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ARRA Temporary COBRA Premium Subsidy

The American Recovery and Reinvestment Act of 2009 ("ARRA")¹ was signed into law by President Obama on February 17, 2009. Among its many provisions, ARRA contains a substantial temporary federal government subsidy for COBRA premiums when the COBRA qualifying event is an employee's involuntary termination of employment.² While ARRA's COBRA premium subsidy provisions are a major benefit for unemployed workers and their families, they impose significant administrative requirements on employers.

To Which Health Plans Does ARRA's COBRA Premium Subsidy Apply?

The ARRA COBRA premium subsidy generally applies to all employer-sponsored health plans that are subject to federal or state group health plan continuation coverage requirements, commonly referred to as "COBRA." These plans include:

- Private (i.e., nongovernmental) plans currently subject to the Employee Retirement Income Security Act's ("ERISA's") and/or the Internal Revenue Code's ("Code's") COBRA health care continuation coverage requirements;
- State and local government plans subject to the Public Health Service Act's health care continuation coverage requirements;
- Federal government plans subject to the health care continuation coverage requirements of Section 8905a of Title 5 of the United States Code; and
- Small private employer (i.e., averaging less than 20 employees during the prior year) fully insured plans not subject to the federal COBRA law, but subject to state insurance laws requiring health care continuation coverage, such as Texas's "mini COBRA" law.³

Who Qualifies for the ARRA COBRA Premium Subsidy?

The individuals eligible for the subsidy (referred to in the ARRA COBRA premium subsidy provisions as "assistance

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eligible individuals," or "AEI's"), are, generally, all COBRA "qualified beneficiaries" who have as their qualifying event a covered employee's involuntary termination of employment occurring on or after September 1, 2008 and before January 1, 2010.

Example: Company X employs Joe. Joe is a participant in Company X's group health plan and has coverage under Company X's group health plan for himself, his wife, and his two children. Company X terminates Joe in April, 2009. Joe, his wife, and his two children are AEI's and therefore are eligible for the ARRA COBRA premium subsidy if they elect COBRA coverage.

What is the Amount of the ARRA COBRA Premium Subsidy?

The subsidy is 65% of the COBRA premium. Since the COBRA premium is typically 102% of the otherwise applicable cost of comparable active employee coverage, the ARRA COBRA premium subsidy will typically be 66.3% (65% of 102%) of the cost of active employee coverage.

Example: COBRA elections are made for Joe, his wife, and his two children. Under Company X's health plan, the cost of coverage for active employees and their families similarly situated to Joe and his family is \$1,000, \$300 of which was paid by Company X for active employees so that Joe's monthly premium cost for himself, his wife and his two children while he was an active employee was \$700. Joe's COBRA premium would normally be \$1,020 (\$1,000 x 1.02). Joe's ARRA premium subsidy is \$663 (1,020 x .65), so his post-subsidy premium is \$357 (\$1,020 - \$663).

When Does the ARRA COBRA Premium Subsidy Go Into Effect?

The ARRA COBRA premium subsidy applies to the first coverage period beginning on or after the date of ARRA's enactment. Since coverage periods typically coincide with the calendar month, and ARRA was enacted on February 17, 2009, the ARRA COBRA premium subsidy generally applies to COBRA premiums beginning with those due for March, 2009.

How Long is an Assistance Eligible Individual Entitled to the ARRA COBRA Premium Subsidy?

The subsidy applies until the earliest of:

- The AEI's becoming eligible⁴ for other group health plan coverage⁵ (e.g., under a plan of a new employer or under a plan of the AEI's spouse's employer);
- The end of the AEI's maximum COBRA coverage period (i.e., the end of 18 months of COBRA coverage);
- The end of the ninth month of premium subsidy (i.e., the maximum subsidy period is nine months).⁶

Since ARRA Was Not Enacted Until February 17, 2009, But Includes AEI's Whose Qualifying Events Occurred on or After September 1, 2008, What Special Rules Apply to Individuals Whose Qualifying Events Occurred Before ARRA's Enactment?

AEI's whose COBRA qualifying events occurred before ARRA's enactment are entitled to the COBRA premium subsidy, but only for premiums due for periods of coverage beginning on or after ARRA's enactment (i.e., generally, for March, 2009 and later months). Individuals who lost their regular group health plan coverage on account of a covered employee's involuntary termination of employment occurring on or after September 1, 2008, and before February 17, 2009, who did not timely elect COBRA, or who elected COBRA but whose continuation coverage terminated because they stopped paying their COBRA premiums, may under ARRA qualify for the premium subsidy by electing,⁷ or re-electing, COBRA within 60 days of the plan administrator's providing them with notice of the ARRA COBRA premium subsidy and of their right to elect or re-elect COBRA.⁸

How is the ARRA COBRA Premium Subsidy Actually Provided to Assistance Eligible Individuals?

