

CLIENT BULLETIN

Stimulus Bill Contains Subsidy for COBRA Premiums for Individuals Who Are Involuntarily Terminated Between September 1, 2008 and December 31, 2009

On February 17, 2009, the President signed into law [H.R. 1](#), the *American Recovery and Reinvestment Act of 2009 (ARRA)*. The new law provides subsidies to COBRA premiums for certain individuals as set forth in ARRA at *Division B – Tax, Unemployment, Health, State Fiscal Relief, And Other Provisions, TITLE III – Premium Assistance For COBRA Benefits, Section 3001 (hereafter Section 3001)*.

Links to the [new law](#), the [conference committee report](#), “To Do” information and other resources are found at the end of this *Client Bulletin*. Let’s look at the basics before going into a detailed analysis of the law.

SUMMARY

Individuals who lose their group health plan (GHP) coverage due to an involuntary termination between September 1, 2008 and December 31, 2009 will be eligible to receive federal government assistance that will pay 65% of the individual’s COBRA premium that would otherwise be payable except for the subsidy. The subsidy is prospective only (no retroactive reimbursements for COBRA premiums paid before March 1, 2009). The subsidy lasts for a maximum of nine months beginning on or after March 1, 2009, but may terminate early under certain conditions, such as the person becoming covered under another GHP. Individuals must report to the Fund Office if they are no longer eligible for the subsidy.

The subsidy will be paid to multiemployer plans directly, unlike single-employer health plans that will receive the premium subsidy through payroll tax offsets and direct reimbursement from the federal government for any shortfall. However, the exact mechanism for reimbursing multiemployer plans has not yet been determined.

The COBRA premium subsidy law has special notice requirements and special election periods. All individuals who were, or will be eligible to elect COBRA due to an involuntary termination between September 1, 2008 and December 31, 2009

must be given special notices. Individuals who could have elected *COBRA* due to being *involuntarily terminated* between September 1, 2008 and February 17, 2009 (date bill signed into law) but did not do so will be given a "second chance" election. The second chance election period will begin on or after February 17, 2009 and will end 60 days after the date on which they receive the special *COBRA* premium subsidy notice from the plan of this right for a second chance *COBRA* election. The notices will also provide individuals who elected *COBRA* prior to February 17, 2009 with information on how to apply for the *COBRA* subsidy. The same information will be given to individuals who become eligible for *COBRA* due to an involuntary termination on or after February 17, 2009.

Plans must send out this information of special election rights and the *COBRA* premium subsidy within 60 days of February 17, 2009 which is on or about April 18. The law contains detailed notice content requirements which are discussed later herein.

This additional information can be communicated by modifying existing forms or adding a separate information sheet to the Plan's current *COBRA* forms. Using a separate information sheet for each mailing seems easier and more efficient due to the limited length of the program. The government has indicated that the model notices should be available on or about March 19, 2009.

Employers or multiemployer plans will be required to file reports containing (1) an attestation of involuntary termination of employment for each covered employee on the basis of whose termination entitlement to reimbursement is claimed; (2) a report of the amount of payroll taxes offset for the reporting period and the estimated offsets of such taxes for the subsequent reporting period in connection with reimbursements [*NOTE: this payroll offset method will need to be modified for multiemployer plans*] and (3) a report containing the TINs of all covered employees, the amount of subsidy reimbursed with respect to each covered employee and qualified beneficiaries, and a designation with respect to each covered employee as to whether the subsidy reimbursement is for coverage of one individual or two or more individuals.

The subsidy is only applicable to individuals with modified adjusted gross income of \$125,000 or \$250,000 per couple. The law addresses other aspects of the rules concerning the subsidy and such "high-income" people. Plans will need to monitor subsidy applicant's income levels. Other details of the law are discussed below.

What is One to Do?

No doubt there will be many unanswered questions until interpretative guidance and model notices are issued. Until then, Plans will have to make their best "good-faith" interpretations.

