The COBRA Premium Subsidy – What Employers Need to Know

Janie Oehlert, MEA Manager, Employee Benefits Services

April 9, 2009

The American Recovery and Reinvestment Act of 2009 (ARRA) signed by President Obama on February 17, 2009 included significant changes to the COBRA regulations. Below are the main points and required actions employers need to know and take:

What is the subsidy?

- "Assistance Eligible Individuals" (AEIs) will receive a COBRA subsidy of 65% of the COBRA premium for up to 9 months.
- An AEI will only need to pay 35% of the COBRA premium; the employer will need to remit the other 65% to the insurer and then take a credit on its payroll taxes through the quarterly Form 941 filing (http://www.irs.gov/newsroom/article/0,,id=204505,00.html).
- If the credit exceeds the amount of the payroll taxes owed, the US Dept of the Treasury will issue tax credits or refunds.

Who is considered an AEI?

- Anyone who is eligible for COBRA coverage anytime between September 1, 2008 and December 31, 2009; and
- elected COBRA during his/her original COBRA election period *or* elects coverage during his/her special 60-day election period as provided by ARRA (explained below); and
- is a qualified beneficiary because of an involuntary termination of the covered employee's employment that also occurred after September 1, 2008 and prior to December 31, 2009.

  NOTES:

  1) It is important to note that all three of the points above must be met in order to qualify for the subsidy. For example, if someone's loss of coverage falls within the required timeframe, but their termination of employment does not, they will not be eligible for the subsidy.

  2) The term "involuntary termination" is not defined by ARRA; at this point, it is only clear that "lay-off" is considered an involuntary termination, but death is not. Further, if a company is requesting volunteers for lay-off or retirement in order to avert mandatory lay-offs, those individuals who volunteer to go on lay-off or retire should be eligible for the subsidy. Being called to active duty from reserve status will not be considered an "involuntary termination", therefore, the subsidy will not apply. The IRS has clarified that an individual who loses coverage because they are out on disability is not eligible for the subsidy, however, if the employer terminates the employee while out on disability, they may be deemed eligible. Circumstances would need to be reviewed to make a determination.

  3) Domestic Partners are not considered qualified beneficiaries; therefore, they are not eligible for the subsidy.

- Income limits were imposed on subsidy eligibility. If a premium subsidy is provided to an individual, his/her spouse, or dependent(s) during a taxable year and the adjusted gross income exceeds $145,000 (or $290,000 for joint filers), the amount of the subsidy for all months in that tax year must be repaid. For those with adjusted gross incomes between $125,000 and $145,000 (or $250,000 and $290,000 for joint filers), the amount of the subsidy to be repaid is reduced proportionately.

  NOTE: Employers do not need to be concerned with determining if someone will exceed the imposed income limits; this provision will be the responsibility of the individual and the IRS.

What if an individual wants to decline the subsidy?

- Individuals are entitled to waive out of the subsidy by providing a written request to the plan. (Further guidance is forthcoming.)
- The waiver is permanent and cannot be revoked.

What is the time period for the subsidy?

- For group health plans using calendar months for COBRA coverage, the subsidy starts on March 1, 2009.
- The subsidy ends on the earliest of: 1) the date the AEI becomes eligible for coverage under another group health plan or Medicare; 2) nine months after the subsidy starts; or 3) the expiration of COBRA coverage (e.g., non-payment of premium, late payments, etc.)

What happens if someone takes the subsidy, but they weren't eligible because they were eligible for Medicare or another group health plan?

- It is the responsibility of the individual to notify the plan administrator when they are no longer eligible for the subsidy.
- If an individual takes the subsidy and it is found out later that they were not eligible due to eligibility for other group health coverage, they will have to pay a 110% tax on their Federal Income Tax Return on the subsidy amount they received while ineligible.
- If an employer knows that an individual is not eligible for the subsidy due to eligibility for Medicare or another group health plan, they should not allow the individual to take the subsidy. However, the penalty for non-compliance rests with the individual, not the employer.

What is the special election period?

- For those who are or would be an AEI but are not enrolled in COBRA coverage or elected coverage and then dropped it due to cost, with qualifying events that occurred between September 1, 2008 and February 16, 2009, they will be given another 60-day election period which will give them the opportunity to become covered by COBRA effective March 1, 2009.
- The special election period ends 60 days after the plan administrator provides the required notice to the AEI.
- Coverage would not be retroactive back to the original coverage termination date.

NOTE: The coverage period for an AEI who elects COBRA during the special election period will end based on the date of his/her original qualifying COBRA event. For example, an AEI who lost coverage on September 1, 2008 elected coverage effective March 1, 2009. His/her coverage will be scheduled to end 18 months from September 1, 2008, not March 1, 2009.

What coverage is eligible for the subsidy?

- The subsidy is available for COBRA eligible plans with the exception of health flexible spending accounts (FSAs).

What notification does the employer need to provide?

- Employers are required to notify all individuals who are currently covered under COBRA, as well as those who did not elect COBRA coverage during their first 60-day election period.

  NOTE: Notices must be provided to all individuals who terminated employment during the applicable time period, and not just to individuals who were involuntarily terminated.

