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COBRA Subsidy Benefit: Extension and Then Limbo

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Historical Overview

- Stimulus Bill (“American Recovery and Reinvestment Act of 2009”) enacted 2/17/09
- Primary changes to COBRA
 - COBRA premium subsidy
 - “Second Chance” COBRA election
 - Cheaper coverage election option
- Subsidy period typically started 3/1/09 and ran for 9 months
- Not designed to be permanent revision to COBRA – ARRA amendments were to apply only through 12/31/09
- Covered those involuntarily terminated between 9/1/08 and 12/31/09
- So those eligible on day one of subsidy (typically March 1) would see it end as of December’s premium (end of 2009)

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Congress Springs Into Action

- Approach of the end of subsidy and continuing job losses moved Democrats to propose extension of subsidy past 12/31/09
- Vehicle was to attach it to the DoD Appropriations Bill, H.R. 3326
- Provision extended eligibility period to 2/28/10 and duration of subsidy from 9 to 15 months
 - Fixed quirk of prior law as to eligibility rule – termination of employment before 2/28/10 is all that's required, not termination plus start of COBRA period
- Passed by Congress on 12/16/09
- Signed by President on 12/21/09
- So: You'd be eligible if you lose your job as late as 2/28/10
- If you started receiving subsidy for the March premium period, and you dropped COBRA coverage when the subsidized period ended on 12/31/09, the law permitted you to retroactively fix that

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Consequences of December 2009 Last-Minute Action

- Only a 2-month extension of eligibility period
- Almost-immediate calls for further extension
- No particular partisan disagreement over first extension
- So why didn't Congress pass a longer extension to begin with?
- Result: Congress found itself in same "pickle" in the last 2 weeks of February

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Situation Today: Limbo-Land

- On Thursday, 2/25, the House passed H.R. 4681 to extend COBRA subsidy for 30 days, to 3/31
- In Senate, Sen. Reid tried to pass similar stop-gap extension of COBRA subsidy (and UI benefits) to 3/31/10
- Concept was that longer 10-month extension would be debated this week, folded into larger “Jobs Bill”
- Under Senate Rules, needed unanimous consent in Senate to avoid the 60-vote Republican “filibuster”
- Sen. Bunning (R-Ky) refused to give consent and repeatedly objected
 - Thought the PAYGO rules should apply (cut money from somewhere else to fund the extensions)
 - Sen. Merkley (D-Or) begged him to drop his opposition; Bunning replied “Tough S***”, complained about having to stay at his desk and really object time after time, which caused him to miss KY/SC basketball game
- Democrats’ position was that the “emergency” exception to PAYGO applied

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Consequences of Limbo-Land

- No affect on anyone already receiving COBRA subsidy
- Employees who lose their jobs from today forward won't have the subsidy available ... until Congress acts and makes any law retroactive
- Employers ought to be able to count on Congress acting soon and making legislation retroactive
- Since COBRA Notices don't go out immediately upon termination, effect may be no worse than in December
 - Send special notices to Assistance Eligible Individuals (AEIs) depending on their situation
- For terminations/layoffs commencing 3/1, don't promise employees they'll receive subsidy - until Congress acts
- Consider giving "as of this present date" letter-type notice to AEIs, advising that they'll be hearing more from your COBRA administrator when (and if) Congress acts

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Limbo-Land Predictions

- Sometime soon, Sen. Bunning (or other Republicans) will relent and/or votes will be found to extend COBRA subsidy and UI benefits
- Funding issue may have to be addressed
- Extension will be retroactive to 2/28
- Subsidy duration will probably be extended to 12/31/10

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What We Know ... What We Don't Know

- At present, only terminations through 2/28/10 eligible for subsidy
 - Test is when employee is terminated, not when COBRA period would start
- Bills for health coverage w/o subsidy post-2/28 probably already went out
- Some participants may have already paid 100% for March
- Some may have already decided to drop coverage as too costly

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The Past As Prologue

- Congress will probably follow same path it did in enacting first COBRA subsidy extension
- Extend subsidy after it expires
- Permit AEs to retroactively opt back in to COBRA coverage
- Require employers to send out new notices, including retroactive opt-back-in option

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Created Concept of “Transition Period”

- AEs in “transition period” following any period of subsidized coverage that began before 12/19/09
- AE’s deemed to timely have paid premium if
 - Had COBRA coverage immediately prior to beginning of transition period, and
 - Pay premium by 2/17/10 (or w/in 30 days of notice)
- AEs who paid full, unsubsidized premium during any transition period entitled to refund/credit

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How Did It Work? How Will It Likely Work?

