



LEGISLATIVE BRIEF

COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

Under the American Recovery and Reinvestment Act of 2009 (ARRA), as amended, certain individuals who are eligible for COBRA continuation health coverage, or similar coverage under State law, may receive a subsidy for 65 percent of the premium. These individuals are required to pay only 35 percent of the premium. The employer may recover the subsidy provided to assistance-eligible individuals by taking the subsidy amount as a credit on its quarterly employment tax return. The employer may provide the subsidy — and take the credit on its employment tax return — only after it has received the 35 percent premium payment from the individual.

The following questions and answers reflect guidance from the Internal Revenue Service regarding administration of and eligibility for the COBRA premium subsidy. Additional Legislative Briefs provide information on taxability and recapture, form preparation, and reporting and documentation.

Please note that the IRS issued this guidance before recent extensions to the premium subsidy laws were adopted. We have noted where the original guidance is affected by the extensions. Please contact your Alan Benoy Insurance Services representative with any questions.

Now that the COBRA Premium subsidy legislation has passed, how is this going to be communicated to the employer/payroll community?

The IRS will continue to provide updated information through www.irs.gov as it becomes available.

What individuals are eligible for the COBRA subsidy?

An assistance-eligible individual can be any COBRA qualified beneficiary associated with the related covered employee, such as a dependent child of an employee, who is covered immediately prior to the qualifying event. The qualifying event for purposes of eligibility for the subsidy is involuntary termination of the covered employee's employment that occurs during the period beginning September 1, 2008, and ending May 31, 2010. The individual must also be eligible for COBRA coverage, or similar state coverage, during this period.

Note: the premium subsidy extension law clarified that COBRA eligibility during this period is no longer a factor, although individuals must timely elect COBRA. In some cases, employees who experienced a reduction in hours before their termination may also be eligible for the subsidy.

Is this provision for employees who involuntarily lose their jobs — or will it apply to all employees even if they leave voluntarily?

The credit applies only to involuntarily terminated employees and their family members who are qualified beneficiaries. ***Note: The subsidy now also applies to individuals who lose coverage due to a reduction in hours of employment and were later involuntarily terminated at any time from March 2, 2010 through May 31, 2010.***

Is the employer required to provide the COBRA subsidy?

The subsidy requirement applies to group health plans that are subject to the Federal COBRA continuation coverage requirements or to similar requirements under State law. If you are an employer with such a plan and you receive a 35 percent payment from an assistance-eligible individual, you are required to make the remaining 65 percent payment.



COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

What if the employer's group health plan is self-insured? Do the subsidy requirements apply?

Yes, the subsidy requirements apply to all plans subject to the COBRA requirements, including self-insured plans. In that case, the employer must provide the COBRA coverage if the assistance eligible individual pays 35 percent of the otherwise required premium. The remaining 65 percent is treated as a payment of payroll taxes by the employer maintaining the plan.

What other agencies will provide information about the COBRA subsidy?

Information about the COBRA subsidy will also be available through the Department of Labor and the Department of Health and Human Services, which, along with the IRS, share responsibility for the COBRA requirements.

In order to be an assistance-eligible individual, must the individual actually have coverage under the group health plan at the time of the involuntary termination of employment?

Yes. The individual must have actual group coverage at the time of the qualifying event, i.e., the involuntary termination of employment. The qualifying event must occur between Sept. 1, 2008, and May 31, 2010, and the individual must be eligible for COBRA coverage at any time during that period.

Is the COBRA benefit based on the former employee's insurance coverage?

In general, COBRA coverage is based on the same coverage that the individual had at the time of the qualifying event. However, under the COBRA subsidy provision, an employer may offer an assistance eligible individual the option of choosing other coverage that is also offered to active employees and that does not have higher premiums than the coverage the individual had at the time of the qualifying event.

Does the subsidy apply to medical and dental plans or medical only?

The subsidy is generally available for COBRA continuation coverage under any group health plan, including medical, dental and vision coverage. However, it does not apply to a flexible spending arrangement (FSA) offered under a cafeteria plan.

If an employer changes the insurance offered under its group health plan, can the subsidy apply to an assistance-eligible individual's coverage under the new insurance?

Yes, as long as the individual's coverage under the new insurance qualifies as COBRA continuation coverage and the individual otherwise continues to be eligible for the subsidy.

What is the general process by which an assistance-eligible individual applies for the subsidy?

A group health plan is required to notify any individual with a qualifying event occurring during the period from September 1, 2008 through May 31, 2010, of the availability of the subsidy. If an assistance eligible individual already has COBRA coverage in effect on February 17, 2009 (date of enactment), the individual should receive a special notice of the availability of the subsidy. The notices will explain how to apply for the subsidy.

