BlueCross BlueShield of Kansas City

An Independent Licensee of the Blue Cross and Blue Shield Association

COBRA Subsidy Provisions of Economic Stimulus Law Enacted on February 17, 2009

What is the American Recovery and Reinvestment Act of 2009?

The American Recovery and Reinvestment Act of 2009 (Act), signed into law on Tuesday, Feb. 17, 2009, extends and expands COBRA rights for employees who have lost coverage under employer-sponsored health insurance due to *involuntary* termination of employment. This expansion includes a premium subsidy for COBRA coverage and for state continuation comparable to COBRA for group plans not subject to federal COBRA. For purposes of this communication, use of the term COBRA will apply to both federal COBRA and state continuation unless otherwise specified.

How much is the premium subsidy?

The government subsidy is 65% of the COBRA premium. The remaining 35% of the COBRA premium is the responsibility of the eligible individual.

Who is eligible for the subsidy?

- Subject to certain income limitations, an individual is eligible for the subsidy if:
    1. the employee is involuntary[*] terminated from employment between September 1, 2008 and December 31, 2009; and
    2. the individual is eligible for and elects COBRA coverage when eligible.
- Qualified beneficiaries of the individual's family are also eligible for the subsidy if the reason for their COBRA eligibility is due to the employee's involuntary termination of employment.
- Individuals who elected COBRA due to an involuntary termination on or after Sept. 1, 2008 but before to the law's enactment are eligible to receive the subsidy on a prospective basis.
- Employees who have voluntarily terminated their employment are not eligible for the subsidy.
- Terminated employees who would have been eligible for the subsidy but are not currently receiving COBRA coverage[†] must be provided a special 60-day period to elect coverage. The 60-day election period begins on the date that the notice of the special election period is provided (see below for details on new notice requirements). While unclear, the special election window may not apply to plans subject only to state continuation requirements.

  NOTE: The new special election period does not extend the period of COBRA coverage beyond the original maximum COBRA coverage period (or state health continuation laws).

Who is responsible for payment of the subsidy?

Employers (for insured and self insured group plans that are subject to federal COBRA laws), multiemployer plans (for multi-employer plans) and insurers (for insured plans subject to state group health insurance laws but not federal COBRA laws) are responsible for the 65% of premium not paid by the eligible individual. The federal government will reimburse these entities through payroll tax credits. The IRS has additional information regarding this process on their Web site at www.irs.gov/newsroom.

How will the reimbursements be made to employers, multiemployer plans and health insurers?

The 65% COBRA subsidy will be provided through a payroll tax credit on that appropriate entities' payroll tax deposit. The entity is permitted to offset any payroll tax liabilities with the amount of the subsidy. However, if the subsidy exceeds the entity's payroll tax liabilities, the entity will receive a tax refund. The amount of the subsidy is based on the actual amount an individual must pay for COBRA. If an employer is paying for a portion of the COBRA premium, this amount must be deducted before calculating the 35% of premium owed by the individual and the 65% subsidy that can be claimed.

The rules governing the timing of tax deposits and requesting the subsidy without exposing the entity to tax penalties are complicated and warrant further analysis by tax/payroll advisors. However, in general the Act provides that any overstatement of a COBRA premium reimbursement is a tax violation.

What additional information must be submitted when applying the subsidy?

The COBRA subsidy amount is reimbursed by being claimed as a credit on the Form 941. No additional information relating to the COBRA subsidy is to be submitted with the Form 941, either electronically or in paper form. However, those claiming the credit must maintain supporting documentation for the credit claimed. Such documentation includes, but is not limited to:

- Information on the receipt, including dates and amounts, of the assistance eligible individuals' 35% share of the premium.
- In the case of an insured plan, copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA.
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals.
- Attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from September 1, 2008, to December 31, 2009), for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.
- Proof of each assistance eligible individual's eligibility for COBRA coverage at any time during the period from September 1, 2008, to December 31, 2009, and election of COBRA coverage.
- A record of the SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for 1 individual or 2 or more individuals.
- Other documents necessary to verify the correct amount of reimbursement.

What type of COBRA coverage is eligible for the subsidy?

- The subsidy is available for COBRA coverage that is otherwise available under a group health plan that is subject to ERISA and the Code.
- The subsidy applies not only to federal COBRA coverage, but also to state continuation coverage that provides "comparable" continuation coverage. [**]
- The subsidy <u>does not</u> apply to healthcare flexible spending accounts.
- Coverage under a health reimbursement account is eligible for the subsidy (only for plans subject to federal COBRA requirements).

What is the effective date of the subsidy?

- The subsidy applies beginning with the first period of COBRA coverage after the Act was signed. This will generally be March 1, 2009.

