

Roadmap for Compliance with COBRA Subsidy Provisions Included in the Stimulus Act

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COBRA Subsidy (Generally)

- American Recovery & Reinvestment Act of 2009 (Act)
- Revises and expands current COBRA provisions
- Downturn in economy will cause increased layoffs...which can lead to an increase in uninsureds

COBRA Subsidy (Generally)

- Provides government assistance
- For “health” coverage
- In the amount of 65% of “such premium”
- For employees who are “involuntarily terminated”
- Between September 1, 2008 and December 31, 2009

COBRA Subsidy (Generally)

- Provides a “second chance” for those involuntarily terminated between September 1, 2008 and February 16, 2009, to elect COBRA (special enrollment)
- Limited HIPAA implications
- Generally effective March 1, 2009

COBRA Subsidy

(RED ALERT)

1. Identify “Assistance Eligible Individuals” (AEI) involuntarily terminated between September 1, 2008 and February 16, 2009.
2. Allow a special **extended election period** for these individuals who are not on COBRA as of February 16, 2009.
3. Send a special notice to all individuals in (1) above who are entitled to a special election period, AND all AEI’s who are on COBRA as of Enactment Date.
4. Determine whether to adopt “other coverage” option.

COBRA Subsidy (AEI)

- A qualified beneficiary (QB) eligible for COBRA by virtue of an **involuntary termination**
- Occurring between September 1, 2008 and December 31, 2009
- (For reasons other than gross misconduct)

COBRA Subsidy (AEI)

AEI includes:

- Employee
- Employee's spouse (as defined under **federal law**)
- Employee's dependant child (as defined by the **plan**)

COBRA Subsidy (AEI)

- Employee does not have to elect COBRA for dependants to make an election
- Each individual (in the prior slide) has an independent right to elect COBRA, and access the subsidy

COBRA Subsidy (AEI)

- AEI does **not** include
 - Domestic Partners (same or opposite sex)
 - Anyone who is not a covered dependant child
- Because they do not meet the definition of “qualified beneficiary” for purposes of federal COBRA law.

COBRA – Special Election Period

- Must be extended to individuals who would be AEI's, but for the fact that they have:
 1. Yet to elect COBRA
 2. Elected COBRA, but lost coverage prior to the Enactment Date

COBRA – Special Election Period

- If election is made by virtue of this special election period (and not within the individual's original COBRA election period) COBRA will:
 1. Only reach back to the period of coverage beginning on or after the Enactment Date (March 1).
 2. And the maximum COBRA period will be measured from the date of the original qualifying event.

COBRA – Special Election Period

- Any break in coverage arising prior to the Enactment Date is **NOT** considered a break in coverage for purposes of HIPAA's creditable coverage rules.
- HIPAA certificates issued for such individuals must reflect this rule.

COBRA – AEI Appeal Procedures

- Individuals who claim eligibility for the subsidy, but who are denied eligibility by the plan may:
 1. Appeal the denial to the DOL or HHS
 2. Who will review appeal within fifteen business days and provide final determination
 3. Sue under ERISA if appeal is denied

COBRA Subsidy – The Amount

- 65% of the amount required to be paid by the AEI
- AEI is deemed to have “paid in full” by remitting 35% of “such premium”
- The employer, plan or insurer covers the government subsidy until such time as the government reimburses the applicable entity for its share of the COBRA subsidy

COBRA Subsidy – The Amount

- If AEI pays full premium (100%) with respect to the first or second consecutive period of COBRA continuation that commences on or after Enactment Date (because employer, plan or insurer was not prepared to comply), entity entitled to reimbursement from government must either:
 1. Reimburse the individual for the amount of premium that exceeds 35% of total premium, OR
 2. Provide a “credit” for such amount that reduces one or more subsequent premium payments (to be used within 180 days)

COBRA Subsidy – The Amount

- Keep in mind that the subsidy applies against the amount of premium **paid by the AEI**.
- If the ER is paying a portion of the COBRA premium, the subsidy is reduced.

COBRA Subsidy – The Amount

Example

- ER agrees to pay 70% of \$1,000 monthly family COBRA premium, or \$700. EEs portion would be \$300.
- EE would pay 35% of \$300, or \$105.
- The subsidy, later reimbursed to the ER, would be \$195.....not \$650.

COBRA Subsidy – The Amount

- ERs considering subsidizing COBRA coverage's for employees (in connection with a termination or a reduction in force program, may wish to reconsider, in light of the possible impact on the subsidy.

COBRA – Subsidy Amount (HC EEs)

- AEs earning more than \$145,000 (\$290,000 for joint returns) will have their income tax increased by the **total amount** of subsidy they receive
- AEs earning between \$125,000 - \$145,000 (\$250,000 - \$290,000 for joint returns) will have their income tax increased by a **percentage** of their subsidy received in that year

COBRA – Subsidy Amount (HC EEs)

- HC EEs can avoid “recapture” by “**permanently**” waving their rights as AEIs
- AEI must inform the plan of such intention
- If permanently waived the subsidy cannot be claimed in subsequent year

COBRA – Claiming the Subsidy

- Entity entitled to the subsidy could be:
 1. In the case of MEWA, the plan
 2. An ERISA plan, the employer plan sponsor
 3. All others, the insurer (rare)

COBRA – Claiming the Subsidy

- Reimbursement in the form of an **offset** in the amount of payroll tax (FICA) due.
- Entitled entity must file a claim for reimbursement with IRS when they submit payroll taxes.
- Current process being developed. Contact your payroll administrator.