ARRA requires that employers, plan administrators, and insurance companies effectively act as conduits in the Federal government's payment of the COBRA premium subsidy. Specifically, the delivery mechanism for the subsidy works like this: An AEI who timely elects COBRA is required to pay only 35% of the otherwise applicable COBRA premium. The plan must nevertheless provide COBRA coverage as if the full premium had been paid. Generally, under the terms of the plan's insurance or other funding arrangement, the employer will need to pay to the plan and/or carrier the full premium amount, as if it had been paid to the employer by the AEI. The employer⁹ is then entitled to reimbursement by the federal government for the 65% of the COBRA premium not paid by the employee. The reimbursement will generally occur nearly simultaneously with the employer's¹⁰ contribution to the plan, or payment to the insurer, of the unsubsidized portion of the premium, because the employer¹¹ is entitled

to treat its payment of the unsubsidized portion of the premium as if it were the employer's¹² payment of federal payroll taxes¹³ to the IRS. The employer then takes a credit for this amount immediately against the employer's next federal payroll tax deposit liability.

Example: Joe is an AEI and his COBRA premium for coverage under Company X's group health plan for April 1, 2009, without the ARRA premium subsidy, would be \$1,020. Because of ARRA's COBRA premium subsidy, Joe's actual COBRA premium for April, 2009 is just \$357 ($\$1,020 \times .35$). Joe sends the plan administrator of Company X's health plan \$357 as Joe's share of his April, 2009 COBRA premium. Company X remits to the plan and/or insurer \$1,020, the full amount of Joe's April, 2009 COBRA premium, of which \$663 ($\$1,020 - \357) is out of Company X's own pocket. When it makes its next payroll tax deposit a few days later, Company X reduces the amount it would otherwise be required to deposit by \$663, claiming a credit for that amount on its IRS Form 941 payroll tax return.

Are All AEI's Entitled to the ARRA COBRA Premium Subsidy?

No. An AEI whose modified adjusted gross income ("MAGI"¹⁴) is \$145,000 or more (\$290,000 or more in the case of a joint return) will have 100% of any COBRA premium subsidy that he or she receives recaptured (essentially, as an addition to his or her personal federal income tax liability) when he or she files his or her 1040 for the calendar year in which the subsidy was received. An AEI whose individual MAGI is \$125,000 or more, but less than \$145,000 (\$250,000 or more, but less than \$290,000, in the case of a joint return), is subject to partial recapture of the subsidy.

What is the Definition of "Involuntary Termination of Employment" for Purposes of Determining Whether a Terminated Employee Is Eligible for the ARRA COBRA Premium Subsidy? What About a Termination of Employment for "Cause" or Gross Misconduct?

ARRA does not contain a definition of involuntary termination. The DOL and IRS have indicated, however, that, in addition to covering obvious situations of involuntary termination, such as layoffs and firings, a "constructive" termination, such as an employee's quitting to avoid an imminent involuntary reduction of hours and/or pay, will likely be considered an involuntary termination for purposes of the ARRA COBRA premium subsidy.

Group health plans are not required to provide COBRA continuation coverage to individuals who are terminated for "gross misconduct." Therefore, for plans that apply this rule, in cases where COBRA continuation coverage is in fact not offered to the employee involuntarily terminated for "gross misconduct," ARRA's COBRA premium subsidy would not apply. However, it would appear that ARRA's COBRA premium subsidy would apply in cases where an employee is terminated involuntarily under circumstances perhaps amounting to "cause," but where the employee is nevertheless provided eligibility for COBRA continuation coverage by the plan.

When Do I Need to Notify Terminated Employees About ARRA's COBRA Premium Subsidy?

AEI's whose qualifying events occur on or after February 17, 2009 should be provided a COBRA notice that includes, or is supplemented with, an explanation of the ARRA COBRA premium subsidy. Since COBRA notices are required to be provided within 44 days after a qualifying event, the first deadline for providing notice to an AEI of his or her COBRA premium subsidy rights in connection with a qualifying event occurring on or after February 17, 2009 is April 2, 2009 (February 17, 2009 plus 44 days). Notice regarding ARRA's COBRA premium subsidy to AEI's whose qualifying events occurred before February 17, 2009, and who are entitled under ARRA to make an election of, or to re-elect, COBRA, must be provided within 60 days after ARRA's February 17, 2009 date of enactment, that is, by April 18, 2009.

