

Questions and Answers from CIAB's COBRA Subsidy Webinar

1. Is it required that a spouse be offered the COBRA subsidy if the employee they are married to dies?

A: No, if the employee died before being involuntarily terminated. In that case, the widowed spouse would not be eligible for the subsidy, although he or she would be eligible for regular COBRA. Note, however, that if the employee died after being involuntarily terminated after September 1, 2008, and had elected COBRA for himself and the spouse, the widowed spouse may be eligible for the subsidy because he or she can be an assistance-eligible individual in his or her own right. (See IRS Notice 2009-27, Question/Answer 19 and 39).

2. If an employee was laid off in February but then later offered their job back and turned it down, are they eligible for the COBRA subsidy?

A: Yes. The person would be eligible because they were involuntarily terminated between September 1, 2008 and December 31, 2009. A later job offer (even with the same employer for the same job) should not change the initial involuntary termination, unless the initial termination was somehow a sham. There is no requirement that the covered individual accept any type of employment just to become eligible for other health coverage. (See IRS Notice 2009-27, Question/Answer 2)

3. Is the subsidy based on 100% or 102% of the premium?

A: The subsidy is based on the amount the employee pays. For example, if the employee was charged 102% of the COBRA premium, he only has to pay 35% of that premium amount (the 102%), and the employer is subsidized for 65% of that premium amount. If the employee is only charged 100% (because the employer elects not to charge the additional 2%) then the subsidy is only 65% of the 100%. And in the case of certain state COBRA plans, if state COBRA allows a different maximum charge for state COBRA premiums (such as 105%), and the employee is charged that amount, the employee pays 35% of that amount (e.g., 35% of the 105%). (See IRS Notice 2009-27, Question/Answer 20)

4. Can an employer legally utilize a separation agreement in an effort to encourage voluntary resignation? How does this relate to the new COBRA laws?

A: A separation agreement that offers employees incentives to leave the employer does not violate COBRA laws. We originally anticipated that departures under such a separation agreement would not make the departing employees eligible for the COBRA

subsidy, as such departures might be considered voluntary rather than involuntary. However, recent guidance from the IRS indicates that the agency may consider a separation to avoid a layoff to be an involuntary termination in certain cases (e.g., where the employer offers an employee a buy-out and indicates that after the offer period for the buy-out expires, a certain number of remaining employees in the employee's group will be involuntarily terminated). (See IRS Notice 2009-27, Question/Answer 1, 9)

5. If a former employee is currently paying COBRA premiums, do you simply offer them the subsidy going forward?

A: Yes. If your plan charges premiums on a calendar month basis, the subsidy goes into effect March 1, 2009. Therefore, unless you are made aware that the former employee does not want the subsidy, the subsidy should be calculated starting from March 1, 2009. (See IRS Notice 2009-27, Question/Answer 31)

6. If an employee was fired for gross misconduct and the insurance company said that the employee should not have been offered COBRA but was, are they now eligible for the subsidy?

A: No. The subsidy law states that employees involuntarily terminated for gross misconduct are not eligible for the subsidy. In fact, such an employee was probably not eligible for the initial COBRA, even if the employer decided to offer it anyway. If the employer now chooses to offer this employee the COBRA subsidy, the employer will have to pay the subsidy amount out of pocket and should not claim a credit on its payroll taxes for the subsidy for the employee who was terminated due to gross misconduct. (See IRS Notice 2009-27, Question/Answer 6)

7. If a person is on disability leave, or for other health-related issues the individual is off from work and elected COBRA, would she be eligible for government-subsidized COBRA?

A: If the person is on leave under the Family and Medical Leave Act ("FMLA"), the person is not eligible for the COBRA subsidy because FMLA leave is not a qualifying event under COBRA. It also appears that if the person is on leave due to other health-related issues, the person is probably not eligible for the subsidy because only those involuntarily terminated between September 1, 2008 and December 31, 2009 are assistance-eligible, and leave for health-related problems does not constitute an involuntary termination. (See IRS Notice 2009-27, Question/Answer 1 and 4)

8. Does an inactive employee on a Long Term Disability Leave under COBRA become eligible for the new COBRA Premium Subsidy?

A: No. Leave due to long term disability is not an “involuntary termination” that would qualify the individual for the COBRA subsidy. Also see the response to Question # 7 above.

9. If a participant was dropped from COBRA for failure to pay the premiums, is that participant entitled to the Second Chance election to enroll and the subsidy?

A: Yes. The explanatory material that accompanied the text of the new law states that an individual who previously elected COBRA but who is no longer enrolled on February 17, 2009 (the date the new law was enacted) because of non-payment, is entitled to the second chance election and the subsidy.