Various publications have developed "to do" lists to prepare for the new notice requirement and administration of the program. We have collected some of these

lists from the articles on the IFEBP webpage on the *COBRA* Subsidy program and is available by "[clicking here](#)."

Health plans will need to determine who suffered an involuntary termination during the relevant time period, who elected COBRA, who needs second chance elections notices, design forms and coordinate record-keeping and other matters either in-house or with their TPA.

Detailed Questions and Answers About the New Law

Now, let's take a deeper look at the law by using a series of Questions and Answers with citation to the particular subsections of Section 3001. We'll use a series of Questions and Answers.

How Much is the Subsidy?.....	4
Who is an Eligible for the <i>COBRA</i> Premium Subsidy Assistance?	4
Who Receives the Subsidy Reimbursement?	4
How Long Does the Premium Assistance Last?	5
What If An Individual Who Experienced An "<i>Involuntary Termination</i>" Between September 1, 2008 and February 17, 2009 Did Not Elect <i>COBRA</i> Coverage? Can They Elect It Now And Be Eligible for the Subsidy?	6
What if a Person Ceases to be Eligible for the <i>COBRA</i> Subsidy?	6
Does the New Law Require Any Special Notices?	7
How Can a Plan Meet the Requirement to Provide This Additional Information on the <i>COBRA</i> Premium Subsidy?	7
What About Individuals Who Experience an Involuntary termination on or After March 1, 2009 But Before The End Of The Subsidy Period?	8
What Coverage is Available?	8
General Provisions	8
What Does Section 3001 Add to the Code?.....	9
A Look At The Structure of the <i>COBRA</i> Premium Subsidy Law	10

How Much is the Subsidy?

The law offers a 65% subsidy of the *COBRA* premium to any “assistance eligible individual.” If such an individual timely pays their 35% portion, they are eligible to have the remaining 65% paid for by the subsidy. Anyone other than the employer can pay the 35% portion the individual owes. Premium reimbursement provisions are added by a new Code Section 6432. (Section 3001(a)(1)(A); (a)(12))

Who is an Eligible for the *COBRA* Premium Subsidy Assistance?

Any individual who is an “assistance eligible individual” is eligible for the subsidy.

An “assistance eligible individual” is any qualified beneficiary if:

- at any time during the period between **September 1, 2008 and December 31, 2009**, such qualified beneficiary was or is eligible for *COBRA* continuation coverage,
- the qualified beneficiary **elects** such coverage, and
- the **qualifying event** is an **involuntary termination** of the covered employee’s employment and occurred during such period.

The only *COBRA* Qualifying Event that triggers *COBRA* premium subsidy eligibility is an involuntary termination. (Section 3001(a)(3))

Who Receives the Subsidy Reimbursement?

In the case of a multiemployer GHP, the Plan is the party eligible to obtain the subsidy. (Section 3001(a)(12)(A) at new Code Section 6432(b)). The law speaks mainly of the subsidy being paid to employers (the proper party in a single-employer plan) by offsetting any employment taxes due from the employer, with the government to reimburse the employer if there is any shortfall due to insufficient payroll taxes to offset. (Section 3001(a)(12)(A) at new Code section 6432(c)). That method would not work for multiemployer plans. However, the law contains a section that the payroll reimbursement method is the default reimbursement method “*except as otherwise provided by the Secretary [of Treasury].*” (Section 3001(a)(12)(A) at new Code section 6432(c)). Thus, it seems most likely that the Secretary of Treasury [referred to herein as the “IRS”] will issue procedures suitable for multiemployer plans.

