

THE NEW EMPLOYER COBRA OBLIGATIONS

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District 11

March 12, 2009

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NEW COBRA REQUIREMENTS FOR EMPLOYERS: A “TO DO” LIST

<p>Background</p>	<p>The American Recovery and Reinvestment Act of 2009 (“Stimulus Plan”) signed by President Obama on February 17, 2009, includes complicated new COBRA obligations for employers and COBRA administrators.</p> <p>This part of the Stimulus Plan is designed to provide more affordable and extended COBRA coverage for certain unemployed individuals. Although it is a temporary program for now, it certainly impacts employers.</p> <p>The new law offers eligible individuals a nine-month 65% subsidy on COBRA premiums and an extended enrollment period within which to elect COBRA and take advantage of this subsidy.</p> <p>The new law imposes immediate costs on most employers, who may be able to eventually recoup them. Thus, the immediate brunt of the new obligations will be felt by companies throughout the state and country, many of whom are already struggling to remain financially profitable.</p> <p>While there are a number of issues that will require further clarification, the deadline for compliance is almost immediate.</p> <p>In general, those who elect COBRA have more medical expenses than those who do not make the election. Due to the retroactive ability to make a COBRA election under the Stimulus, it is reasonably anticipated that those who failed to elect COBRA because they erroneously believed they would remain in good health will now elect it. Those who anticipate continued medical needs will continue to elect COBRA in greater numbers. In either case, those who did not elect COBRA solely due to the expense now have the opportunity to do so.</p> <p>Thus, while on its face the Stimulus is cost-neutral to employers, it will have the real effect of imposing an immediate new financial burden on employers (subject to reimbursement) and will probably have the double whammy of resulting in higher premiums in the future.</p>
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<p>The Effective Date</p>	<p>The new obligations became effective immediately (February 17, 2009) for plans that are not based on monthly coverage.</p> <p>For the vast majority of plans, i.e., those that provide coverage on a monthly period basis, the effective date as a practical matter is March 1, 2009.</p>
<p>What Plans Are Covered</p>	<p>COBRA covers employer group health insurance plans for employers with 20 or more employees. The Stimulus covers all of these plans.</p> <p>The Stimulus also covers group health plans offered by an employee organization (e.g., a joint board of trustees of a multiemployer trust affiliated with one or more multiemployer plans).</p> <p>The Stimulus also covers plans provided by employers who are covered by the more than 40 state-enacted “mini-COBRA” laws. For example, Cal-COBRA covers employers with 2-19 employees, and these employers are covered by the Stimulus.</p> <p>Private and governmental benefit plans, and both insured and self-insured plans, are all subject to the new requirements.</p> <p>The subsidy does not apply to health FSAs.</p>
<p>Who is Eligible</p>	<p>“Assistance Eligible Individuals” (“AEIs”) under the new provisions are any employee and qualified beneficiary whose coverage is through an employee</p> <p>(a) who was “involuntarily terminated” between September 1, 2008 and December 31, 2009, (i.e., on or after September 1, 2008 and before January 1, 2010) and</p> <p>(b) who is not eligible for coverage under another group health insurance plan.</p> <p>This includes:</p> <ul style="list-style-type: none"> - employees who have not been terminated yet, but who are terminated between now and December 31, 2009