- In the event that a terminated employee has paid 100% of his/her COBRA premium during the first 60 days after enactment, the employer (or insurer, if applicable), may either:
    - Reimburse the individual for 65% of the premium paid; or
    - Provide a credit for such amount to offset future premiums (subject to certain terms/conditions).

How long is the subsidy available?

Generally, the subsidy terminates with the first month beginning the earlier of:

- The date that is nine (9) months from the first day of the month that the subsidy applies (e.g., if the subsidy is available beginning March 1, 2009, it would last through Nov. 30, 2009);
- The end of the period of maximum required continuation coverage; or
- The date the individual becomes eligible for Medicare or other employer-sponsored health insurance.

How is an employer (or insurer, if applicable) to know when an individual is no longer eligible for the subsidy due to eligibility for coverage under other employer-sponsored health insurance or Medicare?

Such individual is required to notify the employer/insurer of eligibility for the other coverage and will be penalized by the IRS (110% of the subsidy) for failing to notify the employer/insurer.

Are there any involuntarily terminated employees who are not eligible for the subsidy?

- Individuals with a modified adjusted gross income greater that $145,000 (single) or $290,000 (joint filings) are not entitled to <u>any</u> subsidy.
- Individuals with a modified adjusted gross income between $125,000 and $145,000 (single) or $250,000 and $290,000 (joint filings) are not entitled to the <u>full</u> subsidy, rather a subsidy that is reduced proportionately.
- The responsibility for enforcing this eligibility based on income will fall on the former employee. At the end of the calendar year, if the individual's modified adjusted gross income is above the threshold, the mechanism to repay the subsidy is to increase the taxpayer's income tax liability for the year equal the amount of the subsidy.
- Terminated employees are permitted to permanently waive the subsidy for all periods of coverage by requesting the employer/insurer not claim the subsidy on their behalf.

How are individuals who may be eligible for the subsidy going to be notified?

- The notice of COBRA continuation currently required must now contain additional information. Within 30 days of the enactment of the Act, the Secretary of Labor (DOL) is required to provide a new model COBRA notice that will include the additional information.
- In addition, either the above notice or a stand-alone special election COBRA notice must be provided within 60 days of the law's enactment to all individuals who have become eligible for COBRA since Sept. 1, 2008.
- Violations of the new notice requirements will be considered a violation of the existing COBRA notice requirements (and subject to the same penalties).
- The notice must be provided by employers (for insured and self insured group plans that are subject to federal COBRA laws) and multiemployer plans (for multi-employer plans). It is not yet clear who has responsibility to provide the notice to employees eligible for state continuation coverage that is comparable to federal COBRA. The DOL, Treasury, and Health and Human Services (HHS) will provide rules regarding the notice for these individuals but the Act itself does not indicate if insurers or former employers will be responsible for providing the notice.

Are there rights for individuals to appeal denied subsidy requests?

Yes. Appeal rights are available to those who believe that they have been incorrectly denied COBRA subsidy rights by submitting an appeal to the DOL or HHS. The DOL and HHS have 15 days to review the request.

Are there penalties for non-compliance?

Yes. Failure to provide modified COBRA election notices will be treated as a failure to meet the notice requirements under COBRA (i.e., failure to send timely COBRA election notices that comply with the new requirements could subject the employer or plan to a penalty of up to $110 per day under ERISA) Failure to comply with the new election notices also could result in adverse tax consequences under the Code (e.g., excise tax penalties per day per notice if the plan administrator fails to comply with COBRA).

When are additional clarifications to the law expected?

Blue Cross and Blue Shield of Kansas City (BCBSKC) expects additional clarifications will be made. We continue to monitor guidance and will keep you apprised of significant updates. We are in the process of validating that both Kansas and Missouri state continuation laws are considered "comparable to COBRA." We are also watching for forthcoming guidance regarding whether health insurers or employers will be responsible for providing notices to individuals eligible for state continuation for group plans not subject to federal COBRA. BCBSKC has initiated an internal project team to ensure we have processes in place to support these new requirements and will communicate any changes to our business processes that could impact external clients as a result of our compliance with this new law.

Questions?

If you have questions, please call our COBRA Subsidy Hotline at 816-395-3919 or toll-free at 1-866-505-3233.

[*] Not defined in the Act.

[†] This includes terminated employees who did not elect COBRA, and those who elected COBRA but subsequently discontinued the coverage.

[§] Provided at the same intervals as the deposits of the payroll taxes would have been required without the offset (or as otherwise specified by the Secretary of Treasury).

[**] The Act provides no definition for "comparable" state continuation laws. Treasury may issue future guidance.