- Employers identified AEIs by category
 - Terminated COBRA coverage when subsidy expired
 - Continued COBRA coverage by paying full, unsubsidized premium
 - Laid off/Involuntarily terminated or COBRA period was to start after 12/31/09
- Determined which Model Notice to send

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Category One AEs

- Failed to pay full COBRA premium when subsidy expired (likely on 11/30) so coverage lapsed
- New notices had to be sent
 - Model Notices made available by DOL
- Had 60 days to opt back in to COBRA coverage
 - Or 30 days after notice of rights was sent
- Had to pay reduced COBRA premium in full, retroactive to date coverage lapsed
- Payments had to be received by 2/17/10 or w/in 30 days of receiving revised notice

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Category Two AEs

- Continued COBRA by paying full unsubsidized premiums
- Had right to be reimbursed for 65% of premiums paid
- Employers have choice to reimburse or offer credit to be applied to future premiums
 - Provided it's reasonable to believe credit will be exhausted w/in 180 days

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Required Actions by Plan Administrators

- “Updated General Notice”
 - AEs who experienced qualifying event from 9/1/09 to 2/28/10 and hadn’t ever been given prior election notice
 - AEs who experienced qualifying event in 12/09, weren’t eligible for subsidy until 1/10, and weren’t given Updated General Notice
 - Original ARRA provisions rule was date of employment loss and date COBRA period started
 - When to send? W/in 44 days after qualifying event
- “Premium Assistance Extension Notice”
 - AEs receiving subsidy as of 10/31/09, regardless of whether they continued coverage thereafter
 - AEs experiencing qualifying event from 10/31/09 through 2/28/10 regardless of whether another COBRA election notice was sent to them
 - When to send? By 2/17/10
- Note: Updated Alternative Notice also available for insurance providers covered under state laws

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Groups Unaffected by Extension

- AEs who never elected COBRA
- AEs who initially elected coverage but allowed coverage to lapse before end of their subsidy period

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Action Items for Employers/Administrators

- Double-check you sent the notices required by DoD Act
- Make sure you have up-to-date AEI lists
 - Currently receiving COBRA subsidy
 - Received subsidy but let COBRA lapse at end of subsidy period
 - Were COBRA-eligible but weren't going to receive subsidy till DoD Act
 - Are COBRA-eligible but won't receive subsidy unless Congress acts in March 2010
 - Terminate employment after 2/28/10
- Watch news from Congress, wait for new Model Notices

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General Review and Recurring Issues

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Which Plans Are Covered?

- All plans to which COBRA applies, including
 - Dental, Vision, EAPs that provide healthcare
- NOT healthcare FDAs (Flexible Spending Accounts)
- Includes plans that aren't subject to federal COBRA but are subject to state mini-COBRA laws

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The COBRA Subsidy

- Who pays the 65% subsidy?
 - For typical single-employer plans, the employer pays
 - For multi-employer plans, the plan pays
 - For plans that aren't subject to federal COBRA but to state mini-COBRA laws, the insurance company pays
- Paying entity “fronts” the ex-employee the 65% and recoups the money when paying quarterly payroll taxes
 - Takes a credit against the federal payroll taxes due on behalf of current employees for the amount of premiums it's paid
 - Credit applies against periodic wage withholdings or FICA payroll taxes
- No extension of existing 18-month COBRA eligibility period

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Who Was Originally Eligible

- Employees terminated between 9/1/08 & 12/31/09
- Must have been terminated INvoluntarily
- Spouse and children of involuntarily terminated employees
- Termination wasn't for gross misconduct

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What's an "Involuntary" Termination?

