



## **COBRA Premium Reduction Extension Provisions FAQs**

*Disclaimer: This document contains informal guidance from a recent EBSA webcast (<http://www.dol.gov/ebsa/COBRA.html>). Nothing in this document should be construed as legal advice. Consult your benefits attorney should you have questions.*

### **Acronyms**

AEI – Assistance Eligible Individual – an individual who has a continuation coverage election opportunity related to an involuntary termination of employment that occurred at any time from September 1, 2008 through February 28, 2010, elected the coverage, is not eligible for Medicare nor for coverage under any other group health plan, such as a plan sponsored by a successor employer or a spouse's employer.

ARRA - The American Recovery and Reinvestment Act of 2009 (ARRA) provides for premium reductions and additional election opportunities for continuation coverage under COBRA.

COBRA - Consolidated Omnibus Budget Reconciliation Act of 1985 - COBRA gives workers and their families who lose their health benefits the right to purchase group health coverage provided by the plan under certain circumstances.

If the employer continues to offer a group health plan, the employee and his/her family can retain their group health coverage for up to 18 months by paying group rates. The COBRA premium may be higher than what the individual was paying while employed but generally the cost is lower than that for private, individual health insurance coverage.

The plan administrator must notify affected employees of their right to elect COBRA. The employee and his/her family each have 60 days to elect the COBRA coverage; otherwise, they lose all rights to COBRA benefits.

COBRA generally does not apply to plans sponsored by employers with fewer than 20 employees. Many States have similar requirements for insurance companies that provide coverage to small employers. The premium reduction is available for insurers covered by these State laws.

DoDAA - The Department of Defense Appropriations Act, 2010 amended ARRA on December 19, 2009 and provides for premium reductions for health benefits under COBRA. Eligible individuals pay only 35% of their COBRA premiums and the remaining 65% is reimbursed to the coverage provider through a tax credit. To qualify, individuals must experience a COBRA qualifying event that is the involuntary termination of a covered employee's employment. The involuntary termination must

occur during the period that began September 1, 2008 and ends on February 28, 2010. The premium reduction applies to periods of health coverage that began on or after February 17, 2009 and lasts for up to 15 months.

DOL – The Department of Labor (DOL) administers a variety of Federal labor laws including those that guarantee workers’ rights to safe and healthful working conditions; a minimum hourly wage and overtime pay; freedom from employment discrimination; unemployment insurance; and other income support. <http://www.dol.gov/>

EBSA - The Employee Benefits Security Administration (EBSA), an agency of the Department of Labor, educates and assists Americans covered by private retirement plans, health plans, and welfare benefit plans, as well as plan sponsors and members of the employee benefits community. <http://www.dol.gov/ebsa/>

IRS - The Internal Revenue Service is a bureau of the Department of the Treasury and provides tax administration. <http://www.irs.gov/>

### **Subsidy General**

Q1: What is meant by COBRA subsidy?

A1: Subsidy (or financial assistance) refers to the employer’s or insurer’s picking up 65% of the COBRA premium that a former employee would normally be required to pay.

Example: Bob is involuntarily terminated from employment. He is eligible for COBRA and subsidized premiums. COBRA typically costs Bob \$100/month + 2% admin fee = \$102. However, now that his employer must subsidize 65% of Bob’s premium, Bob only has to pay \$35.70/month.

Q2: Are employers required to provide subsidy?

A2: Yes. Under Federal law, which applies to employers who must offer COBRA (and now to Maryland State Continuation coverage), employers have no opt out options. The IRS views the subsidy by employers as a loan on behalf of the Federal government whereby employers are paid back through the payroll tax credit on Form 941.

Q3: How will an employer know that a qualified beneficiary (QB) is no longer eligible for the subsidy due to eligibility under another group health plan?