Is There a Web Page Where I Can Find an Official Explanation and Examples of The Notices That I Need to Provide in Connection With ARRA's Temporary COBRA Premium Subsidy?

Yes. While your insurance carrier or third-party administrator ("TPA") will likely keep you informed of the notice requirements and provide you with appropriate forms, or simply handle these requirements for you, the U.S. Department of Labor ("DOL") has made an explanation of ARRA's notice requirements, complete with sample forms, available to all on the web. A DOL web page containing a link to the DOL's sample forms and collects links to other DOL web pages, as well as to IRS web pages providing other detailed information about the ARRA COBRA premium subsidy, may be found [here](#).

Has the IRS Provided Guidance and Sample Forms Regarding the Payroll Tax Reimbursement Mechanism for the ARRA COBRA Premium Subsidy?

Yes. Information regarding the ARRA COBRA premium subsidy reimbursement procedures, and a revised IRS Form 941, Employer's Quarterly Federal Tax Return, may be found [here](#).

Since ARRA's COBRA Premium Subsidy is Already in Effect, Am I Out of COBRA Compliance If I Haven't Done Anything About It Yet?

Generally, no. In enacting ARRA's COBRA premium subsidy, Congress realized that employers would need some time to learn about it and implement new procedures. Generally, ARRA provides that a plan administrator who collects the full COBRA premium from AEI's for the first one or two coverage periods (generally, March, 2009 or March and April, 2009) may refund to the AEI the excess portion (i.e., 65%) of the premium paid by him or her or, if the employer reasonably expects that the excess premium payments can be used up within 180 days, instruct the AEI to pay no premium at all until the excess is used up and then apply the excess against the AEI's 35% premium requirement until it is used up.

Whom Should I Contact at Strasburger if I Need Help Navigating the ARRA COBRA Premium Subsidy Requirements?

You should contact your regular Strasburger contact or [Luke Bailey](#), the author of this newsletter.

¹ ARRA is frequently referred to in press accounts as the "economic stimulus bill."

² A copy of the COBRA premium subsidy provisions of ARRA may be found as a PDF [here](#) and a copy of the Joint Committee Explanation of these provisions as a PDF [here](#).

³ Texas's continuation coverage rules for small employers (i.e., Texas's "mini COBRA" provisions) are at § 1251.251 et seq. of the Texas Insurance Code.

⁴ Note that the rule for termination of the right to the ARRA COBRA premium subsidy requires only that the qualified beneficiary receiving the subsidy become *eligible* for alternate non-COBRA coverage, not that he or she actually become *covered* under the alternate plan, unlike the rules for termination of COBRA coverage itself.

⁵ Other than coverage consisting of only dental, vision, counseling, or referral services (or a combination thereof), coverage under a flexible spending arrangement (as defined in Section 106(c)(2) of the Code), or coverage under an employer on-site clinic consisting primarily of first aid services, prevention, and wellness care, or similar care (or a combination thereof).

⁶ In the case of state health care continuation coverage laws, the maximum period of continuation coverage will typically be shorter than the 18 months provided by COBRA, and may be shorter than nine months (e.g., the maximum period of coverage under

Texas's mini COBRA law is six months). In such a case, the maximum ARRA COBRA premium subsidy would be conformingly foreshortened.

⁷ Even if their standard 60-day COBRA election period previously ran out.

⁸ Such an election or re-election will not, however, extend their COBRA coverage period beyond the maximum period of coverage that they would have had if they had made a timely non-ARRA election or had not stopped paying their premium. Note that if a qualified beneficiary does make a special election or re-election of COBRA under ARRA, no part of the "gap period" when the qualified beneficiary was not covered by COBRA may be counted in determining whether the qualified beneficiary has been without coverage for 63 days for purposes of applying HIPAA's pre-existing condition exclusion rules.

⁹ In the case of a multiemployer plan, the plan itself must fund the full COBRA benefit and then obtain reimbursement. In the case of a small fully-insured plan that is not subject to COBRA, but is subject to state health care continuation coverage requirements, such as Texas's "mini COBRA" law, the insurer must provide the same benefit as if the AEI had paid his or her full COBRA premium, and can obtain reimbursement from the federal government.

¹⁰ Or the plan's or insurance company's. See footnote 9.

¹¹ Or the plan or insurance company. See footnote 9.

¹² Or the plan's or insurance company's. See footnote 9.

¹³ That is, employee federal income tax withholding ("FITW") or employer and employee social security and Medicare ("FICA") taxes.

¹⁴ For this purpose, MAGI is the AEI's regular adjusted gross income ("AGI"), with foreign income under Code §§ 911, 931, and/or 933 added back.

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