

# ARRA COBRA Subsidy Frequently Asked Questions for Employers

This FAQ document represents our interpretation based on the information available at the time of its creation. However, it should not be construed as legal advice or counsel. Modifications may be made as additional clarifications and guidance become available.

## 1. EFFECTIVE DATE

### What is the effective date?

The American Recovery and Reinvestment Act (ARRA) was effective February 17, 2009, and measures many of its timeframes from that date. For instance, the COBRA subsidy provisions are effective for a plan as of the plan's first billing period on or after that date (so March 1, 2009, for most plans).

## 2. OVERVIEW

### What do the major COBRA subsidy provisions do?

- Provide a 65% subsidy for COBRA premiums for up to 9 months for "assistance-eligible individuals." The subsidy is "fronted" by the employer, multiemployer plan, or insurer and recovered from the federal government via a payroll tax credit.
- Provide a special COBRA election period for individuals involuntarily terminated from employment between September 1, 2008, and February 16, 2009, who didn't elect COBRA or elected it but no longer had it on February 17, 2009.
- Require new and revised notices related to the subsidy and special election period.

## 3. DEFINITIONS

### Which plans are affected?

ARRA covers most health plans that are subject to COBRA or similar continuation coverage laws. This includes: insured and self-funded plans; state and municipal plans that are subject to continuation under the Public Health Service Act; plans under the Federal Employee Health Benefits Program; and plans subject to state continuation laws similar to COBRA. Medical plans (including dental, vision, and/or prescription only plans) are eligible for subsidy, but flexible spending arrangements are not.

### Which state continuation laws are qualified for the subsidy?

Washington does not have subsidy-qualifying state continuation laws.

### What defines an "assistance-eligible individual?"

To be an assistance-eligible individual (AEI), an individual must be either:

- (a) an employee involuntarily terminated from employment between September 1, 2008, and December 31, 2009, and eligible for COBRA during that period, or
- (b) such an employee's spouse or child who was enrolled through him or her on the day before the involuntary termination.

An individual who is eligible for another group health plan or Medicare is not an AEI. If a child is born to or placed for adoption with a former employee AEI after the involuntary



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termination qualifying event, that child is also a qualified beneficiary and an AEI. Some employees, though entitled to receive the subsidy, will have to refund some or all of it on their next year's federal income taxes because their adjusted gross income is over certain levels (\$250,000 for joint filers; \$125,000 for others). Employers are not required to track or calculate this. AEIs can waive the subsidy, but any waiver is irrevocable.

### **What about domestic partners?**

The subsidy is not available for domestic partners, even if they can be included on COBRA coverage. This may complicate recovering the subsidy from the federal government.

### **What does "involuntarily terminated" mean?**

No definition has been provided to date, but a little guidance exists. Layoff, firing, and other involuntary discharges are likely included. According to U.S. Department of Labor (DOL) FAQs, this includes "being told not to come back to work until further notice." A reduction of hours or furlough under which an employment relationship remains does not appear to be an involuntary termination. Further, if you do not offer COBRA to employees terminated for "gross misconduct," the new law does not appear to change that. You must make any decision not to offer COBRA because of a termination for gross misconduct.

## **4. THE SUBSIDY**

### **When does the subsidy begin?**

The subsidy begins as of the plan's first billing period on or after February 17, 2009 (usually March 1, 2009), whether the recipient is already enrolled as an AEI on that date or enrolls during the special election period described later in these FAQs. There is no subsidy available for premiums related to coverage before that date.

### **When does the subsidy end?**

The subsidy will apply for a maximum of 9 months (though unsubsidized continuation coverage may be available beyond that). It will end earlier if:

- (a) the AEI becomes eligible for (not necessarily enrolled in) another group health plan or Medicare; or
- (b) COBRA ends for any reason (e.g., the maximum continuation period is exhausted, premium is not paid timely, etc.).

