidy if they become eligible for other coverage yet still be entitled to continue coverage under COBRA if they do not elect the other coverage. Also, premium assistance ends when the COBRA coverage period expires, or COBRA coverage terminates early for some other reason.

**7. What additional notification must be included with regard to the premium assistance?**

A special notice explaining the premium reduction, any available opportunity to switch coverage options (if allowed by the employer), and the other required information detailed below must be sent to all AEIs on or before April 18, 2009 (60 days after the February 17<sup>th</sup> enactment date), or else the plan administrator will be treated as not having met the COBRA election notice obligations. Going forward, *all* qualified beneficiaries (regardless of whether termination was voluntary or involuntary) who experienced a qualifying event on or after February 17, 2009 through December 31, 2009 must be sent this special notice along with their election notice, even though only those whose qualifying event was involuntary termination will be eligible for the premium assistance. This special notice can be a separate document or can be incorporated into the COBRA election notice.

#### 8. How will employers know if an AEI is “eligible” for other coverage?

The AEI is responsible for providing timely written notice to the group health plan providing the COBRA continuation coverage regarding eligibility for Medicare or other group health coverage. Failure of the AEI to provide such notice is punishable by a penalty equal to 110% of the subsidy received after becoming eligible for such other coverage, unless reasonable cause rather than willful neglect can be shown to be the cause of such failure to notify. At this time, the Secretary of Labor has not specified the time and manner of notice but we will keep you updated on this issue as it develops.

#### 9. What if an AEI overpays?

If an AEI pays the full premium with respect to the first or second consecutive period of COBRA continuation coverage that commenced on or after February 17<sup>th</sup>, you must either reimburse the individual for the amount of premium that exceeds 35% of the total premium or provide a credit for such amount that reduces one or more subsequent premium payments. If the credit method is used, such credit must be used within 180 days. If at any time during the 180-day period it is reasonable to believe that such credit will not be used, payment equal to the remaining credit must be made within 60 days.

#### 10. How does the employer obtain reimbursement for the 65% subsidy?

The employer will receive reimbursement of 65% of the premium in the form of an offset in the amount of payroll tax due by the amount of subsidy reimbursement. The employer must file a claim for reimbursement with the IRS through the Quarterly Federal Tax Return, Form 941.

*Important note for employers that offer continuation coverage to same-sex domestic partners:* The subsidy is only available for “qualified beneficiaries” as defined in ERISA 607(3), which includes only the employee, the employee’s spouse (as defined by federal law), and the employee’s dependent child. Although not addressed directly in ARRA, the likely result here is that for purposes of the domestic partner’s independent right to elect COBRA (*i.e.*, if the domestic partner wants to elect COBRA but the covered employee does not), he or she will not meet the federal definition of “spouse” and consequently will not be eligible for the premium assistance. Also note that dependents added after COBRA has been elected (*e.g.*, through marriage) are not “qualified beneficiaries”.

#### 11. What if the employer is subsidizing a qualified beneficiary’s COBRA premium?

The premium assistance is tied to the “amount of premiums not paid by assistance eligible individuals *by reason of* ARRA.” However, the term “premium” is not defined in ARRA, which leads to two possible interpretations of this provision.

Our view (and one that has been confirmed with authors of ARRA) is that the “premium” referenced in ARRA refers to the amount to be paid by the qualified beneficiary. In support of this view we note that ARRA specifically states that the AEI will be deemed to have paid 100% of the premium so long as the AEI pays or anyone other than the AEI’s employer pays on the AEI’s behalf, 35% of “such premium”. The effect of reading “such premium” to mean “any amount owed by the AEI other than amounts paid by the AEI’s employer” rather than the “applicable premium” is that the AEI need only pay 35% of whatever their obligation is. For example, if the employer is paying a portion of the individual’s COBRA premium—say 80% on a \$1,000 premium as in the example above—then the AEI only needs to pay 35% of \$200 (\$70), and the other 65% (\$130) will be reimbursed to the employer. No Subsidy, however, would be reimbursed for the \$800 that the employer paid on the AEI’s behalf.

Another view is that “Premium” may refer to the “applicable premium” as defined in COBRA as the “cost to the plan” with regard to a period of coverage, “without regard to whether such cost is paid by the employer or employee.” Under this interpretation it would seem that the Subsidy is available only if an AEI is already paying *more* than 35% of the “applicable premium”. So, for example, if the “applicable premium” is \$1,000, and the employer subsidizes 80%, then the employee is not eligible for the Subsidy because the employee is already paying only 20% of the “applicable premium”. Under either interpretation employers who are paying 100% of a qualified beneficiary’s COBRA premium will not be entitled to any payroll tax offset for such individual. Thus, employers considering subsidizing COBRA coverage for employees (*e.g.*, in connection with a termination or reduction in force program) may wish to reconsider in light of the possible impact on the premium Subsidy.

The IRS has established a special website page to provide information for employers and individuals regarding the provisions. The link is:

<http://www.irs.gov/newsroom/article/0,,id=204505,00.html>

The Department of Labor has also created a special website page with additional information. The DOL link is:

<http://www.dol.gov/ebsa/COBRA.html>

Additional questions about ARRA's impact on COBRA can be directed to your Client Services Team or [compliance@wageworks.com](mailto:compliance@wageworks.com)

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## About WageWorks

WageWorks is the nation's largest independent provider of consumer-directed benefits solutions for employers. Our forward thinking solutions combine technology and service to bring out the best in tax-advantaged benefits and incentive programs. The result is health care and dependent care, commuter, retiree benefits and wellness plans that are as easy for benefits professionals to administer as they are for employees to use. More than 100 of America's Fortune 500 employers and millions of their benefits-eligible employees use WageWorks' programs.

## About WageWorks Dedicated COBRA Solutions

WageWorks' platform provides employers with one comprehensive solution for all aspects of COBRA operation, from implementation and ongoing account management to financial reporting. WageWorks effectively manages all aspects of COBRA administration, from the day-to-day processing of notices and payments to managing participant inquiries and ensuring 100% compliance with complex regulatory and legislative requirements and changes as they occur. WageWorks assumes the burden for all COBRA administration and non-compliance risk, leaving your clients with the freedom to focus on their organizations' critical requirements.

**Want more information about the new COBRA regulations or WageWorks' administrative solutions?**

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