<p>Who is Eligible <i>cont.</i></p>	<ul style="list-style-type: none"> - employees who were already terminated between September 1, 2008 and now, regardless of whether they <ul style="list-style-type: none"> - elected COBRA and are paying - did not elect COBRA - elected COBRA but had their COBRA benefits stopped due to their nonpayment of premiums <ul style="list-style-type: none"> - elected COBRA but then terminated benefits for some other reason (other than becoming eligible for coverage under another group health insurance plan) - qualified beneficiaries under any of the above scenarios <p>Terminated employees of an employer whose plan is not governed by COBRA (due to having fewer than 20 employees) but who reside in states that have “comparable continuation coverage” laws (“mini-COBRA” laws) are eligible for the subsidy, as are terminated governmental employees. It is unclear how the subsidy and special enrollment rights will operate in conjunction with mini-COBRA laws and which states’ laws would be deemed “comparable,” a term not defined in the Stimulus.</p> <p>The new law does not define “involuntary termination.” However, it would certainly include an individual who was laid off. The Conference Committee report adds that termination for “gross misconduct” would not qualify the employee for the subsidy (since that individual would not qualify for COBRA coverage at all under normal circumstances). The DOL website, at the time this handout was prepared, only addressed termination for gross misconduct as a disqualification for an otherwise qualified AEI.</p> <p>Other individuals who had a different kind of COBRA-qualifying event, such as a voluntary termination, reduction in hours, divorce, or attainment of a certain age are <i>not</i> eligible. However, it remains unclear whether employees are eligible if they resigned for good cause (e.g., the employer moved to another state and the employee did not accept a transfer), terminations in connection with voluntary early retirement programs, or “window” programs designed</p>
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<p>Who is Eligible <i>cont.</i></p>	<p>to reduce an employer’s workforce.</p> <p>The Stimulus requires the DOL to provide for expedited review (and to make a determination within 15 days of the date it receives an application for review) of any situation where an individual requests status as an AEI and the group health plan denies that status.</p> <p>If the AEI has a federal modified taxable income of over \$125,000 (\$250,000 for those filing jointly), the subsidy begins to phase out.</p> <p>AEIs with a federal modified taxable income over \$145,000 (\$290,000 for joint filers) are not eligible for the new subsidy.</p> <p>A reduced premium may still be provided to an individual who turns out to be ineligible for the subsidy due to these income restrictions; in that case, the amount of the premium reduction is taxable to the individual.</p> <p>The IRS is mandated to recapture subsidies paid to ineligible AEIs by increasing the individual’s income tax for the taxable year, rather than penalizing the employer for underpayment of payroll tax deposits. An ineligible individual who accepts the subsidy must report the amount of the subsidy received as additional tax owed (not merely as additional taxable income).</p> <p>Individuals can elect to permanently waive any subsidy payment by notifying the employer of the waiver. Thus, if a highly-paid individual wishes to avoid a taxable subsidy, that person may permanently waive the right to any premium assistance. While the IRS is supposed to issue guidance on this waiver procedure, it has not yet done so.</p> <p>The timing and procedures for an AEI payment of his/her portion of the COBRA premium remain the same.</p> <p>Under current California law, the premium subsidy is not taxable for state tax purposes (even for “high income” AEIs) since it qualifies as employer-provided health coverage.</p>
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<p>The New COBRA Subsidy Benefits</p>	<p>Under existing law, an employee and qualified beneficiaries are responsible to pay up to 102% of the COBRA premiums on group medical, dental and vision health plan coverage.</p> <p>The new provisions provide for a 65% subsidy of the usual COBRA premiums for a maximum of 9 months.</p> <p>The federal government pays for 65% of the COBRA premium, and the individual pays for the remaining 35%.</p> <p>The subsidy does not apply to flexible spending accounts (FSAs).</p> <p>The subsidy is based on the amount of the premium that the AEI actually pays. Thus, for example, if the employer is already paying 50% of the COBRA premium, the federal government will pay 65% of half of the premium with the individual only paying 35% of the half that the individual was responsible for.</p> <p>Neither the language of the new provisions or the legislative history indicates whether the subsidy applies to the additional 2% administrative fee that an employer is allowed to charge an individual that elects COBRA; however, there is at least an implication that the premium subsidy is based upon the full 102% premium, since the intention was to subsidize the amount that the AEI would otherwise be responsible for.</p> <p>The subsidy lasts for 9 months, beginning on the first coverage period that begins on or after February 17, 2009. Since most plans have a monthly coverage period, this means that for most AEIs, the subsidy would begin on March 1, 2009 at the earliest. The subsidy itself is not retroactive and thus is not available to reimburse an employee for COBRA premiums that were paid prior to that date.</p> <p>If an AEI paid more than the required 35% of the premium in the first two months that they are eligible for the subsidy (such as March or April 2009), AEI is entitled to reimbursement (if the credit would not be used up by the individual within 180 days) from the employer for the</p>
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The New COBRA Subsidy Benefits *cont.*

overpayment or a credit of that amount against future COBRA premium payments. This amounts to a two-month/two billing cycles “grace period” within which to refund or credit the overpayment.

An AEI’s eligibility for the subsidy ends on the earlier of:

- 9 months after the subsidy becomes available to the AEI
- expiration of the AEI’s maximum COBRA coverage period under current COBRA provisions
- expiration of the AEI’s maximum COBRA coverage period under the extended election period, or
- the date on which the AEI becomes eligible for coverage under another group health plan (e.g., either through a spouse’s plan or a new employer’s plan) or Medicare. Thus, the date under this last provision is different than normal COBRA rules that require the AEI to actually obtain coverage under a subsequent employer’s plan.

