

# The American Recovery and Reinvestment Act of 2009

## Changes to COBRA Regulations



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An agreement has been met between the House and Senate, resulting in The American Recovery and Reinvestment Act of 2009. On February 17, 2009, President Obama signed the Act into law. While the Act addresses many issues relating to the economy, the focus of this article is to outline changes to the current COBRA legislation.

While multiple versions of the bill were offered, the final bill provides a subsidy equaling 65% of monthly COBRA premium for a maximum period of nine months. The subsidy will be funded by the government and paid directly to the employer through federal tax credits.

In an attempt to address the health care needs of the rising unemployed population, the Act implements a financial subsidy for a certain group: *assistance eligible individuals* (AEIs). The subsidy is for those employees involuntarily terminated (except for gross misconduct) from employment beginning September 1, 2008 and ending December 31, 2009.

There are four major steps an employer must follow to comply with the updated COBRA legislation:

- 1) Determine the terminated employees that meet the definition of AEI,**
- 2) Provide notice to the AEIs,**
- 3) Allow a new (or extended) election period to the AEIs,**
- 4) Amend plan documents to address the changes to COBRA,**

Below is a summary of key highlights in the legislation. While some grey areas remain, the majority of the requirements are outlined, allowing employers to begin the new process.

### **Who is an *Assistance Eligible Individual* (AEI)?**

- Qualified beneficiary due to involuntary termination between September 1, 2008 through December 31, 2009,
- Qualified beneficiary such as spouse or dependent,
- Eligible for COBRA coverage during this time period,
- Enrolled in COBRA coverage when originally terminated (within the September 1, 2008 through December 31, 2009 timeframe),
- Declined to enroll in COBRA coverage when termination occurred,

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- Note: a *high income individual* will be charged a ‘recapture tax’ on his personal income tax if the subsidy is utilized
  - *High income individuals* are defined as a single taxpayer with a modified adjusted gross income (MAGI) in excess of \$145,000 or a married taxpayer filing jointly with a modified adjusted gross income of \$290,000. The ‘recapture tax’ phases in for single taxpayers starting at \$125,000 (MAGI) and married filing jointly at \$250,000 (MAGI)
  - The plan administrator must allow *high income individuals* to permanently waive the subsidy (guidance for this waiver will be provided by the Department of Treasury)

### What is the Subsidy?

- 65% of the monthly premium,
- Begins on March 1, 2009,
- Group Health Plan (GHP) may require AEI to pay no more than 35% of the monthly premium,
- Employer may not receive entire subsidy credit if it is charging the participant less than the entire COBRA premium. The participant must contribute the 35% of the required premium contribution in order for the employer to receive the tax credit.

### What is the Coverage Period?

- Nine months after the first month the subsidy was provided,
- When the AEI becomes eligible (not enrolled) in another group health plan or Medicare (unless plan offers only dental, vision, HRA, FSA, etc.),
- The end of the maximum term allowed under COBRA as defined by law,
- For those AEIs electing coverage during the ‘special enrollment period’ the end of the maximum term if they had elected COBRA when originally entitled,
- The date the AEI fails to meet the payment rules under COBRA law

**What coverages does the subsidy provide for?** Group Health Plans (GHP) except for healthcare flexible spending accounts.

### What are Employer Responsibilities?

- Notify all potential Assistance Eligible Individuals (within 60 days of the enactment of the Act). The Department of Labor is required to provide model notices within 30 days of Act’s effective date.
  - **Notice A:** sent to all AEIs involuntarily terminated (from September 1, 2008) currently participating in COBRA. Notice will outline the subsidy and eligibility requirements.
- Or**
  - **Notice B:** sent to all AEI’s involuntarily terminated starting September 1, 2008 that waived COBRA coverage. Notice will outline new ‘special open enrollment period’, the subsidy and eligibility requirements. Employer must include election forms in the mailing. *This notice must also go to all AEI’s that had COBRA coverage but lost coverage due to non-payment of premiums.*

**Employer Responsibilities** (*continued*)

- Allow AEIs to enroll in COBRA, effective March 1, 2009 (if GHP uses monthly coverage periods). Coverage does NOT permit/require election back to original entitlement date.
- Eligibles are allowed to elect at any time from the Act's effective date to 60 days from the employer's notification date.
- Employers must disregard the potential 63 day 'significant break in coverage' from the time period between the AEI's original COBRA effective date and the March 1, 2009 election date. This potential break in coverage may not be used to determine pre-existing clauses.
- Employers may offer a "Plan Enrollment Option". This would allow all AEIs to elect coverage other than that coverage in which he was enrolled in at time of termination. If this option is offered:
  - Option must be offered to AEIs currently participating in COBRA,
  - Premium associated with the additional offering may not be more costly than that coverage in which the AEI was eligible for,
  - Additional coverage may not be offered to COBRA participants only-it must be available to active participants,
  - Additional offering may not be a dental/vision/referral/FSA only offering,
  - The AEI must be allowed 90 days to enroll in the additional offering
- Filing Requirement: Employers will be required to file with the government to request the subsidy credit.
  - Employers must attest that the participants receiving the subsidy were involuntarily terminated,
  - An accounting of credits taken in the current period and estimated credits for the next period must be reported,
  - Report showing a listing of all covered beneficiaries, the amount of subsidy for each and a notation stating if the subsidy is for an individual or two or more persons

In addition to the new subsidy listed above, the legislation also outlines two additional groups whom must be offered an extended COBRA coverage period.

First, a covered employee who has a non-forfeitable right to pension benefits paid directly by the Pension Benefit Guarantee Corporation (PBGC) currently loses COBRA coverage upon date of death. The new legislation increases that coverage period for the spouse or covered dependent(s) to 24 months following the covered employee's death.

Second, an employee who is Trade Adjustment Assistance eligible and about to lose coverage (at 18 or 36 months) may continue COBRA coverage as long as that individual remains Trade Adjustment Assistance eligible.

Both of these specific groups may not continue coverage beyond December 31, 2010. A person falling into the categories above may enact the extension as long as the loss of COBRA happens on or after the effective date of the Act.

William Gallagher Associates will provide additional guidance and model forms once they become available. Employers should begin compiling lists of potentially affected individuals to prepare for the upcoming mailing. Additionally, amendments for employer plan documents will be provided once drafted.

Contact your Account Executive with any questions, or the WGA Compliance Practice at [compliance@wgains.com](mailto:compliance@wgains.com).