10. If someone was terminated in November 2008 and initially did not elect COBRA, but decides to elect COBRA now under the new second chance election opportunity: (a) would their effective date for COBRA be December 1, 2008, or would their COBRA effective date be March 1, 2009 with a lapse in coverage from December to February; (b) are they responsible for the full premium for December 2008 – February 2009; (c) would they start getting the subsidy March 1st; and (d) when would the 9 month subsidy period start – the date they were originally eligible for COBRA (December 1st), or on March 1st?

A: If a former employee was involuntarily terminated as of the end of November 2008, did not initially elect COBRA, but decides to do so now under the new Second Chance election opportunity: (a) their COBRA coverage would begin with the first period of coverage beginning on or after February 17, 2009 (the date the new law was enacted), so if the plan charges monthly premiums on the first day of each month, for example, coverage would begin March 1, 2009; (b) since coverage begins with the first coverage period on or after February 17, 2009, the individual is not responsible for a COBRA premium for the period between his or her November 2008 termination and the effective date of COBRA under the Second Chance election – the individual was not covered by COBRA during this time; (c) the individual would be eligible to receive the subsidy starting March 1, 2009; and (d) the nine month subsidy period would start March 1, 2009, not on the December 1, 2008 date the person originally became eligible for COBRA. There are two caveats to this response: first, keep in mind that the Second Chance election opportunity under the new law does not apply to state COBRA, so the foregoing answer only applies to plans covered under federal COBRA. Second, the Second Chance election and subsidy do not extend the person’s maximum period of eligibility for COBRA – if the person originally became eligible for COBRA on December 1, 2008, their 18 months of COBRA eligibility starts to run on that date, not the date that the Second Chance election or subsidy went into effect. (See IRS Notice 2009-27, Question/Answer 47 and 48)

11. If an employee was fired on 9/1/08 and was removed from COBRA by the

employer on 2/1/09 due to nonpayment of COBRA premium throughout his COBRA period, is he still eligible for the second chance COBRA election on 3/1? If so, is he eligible for the 65% subsidy? In addition, due to the fact that he still owes the employer five months of back COBRA premium charges, is the employer entitled to demand full monthly premium payments (and not 35%) going forward until he pays up the previous COBRA charges?

A: If an employee was involuntarily terminated on September 1, 2008 and would be eligible for COBRA but currently is not enrolled (whether for non-payment or because the person never elected it in the first place), that person is entitled to a Second Chance election and is eligible for the COBRA subsidy. Neither the law nor any of the guidance provided by the government to date addresses the situation in which the former employee owes back payments for COBRA premium charges. However, the text of the statute does state that for periods of coverage on or after February 17, 2009, an individual will be considered to have paid the full amount of a COBRA premium if he pays 35% of the premium amount. The IRS guidance indicates that the "second chance" election is a fresh start so it appears that the individual would be able to get COBRA coverage for periods on or after February 17, 2009 and would not be required to pay any back premiums for periods before that (unless, of course, he wanted to get coverage for that prior period and was still within the election period). (See IRS Notice 2009-27, Question/Answer 50)

12. Would you expect that there will further clarification of the term "involuntarily terminated" to allow employers to disallow the subsidy for employees terminated for inability to do their job correctly or for excessive absenteeism?

A: The U.S. Department of Labor and the IRS have published some additional guidance on administering the subsidy program, including more detail on the definition of the term "involuntarily terminated." The employee in your case appears to have been "involuntarily terminated," but your question addresses whether the employee could be denied the subsidy due to his "gross misconduct." The guidance from the IRS concerning the subsidy states that an involuntary termination can include termination for cause, for purposes of qualifying for the subsidy. But this still leaves the question of whether the conduct cited here amounts to "gross misconduct," and there is no guarantee that additional guidance will be forthcoming on this particular issue. If you need assistance in determining whether particular conduct constitutes "gross misconduct" that would make an employee ineligible for the subsidy, you may wish to consult both the current COBRA law (there are cases that have interpreted what constitutes "gross misconduct" in certain circumstances) and your state's employment law. (See IRS Notice 2009-27, Question/Answer 6)

13. What is the role of the employer under state continuation?

A: For state COBRA the statute seems to contemplate that the individual would generally

deal with the insurance company, although this may not be the current practice in all cases. Note that state law will determine the respective responsibilities of the employer and the insurer. However, there will be a necessary role for the employer. The individual can only be charged the 35% premium. But government guidance has made it clear that for insured, state continuation plans, only the insurance company is eligible for the premium reimbursement (unless further guidance, which we do not expect, allows the employer to do so).

Communication between the insurance company and the employer will be essential, however. The two parties should determine among themselves who will issue the COBRA statement and handle the premiums. The DOL Model Notice discussed in Question # 15 below appears to assume that the insurance company will send the notice. The insurance company will have to rely on the employer to certify that the employee was involuntarily terminated. (See IRS Notice 2009-27, Question/Answer 56, 58)

14. What can we do if all of the regional carriers (specifically in Maryland) will not take responsibility to pay premiums under state continuation provisions?

