

# BREAKING NEWS



www.barneyandbarney.com

## COBRA Premium Subsidy Now Reality: Immediate Action Required

February 17, 2009 (Rev February 23, 2009)

Prepared by Alfred B. Fowler, Attorney at Law, for Saylor & Hill Co., a Barney & Barney LLC Company.

---

### The Law

**Employers / Plan Sponsors who are subject to state or federal COBRA must provide premium subsidies of no less than 65% of regular COBRA premium to “Assistance Eligible Individuals” beginning March 1, 2009. Employers must provide notice of the subsidy’s availability to all eligible individuals within 60 days of the law’s enactment.**

### Background

On Friday, February 13, 2009 both houses of Congress approved the economic stimulus package now known as The American Recovery and Reinvestment Act of 2009 (ARRA). ARRA calls for special assistance to most but not all individuals electing COBRA who lose their jobs for any reason (other than gross misconduct) between September 1, 2008 and January 1, 2010.

### Discussion

1. **Assistance Eligible Individuals.** Assistance Eligible Individuals (Eligible Individuals) are any Qualified Beneficiaries who become eligible for COBRA coverage on or after September 1, 2008 and before January 1, 2010 through involuntary termination of employment which results in the loss of coverage. This includes spouses and dependents of employees covered under the health plan at the time of the Qualifying Event who would also lose coverage as of the Qualifying Event. If the covered employee dies, coverage will remain in place for the remaining Qualified Beneficiaries. It’s important to note that the Qualifying Event relates only to loss of coverage as a result of loss of employment.
2. **Individuals not Eligible for Assistance.** Although all assistance eligible individuals are eligible to receive the premium subsidy, High Income Individuals who take the

subsidy will be subject to increased tax liability for any subsidy taken beyond the new law's income threshold. A "High Income Individual" is any taxpayer with modified adjusted gross income of \$145,000 in the year in which he/she took the subsidy (\$290,000 for individuals married, filing jointly). The subsidy recapture tax begins to phase in for a single taxpayer with a modified adjusted gross income of \$125,000 (\$250,000 for individuals married, filing jointly).

To avoid the tax, High Income Individuals must be given a chance to make a permanent election to waive the subsidy and pay the full COBRA premium. Each Qualified Beneficiary (e.g. spouse) who is a High Income Individual must make his/her own election.

3. **The Subsidy Election.** The Eligible Individual must elect the subsidy either during the original COBRA election period on or after September 1, 2008 or during the Special Election Period, if the original period has passed.
4. **The Special Election Period.** The Special Election Period for Eligible Individuals begins upon the date of enactment (February 17, 2009) and ends 60 days from the date he/she receives notice of the special election.
  - a. For those whose Qualifying Events occurred on or after September 1, 2008 and who have elected COBRA, he or she may elect to reduce the COBRA payment by 65% effective March 1, 2009 for a period not to exceed nine months.
  - b. For those who are currently in his/her election period, he/she may elect COBRA and pay the full COBRA premium for the months of COBRA coverage prior to March 1, 2009, if any, and then pay the lesser amount up to nine months beginning on March 1, 2009.
  - c. Individuals who failed to elect coverage during the original COBRA election period on or after September 1, 2008, may now elect COBRA coverage effective for months beginning March 1, 2009 or later for the number of months remaining since his/her original loss of coverage. A maximum of nine months of coverage will be subsidized. The individual may only elect coverage on a prospective basis, resulting in a period of no coverage prior to the election.

The new law also waives the applicability of a pre-existing condition limitation resulting from a 63 day gap in coverage for individuals who take advantage of this special election. Individuals who elected COBRA but ceased paying premiums prior to the law's enactment will also be eligible to make the new election, for the balance of COBRA eligibility measured from the date of the original loss of coverage.

5. **Group Health Plan.** For purposes of ARRA, group health plan means any medical, dental, vision type plan (established or maintained by an employer or employee organization) that would be subject to federal COBRA except for a health care

spending account (i.e. health FSA) established in accordance with IRC Section 125 (Cafeteria Plans).