Such a procedure could be modeled after the reimbursement method used by the IRS to administer the 65% subsidy for individuals displaced by international trade. The *Health Coverage Tax Credit (HCTC)* provided for by the *Trade Act of 2002* is fully explained in [Research Memo 2003-32](#). More information on the *HCTC* is available through the following links on the IRS *HCTC* homepage: <http://www.irs.gov/individuals/article/0,,id=187948,00.html>

Under the *HCTC Subsidy Program*, qualified individuals also receive a 65% *COBRA* premium subsidy. Qualified individuals submit their 35% portion to the *HCTC* Program and the *HCTC* Program adds the 65% subsidy to the amount paid and

remits the full payment (100%) to the health plan at the end of the month. The IRS could similarly rule that individuals in multiemployer plans could pay their 35% of the *COBRA* premium to the Plan and the Plan would present proof of payment to the government which would then issue a check for the subsidy amount.

How Long Does the Premium Assistance Last?

The *COBRA* premium subsidy ends on or after the earlier of:

- the first date the individual is eligible for coverage under any other GHP; **or**
- the earliest of:
 - 9 months after the individual pays his first premium payment.
 - the date after the initial qualifying event that the *COBRA* coverage would otherwise expire (18 months from the involuntary termination), or
 - the date after the initial qualifying event that the *COBRA* coverage would otherwise have expired if *COBRA* had been elected by the individual (18 months from the involuntary termination)

(Section 3001(2)(A))

The following chart illustrates the timing rules. Assume the person did NOT become eligible under another GHP within nine months after starting to receive the subsidy. If they did, that date would be the *COBRA* and subsidy termination date.

Action	Scenario A	Scenario B	Scenario C	Scenario D
Date of involuntary termination	9/1/08	12/1/08	3/1/09	6/1/09
Eligible for <i>COBRA</i> subsidy	Yes	Yes	Yes	Yes
Elected <i>COBRA</i> upon termination	Yes	No	Yes	Yes
Entitled to new <i>COBRA</i> enrollment	Already enrolled	Yes	Not applicable	Not applicable
<i>COBRA</i> subsidy begins	3/1/09	3/1/09	3/1/09	6/1/09
18-month <i>COBRA</i> period runs from	9/1/08	12/1/08	3/1/09	6/1/09
Subsidy terminates	11/30/09	11/30/09	11/30/09	3/31/10
18-month <i>COBRA</i> period ends	2/28/10	5/31/10	08/31/10	12/31/10

It is important to note that coverage under a GHP does NOT include:

- coverage consisting of only dental, vision, counseling or referral services (or a combination thereof), coverage under a flexible spending arrangement; **or**
- coverage of treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination thereof); **or**
- is eligible for benefits under title XVIII of the Social Security Act.

(Section 3001(a)(2)(A)(i))

An individual shall not be treated as eligible for coverage under a GHP before the first date on which such individual could be covered under such plan.

(Section 3001(a)(2)(B))

What If An Individual Who Experienced An "Involuntary Termination" Between September 1, 2008 and February 17, 2009 Did Not Elect COBRA Coverage? Can They Elect It Now And Be Eligible for the Subsidy?

Yes. If an eligible individual who suffered an involuntary termination after September 1, 2008 did not elect *COBRA*, but would have been entitled to the premium subsidy if he had elected *COBRA* may elect *COBRA* during the period **beginning** on February 17, 2009 and **ending 60 days after** the date on which the **notification of the right to elect COBRA** is provided to such individual. Health plans have 60 days after enactment to notify current and potentially former qualified beneficiaries of their right to so elect. (Section 3001(a)(4)(A))

Any *COBRA* continuation coverage elected by a qualified beneficiary during an extended election period explained above:

- shall begin with the first period of coverage beginning on or after February 17, 2009 [as most Plan's charge for *COBRA* monthly, **this means March 1, 2009**], and
- shall not extend beyond the normal length of COBRA coverage that would have been applicable if the coverage had been elected. (**18 months** is the "normal" length of *COBRA* coverage for an involuntary termination.)

(Section 3001(a)(4)(B))

What if a Person Ceases to be Eligible for the COBRA Subsidy?