What agency is responsible for providing guidance on these notice requirements?

The Department of Labor (DOL) is responsible for providing guidance on notices that must be provided about the availability of the subsidy and, if applicable, the special COBRA election period. For more information on the COBRA subsidy notice requirements, visit DOL's COBRA page at www.dol.gov/COBRA, which contains model notices and other guidance on these provisions. You can also call 1-866-444-3272 to speak with a benefits advisor from DOL's Employee Benefits Security Administration.

How will the COBRA premium subsidy be provided retroactive to September 2008?

The COBRA premium subsidy is not retroactive. The earliest it can apply is for the first period of coverage beginning on or after February 17, 2009, the date of enactment of ARRA. In addition, if an individual elects COBRA coverage under the special COBRA election period, the coverage is effective only for the first period of coverage beginning on or after February 17, 2009. In the case of a health plan that provides coverage on a calendar month basis, the first period of coverage is the month beginning March 1, 2009.

COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

Can an assistance-eligible individual reduce his or her COBRA premium to 35% immediately, rather than waiting for the notice from the health plan?

Yes. The subsidy applies as of an assistance eligible individual's first period of coverage beginning on or after February 17, 2009. For example, it would apply to the premium for the period of coverage beginning March 1, 2009, in the case of coverage provided on a calendar month basis. However, because the COBRA subsidy provision was only recently enacted, systems to implement the premium reduction might not yet be in place. The assistance-eligible individual would therefore be well-advised to contact the group health plan or employer to discuss the premium reduction before sending in the reduced premium.

Can an employer just reduce an assistance-eligible individual's premiums to 35 percent, rather than notifying the individual about the subsidy?

No, because an individual might not be eligible for the subsidy. For example, the individual might be eligible for coverage under another group health plan and therefore not be eligible for the subsidy.

Can an employer pay an assistance-eligible individual's 35 percent share of the premium, rather than collecting it from the individual?

No. The premium subsidy provision does not allow the individual's 35 percent share of the premium to be paid by the employer.

If I am an assistance-eligible individual, is there any other way to get the subsidy besides paying reduced premiums? For example, can I take it as a credit when I file my 2009 tax return?

No, the subsidy is provided to an assistance-eligible individual only in the form of reduced COBRA premiums. That is, the assistance-eligible individual only has to pay 35 percent of the premium in order to receive COBRA coverage. The employer is reimbursed for the remaining 65 percent through a credit on its payroll tax returns.

Is an employer-initiated layoff an involuntary termination of employment for purposes of eligibility for the COBRA premium subsidy?

Yes, an employer-initiated layoff is generally an involuntary termination of employment for purposes of eligibility for COBRA premium subsidy.

Are tax-exempt entities subject to this provision?

Yes, if the tax-exempt entity is required to provide COBRA continuation coverage. Moreover, an employer that is exempt from Federal income tax is generally subject to federal payroll tax requirements and required to file [Form 941](#). As in the case of taxable employers, a tax-exempt entity can claim credit on Form 941 for the COBRA subsidy it provides.

How will the COBRA credit apply in the case of a business acquisition which results in a successor employer?

There is no "one size fits all" answer because the result depends on the facts and circumstances, including whether the entity that provided the subsidy continues in existence. The fact that an employer is a successor employer for purposes of applying the social security wage base does not mean that it can claim credit for the subsidy provided by the predecessor employer.

Does the COBRA premium subsidy provision apply to employers in Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands?

Yes. Employers (or multiemployer plans or insurers, as applicable) in Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands that are required to provide COBRA continuation coverage are required to provide the subsidy to assistance eligible individuals and can claim credit on [Form 941-PR](#) (for Puerto Rico) or [Form 941-SS](#) (for American Samoa, US Virgin Islands, Guam and the Commonwealth of the Northern Mariana Islands) for the amount of subsidy provided.

COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

When does the premium reduction first apply to an assistance eligible individual?

The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009, for which the assistance eligible individual is eligible to pay only 35 percent of the premium (as determined without regard to the premium reduction) and be treated as having made full payment. For this purpose, a period of coverage is a monthly or shorter period with respect to which premiums are charged by the plan. The exact date when the first period of coverage beginning on or after February 17, 2009, begins depends on the period with respect to which premiums are charged by the plan.

Note: This question and answer is based on Q&A-30 of IRS [Notice 2009-27](#). See Q&A-31 and -32 of IRS Notice 2009-27 for additional guidance on the first period of coverage for which the premium reduction applies.

How long does the premium reduction apply to an assistance eligible individual?