A3: An AEI’s entitlement to the subsidy will end early if either (1) the COBRA period of coverage ends under the general COBRA rules or (2) the individual becomes *eligible for coverage* under Medicare or under any other group health plan (other than coverage that provides only dental, vision, counseling or referral services, coverage under a flexible spending arrangement, or an on-site medical facility at the employer’s workplace). The requirement that the subsidy ends when the individual becomes *eligible for other coverage* or Medicare is different than the general COBRA early termination rule under which a qualified beneficiary’s COBRA coverage may be terminated early if

the individual actually *enrolls in* another group health plan or Medicare. *See* Treas. Reg. 54.4980B-7, Q&A 2(b), Q&A 3(b); Notice 2009-27, Q&A 34. However, eligibility for or coverage under TRICARE does not end an AEI's entitlement to the subsidy. *See* Administration and Eligibility Q&A 34.

Under ARRA and DoDAA, AEIs are required to notify plans when they become eligible for other group health coverage or Medicare. Q&A 42 of Notice 2009-27 confirms that if a participant receiving a COBRA subsidy fails to provide notice of eligibility for other group health coverage or Medicare, and the plan later discovers that the participant was not eligible for the subsidy after claiming reimbursement from the IRS, the plan does not have to provide a refund to the IRS for the reimbursement it received. (The AEI is subject to a federal tax penalty of 110% of the subsidy amount.) However, the guidance makes one exception – if the plan otherwise knew that the participant would be ineligible due to eligibility for other group health coverage or Medicare, it would have to provide a refund. For example, a plan that maintains date of birth information would know when an AEI attains age 65 and becomes Medicare-eligible and may know that an AEI is eligible for other health coverage based on coordination of benefits information it receives.

In addition, Notice 2009-27, Q&A 17, states that an individual can be an assistance-eligible individual more than once, assuming each involuntary termination falls within the relevant period under ARRA. Such an individual would be eligible for up to nine months of the COBRA subsidy for each involuntary termination. This could mean that some participants in multiemployer plans could go on and off of the subsidy several times during the period for which the subsidy is in effect.

### **Failure to Provide Original Subsidy Notice**

Q4: What if the employer never told former employees about the original subsidy provisions and the employees did not elect COBRA. Is it too late for the subsidy to apply now?

A4: Although the original statute that was just amended by the DoDAA added some provisions, the original ARRA provisions still stand. If at any point between September 31, 2008 and February 28, 2010, a qualifying event occurs but the individuals were never notified of the ARRA or DoDAA subsidy provisions, that person most likely still has an opportunity to make an election for subsidy retroactively.

### **Transition Period**

Q5: Describe the transition period and when it ends.

A5: It starts with the first day of the month following the end of the nine-month subsidy period under ARRA. If the transition period starts on April 1, 2010 but the plan provides notice of the premium assistance extension 60 days after the date of enactment (12/19/09), then notice has been sufficiently provided. Therefore, the individual has through the end of the applicable grace period to make the next payment.

Q6: An individual's nine-month period of subsidy ended in November 2009. He did not pay the full premium in December because he couldn't afford it. How long does the individual get to make a retroactive payment under the DoDAA?

A6: Payments must be made by the later of February 17, 2010 or 30 days from when the notice was provided to the end of the applicable grace period.

Q7: A qualified beneficiary, who is an AEI, elected and paid nine months of subsidized COBRA which ended on January 31, 2010. However, he failed to pay for February 2010. Is he able to retroactively pick up the subsidy extension beginning in February?

A7: Under the interpretation adopted by the IRS and DOL, the QB would have until February 17, 2010 or 30 days from when the notice was provided to the end of the grace period to make their payment.

Q8: A qualified beneficiary who is an AEI elected and paid for eight months of subsidized COBRA, which ended on November 30, 2009. However, the QB failed to pay for the ninth month of subsidized coverage which was December 2009. Does he have any notice rights?

A8: No. The transition period relief is only available for individuals that exhausted the subsidy. If a QB stopped subsidized coverage early and did not reach the end of the subsidized coverage period, he has no re-election rights.

