COBRA Coverage Expansion: HR Action Steps to Take Now

2/17/2009 By Toni Pilzner of Butzel Long

The American Recovery and Reinvestment Act of 2009 (ARRA), the financial stimulus law signed by President Barack Obama on Feb. 17, 2009, includes significant changes to the COBRA continuation coverage rules. In general, the ARRA:

- Provides a 65 percent federal government subsidy of COBRA continuation coverage premiums for a maximum of nine months for certain individuals who are COBRA qualified beneficiaries because of a covered employee's involuntary termination of employment.
- Requires employers to pay the 65 percent portion upfront, and then allows them to deduct those costs from their Social Security and Medicare taxes (see **Claiming the New COBRA Premium Credit on Payroll Tax Forms**).
- Retroactively allows workers who became jobless as early as Sept. 1, 2008, and rejected COBRA coverage to reconsider and receive COBRA benefits.
- Extends COBRA continuation coverage periods for certain individuals receiving Trade Adjustment Assistance benefits or pension benefits from the Pension Benefit Guaranty Corp.

Plan administrators of group health care plans subject to COBRA need to act quickly to:

- Implement administrative procedures necessary to provide the subsidy.
- Provide notices required by the ARRA to COBRA qualified beneficiaries who are eligible for the subsidy.
- Implement the extended COBRA coverage periods.

In addition, group health plan documents will need to be amended to incorporate these changes.

COBRA Premium Subsidy

What COBRA premium subsidy does the ARRA provide?

Under the ARRA, the federal government will subsidize 65 percent of the COBRA premium actually charged to an "assistance eligible individual" (AEI) for up to nine months.

How is the subsidy provided?

Under the subsidy program, a group health plan can require an AEI to pay only 35 percent of the COBRA premium that the AEI would otherwise be required to pay. The federal government will reimburse an employer for the remaining 65 percent of the COBRA premium by allowing the employer to take a credit against the employer's liability to deposit payroll taxes and federal income taxes withheld from employees' compensation.

Who are "assistance eligible individuals"?

An AEI is a COBRA qualified beneficiary who meets all three of these criteria:

- Is eligible for COBRA coverage at any time on or after Sept. 1, 2008 and on or before Dec. 31, 2009.
- Elects COBRA coverage either during the original COBRA election period or during the special election period provided by the ARRA (discussed below).
- Is a COBRA qualified beneficiary because of an involuntary termination of a covered employee's employment (other than for gross misconduct) that occurs on or after Sept. 1, 2008 and on or before Dec. 31, 2009.

An AEI may be a covered employee or a covered employee's covered spouse or dependent child who became a qualified beneficiary because of the involuntary termination of the covered employee's employment.

When does the subsidy begin?

The subsidy applies to periods of COBRA continuation coverage beginning after the enactment of the ARRA. A "period of coverage" is the monthly (or shorter) period for which COBRA premiums are charged. For group health plans using calendar months as the period of coverage, the subsidy applies beginning March 1, 2009.

When does the subsidy end?

The subsidy ceases to apply (and a plan administrator may again charge the full COBRA premium) as of the earliest of:

- The date the AEI becomes eligible for coverage (not actually covered) under another group health care plan (other than plans providing only dental, vision, counseling, or referral services, a health care flexible spending plan, or a health reimbursement arrangement) or Medicare coverage; or

- Nine months after the first day of the first month to which the subsidy applies; or

- The end of the maximum COBRA coverage period required by law (including permissible early terminations); or

- For an AEI who elects COBRA during the special enrollment period (discussed below), the end of the maximum COBRA coverage period that would have applied if the AEI had elected COBRA coverage when first entitled to do so.

The act requires an AEI who becomes eligible for coverage under another group health plan to notify the plan providing COBRA coverage in writing. An AEI who fails to provide the required written notice is subject to a penalty 110 percent of the subsidy provided for the AEI after the date the AEI became eligible for the other coverage.

Does the subsidy apply to COBRA premiums for all types of group health plans?

No. The subsidy does not apply to COBRA premiums for health care flexible spending accounts.

How does the subsidy apply in situations where the group health plan charges the AEI less than the maximum permissible COBRA premium?

The ARRA specifically states that 35 percent of the premium must be paid by the AEI or on the AEI's behalf by someone other than the AEI's employer and that an employer cannot claim a subsidy credit until the group health plan has actually received the 35 percent of the COBRA premium as required by the ARRA.

This means that an employer is permitted to claim only a subsidy credit of 65 percent of what the total COBRA premium would be if the amount actually paid by the AEI was 35 percent of the total COBRA premium. For example:

If the maximum permissible COBRA premium is $500 per month, but the employer only requires the AEI to pay $100 per month, the employer can claim only a subsidy credit of $185 ($100/35 percent = $285 x 65 percent = $185). The employer cannot claim a subsidy credit of $325 (65 percent of the maximum permissible $500 COBRA premium) or of $400 (the difference between the maximum permissible COBRA premium and the $100 actually paid by the AEI).

