

February 18, 2009

President Obama Signs American Recovery and Reinvestment Act COBRA and Commuter Benefits Affected; Guidance Pending

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (the "Act"). Generally, the Act is an economic stimulus bill designed to address the current economic crisis, but it also includes several important changes to COBRA. While the Act includes several components of the previous House and Senate bills, the controversial extension of COBRA coverage for long-service or older employees is not part of the final bill.

COBRA in General

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amends sections of the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code and the Public Health Service Act (PHSA). COBRA requires group health plans to offer certain individuals, who would otherwise lose their group health plan coverage as a result of a specific qualifying event (such as employment termination or certain changes in family status), the opportunity to continue their group health plan coverage for a specified period of time at applicable group rates.

Changes to COBRA

The Act provides for a federal subsidy of 65 percent of the COBRA continuation coverage premiums for qualified beneficiaries receiving COBRA continuation coverage due to the covered employee's **involuntary termination of employment** between September 1, 2008, and December 31, 2009. These individuals are referred to as "Assistance Eligible Individuals" or "AEI."

IMPORTANT: Employers should begin to review their records to identify "Assistance Eligible Individuals." Although additional guidance and model notices will be forthcoming (as described below), it is important to identify these individuals as soon as possible so the necessary actions can be taken when ready.

The definition of qualified beneficiary includes the covered employee, the covered employee's spouse (as defined by federal law), and the covered employee's dependent children (as defined by the plan). Qualified beneficiaries have separate election rights under COBRA. Therefore, even if the covered employee does not elect COBRA, a covered spouse or covered child of the involuntarily terminated covered employee will qualify as an AEI.

The subsidy applies to all COBRA-eligible group health plans sponsored by an employer with the exception of health flexible spending accounts offered under a cafeteria plan.

Subsidy Eligibility

Qualified beneficiaries that experienced an involuntary termination of employment and subsequently elected COBRA continuation coverage on or after September 1, 2008, but prior to February 17, 2009 (the "Enactment Date"), are eligible to receive the subsidy on a go-forward basis beginning on the enactment date.

Qualified beneficiaries that experienced an involuntary termination of employment between September 1, 2008, and February 17, 2009 and **did not** elect COBRA coverage during their initial 60-day election period must be provided another opportunity to elect COBRA coverage during a second 60-day election period. This second election period also applies to those individuals who elected COBRA coverage but have subsequently lost that coverage prior to the enactment date (e.g., due to non-payment of premiums).

If these AEIs elect COBRA continuation coverage, their coverage will extend back to the enactment date. However, the maximum COBRA eligibility period is measured from the original qualifying event date (i.e., the date of the involuntary termination of employment). Many plans provide coverage on a calendar month basis (i.e., coverage begins on the first of the month). For these plans, coverage elected by AEIs under the Act will begin on March 1, 2009. For those plans that allow partial month coverage, coverage for these individuals will begin on February 17, 2009.

Example. Andrew is involuntarily terminated on September 1, 2008, and loses his active employee coverage as of September 30, 2008. He is mailed a COBRA election notice but fails to elect by the November 29, 2008 deadline. Within 60 days of the enactment date, Andrew must be offered another opportunity to elect COBRA. Andrew makes this election on March 15, 2009. Since his plan offers coverage month-to-month, his COBRA coverage will begin on March 1, 2009. However, his maximum COBRA eligibility period will still begin on October 1, 2008 (the day after his last date of active employee coverage) and run through March 31, 2010.

NOTE: Any gap in coverage between the date coverage is lost and the enactment date will not be considered a break in coverage for purposes of HIPAA's pre-existing condition exclusion rules.

Income Limitations

Individuals with modified adjusted gross income that exceeds \$250,000 (for joint return filers) or \$125,000 (for all other filers) are not eligible for the full premium subsidy. However, they may be eligible for a portion of the subsidy. Individuals earning between \$125,000 and \$145,000 (between \$250,000 and \$290,000 for joint return filers) will have their income tax increased by a percentage of their total COBRA subsidy received in that year. Individuals earning more than \$145,000 (\$290,000 for joint return filers) will have their income tax increased by the total amount of COBRA subsidy they receive.