A: We urge you to raise this concern with the government, specifically the IRS and the U.S. Department of Labor, although we suspect that they will advise you to work it out with the insurers. This has been a common concern and a problem because under the statute and as explained in the IRS questions and answers, in the state continuation situation involving an insured plan, only the insurer can get the premium reimbursement. (See IRS Notice 2009-27, Question/Answer 58)

15. Does the COBRA election notice change?

A: Yes. Going forward, federal COBRA election notices will need to advise individuals of the availability of the COBRA premium subsidy. See the response to Question # 16 below for more information about new model notices the U.S. Department of Labor (DOL) published on March 19, 2009. And certain individuals who were previously terminated and had already received COBRA notices will need to be sent a new notice informing them of the Second Chance election process as well as the COBRA premium subsidy. For these purposes, the DOL has issued one model notice for persons who are not now covered by COBRA but who are entitled to the Second Chance election, and one for persons who elected COBRA and now need to be informed about the subsidy. It is recommended that you model your federal COBRA notices on the ones that DOL provides because use of the DOL model notices provides a “safe harbor” with respect to compliance with the new notification requirements. For state COBRA, you will need to follow the notification requirements applicable in your state, and review the “alternative” model notice the DOL has issued for persons eligible for continuation coverage under a state law. (See DOL FAQ for Employers, Question/Answer 14-16, 18, and 20-26)

16. Can you please send me a copy of the new revised Notice concerning government-subsidized COBRA?

A: The U.S. Department of Labor published four model notices concerning the COBRA on March 19, 2009. They are available at www.dol.gov/ebsa/COBRAmodelnotice.html. You may also wish to subscribe to the DOL's webpage on the COBRA subsidy at https://service.govdelivery.com/service/subscribe.html?code=USDOL_231 to be notified of other updates and information from DOL.

17. Do you have a copy of the new COBRA election notice?

A: See the response to Question #16 above for more information about new model notices.

18. Do you have a copy of the "Second Chance" COBRA notice for former employees?

A: See the responses to Question # 16 above.

19. An employer is using a third party as a COBRA administrator. Can the third party administrator send out the "second chance" COBRA notices on the employer's behalf?

A: Probably yes. The statute requires the "group health plan (or other entity) involved" to send the Second Chance election notices. This language is broad enough that it can reasonably be interpreted to allow a third party to send out the notice on behalf of the "group health plan (or other entity) involved." Keep in mind, however, that as far as the government is concerned, the "group health plan (or other entity) involved" will probably be the one ultimately held responsible if there is a problem with distributing the notices.

20. Is the employer required to pay the 65% for the dependent coverage or just the employee coverage?

A: Dependents of assistance-eligible individuals can be eligible for the COBRA subsidy. If a dependent was eligible for COBRA due to the employee's involuntary termination within the September 1, 2008 to December 31, 2009 timeframe (see the response to Question # 21(a) below for more information on dependent eligibility), and the dependent enrolled in COBRA (or elects COBRA during the Second Chance election period), the employer must pay the 65% subsidy for that dependent. Note also that the dependent must meet the Internal Revenue Code definition of "dependent." Domestic partners, for example, are not dependents eligible for the subsidy, which has been confirmed in informal guidance from the IRS. Plans that cover domestic partners and other individuals

who are not dependents will have to determine how to allocate the value of the subsidy in certain cases (e.g., with family coverage). The IRS has provided some rules for doing so in its questions and answers, and these are quite generous to the employees. The rules state that (for purposes of determining the portion of the premium eligible for the subsidy) if the cost of covering the non-assistance eligible individual is zero (for example, because the domestic partner is just one individual covered under the employee's family coverage) then the premium reduction (and subsidy) can apply to the full amount paid for the coverage. If the cost of adding a non-dependent does add to the cost of coverage, the incremental cost is ineligible for the premium. The application of this "marginal cost" rule will depend on the employee's particular fact situation and how coverage is priced. (See IRS Notice 2009-27, Question/Answer 23, 25)

21. (a) If an employee eligible for the subsidy elected COBRA for just employee and not any dependent coverage, are they now able to add dependents to the COBRA coverage? (b) Assistance eligible individuals are "qualified beneficiaries" so should we interpret that to mean that the employee and his dependents all are eligible for the 65% subsidy and not just the employee's portion of the premium is subsidized?