If the individual fails to notify the employer that he/she has become eligible for coverage under another health plan or Medicare, then the individual is subject to a penalty tax of 110% of the subsidy received after eligibility ended.

Note: If the new group health plan only provides (a) dental, vision, counseling or referral services, (b) is a flexible spending account or health reimbursement arrangement, or (c) only consists of on-site medical services consisting primarily of first-aid services, prevention and well care, the AEI can keep extended COBRA coverage and the Stimulus subsidy without penalty.

The new provisions do not extend COBRA coverage beyond the original maximum required period (generally 18 months after an employee’s termination for employees, and up to 36 months for qualified beneficiaries).

<p>The New COBRA Subsidy Benefits <i>cont.</i></p>	<p>The subsidy program itself ends for all participants on December 31, 2009, unless Congress chooses to extend it.</p> <p>If there is no underlying group health insurance available (e.g., the employer discontinued offering group health insurance, or has gone out of business), the Stimulus does not provide replacement insurance, nor is the subsidy available to pay for replacement insurance.</p>
<p>Retroactive and Extended Benefit Elections</p>	<p>The new provisions provide AEIs a special 60-day period to elect subsidized COBRA coverage.</p> <p>An AEI who did not elect COBRA prior to the enactment of the new law can enroll during an extended election period.</p> <p>This includes AEIs who did not previously elect COBRA, as well as those who enrolled but terminated coverage prior to the enactment of the new law (including those whose coverage was terminated for failure to pay the premiums).</p> <p>The extended election period began on February 17, 2009 and ends 60 days after the plan administrator provides the individual notice of the extended election period.</p> <p>If COBRA coverage is elected during this extended period, it is effective as of the first period of coverage beginning on or after February 17, 2009. For example, if the group health plan coverage period is on a monthly basis that begins the first day of every month, the effective date would be March 1, 2009.</p> <p>The maximum length of coverage is determined as if the individual had timely elected continuation coverage after the qualifying event and without regard to the actual enrollment date during the extended election period.</p> <p>Thus, for example, if an employee was involuntarily terminated on September 1, 2008 and did not initially elect COBRA, but now elects COBRA under the new provisions, that person's COBRA continuation coverage will still end 18 months after termination (e.g., March 1, 2010 if coverage ended immediately upon termination).</p>

<p>Retroactive and Extended Benefit Elections <i>cont.</i></p>	<p>A group health plan may generally refuse to cover the pre-existing conditions of an individual who has a 63-day break in coverage. However, under the Stimulus, the period of non-coverage by an AEI who now elects COBRA coverage may not be counted toward any pre-existing condition exclusion.</p>
<p>Employer Up-Front Payments</p>	<p>Although the new provisions provide for ultimate payment of the 65% premium portion by the federal government, the employer has to “front” the money.</p> <p>Thus, once an AEI elects COBRA, the AEI begins paying only 35% of the premium. The employer is required to “front” the remaining 65% of the COBRA premium. If the plan is a multiemployer plan, this “front money” is paid by the plan.</p>
<p>Plan Changes</p>	<p>An employer can allow all AEIs, not only those enrolled during the extended election period, to elect a different benefit coverage option within 90 days of the notice date.</p> <p>Giving this option is not required, and is like the election among existing coverage options that an employer can provide to qualified individuals after a qualifying event.</p> <p>Thus, in order to offer the option to COBRA-covered AEIs, the employer must offer the same option to active employees.</p> <p>In addition, the option must have the same or lower cost (pre-subsidy) as the option under which the person was previously covered (i.e., an AEI cannot opt to a more expensive plan).</p> <p>The option to select different coverage is not available to elect a health FSA, coverage consisting only of dental, vision, counseling, referral services (or a combination of these), or coverage that provides services at certain on-site medical facilities.</p> <p>If offered by the employer, this option may be elected within 90 days following receipt of the required notice.</p>