COBRA – Claiming the Subsidy

- Entitled entity must satisfy the following requirements and attestation.
 1. Attestation to the involuntary termination,
 2. A report of the amount of payroll taxes offset for the reporting period, and
 3. A report containing the tax identification numbers (SS#) of all covered employees, amount of subsidy with respect to each EE and QB, and designation as to single or family coverage.

COBRA – Subsidy Duration

- Up to 9 months
- Entitlement date ends if they merely become “eligible for” certain other group health coverage or medicare
- AEI may lose subsidy, but continue on COBRA if they do not elect other available coverage

COBRA – (Optional) Special Enrollment Rules

- Employer may (but does not have to) make AEs eligible to elect a coverage option (assuming there is more than one option) that is “different” from the coverage under the plan in which the individual was enrolled at the time of the qualifying event.

COBRA – (Optional) Special Enrollment Rules

- This is contrary to current COBRA law that allows QBs to initially elect only the same coverage they maintained prior to the qualifying event.

COBRA – (Optional) Special Enrollment Rules

- If ER decides to offer this option, there are 3 mandatory requirements:
 1. Premium for “different” coverage cannot exceed premium for current plan of enrollment;
 2. “Different” coverage must be offered to active employees;
 3. “Different” coverage cannot be:
 - Only dental, vision or EAP
 - Flexible spending account
 - On-site medical facility

COBRA – (Optional) Special Enrollment Rules

- Upon notification of this opportunity (if ER chooses), AEs must be given **90 days** to make such an election, from the date of the notice of such plan enrollment option.
- We do **not** recommend that employees select this option, as dual election periods will create significant confusion.

COBRA – Administrative Notice Requirements

Two (2) separate categories of notice recipients:

Group #1 – AEs who experience a qualifying event on or after the enactment date (February 16, 2009) but prior to December 31, 2009

Group #2 – AEs who experience a qualifying event between September 1, 2008 and February 16, 2009

COBRA – Administrative Notice Requirements

For Group #1 – Revise COBRA election notice to include:

- Forms establishing eligibility for COBRA subsidy (such as confirming a highly compensated employee's waiver);
- Name, address and phone number of administrator or any other person with knowledge of premium reduction;
- A description of QB's obligation to notify plan if they become eligible for subsequent coverage, and a description of the penalty for failing to notify;
- Prominent description of the QB's right to the subsidy
- Description of special enrollment option (if selected by ER)

COBRA – Administrative Notice Requirements

For Group #2 – A notice revised to include:

- All of the items listed for Group #1, within **60 days of the Enactment Date**; plus
- A description of the special election period for those who have yet to make an election as of the Enactment Date
- And a clear statement that their COBRA will begin on March 1, 2009
- And that the 18 months will be measured from the date of the original qualifying event

COBRA – Special Enrollment Period

For AEs in Group #2 above:

- Upon notice of new subsidy rights (before May 1, 2009) they have 60 days to elect subsidized coverage
- If the notice is late, special election period continues until QB is provided the notice
- Plan administrator liable for late notice, same as usual COBRA rules

COBRA – Special Election Period

- If elected, coverage commences on March 1, 2009
- **NOT** back to the date of the qualifying event
- The **coverage period** (18 months) does relate back to the date of the qualifying event
- If QB, who would otherwise be an AEI, is still within their normal COBRA election period, and makes a timely election, they are **not** subject to the adjusted coverage period

COBRA – Roadmap to Compliance

1. Identify all AEs between September 1, 2008 and February 16, 2009, who have not elected, or have lost, COBRA
2. Determine if plan will offer the AEs a “different” coverage option, and the related special enrollment period for such election
3. Determine if you wish to wait on model notices (due within 30 days of enactment), or draft notices independently

COBRA – Roadmap to Compliance

4. Determine a strategy and a responsible party to send revised notices
5. Draft a subsidy waiver form for highly compensated employees, and an “attestation of eligibility” form for all individuals who will be entitled to the premium assistance
6. Revise HIPAA creditable coverage certificates for those who take advantage of the special election period (Group #2 above)

COBRA – Roadmap to Compliance

7. Develop a credit procedure if an AEI pays more than 35% during the first or second month of subsidized coverage
8. Develop procedure for calculating new premium structure, calculating the subsidy due in the form of a payroll tax offset, and the filing of a claim for subsidy
9. Review/amend plan documents, SPDs
10. Communicate with payroll administrator
11. Implement a procedure to notify AEI that premium subsidy is about to be exhausted (after 9 months)