Q9: Can a plan require individuals that are in a transition period to pay 100% percent of the COBRA premium as long as they agree to refund or credit the person's payment at a later date?

A9: No. Qualified beneficiaries have the right to make 35% payment which is to be treated as a whole payment. Even if they plan promises to credit forward or refund those payments, the IRS guidance has been clear that plan cannot require this.

### **Severance/Future Loss of Coverage**

Q10: If someone experiences an involuntary termination before February 28<sup>th</sup>, but banked hours that extends active employee coverage for several months beyond the February 28, 2010 eligibility date, is the individual eligible for subsidy and for how long?

A10: Generally, the individual will still qualify for the subsidy. The DoDAA states that the coverage lost date is not what makes a person eligible or ineligible for subsidy. It is the qualifying event date, which in this example, is prior to February 28, 2010.

The COBRA time period begins when the QB starts COBRA, provided it's within 18 months of the qualifying event. An individual who gets a severance package of more than 18 months will likely not be eligible for the COBRA subsidy.

Q11: Does a severance agreement that continues salary beyond 2010 affect eligibility for the subsidy?

A11: The former employee can still be eligible for the subsidy even though he is getting severance benefits which presumably includes continued active health coverage after February 28, 2010. So the next question is when the involuntary termination occurs.

If he continues on the payroll but lost his job, the involuntary termination would probably be considered to have occurred by February 28, 2010. Even though the severance may continue active coverage or the equivalent of active coverage to some later time, generally he would still be eligible for the subsidy once the COBRA kicked in, provided it's within 18 months of the initial qualifying event date.

Q12: How would the subsidy apply in the severance package scenario where the employer is paying 100% of the premiums for the first three months of severance?

A12: It depends on how the employer chooses to treat the severance. Where employers decide to treat those three months of severance as the beginning of COBRA, subsidy would run for 15 months from the beginning of the severance. However, there is no payroll credit permitted for the employer's coverage of the premiums during that first three months.

On the other hand the employer can choose to offer COBRA after three months of severance have exhausted. Therefore, the involuntary termination date is measured from the end of the severance period. Provided the involuntary termination date falls before 2/28/10, then the individual will be eligible for up to 15 months of subsidy.

### **Future Extensions**

Q13: Is there expected to be future extensions beyond 2/28/10?

A13: There are some bills on the Hill right now that would extend this and modify this program further. Go to [www.dol.gov/cobra](http://www.dol.gov/cobra) and subscribe to stay current on any changes to this extension.

### **Second Opportunity to Elect**

Q14: An employee was laid off last year but did not elect COBRA when it was first offered. Does the DoDAA include a second election opportunity for him to get the subsidy?

A14: No, the transition relief did not allow second chance elections if they did not timely elect COBRA. The DoDAA transition relief is for individuals who have exhausted the subsidy and at that point stopped paying their premiums. If COBRA was not elected, the opportunity to obtain the subsidy is lost.

## **Payroll Tax Form 941**

Q15: COBRA premiums are paid to a third-party administrator rather than to the employer. The third-party administrator receives the AEI 35% payment for December premium in December, but the employer does not receive documentation that the premium was paid until January. Can the employer take the credit in 2010 or is that attributable for the subsidized coverage on December in its return for the last quarter of 2009?

A15: Treat payments received by the TPA as received by the employer. So, the employer is eligible for the credit for December and it would be taken on the return Form 941 for the last quarter of 2009.

Q16: The TPA receives the premium payment in December but the employer doesn't find out that the premium was paid until late January or February and at some point after the 941 for December -- for the last quarter of 2009 was filed. Will the employer have to file an amended Form 941x for the last quarter of 2009?

A16: This is still an open question.

## **Notices**

Q17: In certain situations under the extension provisions, an AEI would be entitled to receive more than one notice at different intervals following the premium extension. Does ARRA require that these individuals receive duplicate notices?