<p>Plan Changes <i>cont.</i></p>	<p>Once this election is made, it is effective for the entire COBRA period, even if longer than the nine-month subsidy period.</p>
<p>How Employers Will Recoup Costs</p>	<p>An employer who “fronts” the 65% of the COBRA premium can apply for a payroll tax credit against normal payroll tax deposits (wage withholding for federal income taxes, and the employer and employee portions of FICA, Social Security and Medicare taxes). If the multiemployer plan has been the entity making these subsidy payments, then the plan will make this application; in rare instances the insurer will make payments and get the credit.</p> <p>The credit will be taken on the Form 941 that is filed for the period during which the subsidized premium is paid, and the payment of the subsidized premium will be treated as a deposit of payroll taxes. The Secretary of the Treasury is expected to be issuing further guidance regarding the tax credit.</p> <p>If the employer is entitled to subsidy amounts greater than payroll tax liability, the IRS will credit or refund the excess amount to the employer as if an overpayment had been made.</p> <p>The IRS will treat an overstatement of reimbursements as an underpayment of payroll taxes, allowing for collection and penalty assessment.</p> <p>Where an employer is already contributing part of the COBRA payment, the employer may only seek reimbursement for the government-subsidized amount. For example, if the employer paid 50% of the COBRA premium under a separation agreement, the employer would continue to pay that percentage plus “front” 65% of the employee’s half of the premium. The employer would then get reimbursement for the 65% of the employee’s half that was “fronted.”</p> <p>An employer is not allowed to take the payroll tax credit until the AEI pays the subsidized premium.</p> <p>For any insured, single-employer group health plan that is</p>

<p>How Employers Will Recoup Costs <i>cont.</i></p>	<p>not subject to COBRA but is subject to Cal-COBRA (or similar laws in other states), the health insurance company is entitled to the reimbursement through the same credit as its payroll taxes as described above.</p>
<p>New Notice Requirements</p>	<p>In addition to the notices that were previously required under COBRA, during the subsidy period the plan administrator must also provide notice of:</p> <ul style="list-style-type: none"> - the availability of premium reductions, and - the option to enroll in different plan coverage (if the employer allows this option) <p>Thus, notices that are sent out from February 17, 2009 through the end of the subsidy period must be amended to include this information or the information must be included in a separate document.</p> <p>For AEIs who elected COBRA continuation coverage between September 1, 2008 and February 17, 2009, or who are eligible to do so during the extended election period, the plan administrator must issue the additional notice within the next 60 days.</p> <p>Putting all of the requirements together, this means that – whether in the same document or in a separate document – all individuals who are eligible to take advantage of the new provisions must be given notice of:</p> <ul style="list-style-type: none"> - a prominently-displayed description of the employee and qualified beneficiary’s right to a reduced premium and any conditions on entitlement to the reduced premium - a description of the 60-day extended election period - the forms necessary for establishing eligibility for premium reduction - the name, address and telephone number of the plan administrator

<p>New Notice Requirements <i>cont.</i></p>	<ul style="list-style-type: none"> - if applicable, a description of the ability to elect an alternative coverage option within 90 days - a description of the individual’s obligation to notify the plan administrator of his/her eligibility for coverage under another group health plan or Medicare, and the penalty for failing to do so. <p>The federal government has 30 days to issue model notices that comply with the new provisions (i.e., by mid-March 2009).</p> <p>The plan administrator must provide the amended COBRA notices to AEIs within 60 days of the enactment of the new provisions (i.e., on or before April 18, 2009). Thus, as a practical matter, there is only 30 days to get the notices out if the federal government takes the full 30 days to issue the model notices.</p> <p>Failure to provide the required notice will be treated as a failure to meet the ordinary COBRA notice requirements (i.e., a plan penalty of up to \$110 per day under ERISA and an excise tax under the Internal Revenue Code).</p>
<p>New Reporting Requirements</p>	<p>An employer who wants to get reimbursement for the COBRA premiums “fronted” under the new law must submit reports to the IRS upon request with information that includes:</p> <ul style="list-style-type: none"> - information on the receipt (including dates and amounts) of the AEIs’ 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 AEIs - attestation of involuntary termination, including the date of the involuntary termination (which must be

<p>New Reporting Requirements <i>cont.</i></p>	<p>between September 1, 2008 and December 31, 2009) for each covered employee whose involuntary termination is the basis for eligibility for the subsidy</p> <ul style="list-style-type: none"> - proof of each AEI's eligibility for COBRA coverage at any time during the period from September 1, 2008 through 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. <p>The IRS is supposed to publish guidance and regulations setting the exact time and manner for the reporting requirements.</p>
<p>Steps to Take NOW</p>	<p>The time to act is NOW!</p> <p>Here is a list of action items:</p> <ul style="list-style-type: none"> - Contact internal and external personnel who have responsibility for administering COBRA compliance to assign and coordinate responsibility for compliance with the new rules - Contact payroll about getting the necessary information for reporting requirements, including how to identify all AEIs - Determine how you are going to define "involuntary termination" - Determine how you will identify employees who were "involuntarily terminated" from September 1, 2008 through December 31, 2009 - Identify employees who were involuntarily terminated on or after September 1, 2008 and/or their qualified