Employers that do not charge the full COBRA premium (e.g., when an AEI is charged a reduced COBRA premium under a separation agreement) will have to calculate the correct subsidy based on the amount actually paid by the AEI. If the employer pays 100 percent of the AEI's COBRA premium, the employer cannot claim any subsidy credit for that AEI.

Are all AEIs eligible for the subsidy?

Although all AEIs are technically eligible for the subsidy, any AEI who is a "high-income individual" or the spouse or dependent of a high-income individual will be required to repay the subsidy as an additional tax on the high-income individual's individual tax return for the year in which the subsidy was provided.

A "high-income individual" is a single taxpayer with modified adjusted gross income in excess of $145,000 or a married taxpayer filing jointly with modified adjusted gross income in excess of $290,000. The subsidy "recapture tax" begins to phase in for a single taxpayer with modified adjusted gross income in excess of $125,000 or a married taxpayer filing jointly with modified adjusted gross income in excess of $250,000.

A plan administrator must allow an AEI who is a "high-income individual" to waive the subsidy permanently in the manner to be prescribed by the Secretary of the Treasury. If it is waived, the "high-income individual" would pay the full COBRA premium charged by the group health care plan.

Actions Required to Implement the Subsidy

What does a group health plan administrator have to do now?

A group health plan administrator must take all necessary actions to provide the 65 percent subsidy to AEIs beginning March 1, 2009. This generally means ensuring that an AEI is required only to pay the reduced COBRA premiums for periods of coverage beginning on or after March 1, 2009.

However, because it is likely that a plan administrator will not be able to make timely notification to all AEIs about the reduced amounts effective for March premium payments, AEIs may pay the full COBRA premiums for one or two months. If an AEI pays the full COBRA premium for the first or second period of coverage beginning after the date of enactment of the ARRA (i.e., periods of coverage for March and April 2009), the plan administrator must credit the subsidized portion of the premium against future COBRA premiums (if the plan administrator reasonably expects the overpayment to be fully applied to future COBRA premiums within 180 days) or refund the subsidized portion within 60 days.

What does a group health plan administrator have to do in the near future?

For any individual who becomes a COBRA qualified beneficiary after the enactment of the ARRA:

- The group health plan administrator must include with all other required COBRA election notices and forms specific information about the availability of the subsidy.

- The group health plan administrator must provide notices to two groups of AEIs within 60 days after the enactment of the ARRA.

The first notice must go to all AEIs who currently have COBRA continuation coverage to advise them of the availability of the subsidy and the requirements to qualify for the subsidy.

The second notice must go to any individual who is entitled to the special enrollment period (discussed below). An individual is eligible for this special enrollment period if the individual qualifies as an AEI except that the individual does not have a COBRA coverage election in effect on the date of enactment of the ARRA. (This includes an individual who previously made a COBRA coverage election but whose COBRA coverage ended before the enactment date because of non-payment of premiums.) The notice to these individuals must advise them of the availability of the subsidy, the requirements to qualify for the subsidy and additional information required by the ARRA, as well as provide them forms necessary for electing COBRA during the special election period.

The act requires the U.S. Department of Labor to provide model notices for plan administrators to use within 30 days after the enactment of the ARRA.

Special COBRA Election Period

What is the special election period for AEIs?

An individual who would be an AEI except that the individual does not have a COBRA coverage election in effect on the date of enactment of the ARRA must be given a second chance to elect COBRA coverage. This special election period begins on the date of enactment of the ARRA and ends 60 days after the plan administrator provides the required notice described above to the individual.

If an AEI elects COBRA during the special election period, when does COBRA coverage begin?

COBRA coverage for an AEI who elects COBRA during the special election period begins on the first day of the first COBRA coverage period beginning after the date of enactment of the ARRA (March 1, 2009, for group health plans using calendar months as COBRA coverage periods).

COBRA coverage is *not* retroactive to the date the AEI originally lost coverage.

If an AEI elects COBRA during the special election period, when does the COBRA coverage period end?

The COBRA coverage period for an AEI who elects COBRA during the special election period ends when COBRA coverage would otherwise have ended if the AEI had elected COBRA when initially eligible to do so after qualifying event. For example:

An AEI who lost coverage and became entitled to elect COBRA continuation coverage that would have begun on Oct. 1, 2008 elects COBRA under the special election. This AEI's COBRA coverage period begins on March 1, 2009 and ends on March 31, 2010 (18 months after the date the AEI's COBRA coverage would have begun because of the original qualifying event). The AEI's 18 month maximum COBRA coverage period is not measured from the date of enactment of the ARRA.

Can pre-existing condition exclusions be applied to an AEI electing during the special enrollment period?

The act provides that the period beginning on the original qualifying event date and ending on the first day of the first COBRA coverage period beginning after the date of enactment of the ARRA is disregarded when determining if the AEI had a 63-day significant break in coverage for purposes of applying pre-existing condition exclusions.

Employer's Option to Offer Additional COBRA Coverage Options

What is the ARRA's "Plan Enrollment Option"?

Generally, a COBRA qualified beneficiary is permitted only to elect COBRA continuation coverage that is the same as the coverage the qualified beneficiary had as of the date of the COBRA qualifying event. The act permits (but does not require) an employer to allow AEIs (including AEIs that have COBRA coverage without the special election) to elect a health care coverage option different from the health care coverage originally offered to the AEI under COBRA.