In an eligible individual ceases to be eligible for the *COBRA* premium subsidy, they must notify the GHP in writing and take such other steps as may be required by the Secretary of Labor. (Section 3001(a)(2)(C))

Does the New Law Require Any Special Notices?

Yes. The law requires that additional notices be sent to anyone who would be entitled to elect *COBRA* continuation coverage due to an involuntary termination between September 1, 2008 and December 31, 2009. (Section 3001(a)(7)(A)(i))

The additional information must include notice of:

- the availability of premium reduction with respect to such coverage; and
- the option to enroll in different coverage if the employer permits assistance eligible individuals to elect enrollment in different coverage.

In addition, each notice shall include—

- the forms necessary for establishing eligibility for premium reduction under this subsection,
- the name, address and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium reduction,
- a description of the extended election period provided for individuals who were eligible to elect *COBRA* during the applicable period but who did not do so,
- a description of the obligation of the qualified beneficiary to notify the plan providing continuation coverage of eligibility for subsequent coverage under another GHP or eligibility for benefits under title XVIII of the Social Security Act and the penalty provided for failure to so notify the plan,
- a description, displayed in a **prominent manner**, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium, and
- a description of the option of the qualified beneficiary to enroll in different coverage if the employer permits such beneficiary to elect to enroll in such different coverage as explained above.

(Section 3001(a)(7)(B))

How Can a Plan Meet the Requirement to Provide This Additional Information on the COBRA Premium Subsidy?

The Plan can meet the requirement to provide the required additional information by amending existing notices **or** by including a separate document with the *COBRA* notice otherwise required. (Section 3001(a)(7)(A)(iii))

Given the short-term nature of the program, plans may find it more efficient to draft a separate document with the required information to mail out as appropriate.

Model Notices should be available not later than 30 days after the date of enactment of the law or about March 19, 2009. (Section 3001(a)(7)(D))

What About Individuals Who Experience an Involuntary Termination on or After March 1, 2009 But Before The End Of The Subsidy Period?

In such cases, the individual would elect COBRA as usual and would be provided with election notices containing the additional required COBRA premium information. (Section 3001(a)(7))

What Coverage is Available?

An eligible individual may elect to enroll in the normal *COBRA* coverage that is offered under the Plan or may enroll in coverage that is *different* than coverage under the plan, *if offered* by the plan sponsor and if certain conditions are met. Some companies (probably single-employers) may offer a lower level of coverage to their affected employees if the normal *COBRA* cost even after the subsidy is still too high. (Section 3001(a)(1)(B))

General Provisions

The new *COBRA* premium subsidy law also addresses these other major areas:

- disregards counting any 63-day break in coverage for preexisting condition exclusions; (Section 3001(a)(4)(C))
- provides for expedited review of denials of premium assistance; (Section 3001(a)(5))
- disregards subsidies as "income" for purposes of qualifying for federal and state programs; (Section 3001(a)(6))
- contains provisions calling for the issuance of regulations by the Secretary of the Treasury, Secretary of Labor and the Secretary of Health and Human Services; (Section 3001(a)(8))
- contains provisions for outreach by public education and enrollment assistance by the Secretary of Labor, Secretary of the Treasury and the Secretary of Health and Human Services; (Section 3001(a)(9))
- contains certain defined terms under the section on definitions; (Section 3001(a)(10))
- calls for interim and final reports on the program by the Secretary of the Treasury and others; contains provisions that hold the Social Security trust funds harmless; (Section 3001(a)(11))
- contains provisions for refund of overpayments if the individual pays the full COBRA premium before electing the subsidy; (Section 3001(a)(12)(E))

- contains penalty provisions for individuals who fail to notify their health plan of the loss of eligibility for premium assistance; (Section 3001(a)(13))
- contains provisions for coordination with HCTC; (Section 3001(a)(14))
- excludes *COBRA* premium assistance from gross income; (Section 3001(a)(15)); and
- contains provisions for the elimination of premium subsidy for high-income individuals. (Section 3001(b))

What Does Section 3001 Add to the Code?