A: (a) Under regular COBRA, a dependent generally is only eligible for COBRA coverage if he or she was covered under the plan at the time of the qualifying event. (The exception to this is for newborns and children adopted after the qualifying event. Informal guidance from DOL indicates that newborns and newly adopted children would be considered qualified beneficiaries with the same rights as someone covered at the time of the qualifying event, which presumably means that they would be eligible for COBRA and the subsidy). Otherwise, if at termination the employee was the only individual covered by the plan, the dependent is not eligible for COBRA coverage at that time. We do not think that the Second Chance elections would allow such a dependent to become covered now and receive the subsidy. Under regular COBRA, the dependent could be added at open enrollment, but that would not qualify the dependent for the subsidy. By contrast, if the dependent was covered under the plan at the time of termination (e.g., if the employee had elected family coverage) then under COBRA the dependent has an independent right to elect COBRA and an independent right to receive the subsidy. (b) Subject to the answer to (a), the 65% subsidy would have to be paid for both the subsidy-eligible former employee and any dependents who are eligible for the COBRA coverage due to the former employee's involuntary termination. (See IRS Notice 2009-27, Question/Answer 10, 23, and 47)

22. If an employer offers a severance package that provides for a full payment of the former employee's COBRA premiums, so that the former employee has no premium payment, we understand that there would be no subsidy for that time. But does the 9 month subsidy begin after this severance ends or does it go back to the beginning of that time period? For example, if an employee is involuntarily terminated as of April 1, 2009 and the employer pays 100% of the premium for 6 months (through September) does the former employee have 3 months of the

subsidy left, or can he argue that he has 9 months starting in October 2009 through June 2010?

A: The recent guidance from the IRS indicates that the answer will depend on when the employer treats the individual as “losing coverage” after the termination. In cases where the employer voluntarily allows the employee to continue to receive active employee coverage for a period of time, the current COBRA law allows an employer to elect to treat the employee as losing coverage (and to provide the COBRA election) either at termination of employment or when the employee actually loses employer-provided coverage. Thus, in the example above, if the employer treats the individual as still covered as if he was an active employee for a 6-month period through the end of September, the 9 month clock would not start until the individual loses that coverage on October 1, 2009 and elects COBRA. On the other hand, if the employer treats the individual as eligible for COBRA as of the April 1, 2009 date of termination and provides the COBRA notice and election forms on that date, under the IRS’s guidance: (1) the individual would be deemed eligible for the subsidy on April 1, 2009; (2) as a result, the subsidy period would start at termination of employment (April 1, 2009); and (3) if the employee doesn’t pay any amount until October 1, 2009, the employee would get only 3 months of the Federal subsidy since 6 months has been used up. Note that the IRS guidance provides that in all cases, both the involuntary termination and loss of coverage must occur between September 1, 2008 and December 31, 2009, so the date that “loss of coverage” occurs is significant even if the employer does not pay the COBRA premiums. (See IRS Notice 2009-27, Question/Answer 20 and Examples 2-5 thereunder)

23. When does the 9 month clock start ticking for the subsidy – on March 1, 2009 or on the employee’s termination date?

A: This depends on the period for which you are measuring the subsidy. Generally, the 9-month subsidy limit does not begin until the first period of coverage on or after February 17, 2009 (or March 1 for plans that base continuation coverage on a calendar month basis). The subsidy only applies – and the clock only starts – after the assistance eligible individual BOTH terminates employment and loses coverage. Thus, if the individual terminates employment and does not lose coverage, the clock does not begin until he loses coverage. (See IRS Notice 2009-27, Question/Answer 30-32, and 48-49) (Also see the response to Question # 22 above for a discussion of when the 9 month clock might start to run in situations where an employer continues health coverage for a short period of time after termination or pays 100% of COBRA as part of a severance package).

24. Suppose the employee’s severance package subsidizes health benefits, but not the separate vision or dental; when does the subsidy begin? If he chooses the dental and vision package, would that be eligible for the subsidy? Would that start the clock ticking on the 9 months for the medical, or are the packages evaluated separately?

A: The answers here are not clear and quite confusing. They depend in part on whether vision and dental are separate from the medical coverage, and under COBRA, that depends on how the employer structures the arrangements. If the vision and dental coverage is part of the same plan as the medical plan, the 9 months starts when you terminate employment and lose the vision and dental. If they are separate plans, then they should be evaluated separately. Oddly enough, however, the statute causes difficulties when the plans are separate, because eligibility for the subsidy is lost once a former employee is eligible for a separate medical plan. So arguably, the subsidy for the medical and dental could be lost not only in the case where the former employee becomes eligible for a medical plan of another employer on or after February 17, 2009, but also if the former employee becomes eligible for a separate medical plan of the former employer. (See IRS Notice 2009-27, Question/Answer 27, 34-36)

25. If a husband was divorced and as a result is on regular COBRA for 36 months, and then the ex-wife (who was entitled to the health coverage due to her job) is involuntarily terminated, is the ex-husband eligible for the subsidy?