The premium reduction applies until the earliest of (1) the first date the assistance eligible individual becomes eligible for other group health plan coverage (with certain exceptions) or Medicare coverage, (2) the date that is ~~nine~~ **15** months after the first day of the first month for which the ARRA premium reduction provisions apply to the individual, or (3) the date the individual ceases to be eligible for COBRA continuation coverage.

Note: This question and answer is based on Q&A-33 of IRS [Notice 2009-27](#). See Q&A-34 through -37 of IRS Notice 2009-27 for additional guidance on how eligibility for other group health plan coverage affects eligibility for the premium reduction.

IRS Notice 2009-27 provides guidance on whether a termination of employment is involuntary for purposes of the COBRA premium subsidy provision. In what circumstances will the IRS accept an employer's determination that an employee's termination of employment was involuntary for purposes of claiming a payroll tax credit for the COBRA premium subsidy provided to the employee?

If an employer's determination that an employee's termination of employment was involuntary for purposes of the COBRA subsidy provision is consistent with a reasonable interpretation of the applicable statutory provisions and IRS guidance, the IRS will not challenge that determination for purposes of whether the employer is entitled to claim a payroll tax credit for the COBRA premium subsidy provided to the employee. The employer must maintain supporting documentation of its determination that the employee's termination of employment was involuntary for this purpose, including an attestation by the employer of involuntary termination for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.

If a health plan is not subject to any "COBRA continuation coverage" requirements as defined for purposes of the COBRA premium subsidy, but the employer voluntarily provides continuation coverage, does the subsidy apply to the voluntary coverage?

No. See IRS Notice 2009-27, Q&A-16. The subsidy applies only to premiums for "COBRA continuation coverage" as defined under the COBRA premium subsidy provision. Under this definition, COBRA continuation coverage consists of federal COBRA under the Internal Revenue Code (Code) or the Employee Retirement Income Security Act of 1974 (ERISA), which generally apply to plans of private employers (other than churches) with at least 20 employees, or under the Public Health Service Act (PHSA), which applies to plans of state or local government employers with at least 20 employees; temporary continuation coverage (TCC) under the Federal Employees Health Benefits Program (FEHBP); and state law continuation coverage requirements that are comparable to the Federal COBRA requirements, often referred to as state "mini-COBRA" laws.

For example, the subsidy does not apply to premiums for continuation coverage under a church plan (as defined under the Code and ERISA) that is exempt from the COBRA requirements under the Code and ERISA and is also not subject to any comparable State law requirements. Similarly, the subsidy does not apply to premiums for continuation coverage under a governmental plan (as defined under the Code and ERISA) maintained by a federal instrumentality the employees of which are not covered by FEHBP, or to a plan maintained by an Indian tribal government that satisfies the requirements for a governmental plan (as defined under the Code and ERISA).

COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

If an insurer provides continuation coverage that is required under state law and is otherwise comparable to federal COBRA coverage, does it fail to be “COBRA continuation coverage” as defined under the COBRA premium subsidy provision merely because it is provided after the employer has gone out of business and the employer’s group health plan has been terminated?

No. If the continuation coverage is required under state law and is otherwise comparable to federal COBRA coverage — that is, the coverage is substantially similar to the coverage that was previously provided under the group health plan and is provided at a monthly cost that is based on a specified percentage of the group health plan’s cost of providing such coverage — then it qualifies as COBRA continuation coverage that is eligible for the premium subsidy even after the employer has gone out of business and the group health plan has been terminated.

In the case of an employee who is hired only for a limited period, such as a seasonal worker, or a teacher hired only for one school year, can the end of employment at the end of the period be considered an involuntary termination?

Yes. Under IRS Notice 2009-27, Q&A-1, an involuntary termination may include the employer’s failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services. Thus, if an employee hired for a limited period works to the end of the period, is willing and able to continue employment, and terminates employment because of the failure of the employer to offer additional work, an involuntary termination occurs for purposes of the premium subsidy.

Is an elected official involuntarily terminated at the completion of his or her term of office if the official ran for reelection and was not reelected?

Yes.

Is an elected official who is prohibited from running for reelection because of term limits involuntarily terminated at the completion of his or her term of office?

Yes.

Is an elected official who is eligible to run for reelection, but chooses not to, involuntarily terminated at the completion of his or her term of office?

No. This is the result even if the official does not run for reelection because of health or other reasons.

If an employee’s eligibility for health coverage under a multiemployer plan is based on a minimum number of hours of covered employment, can the employee become an assistance-eligible individual if the employee’s involuntary termination by an employer contributing to the plan results in the employee’s failing to satisfy the minimum hours requirement and losing coverage? If so, how does subsequent employment with one or more employers contributing to the plan affect the employee’s eligibility for the premium subsidy?