A17: Multiple notices aren't required. If individuals received an updated general notice that was timely, they are done even if they fall into some other category; the updated general notice is the gold standard. It has all of the information and they don't have to get a supplemental notice.

However, there are certain people who may get multiple notices, including someone who received an old ARRA General Notice must now be notified of the new act. But the general answer to this question is you don't have to send multiple notices to the same person just because they could fit into two categories as long as you get them notification by the earliest time period.

Q18: Is there a due date for when the notices need to be mailed?

A18: The updated general notice is just like the COBRA election notice; 30 day time period after the event to provide notice to the plan, then 14 days to provide notice to the former employee and dependents.

AEIs as of 12/31/09 must get Premium Assistance Extension notice within 60 days of the date of enactment so that would be by February 17, 2010 or 30 days from the first day of the transition period.

Most everyone who is getting to subsidize COBRA will be in a transition period at some point and will get their notice by February 17<sup>th</sup>. However, there may be someone whose transition period doesn't start until June. He will get notice of the extension within 30 days of the first day of the transition period.

### **Open Enrollment**

Q19: An employee had an involuntary termination and was an AEI. COBRA began on March 1st, 2009 and he elected coverage for the entire family. They paid full price for the family during December because the subsidy ended in November. The QB was sent enrollment documents in November 2009 for the open enrollment elections that would be effective for coverage beginning January 31, 2010. During the open enrollment the qualified beneficiary selected coverage for only one individual and the rest of the family did not elect to continue coverage. Under the ARRA extension provisions of the DoDAA, are the family members eligible to elect the family coverage under the extension?

A19: Yes. The short answer is anyone who qualifies for transition relief has a right to keep what they elected. In this case, the AEI has qualified because he had the coverage and had exhausted it through 10/31/09.

Also remember that spouses and dependents who are qualified beneficiaries have an independent right to make COBRA elections. Therefore, regardless of what the covered employee elects, the spouse and dependents have not given up their rights to elect and therefore, the spouse and dependent get the transition relief also. They can pay for their coverage and go forward with a new election.

Anyone in a transition period will have the opportunity to go back to the coverage that they had and get the extended subsidy period.

Q20: Can a QB switch to more expensive coverage during open enrollment and does the subsidy apply to the new more expensive coverage?

A20: Yes, subsidy applies. This is addressed in IRS notice 2009-27, Q&A 26.

### **Refunds or Credits**

Q21: If a qualified beneficiary was an AEI and paid 100% of the premium for their 10 month or more, is the employer required to provide them with a refund of their overpayment? If so, how much time does the employer have to refund the excess premium payments?

A21: The plan can decide how to handle the overpayment; whether it will be reapplied or refunded. There is language in the DoDAA that suggests that for the first month of the transition period (following the ninth month of subsidy), the employer must provide the option to credit going forward or refund the QB.

### **Individual Policy**

Q22: If a qualified beneficiary's subsidy assistance expires in November 2009 prior to the passage of the extension so they dropped COBRA and purchased an individual policy, can they choose to start their COBRA back up in a later month, January or February or do they have to pay retroactively for December? If they choose to start at a later month, is that the employees choice or the employer's choice and when does the 15 month clock apply?

A22: First, the purchase of an individual policy does not affect eligibility for the subsidy, unlike coverage under health plans. Second, it is the plan's choice whether it will require the individual to pay for COBRA as of the date that coverage stopped or if it will let the individual skip ahead a couple of months and only pay going forward. Regardless, the 15 months is based on when they started their original COBRA rather than if there is any gap. The fact that the plan allows them a gap does not extend the 15 months.

### **Maryland State Continuation**

Q23: If an employee was only with our company for three months before termination of employment, is he eligible for the 15 months of subsidy?

A23: The DoDAA subsidy rules do not change the rules for eligibility under MD State Continuation Coverage. So, if an employee has not been employed with a small employer (i.e. under 20 employees) for at least three months, then he is not eligible for continuation coverage nor subsidy.