AEIs have the obligation to notify you of their eligibility for other coverage and are subject to a penalty of 110% of the subsidy amount if they fail to do so.

### **How does the subsidy work?**

For a period of up to 9 months, AEIs who pay the 35% of their share of the COBRA premium will be entitled to the continued coverage. For continued coverage before or after that time, the usual premium amounts apply. Alternatively, any person or entity, except the AEI's employer, may pay on the AEI's behalf. Usually, the AEI's premium is calculated from 102% of the "active" premium (so 35% would be 35.7% of that active premium). The entity "fronting" the remainder of the premium is permitted to take a credit in the amount of the remaining 65% against its federal payroll tax (Form 941). If the



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credit amount is greater than the taxes due or no taxes are due, the Department of the Treasury will directly reimburse the entity as if taxes had been overpaid.

Note that an entity that was already subsidizing continuation premiums before ARRA would not be able to take a credit for the amount of that subsidy, but rather only for 65% of the amount that was actually being charged to AEIs.

For instance: if full COBRA premium is \$1,000, but you already were paying half, the subsidy would be based on the half that the qualified beneficiary was being charged. The AEI would have to pay only \$175 (35% of \$500) and you would have to pay the \$825 balance, but only \$325 (65% of \$500) could be recovered through the payroll tax credit.

### **Who pays the subsidy?**

In a multiemployer group health plan, the multiemployer plan pays the subsidy and claims the payroll tax credit. In a COBRA-eligible group health plan or a self-funded plan (whether or not COBRA-eligible), the employer pays the subsidy and claims a payroll tax credit. In both cases, Asuris will require timely payment of the full premium from the plan or employer.

### **What if I've received full premium payments from AEIs already?**

During the first two months after the effective date of the subsidy program, if full payments are received, you may refund the "overpaid" 65%. Alternatively, if it is (and remains) reasonable to believe that amount would be exhausted within 180 days, you may provide an AEI a credit of the overpaid amount against future premiums. After the first two months, the subsidy must be fully implemented.

<b>5. SPECIAL ELECTION PERIOD</b>
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### **What is the special election period and how does it work?**

Employees involuntarily terminated from employment between September 1, 2008, and February 16, 2009, who didn't elect COBRA, or elected it but no longer had it on February 17, 2009 (and their spouses and dependent children covered the day before the involuntary termination), are given a second chance to elect COBRA. The special election period began February 17, 2009, and will last until 60 days after you provide notice of it. If special election is made, COBRA coverage is effective as of the first billing period on or after February 17, 2009 (usually March 1, 2009). The period between the original COBRA qualifying event and the effective date of special election is not part of a significant break in coverage for purposes of applying a pre-existing condition waiting period to an AEI. Eligible individuals using the special election period must start COBRA as of March 1, 2009, and pay the corresponding premiums.



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## 6. NOTICES

### **Are new or revised notices required?**

Yes. Because the subsidy is a temporary provision, you may prefer to create separate supplemental notices, rather than amending existing ones, and that is permissible.

COBRA requires a general notice to be sent to qualified beneficiaries upon the occurrence of a qualifying event. You must send a revised general notice to all individuals experiencing a qualifying event between September 1, 2008, and December 31, 2009, with one exception. A revised general notice does not have to be sent to a qualified beneficiary whose qualifying event occurred between September 1, 2008 and February 16, 2009 if the qualifying event was not an involuntary termination of employment and you provided a general notice that was compliant with the law at that time. The revised general notice must provide information about the subsidy and include related forms. Department of Labor model notices are available at <http://www.dol.gov/ebsa/COBRAGeneralNoticeFullVersion.doc> and <http://www.dol.gov/ebsa/COBRAGeneralNoticeAbbreviatedVersion.doc>. The models include a full version and an abbreviated version.

The full version must be used for all qualified beneficiaries with any qualifying event from September 1, 2008, through December 31, 2009, if either:

- they haven't been provided a general COBRA notice yet, or
- they were provided one after February 16, 2009, that did not address the subsidy.