<p>Steps to Take <i>NOW</i> cont.</p>	<p>beneficiaries who did not timely elect COBRA (or who elected it but then terminated it) for the purposes of the extended election period, as well as their last known addresses</p> <ul style="list-style-type: none"> - Decide if you are going to offer an option to elect different coverage - Establish a system to limit COBRA charges for AEIs to 35% of the COBRA premium, effective as soon as possible on or after March 1, 2009 - Provide an interim method of an AEI to waive the right to subsidy assistance until the IRS provides additional guidance - Establish a system for individual who become ineligible for the subsidy (e.g., because they become eligible for another group health insurance plan) can provide the required notice of such fact - Update your COBRA qualifying event notices (which must be provided to all COBRA-eligible individuals within 14 days after a COBRA-qualifying event) to add the new subsidy provisions (including, where applicable, the notice to select a different option) and provide them to all future AEIs - On or before April 17, 2009, provide a special enrollment notice to AEIs who were involuntarily terminated on or after September 1, 2008 but who either did not previously elect COBRA coverage or did elect it but lost it or terminated it, and permit them a 60-day special election period after such notice is provided in which to elect COBRA coverage and receive the subsidy - On or before April 17, 2009, provide notice of the subsidy to all current AEIs who were on COBRA coverage as of February 17, 2009 - Develop a procedure to establish and monitor the maximum 9-month period for the subsidy and/or the
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<p>Steps to Take <i>NOW</i> cont.</p>	<p>end of the COBRA coverage period (whichever occurs first)</p> <ul style="list-style-type: none"> - Get the forms for reimbursement, and make sure to complete and submit them as soon as possible (including collecting information needed to attest to involuntary termination, determining the amount of offset based on amount of subsidies, etc.) - Develop a tracking system that you can use to get government reimbursement - Identify any AEIs who will be eligible for the subsidy after any employer-initiated subsidy ceases (e.g., through a severance plan) - If a voluntary employer subsidy of COBRA premiums is considered for future involuntary terminations, consider the cost-effectiveness of that subsidy in light of the Stimulus subsidy and what alternative measures the employer will take instead (e.g., a cash payment, subsidy following the expiration of the Stimulus subsidy)
<p>Special Provisions</p>	<p>The Stimulus also extends the maximum COBRA period for AEIs whose qualifying event is a termination of employment or a reduction in hours and who have a right to receive pension benefits directly from the Pension Benefit Guaranty Corporation (“PBGC”) because the PBGC has taken over the pension plan in which the AEI participated. In this case, the maximum COBRA period ends on the employee’s date of death, with the maximum period for the surviving spouse and any dependents ending 24 months after the employee’s death.</p> <p>The Stimulus also extends the maximum coverage period for AEIs who are Trade Adjustment Assistance-eligible (i.e., a worker who lost a job or whose hours of work and wages were reduced as a result of increased imports and who, as a result, is eligible for certain benefits, re-employment services, etc. under the Trade Act of 1974) as of the date the maximum COBRA coverage period would otherwise end. In such case, the maximum COBRA period</p>

Special Provisions <i>cont.</i>	ends on the date such employee ceases to be a Trade Adjustment Assistance-eligible individual.
Problems Already Apparent	AEIs may pay the reduced COBRA premiums beginning on the effective date of the new provisions (February 17 or March 1). Because many AEIs may have already paid, or will pay, the full benefit premiums in advance for coverage during the months of March and April 2009, the employer must either reimburse the difference to the AEI, or provide a credit toward future payments.
Updates	<p>On February 26, 2009, the DOL updated its website to include information on the subsidy, a sample notice, and similar information. It is likely there will be additional updates. Its website is www.dol.gov/COBRA.</p> <p>The IRS has also released new guidance for employers on claiming credit for COBRA subsidies that are “fronted.” The guidance, in Q/A form, and revised IRS Form 941 are available on the IRS website, www.irs.gov. Employers will be able to claim the credit on Line 12a of revised Form 941. Employers must list the number of individuals provided COBRA premium assistance on Line 12b. The due date for the first quarter 2009 Form 941 was not extended.</p>

Teresa R. Tracy is chair of Berger Kahn’s Labor & Employment Group. She has practiced exclusively in labor and employment law for 28 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles. She has been selected six times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. In 2005, she was named one of the “Top 75 Women Litigators” by the *Los Angeles Daily Journal*.

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