A: No, because one of the requirements for the subsidy is that the individual became entitled to COBRA “by reason of the involuntary termination.” In this case, the ex-husband received COBRA coverage due to divorce. IRS guidance indicates that in such a case, a subsequent involuntary termination of the ex-spouse would not cause the ex-husband to become eligible for the subsidy. (See IRS Notice 2009-27, Question/Answer 15)

26. If the husband and the employed wife were married at the time of the wife’s termination, and the husband elected separate coverage (as permitted under COBRA) would he get the subsidy? Would the subsidy continue if he is later divorced?

A: As noted in the question, if a dependent is covered under a plan at the time of the qualifying event, the dependent can elect separate coverage. So if the husband and wife are married at the time of termination and both are covered under the plan (e.g., family coverage), and the husband elects separate coverage, he would be entitled to the subsidy for that coverage. If he was divorced two months later, it seems to us that he was still eligible for COBRA coverage (and the subsidy) “as a result of the involuntary termination.” The only effect of the divorce is to create a second “qualifying event” that might lengthen the period of regular COBRA continuation, but not the subsidy period. He should get the subsidy for the 9 months anyway, assuming he is otherwise eligible. (See IRS Notice 2009-27, Question/Answer 44)

27. If the employer reduces an employee’s hours so as to make the employee eligible for “regular” COBRA, the employee elects COBRA coverage, and is later

completely terminated, would the employee be eligible for the subsidy?

A: It depends. IRS guidance provides that generally, the answer is no because he received COBRA initially as a result of “reduction in hours” – not involuntary termination.

However, IRS guidance indicates that a reduction in hours and subsequent termination would be viewed as an involuntary termination that can make the employee eligible for the subsidy if the employer reduced the employee’s hours in anticipation of involuntarily terminating the employee. The IRS states that in that case, “the action causing the loss of coverage prior to the involuntary termination is disregarded in determining whether the involuntary termination is the qualifying event that results in the COBRA continuation coverage for the individual.”

Additionally, the IRS has indicated that if hours were reduced to such a low level that the reduction is a “material negative change in the employment relationship for the employee,” and the employee leaves voluntarily, that departure also would be considered an involuntary termination. (See IRS Notice 2009-27, Question/Answer 3 and 15)

28. Is there anything to prevent the employer from reducing the employee’s hours so as to make the employee eligible for “regular” COBRA, and then if he quits or is fired later he wouldn’t get the subsidy?

A: If the employer reduces an employee’s hours to such a low point that the employee quits, the IRS has indicated that it will consider such a situation to be an involuntary termination (see discussion in response to Question # 27 above) that can make the employee eligible for the subsidy.

29. Suppose the employee is eligible for the subsidy because he is involuntarily terminated, and then comes back part-time (but is not entitled to health benefits). Would he continue to be eligible for the subsidy when he returns?

A: We think he would continue to be eligible for the subsidy (absent any deliberate manipulation to get the subsidy – e.g., firing the employee Monday and rehiring him part-time Tuesday).

30. If the former employer elects to give the former employee the option to change plans, or to opt down, do we do this now or at open enrollment?

A: Remember that the employer does not have to offer the option to change plans. If it does, the idea is that the employer will give the former employee the option to do it NOW so as to save costs. If the employer does not, under regular COBRA, the employee would have whatever rights active employees have to change their benefits at the next anniversary.

31. The information I have states that “The premium reduction applies to periods of coverage beginning on or after February 17, 2009. A period of coverage is a month or shorter period for which the plan charges a COBRA premium. The premium reduction starts on March 1, 2009 for plans that charge for COBRA coverage on a calendar month basis.” I am unclear as to how the “periods of coverage” are defined. Does this mean that if the insurance carrier bills on a calendar month basis, the subsidy begins on March 1, and if the insurance carrier bills from the 15th to the 15th of the month, it begins on February 17? Or does it mean that if an employer terminates coverage on the date of the event and pro-rates the first and last month premium the subsidy begins on February 17th even though the insurance carrier bills from the 1st through the end of the month?

A: If the insurance carrier bills monthly for monthly periods of coverage, the subsidy begins March 1. Also, if the carrier bills monthly for a period of coverage that begins on the first day of the month, under IRS guidance, except for “Second Chance” elections discussed in the next paragraph, if a plan requires an individual who loses coverage other than on the last day of the month and who wishes to enroll in COBRA continuation coverage to pay a pro-rata portion of the monthly premium, then the first period of coverage for which the subsidy applies for a person who loses coverage and must pay for a partial month of coverage is the individual’s first partial month of coverage (so if he loses coverage on April 15, 2009 in this case he might get the subsidy only for part of April and then for the next 8 months). This is because the maximum premium reduction period ends on the date that is nine months after the first day of the first month for which the premium reduction provisions apply to the individual.