Also, for purposes of ARRA, state continuation of health coverage laws (typically small group plans with 2-19 lives) must also comply, as must health plans sponsored by state or federal governments.

6. **Choice of Plans.** Generally a COBRA Qualified Beneficiary is only permitted to elect COBRA continuation coverage that is the same as the coverage the Qualified Beneficiary has as of the date of the COBRA Qualifying Event. Current law also allows the employer to offer an alternative plan. The new law permits (but does not require) an employer to allow Eligible Individuals to elect a health care coverage option different from the health care coverage in effect for that individual at the time of the Qualifying Event, but it is subject to the following conditions:

- The COBRA premium for the different coverage cannot exceed the COBRA premium for the coverage in which the Eligible Individual was enrolled when the COBRA qualifying event occurred.
- The different coverage must be coverage the employer is offering to its active employees at the time the Eligible Individual elects the different coverage.
- The different coverage cannot provide just dental, vision, counseling or referral services (singly or in a combination) and cannot be a health care flexible spending account or an on-site facility primarily providing first aid, prevention or wellness care.

**Extended Election Period.** If an employer decides to offer the different coverage option to an Eligible Individual, the employer must provide the Eligible Individual an election notice and allow an election period of not less than 90 days.

7. **End of the Subsidy.** The subsidy ends on the earliest of the following:
- a. The date the eligible individual becomes eligible for (not covered) under another group health plan that would result in termination of COBRA coverage under the basic COBRA law. This is different from current COBRA law and applies only to the subsidy.
  - b. Failure to pay the net COBRA premium due on a timely basis.
  - c. Upon becoming eligible for Medicare.
  - d. The end of nine months of subsidy payments.
  - e. The end of the maximum period of coverage measured from the date of the original loss of coverage.

Individuals who lose coverage as a result of being eligible for other group health coverage must notify the COBRA Administrator/Employer on a timely basis as

determined by regulations which will be forthcoming. Failure to do so will subject the individual to IRS penalties of 110% of the improperly paid subsidy amount.

8. **Reimbursement to the Group Health Plans for Subsidies.** Employers may claim tax credit against periodic deposits for wage withholdings and FICA payroll taxes for the portion of COBRA premium not paid by the individual. If the employer's claims for COBRA subsidy payments exceed the amount of wage withholdings or FICA payroll taxes reported by the employer, Treasury is directed to reimburse the employer directly for the excess amount. Employers may claim the tax credit only for months during which it actually receives the 35% contribution.
9. **Overpayments.** In the event that an eligible individual pays full COBRA premium on or after March 1, 2009 and subsequently elects to accept the subsidy, the COBRA Administrator/employer must either credit the subsidized portion against future COBRA premiums (as long as the credit is exhausted within 180 days) or refund the subsidized amount.
10. **Third Party Premium Payers.** If a third party (e.g. relative, state agency, hospital, etc.) pays the COBRA premium on the Eligible Individual's behalf, the third party need only pay the 35%.
11. **Premium Due Dates.** Although the new law provides no direct guidance, eligible individuals who are electing the subsidy at the same time he/she is making his/her initial COBRA election, premium would be due within 45 days of the election. Individuals already paying COBRA premiums and who elect the subsidy coverage may pay the 35% amount for the regular COBRA period immediately following the new election. Individuals who failed to elect COBRA coverage when it was first available may have a right to the 45 day grace period allowed for new COBRA beneficiaries. For this class of Eligible Individuals, we would recommend allowing this 45 day grace period from the date of the election until such time as regulations to the contrary are published.
12. **Tax Treatment.** The employer subsidy amounts may not be treated as income to the individual. It is not counted as additional income tax or FICA withholding with regard to any taxpayer. It also cannot be considered as income for purposes of determining eligibility for any state or federal public aid (e.g. Medicaid entitlement).
13. **Denial of Eligibility.** In the event an individual is denied coverage under this new law, the Department of Labor (DOL) must provide a 15 day complaint review process. The DOL will publish guidelines for the process shortly.
14. **Notice Requirements.** The new law requires employers to notify all new Eligible Individuals who are Qualified Beneficiaries of their rights to a COBRA premium subsidy and of their duty to notify the COBRA Administrator or the employer of their becoming eligible under another group health plan or eligibility for Medicare and the penalty for failure to provide the notification. This notice is to accompany the notice

