

COBRA Subsidy Extension Signed into Law

A COBRA subsidy extension has been signed into law (December 21, 2009) as part of the Fiscal Year 2010 Defense Appropriations Act. According to the Assistant Secretary of the Employee Benefits Security Administration (EBSA), the Act extends the eligibility period for the American Recovery and Reinvestment Act (ARRA) premium reduction for an additional two months (through Feb. 28, 2010) and the maximum period for receiving the subsidy for an additional 6 months (from nine to 15 months).

Warning: Additional COBRA subsidy extensions may also be included in other pieces of legislation, so the eligibility period may be extended further.

The Defense Act provides a 2-month extension of the eligibility date for the COBRA subsidy, from December 31, 2009 to February 28, 2010. The bill increases the length of the COBRA subsidy for a total of 15 months for those who have already been receiving the subsidy as well as those who are newly eligible. For those individuals who were unable to pay their full COBRA premium after the 9-month subsidy ran out, they will now have the opportunity to receive another 6 months of the COBRA subsidy for a total of 15 months.

Examples

1. An "assistance eligible individual's" 9-month COBRA subsidy expired at the end of November. This individual, provided that he is still an "assistance eligible individual" and has not become eligible for other group health plan coverage or Medicare, is entitled to receive another 6 months of the subsidy.
2. "Assistance eligible individuals" who experience a qualifying event in January or February 2010 are eligible for 15 months of the COBRA subsidy.

New Notice Requirements

The Defense Act imposes new notice requirements on group health plans to alert individuals to the availability of the COBRA subsidy extension. There are various categories of individuals who must receive notice with varying notice deadlines.

After the original COBRA subsidy provision passed as a part of the American Recovery and Reinvestment Act (ARRA), there was confusion about which qualified beneficiaries were entitled to receive notice of the ARRA subsidy, qualified beneficiaries who experienced an event that clearly would not entitle them to the COBRA subsidy (such as divorce, death of the employee, loss of dependent status, or entitlement to Medicare) were required to receive an "abbreviated" notice if they had elected COBRA. The Defense Act appears to have resolved the drafting of the earlier law and limits the new notices to be sent only to those who are eligible for the COBRA subsidy extension.

Below are the categories of individuals who must receive notice that we have identified at this stage in our analysis process.

Categories of Individuals Who Must Receive Notice

- >> "Assistance eligible individuals" whose COBRA subsidy expired, continued to pay the full COBRA premium for December and now are entitled to an extension.
- >> "Assistance eligible individuals" whose COBRA subsidy expired, did not pay the full COBRA premium for December and are now entitled to an extension.
- >> "Assistance eligible individuals" who are currently receiving the 9-month subsidy and are now entitled to an extension.
- >> "Assistance eligible individuals" having a qualifying event on or after October 31, 2009 and are still within their election period.
- >> "Assistance eligible individuals" terminating after the law's enactment date (December 21, 2009).

Notice Deadlines

There are three different notice deadline dates for the COBRA subsidy extension.

For those "assistance eligible individuals" who did not timely pay the December premium or paid the full premium, the statutory language requires the group health plan to provide notice of the COBRA subsidy extension within 60 days starting with December 1. This notice must include information on the ability to make retroactive premium payments.

For those "assistance eligible individuals" who are currently receiving the 9-month subsidy as well as those within an election period, the notice of the COBRA subsidy must be provided within 60 days after the date of the law's enactment (December 21, 2009).

For those "assistance eligible individuals" having a qualifying event occurring after the law's enactment (December 21, 2009), the notice of the COBRA subsidy extension should meet the usual COBRA notice deadlines.

We understand from the DOL that they are planning to issue updated model notices within 30 days after the law's enactment (December 21, 2009). However, there is no guarantee at this point. The Assistant Secretary of Labor of the Employee Benefits Security Administration encourages all to watch the DOL website for updates, www.dol.gov/COBRA.

How long does an individual have to pay the retroactive premium?

For individuals who failed to pay their COBRA premium because they were unable to pay the full COBRA premium after their subsidy expired, the Defense Act provides an opportunity for these individuals to retain their COBRA coverage at the reduced subsidy rate. Since a group health plan has up to 60 days to notify these individuals of the new option, their COBRA coverage may lapse, but they would be entitled to a reinstatement.

"Assistance eligible individuals" who failed to timely pay their December premium have 60 days after the date of enactment (December 21, 2009), or if later, 30 days after the group health plan provides notice.

Has the "involuntary" termination provision been retained?

Department of Labor (DOL) sources as well as counsel on the House Education and Labor Committee involved in drafting the COBRA language tell us that the omission of the word "involuntary" preceding the phrase "termination of employment" in the new law does not mean the subsidy extension is now opened to all terminations of employment. They interpret the omission to apply only for purposes of the notification requirement. Plan sponsors may still make voluntary vs. involuntary determinations in granting the subsidy extension, but individuals have the right to appeal. However, as we have seen since last March, DOL has been extremely generous to individuals in defining the term "involuntary." In fact, DOL contact noted that 75% of employer denials of the COBRA subsidy have been overturned by the DOL.

Refunds for Retroactive Subsidy

For those "assistance eligible individuals" who paid a full COBRA premium in December, a refund or credit is due from the plan. The refund /credit rules are the same as the rules that were created in the original COBRA subsidy law. Either a reimbursement must be made to the individual or a credit must be provided that reduces subsequent premium payments.

Eligibility Based on Timing of Event

The Defense Act resolves an issue from the original ARRA law that prevented an individual from becoming eligible for the subsidy if their termination of employment occurred in December, but their COBRA did not start until January 1. The Defense Act amends the ARRA to base the COBRA subsidy on when the qualifying event occurs and not when the COBRA begins. For involuntary terminations of employment occurring February 28, 2010, the COBRA subsidy will be available even though the COBRA period will not begin until March 1.