Despite the general rule described above, the IRS has a special rule for the period of coverage where “second chance” election is involved. If, as a result of the extended election period, the individual becomes eligible for COBRA coverage under a plan that requires that the continuation coverage be paid for based on a calendar month, the individual’s first period of coverage beginning on or after February 17, 2009 is the month beginning March 1, and the premium reduction only applies to premiums for COBRA continuation for March and subsequent months. This does not change even if the plan otherwise requires individuals who lose coverage before the last day of the month and who wish to enroll in COBRA continuation coverage to pay a pro-rated portion of the monthly premium for the first partial month. (See IRS Notice 2009-27, Question/Answer 30-32, 48)

32. We have a facility that will be closing in May, and the health plan will no longer be in place, but the facility is part of a larger controlled group which will still have health policies in effect. My question is, once the closed facility runs out of payroll tax to take the COBRA credit against is there another way to apply for reimbursement of the 65% of the premium that we will be paying?

A: The explanatory material accompanying the statute indicates that to the extent the subsidized amounts exceeds the employer’s payroll tax, a separate payment will be made.

It is not clear if the government will insist that the “employer” be defined as a controlled group for these purposes. At this point there appears to be no guidance on this issue.

33. Should I distribute the new COBRA form to new hires and current employees?

A: The new model notices are specifically designed for persons who have had a qualifying event. Under COBRA, a general notice of COBRA rights has to be distributed to all employees and spouses when the employee is enrolled. The DOL previously issued a model notice for new hires, but obviously it is outdated and should be updated. When adding an explanation about the subsidy, you should keep in mind (and make it clear in any communication to participants) that the subsidy is a temporary one.

34. If the second chance government-subsidized COBRA starts as of September 2008, does the individual only have 2 more months of subsidized COBRA under this program? Or does the subsidy period start from March 1, 2009?

A: Individuals who were involuntarily terminated starting September 1, 2008 are eligible for the COBRA subsidy. The September 2008 date only goes to eligibility for the subsidy, not the subsidy period itself, so an assistance-eligible individual who was terminated in September 2008 can get as much as nine months of subsidy, which subsidy starts on March 1, 2009. (See IRS Notice 2009-27, Question/Answer 48)

35. If the employee was terminated in October 2008 and is eligible for the subsidy, are they responsible for back payment if they never paid the original COBRA premiums?

A: We are assuming that in this situation, the former employee elected COBRA but then never paid any premiums. Neither the new COBRA subsidy law, nor the guidance issued by the government to date, addresses the issue of past due COBRA payments from the time period before the subsidy law was enacted. See the response to Question 11 concerning the question of whether past due COBRA premium payments can affect rights to a new election and the subsidy on a forward-going basis. (See also IRS Notice 2009-27, Question/Answer 48).

36. We have some self-funded clients. There has never been any real technical guidance that I am aware of, for the setting of "premium rate equivalents" for COBRA premiums. We have always followed the directive that employers are allowed to include all expenses that would otherwise be incorporated into a fully insured premium rate. That would certainly include claims but could also include claim reserves (even if the employer did not establish a trust to hold the reserves they still have the liability), claim fluctuation margins, consulting fees, admin fees, etc.. When we get "suggested COBRA rates" from carriers paying claims for self

funded plans, they rarely include anything beyond claims, expenses and stop loss premiums. We are wondering if the DOL intends to give more specific guidance here.

A: We are not aware of any such guidance.

37. In determining the number of employees by which COBRA is mandated (20 or more employees) are owners counted if they are receiving a salary and covered by the group plan?

A: It depends. Individuals who are not "common-law employees" are not counted for this purpose. So the answer to your question depends on whether the owner is a self-employed individual, a director (but not an employee-director), or independent contractor. Those individuals are not treated as employees for purposes of this test. A "self-employed individual" is an individual whose income from the enterprise is treated as "earned income" under the tax laws. You would have to determine if your owners are in that category. If they are, they are excluded from the "20 employee" test.

38. If a company has 20 people and lays one off is COBRA no longer required? Note that the layoff only is because of COBRA.

A: Under the Federal COBRA rules, a "small employer plan" that is not subject to COBRA is one that "normally employs fewer than 20 employees... during the preceding calendar year" (that is, the calendar year preceding the qualifying event). An employer is considered to have normally employed fewer than 20 employees during a particular calendar year if, and only if, it had fewer than 20 employees on at least 50 % of its typical business days during that year.

Note that for purposes of this rule, the employer is determined by looking at the controlled group (e.g., a parent and subsidiary would be in a controlled group, as well as certain other connected organizations). Those rules are tricky and need to be determined on a fact-specific basis. Also, see the answer to Question # 37 above on who is counted as an employee.

And remember, any state mini-COBRA rules may have different requirements and definitions.

39. Does CIAB have or can you direct us to a comprehensive list of states that have already mandated "mini-COBRA" requirements?