provided at the time of a Qualifying Event as required under basic COBRA. For purposes of individuals with coverage continuation rights provided under state law. Employers must notify Eligible Individuals of this new law. Employers may draft their own notice or use the DOL model.

**The Department of Labor is to provide a model notice  
within 30 days of the law's enactment**

15. **Timing of the New Notice.** COBRA Administrators/employers must distribute this notice to all eligible individuals within 60 days of the law's enactment. Eligible Individuals will have 60 days from the date of the notice to elect the subsidy or 90 days if the employer also offers additional plan choices.
16. **Reports.** Employers will also be required to provide periodic utilization reports to the federal government pursuant to forthcoming regulations.

## Action Plan

1. **Urgent:** Identify the following classes of potential Assistance Eligible Individuals:
  - A. All COBRA Qualified Beneficiaries who are currently paying COBRA premiums;
  - B. All who are about to or who have lost active plan coverage and are in their election period; and,
  - C. All terminated employees whose termination dates fall within September 1, 2008 and present, who have either elected COBRA or allowed it to terminate or who failed to elect COBRA when originally offered.
2. **Urgent:** Obtain mailing addresses of individuals in all classes based on W-2 records or other sources.
3. Meet with your COBRA Administrator to devise a plan for mailing notices to all Assistance Eligible Individuals and a procedure for verifying and implementing elections.
4. Modify existing election notices based upon the DOL model notice or scripted notices.
5. Meet with your payroll tax staff or vendor to determine the method for taking tax credit and maintaining records to support the credits.
6. Prepare and make two mailings:
  - A. To all Eligible Individuals (Classes A and B) who currently pay COBRA premiums whose active coverage terminated on or after September 1, 2008,

and those who currently are in their COBRA election period. The notice must describe the availability of the subsidy and the requirements to qualify for it.

- B. To all other Eligible Individuals (Class C), this notice must also include a description of the subsidy as well as information necessary to make a current COBRA election.

## Other Provisions

ARRA also modifies the Health Coverage Tax Credit (HCTC) provisions applicable to individuals eligible under the Trade Act of 2002 as extended through December 31, 2010. It also contains new Privacy Rules under the Health Insurance Portability and Accountability Act (HIPAA) as well as expanded Medicaid support to states. It also affects the COBRA rights of COBRA beneficiaries who receive pension benefits directly from the PBGC.

This Legislative Update is based on the Joint Explanatory Statement of Managers and Conference Report released to Congress at 10:45 p.m. Thursday night (February 12, 2009) immediately following the Senate vote. Although presumed reliable, we expect additional clarification of the new COBRA rules and the publication of model notices and regulatory guidance within a very short time. We will keep you informed of developments.

Additionally, we will be publishing updates on newly modified Trade Assistance rights employer obligations under the Children's Health Insurance Program Reauthorization Act of 2009 and the new HIPAA Privacy Rules.

Finally, we must correct our Notice of Friday, February 13, 2009 reporting the employer subsidy to be 60% and not 65%. Our original Notice was drawn from the Fact Sheet prepared by House Speaker Pelosi's office and reported by other sources as well.

///

Copyright © 2009 Alfred B. Fowler, Attorney at Law.

All Rights Reserved. Reprint with permission only.

This legislative update is published as an information source for our clients and colleagues. It is general in its nature and is no substitute for legal advice or opinion in any particular case. [mike@abferisa.com](mailto:mike@abferisa.com)

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication, unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of ( i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.