If an employee covered by a multiemployer health plan is involuntarily terminated by an employer contributing to the plan, resulting in a reduction in the employee’s total number of hours of covered employment, which causes the employee to lose coverage and become eligible for COBRA, the employee can be an assistance-eligible individual (and eligible for the COBRA premium reduction) if the involuntary termination and COBRA eligibility occur during the period from September 1, 2008 through May 31, 2010, and the individual elects COBRA coverage.

This is the case even if the loss of coverage and eligibility for COBRA do not occur immediately after the involuntary termination, for example, because the employee has “banked” hours at the time of the involuntary termination. In addition, the employee does not become ineligible for the premium subsidy merely because of subsequent employment with one or more employers contributing to the plan, provided that the employee continues COBRA coverage and does not otherwise become disqualified. However, if the employee works enough hours to become

COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

eligible again for active coverage, eligibility for the premium subsidy ends when active coverage under the plan begins and COBRA coverage ends.

Note: the premium subsidy extension law clarified that COBRA eligibility during this period is no longer a factor, although individuals must timely elect COBRA.

Does an involuntary termination of employment occur if a member of a military Reserve unit or the National Guard who is employed by a civilian employer is called to active duty?

Yes. This is the case regardless of whether the civilian employer otherwise treats the employee's absence as a termination of employment or a leave of absence.

Does eligibility for the COBRA premium reduction end if an assistance-eligible individual is eligible for or covered by TRICARE health coverage provided for members of the military and their families?

No. Eligibility for coverage or coverage by TRICARE health coverage does not end an assistance-eligible individual's period of premium subsidy. See *McGee v. Funderburg*, 17 F.3rd 1122 (8th Cir. 1994).

If an individual who did not have a COBRA election in effect on February 17, 2009, is eligible for the extended Federal (or FEHBP) COBRA election period and elects COBRA coverage during that period, does the individual's COBRA coverage have to be effective with the first period of coverage beginning on or after February 17, 2009?

An individual who is eligible for the extended Federal (or FEHBP) COBRA election period must be offered COBRA coverage that is effective with the first period of coverage beginning on or after February 17, 2009. See IRS Notice 2009-27, Q&A-52. However, the employer or health plan may also allow the individual to elect COBRA coverage to be effective as of a later date. In that case, however, for purposes of the 15-month limit on eligibility for the premium subsidy, the 15-month period would begin with the first period of coverage beginning on or after February 17, 2009.

In addition, under ARRA, the period starting with the involuntary termination and ending with the first day of the first period of coverage beginning on or after February 17, 2009, is disregarded in determining whether a break in coverage has occurred for purposes of limiting preexisting condition exclusions under subsequent group health plan coverage. However, if an individual elects COBRA coverage to be effective as of a later date, the period between the first day of the first period of coverage beginning on or after February 17, 2009, and the date when COBRA coverage is effective is not disregarded for purposes of the rules limiting preexisting condition exclusions.

Notice 2009-27, Q&A-51, provides that the premium subsidy can apply to coverage provided under state requirements pursuant to a special election period similar to the extended federal (or FEHBP) COBRA election period. If state COBRA law is amended to provide such an election period, does the COBRA premium subsidy apply to coverage elected during such a period, and, if so, even if the coverage offered during such a period begins later than the first period of coverage beginning on or after February 17, 2009?

If state COBRA law is amended to provide a special election period similar to the extended federal (or FEHBP) COBRA election period, the COBRA premium subsidy applies to coverage elected during such a period. Such state law can require coverage offered during such a period to be effective with the first period of coverage beginning on or after February 17, 2009, or allow it to be effective as of a later date. However, as discussed in question above, if an individual is eligible for COBRA coverage effective with the first period of coverage beginning on or after February 17, 2009, and elects COBRA coverage to be effective as of a later date, the 15-month limit on eligibility for the premium subsidy would begin with the first period of coverage beginning on or after February 17, 2009. In addition, depending on state law, the delay in the beginning of COBRA coverage could affect the application of preexisting condition limitations.

COBRA Premium Subsidy Answers for Employers: Administration and Eligibility

If an assistance-eligible individual has the option of paying his or her COBRA premiums on a pretax basis under a health reimbursement arrangement (HRA), can the individual's 35 percent share of the premium be paid from the HRA?

COBRA premiums paid on a pretax basis from an HRA are treated as paid by the employer and are not taken into account in determining whether an individual has paid his or her 35 percent share of the COBRA premiums. See IRS Notice 2009-27, Q&A-22, Example 2. Therefore, the individual is not treated as paying the 35 percent and the subsidy does not apply.

Source: Internal Revenue Service