What requirements apply to the different coverage option?

- The COBRA premium for the different coverage cannot exceed the COBRA premium for the coverage in which the AEI 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 AEI elects the different coverage.
- The different coverage cannot provide only dental, vision, counseling or referral services (singly or in any combination) and cannot be a health care flexible spending account or an on-site facility primarily providing first aid, prevention, or wellness care.

When is an AEI permitted to elect different coverage?

If an employer decides to offer the different coverage option to an AEI, the employer must provide the AEI an election notice and allow an election period of not less than 90 days.

What questions or issues regarding the subsidy are not addressed by the ARRA?

1. The term "involuntary termination" is not defined in the ARRA. Despite this, an employer must attest that each AEI for whom the employer takes the subsidy credit was involuntarily terminated. This determination can be complicated by questions such as constructive discharge, participation in voluntary termination programs, and mutual agreement of the employer and employee to terminate employment. A determination that an employee was involuntarily terminated can impact eligibility for

other benefits, including severance benefits and unemployment benefits.

2. There is no guidance as to when an AEI electing COBRA during the special enrollment period must pay the initial premium for COBRA coverage. This might be addressed by the Department of Labor, perhaps in the model forms. It is possible that the existing rules governing when an initial COBRA premium must be paid may apply (payment of all premiums due must be made within 45 days of date COBRA coverage is elected).

COBRA Coverage Period Extension

How does the ARRA extend the COBRA coverage period?

The act extends the initial COBRA coverage period for two distinct groups of COBRA qualified beneficiaries following a termination of employment or reduction in hours of a covered employee COBRA qualifying event:

1. If the covered employee has (as of the qualifying event date) a nonforfeitable right to receive any pension benefits directly from the Pension Benefit Guaranty Corp. (PBGC), the maximum COBRA coverage period for the covered employee ends on the covered employee's date of death. The maximum COBRA coverage period for the covered employee's surviving spouse or dependent children ends 24 months after the covered employee's date of death.

2. If the covered employee is a Trade Adjustment Assistance-eligible individual (as of the date COBRA coverage would otherwise end because of the regular 18-month or 36-month COBRA coverage periods), the maximum COBRA coverage period ends on the date the covered employee ceases to be a Trade Adjustment Assistance-eligible individual.

Is there a limit on these extended COBRA coverage periods?

Under the ARRA, a COBRA coverage period cannot be extended beyond Dec. 31, 2010 under either of the provisions above.

When do the extended COBRA coverage periods become effective?

These extensions to the maximum COBRA coverage periods for these groups of qualified beneficiaries apply to any COBRA coverage periods that would otherwise end on or after the date of enactment of the ARRA.

Conclusion

The new COBRA provisions established by the ARRA require employers and plan administrators to take prompt action and make quick decisions to implement new COBRA procedures. Some of these decisions and procedures include:

- Identifying all potential AEIs – employees who were covered by the group health plan whose employment was involuntarily terminated (other than for gross misconduct) beginning Sept. 1, 2008 (and their covered spouses and dependents) – and their last known addresses.

- Identify which of these individuals are AEIs currently receiving COBRA coverage and which are entitled to the special enrollment period.

- Adopting the method when developed by the Secretary of Treasury for permitting "high-income individuals" to waive the premium subsidy permanently.

- Determining the correct premium subsidy that applies to AEIs who are not being required to pay the maximum permissible COBRA premium.
- Developing a method for either applying the excess of any COBRA premiums above the 35 percent AEI portion received from an AEI for March and April 2009 COBRA premiums to future premiums or refunding the excess.
- Adjusting administrative procedures to reflect the maximum nine months of available COBRA premium subsidy and the maximum COBRA coverage period for AEIs who elect COBRA continuation coverage during the special enrollment period.
- Develop and provide the notices required by the ARRA (noting that the Department of Labor is to provide model notices within 30 days of the ARRA).
- Determine whether to implement the special coverage option for AEIs.
- Determine if any covered employee has a nonforfeitable right to receive pension benefits from the PBGC or is Trade Adjustment Assistance eligible and adjust administrative procedures to reflect the extended maximum COBRA continuation coverage period that may apply to the covered employee or the covered employee's surviving spouse and dependent children.

We encourage all employers and plan administrators to begin responding to these new rules immediately. Employers using a third party COBRA administrator should contact their COBRA administrator to coordinate a response.

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Checklist for Complying with COBRA Special Election Period, SHRM Templates and Tools, February 2009

Stimulus Law Increases HIPAA Requirements, *SHRM Online* Legal Issues, February 2009

Additional Resources (External):

Summary of Key COBRA Provisions in the American Recovery and Reinvestment Act, American Benefits Council, February 2009

Congress Establishes Premium Subsidy for COBRA Beneficiaries, AON Consulting, February 2009

American Recovery and Reinvestment Act of 2009 Affects Group Health Plans, Even If Fewer Than 20 Employees, Thompson Hine LLP, February 2009

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