- The Dept. of Labor (DOL) released the following model notices (available at http://www.dol.gov/ebsa/COBRAmodelnotice.html):
  - COBRA Continuation Coverage Election Notice (full version) – for qualified beneficiaries who have not yet received an election notice and with qualifying events occurring during the period that begins with September 1, 2008 and ends with December 31, 2009.
  - COBRA Continuation Coverage Supplemental Notice (abbreviated version) – for qualified beneficiaries currently enrolled in COBRA coverage with qualifying events that occurred on or after September 1, 2008 to advise them of the availability of the premium reduction.
  - Notice in Connection with Extended Election Periods – for qualified beneficiaries who are or would be an AEI but are not enrolled in COBRA coverage (including those who never elected and those who elected but subsequently discontinued coverage) with qualifying events that occurred during the period from September 1, 2008 through February 16, 2009.
  - Alternative Notice – for use where coverage is subject to state continuation requirements during the period that begins with September 1, 2008 and ends with December 31, 2009.

- Employers were required to send the notices within 60 days of ARRA's enactment (April 18, 2009). For future qualified beneficiaries, the current COBRA notification timeline requirements will continue to apply.

- If an individual was provided the old version of the COBRA election notice after February 17, 2009 (the date the act was signed), employers must send the new full version of the notice. For individuals who received their election notice prior to February 17, 2009 who do not fall into the notice categories above, we suggest employers "cast the net wide" and resend the new full version election notice to those individuals as well. While there is no penalty for sending an extra notice, the penalties are clear and can be harsh for not sending a notice when one was required.

What happens if our company disagrees with a qualified beneficiary regarding subsidy eligibility?

- If the plan determines that an individual is not eligible for the subsidy, the individual can request an expedited review of the denial by the DOL.
- The DOL is required to make a determination within 15 business days of receiving the individuals completed EBSA application (provided through the www.dol.gov/cobra website).
- The DOL may request information from the employer that will require a quick turnaround time (probably a couple of days).
- The DOL's determination will be binding.

How does a company handle overpayments of premium by those who are eligible for the subsidy, but remitted the full COBRA premium?

- If an individual overpays COBRA premium when they were entitled to the subsidy, the plan can either count the credit toward future months of coverage or refund the overpayment. If the overpayment takes the individual beyond 180 days of coverage, the plan must send a refund.

Can the employer take the 65% subsidy if the company is paying part or all of the individual's COBRA premium as part of a severance package?

The DOL's webcasts on March 24, 2009 and April 6, 2009 addressed the complexity of this issue. There are several points to consider when applying the subsidy to these situations:

- If an employer offers a severance package to an individual that includes health insurance continuation, the company needs to determine ahead of time whether the continuation coverage is part of the COBRA 18-month continuation period or if COBRA will begin at the end of the company-continued period.
- If the continuation is considered part of the COBRA period, then the subsidy would be available following the end of the company-paid period, but the employer-paid COBRA would be included in the 9-month subsidy period (see Example #2 below).
- If the company determines that COBRA will begin at the end of the severance period, then coverage will be deemed to have terminated at that time. If the severance continuation takes the individual beyond December 31, 2009, then they will not be eligible for the subsidy.

  Example #1: John Smith involuntarily terminates employment on October 31, 2009. His employer provides him with a severance package that includes company-paid health insurance continuation through January 31, 2010. The company determines that they will not include the continuation coverage as part of John's 18-month COBRA eligibility; therefore, his COBRA election period will start on February 1, 2010. In this scenario, John will not be eligible for the subsidy because he will have been deemed to lose coverage after December 31, 2009.

  Example #2: John Smith involuntarily terminates employment on October 31, 2009. His employer provides him with a severance package that includes company-paid health insurance continuation through January 31, 2010. The company determines that they will include the continuation coverage as part of John's 18-month COBRA eligibility;

therefore, he will be deemed to have lost coverage on November 1, 2009 and will be eligible for the subsidy beginning February 1, 2010 for 6 months.

- In instances where the employer is partially subsidizing the COBRA premium, the subsidy amount will be based on the reduced premium.

  Example #3: John Smith involuntarily terminates employment on October 31, 2009. His employer provides him with a severance package that includes a reduced COBRA rate equal to the active employee contribution amount from November 1, 2009 through January 31, 2010. In this case, the full COBRA rate is $1,000 per month; however, the active employee contribution is $200 per month. John would be eligible for the subsidy and would pay $70 per month (35% of $200) and the company would take the tax credit of $130 (65% of the $200) for the months of November through January. For the months of February through July, John would pay $350 per month (35% of $1,000). In effect, John would receive the subsidy for 9 months measured from November 1, 2009.

- It will be important for employers to fully review any current severance packages as well as any future agreements to make sure they understand the subsidy ramifications as well as meet their commitments.

While this is a summary of the main points of the COBRA premium subsidy, it is not all-inclusive. There are gray areas in the act that still need to be clarified; hopefully, those clarifications will be forthcoming shortly. For more information on the subsidy or for any questions, please contact Janie Oehlert, MEA Manager, Employee Benefits Services directly at 610-994-7635 or via email at joehlert@meainfo.org.