

COBRA Changes Effective Immediately: Major New Employer Obligations and Employee Rights

Labor & Employment Law Alert -- February 25, 2009

by [Jo Vestal](#)

On February 17, 2009 President Obama signed the American Recovery and Reinvestment Act of 2009 ("ARRA" or "the Act") which imposes significant new obligations on employers. Among the significant changes was a change in who is responsible for paying the premiums for COBRA coverage as a result of employment terminations. Major modifications include:

- Assistance eligible individuals" (defined below) are only required to pay 35% of the applicable COBRA premium for a period of up to 9 months beginning with the first period of COBRA coverage on or after February 17, 2009. Employers are required to pay the remaining 65% of the premium and are to be reimbursed by the government, generally through a credit against withholding and FICA taxes with respect to its employees.
- Assistance eligible individuals" who are eligible for the premium subsidy are defined as:
 - Individuals who are or were eligible for COBRA continuation coverage; and
 - Who lost or lose coverage under their employer sponsored group health plan due to involuntary termination of employment between September 1, 2008 and December 31, 2009; and
 - Who elect COBRA continuation coverage.
- Assistance eligible individuals" who are eligible for the subsidy include not only involuntary terminated individuals, but any qualified beneficiary associated with the relevant qualified employee (like a dependent of an employee who was covered immediately prior to the qualifying event).
- Contrary to press coverage, premium subsidies are not limited to individuals affected by layoff, but appear to include those affected by any type of involuntary loss of employment – including for misconduct unless it is disqualifying gross misconduct.
- The Act requires that employer locate "assistance eligible individuals" who lost coverage due to an eligible employment termination between September 1, 2008 and the enactment of ARRA who were previously eligible to elect COBRA coverage but did not accept it, and notify them of their right to subsidized COBRA coverage and other matters specified in the Act.
- There is no premium reduction or subsidy for periods of COBRA coverage before February 17, 2009, and ARRA does not extend or change the length of COBRA coverage.
- Other COBRA changes addressed in ARRA include:
 - A requirement that Employers refund partial premiums for qualified individuals who pay or have paid more in premiums than they are now required to pay under the Act's subsidy provisions.
 - The ability of "assistance eligible individuals" to select coverage different than they had while employed, under certain circumstances, as long as the premium is no greater than the previous coverage.
 - High income individuals, defined as those with modified adjusted gross income (AGI) in excess of \$145,000 (\$290,000 for joint filers), will have their taxes increased by the amount of the subsidy for the tax year in which they receive the subsidy. They also have the opportunity to elect not to receive the subsidy. The amount of premium subsidy that is taxed is reduced for individuals with modified AGI between \$125,000 and \$145,000 (\$250,000 - \$290,000 for joint filers).
 - There are new rules on when "assistance eligible individuals" lose their right to a subsidy if they have other group health coverage or Medicare.
 - The COBRA changes in ARRA are also applicable to continuation coverage that may be required by comparable state law (e.g. for small employers) or health plan maintained by federal or state government. They do not apply to FSAs (flexible spending accounts).

Employers need to modify their current COBRA election notices to comply with the Act, including informing former employees about the availability of the subsidy. Employers also must send notices to “assistance eligible individuals” affected by a termination after September 1, 2008 and prior to enactment of the Act (February 17, 2009) informing them of their subsidy rights. The Department of Labor is directed to issue model notices within 30 days of enactment of the Act. It has not done so at this time.

These COBRA changes are difficult and create numerous issues for employers. We are available to assist you with compliance.