The abbreviated version can be used as an alternative to the full version, but only for qualified beneficiaries who already elected and have retained COBRA coverage in connection with a qualifying event on or after September 1, 2008. The abbreviated version provides only the subsidy information.

These notices must be mailed no later than April 18, 2009. The full version is also to be used as your general COBRA notice hereafter for qualifying events occurring until January 1, 2010.

You also must send notice of the available special election period to individuals who had an involuntary termination of employment qualifying event between September 1, 2008, and February 16, 2009, and either did not elect COBRA, or elected it but no longer had it on February 17, 2009. A Department of Labor model of this notice is available at <http://www.dol.gov/ebsa/COBRAExtendedElectionPeriodNotice.doc>. This notice approximates the full general COBRA notice, providing information about the special election opportunity, as well as the subsidy and related forms.

In addition to these notices, you may want to consider updating or supplementing the initial COBRA notice that you provide to individuals upon enrollment in your plan to disclose the availability of the subsidy, though doing so is not required. Because the subsidy is temporary, Asuris' benefit booklets and certificates of creditable coverage will not be changed at this time.



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## 7. ADMINISTRATION, COMMUNICATION, AND COOPERATION

### **What information must you provide to Asuris?**

If your group is subject to COBRA, you will continue to use the same COBRA application form you have always sent to Asuris. You need to note on the form whether **or not** the qualified beneficiary is eligible for the subsidy. Failure to do so may result in processing delays.

If your employee count has varied above and below the 20-employee mark from calendar year to calendar year, it is imperative you ensure that Asuris has accurate information about whether COBRA applies to your plan.

You must notify Asuris, when you are notified, that an AEI has become eligible for Medicare or other group coverage.

## 8. COVERAGE CHANGES

### **Can AEIs change from one of our health plan options to another?**

COBRA qualified beneficiaries have long been able to change among health plan options at the same times that active employees may, generally at annual renewal. ARRA permits, but does not require, groups to allow an AEI to enroll in an option that is different than the coverage he had at the time of his qualifying event as long as that other coverage is: (a) no more expensive; (b) is also offered to active employees; and (c) is not limited to only dental, vision, or counseling coverage (or any combination of those coverages), a flexible spending arrangement, or an on-site medical clinic.

Serious consideration should be given before making any decision to allow such changes, as doing so should be expected to increase claims experience, and therefore premium rates, as well as add to administrative tasks. Should you decide to allow these changes, you will need to provide individuals with a notice of that opportunity and give them a 90-day period after notice in which to elect a change. The Department of Labor model notices include optional forms and language for this purpose. You will also need to inform Asuris.

## 9. APPEALS

### **What if an individual thinks he or she has been wrongly denied subsidy?**

If you are a private employer subject to COBRA, the individual can appeal to the U.S. Department of Labor. If you are a public employer, the individual can appeal to the U.S. Department of Health and Human Services. The relevant Department's decision is due within 15 business days.



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## 10. Health Coverage Tax Credit (HCTC)

### **How does this COBRA subsidy work with the subsidy under the HCTC?**

The two do not work together; a choice must be made between them. The HCTC under the Trade Adjustment Act is complex but, in general terms, includes a premium subsidy available to a small category of individuals who have lost employment due to foreign competition. HCTC-eligible individuals are notified from the IRS. The ARRA increases the HCTC premium subsidy such that an individual may be better off taking it than the COBRA subsidy that is the subject of these FAQs.

## 11. ADDITIONAL INFORMATION

### **Where can I get more information?**

Official guidance is available at [www.dol.gov/COBRA](http://www.dol.gov/COBRA).

For updated information from Asuris, including details and changes in processes and forms related to COBRA and the ARRA subsidy, visit [www.asuris.com/cobra](http://www.asuris.com/cobra).