- Originally some confusion and no guidance
- DOL subsequently issued Qs & As describing what's "involuntary"
- Specific examples of "involuntary" termination
 - Termination for cause but NOT for gross misconduct
 - Layoff with right of recall
 - Temporary furlough
 - Reduction in hours which results in loss of health coverage
 - Resignation resulting from material geographic change in work location
 - Employer-initiated lockout – BUT strikers aren't covered
 - Failure to renew employment contract at expiration when employee willing to continue to work on same terms
 - Employee quits "for good reason"
 - "Voluntary" termination "with a package" – provided employer announces an involuntary RIF will follow if there aren't enough volunteers

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What's NOT an “Involuntary” Termination?

- Death
- Retirement
 - Unless employee knew employer would terminate involuntarily if didn't retire
- Following employee-initiated strike

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When Doesn't the Subsidy Apply?

- Employer ceases to maintain any medical expense plan for employees (COBRA doesn't apply)
- Individual is or becomes eligible for Medicare or Medicaid or for coverage under another group health plan, like spouse's
- NOTE: It's "becomes eligible for" NOT "becomes covered by"
- Individuals who become eligible for or obtain alternate coverage are obligated to notify their employer of status
 - Failure to notify results in penalty of 110% of subsidy they receive after becoming ineligible

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Denial Of Subsidy Can Be Appealed

- Secretary of Labor to provide “expedited review” of denials of a premium subsidy
- Determinations to be made within 15 days of appeal
- Issue of “involuntariness” could be raised in this procedure

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What About The Highly Compensated?

- Adjusted Gross Income exceeds \$125K -- \$250K for joint filers
- Highly-compensated employees receive the subsidy – BUT have to pay some or all of it back
- Subsidies recouped through income tax filings
- Full recoupment from those with AGI above \$145 (\$290K/joint filers)
- Partial recoupment from those with AGI between \$125K and \$145K (between \$250K and \$290K for joint filers)
- Possible to waive the subsidy up front

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Employer Reporting Requirements

- When seeking the tax subsidy, employers must submit supporting information on modified Form 941
 - Receipt date and amount of qualified individual's 35% premium payment
 - “Attestation” that each qualified employee for whom reimbursement is requested was involuntarily terminated
 - Each covered individual's taxpayer identification number/SSN
 - Amount of the subsidy attributable to each individual
 - Designation of whether the subsidy was for one or two or more individuals
 - Accounting of payroll tax credits taken this payroll period and an estimate of credits to be taken next period

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Different Coverage Can Be Elected

- Couldn't change type of coverage before ARRA
- Could ONLY keep same level of coverage
- ARRA established 2 types of continuation coverage
 - Regular Health Plan coverage – continue same type of coverage in effect before qualifying event
 - Alternative Health Plan coverage – employers may (but are not required to) offer alternative coverage

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“Alternative” COBRA Coverage

- Employer must either already offer, or determine to offer, alternative coverage
- Same option must also be available to active employees
- Premiums must be equal to or lower than cost of coverage maintained prior to termination
- Individuals can't opt into FSAs or other limited plans
- If offered, individual has 90 days after receiving notice of option to select lower-cost option
- Qualified individuals will continue to be able to change coverage during open enrollment periods, like active employees

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Consequences of Generous Severance

- Subsidy should have triggered re-evaluation of medical continuation policies for RIFs, individual terminations
- Severance plans and termination agreements providing for employer-paid subsidies for COBRA continuation
 - Payroll tax credit only applies to COBRA premiums paid by employers on account of the ARRA
 - Employers that voluntarily agree to directly pay COBRA premiums aren't eligible for a tax refund
 - One option: Increase severance (taxable) by amount of COBRA cost
- Consequences of applying subsidy to benefit continuation policies that may be more generous than COBRA
 - Offering continuation coverage to those not eligible for it under COBRA – Domestic partners
 - If employer extends subsidy to these groups, it won't get reimbursed and would have to include any amount of "private subsidy" as taxable income to individual

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Resources For Employers

- DOL general COBRA/ARRA page
 - <http://www.dol.gov/ebsa/COBRA.html>
- Model Notices
 - <http://www.dol.gov/ebsa/COBRAmodeInotice.html>
- FAQs for employers
 - http://www.dol.gov/ebsa/faqs/faq_compliance_cobra.html
- FAQs for employees
 - http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html

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Final Questions?

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