A: We understand that the National Association of Insurance Commissioners ("NAIC") publishes a compendium of state laws on various topics including "Group Health Insurance Continuation Provisions in States," but we have not reviewed this publication and cannot provide any information or endorsement of it. You may wish to visit NAIC's

website at http://www.naic.org/store_pub_legal.htm#compendium for more information about this publication. Additionally, we have seen a state-by-state listing of mini-COBRA laws on insure.com (<http://www.insure.com/articles/healthinsurance/cobra-by-state.html>) and there may be other websites that provide such a listing. This listing can give you an idea of what the applicable state laws are like, but we have not reviewed the listing for accuracy. Also, a number of state laws are changing in response to the new COBRA subsidy law, and these state laws may have different eligibility, notice, and administrative requirements from the Federal law, so we recommend consulting the actual state law or an adviser with knowledge of the particular state's requirements if you have specific questions about a state's mini-COBRA law.

40. Is Pennsylvania state law any different from federal? If not then the alternative notice isn't needed?

A: We are unable to comment on the specific laws of particular states, although our very general research in this area indicates that Pennsylvania has not enacted a COBRA law yet but has one pending before the state legislature. As suggested in the DOL's "Frequently Asked Questions" for employers concerning the new COBRA law (<http://www.dol.gov/ebsa/faqs/faq-cobra-premiumreductionER.html>), you may wish to consult the state insurance commissioner's office for more information on continuation laws in that particular state. There is also some limited information provided by the U.S. Department of Health and Human Services Center for Medicare & Medicaid Services at http://www.cms.hhs.gov/COBRAContinuationofCov/Downloads/Helpful_Information_State_COBRA_ARRA.pdf. Additionally, we understand that the National Association of Insurance Commissioners ("NAIC") publishes a compendium of state laws on various topics including "Group Health Insurance Continuation Provisions in States," but we have not reviewed this publication and cannot provide any information or endorsement of it. You may wish to visit NAIC's website at http://www.naic.org/store_pub_legal.htm#compendium for more information about this publication. Finally, we have seen a state-by-state listing of mini-COBRA laws on insure.com (<http://www.insure.com/articles/healthinsurance/cobra-by-state.html>) and there may be other websites that provide such a listing. This listing can give you an idea of what the applicable state laws are like, but we have not reviewed the listing for accuracy. Also, a number of state laws are changing in response to the new COBRA subsidy law, and these state laws may have different eligibility, notice, and administrative requirements from the Federal law, so you will need to consult the actual state law or an adviser on this matter before going forward.

41. If an employee is in COBRA since September 1, 2008, and we send a new notice about this Act, when would the 9 months start counting □ □ February 17, 2009; March 1, 2009; or when the person receives the letter?

A: See the response to Questions # 23 and 31 for discussion of this issue.

42. Would the person be eligible for the whole nine months? Or would the nine months be deducted from the September 1 date, in which case the person would only have two more months left for the ARRA subsidy?

A: See the response to Questions # 23 and # 34 for discussion of this issue.

43. “Caution: “Second Chance” election notice needs to go to all former employees who had qualifying event during September 1, 2008 to December 31, 2009 period, even if they wouldn’t be eligible for subsidy.” I have a few employees that left the company since September 1, 2008. They were not covered under our benefit plans because they waived their benefits coverage. When the ARRA specifications say “all former employees” do they mean even if they were not participating in our benefits? What if I send a COBRA letter to these employees, and they elect COBRA. Is the insurance company going to accept them if they were not previously covered?

A: Under the regular COBRA law, only “qualified beneficiaries” are eligible to elect COBRA. And a “qualified beneficiary” is an individual who was covered by a group health plan on the day before a qualifying event. The new law does not change these requirements, and limits the notice requirement, in relevant part, to those who would have been entitled to elect COBRA initially. Thus, if the question is whether you are required to send new COBRA notices to individuals who were not covered by the plan at the time the employee left the company, we believe the answer is no, because such individuals would not have been “qualified beneficiaries.”

44. I have an employee who is out on long term disability. She is not terminated, but she is not an active employee. (She is inactive). She is currently covered under COBRA. I am not sure what category would she be in: would you say she is involuntary terminated?

A: Leave due to long term disability is not an “involuntary termination” that would qualify the individual for the COBRA subsidy. (See IRS Notice 2009-27, Question/Answer 1)

45. Are we sending the forms to the state to determine the employee eligibility for ARRA? The same as unemployment, the former employees file for unemployment and the state determines if they are eligible based on whether the termination was voluntary or involuntary.

A: It is expected that the employer or other plan official will determine whether the employee is eligible for the subsidy (e.g., whether he or she was involuntarily terminated within the proper timeframe). If there is a dispute, the law provides for a special and

quick review by government agencies. The DOL will be handling reviews for employers subject to COBRA; HHS will do that for others (state continuation and government plans). Look for more guidance from DOL and HHS on this process.