Because any portion of a subsidy an individual receives but is not eligible for must be reported on the individual's income tax return, employers and insurers may treat all AEIs as eligible for the subsidy regardless of their income level. However, these individuals have the right to waive the subsidy and pay the full COBRA premium required. The manner in which an individual waives the subsidy has yet to be determined.

How the Subsidy Works

As noted above, the federally provided COBRA subsidy is 65 percent of the amount owed by AEI. A payment made by the AEI equal to 35 percent of the applicable premium is considered payment in full. The remainder must be paid by the employer, plan, or insurer and will be subsequently reimbursed by the government through payroll tax credits. The IRS and Treasury are expected to issue additional details regarding exactly how the credit process will work, including tax filing and reporting requirements, in the near future.

NOTE: The 65 percent COBRA subsidy applies to the AEIs total premium responsibility, including any other subsidies not affiliated with the Act. However, the employer, plan, or insurer will only receive federal reimbursement of the 65 percent paid by reason of the Act.

Example. Brandy's total COBRA premium is \$500 per month. Due to a severance agreement, Brandy's former employer subsidizes 50 percent of the premium and Brandy pays the remaining \$250. Under the Act, Brandy is an AEI, so she is eligible for the additional COBRA subsidy. Brandy is now responsible for 35 percent of the \$250 premium (\$87.50) and her former employer can receive federal reimbursement of 65 percent of \$250 (\$162.50).

Assistance Eligible Individuals are entitled to receive the subsidy for up to nine months. However, if an AEI becomes eligible for other group health coverage or Medicare, or reaches the end of his or her maximum COBRA coverage period, his or her entitlement to the subsidy ends. Any AEI who becomes eligible for other group health coverage or Medicare must provide timely written notice that he or she no longer qualifies for the COBRA subsidy. Failure to do so is punishable by a penalty equal to 110 percent of the subsidy received after becoming eligible for other coverage.

Electing Other Coverage

The Act allows employers to offer AEIs the option to change their health insurance coverage when making a COBRA election under the employer's plan. This new coverage option must have the same or lower premiums and must be available to similarly situated non-COBRA employees under the plan. If the employer chooses to offer this option, an AEI must elect to change his or her coverage within 90 days of receipt of the COBRA election notice. This provision is optional and an employer is not required to make this option available.

New Notice Requirements

The Act requires employers to modify their COBRA election notices or provide separate, supplemental notices to all individuals who become entitled to elect COBRA continuation coverage during the period beginning on September 1, 2008 and ending on December 31, 2009. These notices must include all of the following:

- An explanation of the eligibility requirements for the COBRA subsidy
- The name, address, and phone number of the plan administrator if the individual has questions or requires more information
- A description of the qualified beneficiary's obligation to notify the plan if he or she becomes eligible for coverage under another group health plan or Medicare, and a description of the penalty for failure to notify the plan
- A description of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium
- A description of the election of different coverage option described above (if the employer chooses to offer this option to AEs)

Those COBRA qualified beneficiaries who were involuntarily terminated between September 1, 2008, and February 17, 2009, must be issued a revised notice including the information outlined above within 60 days of the enactment date. These notices must also describe the second 60-day COBRA election period and explicitly state that the maximum COBRA coverage period is still measured from the date of the original qualifying event.

The Act requires the Department of Labor, Treasury, and the Department of Health and Human Services to work together to provide a model notice within 30 days of the enactment date. Because employers have a 60-day period in which to provide the revised notices, some employers may choose to wait until the model notices have been issued before revising their own notices.

Commuter Benefits

The Act modifies the monthly maximum election limit for transportation benefits under a qualified commuter benefits plan from \$120.00 to \$230.00 (the same as parking benefits). This increased amount is available beginning in March 2009, continuing through December 2010.

Additional Information

It is important to note that although the American Recovery and Reinvestment Act is now law, there is still important guidance forthcoming. CONEXIS is a compliance driven organization and we are dedicated to providing compliant solutions to all of our clients. We are actively working to address the new requirements introduced in the Act as well as monitoring ongoing activity surrounding subsequent guidance. We will issue additional information as it becomes available.