Section 3001 adds four sections to the Internal Revenue Code of 1986 (Code), clicking on the Section number will bring up the new text:

- ***Section 35(g)(9) Coordination With HCTC*** (added by Section 3001(a)(14))
- ***Section 139C Exclusion Of COBRA Premium Assistance From Gross Income*** (added by Section 3001(a)(15))
- ***Section 6432 COBRA Premium Assistance.*** (added by Section 3001(a)(12))
- ***Section 6720c Penalty For Failure To Notify Health Plan Of Cessation Of Eligibility For COBRA Premium Assistance.*** (added by Section 3001(a)(13))

A Look At The Structure of the COBRA Premium Subsidy Law

The following is a brief look at the structure of the new law. The *COBRA* Premium Subsidy law is found in *ARRA* at *Division B – Tax, Unemployment, Health, State Fiscal Relief, And Other Provisions, TITLE III – Premium Assistance For COBRA Benefits, Section 3001* and divided into two parts (a) and (b). Section 3001 has two main Subsections: (a) and (b).

Subsection (a) has 15 Subsections:

- (1) Provision of Premium Assistance
- (2) Limitation of Period of Premium Assistance
- (3) Assistance Eligible Individual
- (4) Extension of Election Period and Effect on Coverage
- (5) Expedited Review of Denials of Premium Assistance
- (6) Disregard of Subsidies for Purposes of Federal and State Programs
- (7) Notices to Individuals
- (8) Regulations
- (9) Outreach
- (10) Definitions
- (11) Reports
- (12) *COBRA* Premium Assistance
- (13) Penalty for Failure to Notify Health Plan of Cessation of Eligibility For Premium Assistance.
- (14) Coordination with HCTC
- (15) Exclusion of *COBRA* Premium Assistance from Gross Income

Subsection (b) has seven subsections:

- (1) Recapture of Subsidy for High-Income Individuals
- (2) Phase-In of Recapture
- (3) Option for High-Income Individuals to Waive Assistance and Avoid Recapture
- (4) Modified Adjusted Gross Income
- (5) Credits Not Allowed Against Tax, Etc
- (6) Regulations
- (7) Effective Date

A special copy of Section 3001 has been prepared with a Table of Contents that helps one better understand the layout of the statute and is available by "[clicking here.](#)"

Additional Resources

A copy of the Joint House and Senate Conference Report on the *COBRA* premium portion of *ARRA* is available by "[clicking here](#)" or at:

[http://www.conferencereport.gpoaccess.gov/\(X\(1\)S\(sm4f1h55bpg0kc55t121ch45\)\)/SearchCongressionalRecord.aspx?CongressionalRecordId=xN/m0fuchas=&AspxAutoDetectCookieSupport=1](http://www.conferencereport.gpoaccess.gov/(X(1)S(sm4f1h55bpg0kc55t121ch45))/SearchCongressionalRecord.aspx?CongressionalRecordId=xN/m0fuchas=&AspxAutoDetectCookieSupport=1).

The *COBRA* provisions are found in the [fourth section](#) starting on page 37 or by "[clicking here](#)". The *International Foundation of Employee Benefit Plans (IFEBP)* has a *COBRA* Subsidy Webpage that has links to various articles at:

<http://www.ifebp.org/Resources/News/Regulatory+Updates/AmericanRecoveryandReinvestmentBillIncludesCOBRACHanges.htm>.

As with many other employee benefit organizations, the IFEBP is offering a webcast on February 26 on the new *COBRA* Subsidy law. Information is at:

<http://www.ifebp.org/Education/Webcasts/Economic+Stimulus.htm>.

* * *

LEGAL DISCLAIMER: Information contained in this publication is not legal advice, and should not be construed as legal advice. If you need legal advice upon which you can rely, you should seek a legal opinion from your attorney.