46. We have several questions from EB producers related to the interface of state continuation health coverage and the ARRA premium subsidy requirements. From a federal standpoint, employees involuntarily terminated 9/1/2008 thru 2/16/2009 can have a second chance to elect COBRA and may be eligible for the ARRA premium subsidy going forward from 2/17/09 for up to 9 months. For health plans subject to state continuation, the premium subsidy may apply, however the DOL on its FAQ page indicates that the second chance election is not required under state continuation coverage. Do you have any further details on any state actions which are being taken, particularly in our footprint?

A: We do not have any details on specific state actions being taken concerning the new COBRA subsidy law. However, you may wish to review some of the resources discussed in response to Question # 40 above as a starting point to determine whether any states are making changes to their laws. Government officials have informally indicated that if a state adopts such laws, a second chance election will be permitted.

47. Who is eligible for the COBRA subsidy?

A: "Assistance eligible individuals" are those meeting following criteria: (1) they are qualified beneficiaries who became eligible for COBRA between September 1, 2008 and December 31, 2009 due to involuntary termination of employment (other than by reason of gross misconduct); and (2) they elect COBRA. The law does not define the term "involuntary termination," so employers should be prepared to address disputes over whether a departure or other event was involuntary. For example, it is unclear whether an employee who voluntarily leaves to avoid being laid off, or who voluntarily goes to part-time status to avoid being laid off, would be eligible for the subsidy. It is anticipated that the relevant federal agencies will provide additional guidance to help answer such questions. In the meantime, there may be guidance from some state employment programs that can at least help distinguish between voluntary versus involuntary terminations.

There are income limits for eligibility: the subsidy is reduced for those with modified adjusted gross income exceeding \$125,000 (\$250,000 for joint filers) and it phases out entirely for those with incomes exceeding \$145,000 (\$290,000) in the year the subsidy is to be received. The assistance eligible individual appears to be the one responsible for monitoring the income requirement, not the employer. This is the case because the mechanism for recapture of premiums for high income individuals is an increase in the taxpayer's income tax liability for the year equal to such amount. High income individuals may permanently waive the right to the subsidy (by notifying the entity entitled to reimbursement of the subsidy), and they may wish to waive the subsidy to

avoid having to report it on their tax returns. Employers should accordingly create a procedure for tracking those who waive the subsidy.

If an individual would have been eligible for COBRA but failed to elect it (or elected it and then discontinued), that person must be given a second chance to elect it. The second-chance election period begins on the date that a second-chance election notice is provided (this new notice is discussed below) and ends 60 days thereafter.

Individuals collecting the Health Coverage Tax Credit (“HCTC”) are not eligible for the COBRA subsidy. Note that the new law also increases the HCTC from 65% to 80%.

Finally, note that qualifying events that occur after termination do not add beneficiaries to COBRA subsidy coverage. Thus, for example, if an employee is involuntarily terminated on September 10, 2008, elected COBRA at that time, got married on September 15, 2008 and then added the new spouse to her COBRA coverage, the new spouse is not eligible for the COBRA subsidy (although the former employee is).

48. What is the subsidy amount?

A: The subsidy amount is 65% of the COBRA premium. The individual pays the remaining 35%. The law does not change the method by which a self insured plan can determine premiums.

The subsidy only applies to the amount of the COBRA premium paid by the former employee. For example, if the applicable premium is \$1,000 and the employer charges \$1,020 (the 102% allowed by law), the individual would be required to pay 35% of the \$1,020 (\$357) and the employer would pay the balance (\$663).

Significantly, this framework creates an anomaly if the employer has independently decided to directly subsidize COBRA premiums, as part of a severance package, for instance. If 102% of the applicable COBRA premium is \$1,020 and the employer agreed to pay 70% of that amount, i.e., \$714, the former employee’s share would be \$306. When the new law is applied to this scenario, the former employee’s 35% is calculated on the premium amount he is actually paying – 35% of \$306, or \$107.10. This means the employer must pay a total of \$912.90 (\$1,020 minus \$107.10), but only receives a payroll tax credit of \$198.90 (\$306 minus \$107.10).

In short, under the new law the employer is significantly penalized for having independently agreed to subsidize COBRA premiums – the employer is now paying much more money (\$912.90 versus \$663) and is getting a much smaller payroll tax credit (\$198.90 versus \$357).. This is something to take into account if companies are planning lay offs and are considering subsidizing COBRA premiums. One alternative may be to offer stipends not designated as a COBRA subsidy, since that money will not count against the amount that will be subsidized and recouped by the employer.

49. When does the subsidy begin?

A: The subsidy becomes effective for any premium for a period of coverage beginning on or after enactment of the stimulus law, i.e., February 17, 2009. This means that for plans that charge COBRA premiums on a monthly basis, as is the norm, the subsidy is effective as of March 1, 2009.

Note that although the subsidy becomes effective March 1, the law appears to allow an additional two months, that is, the months of March and April, during which covered individuals may continue to be charged the full premium. This two month period is in apparent recognition of the fact that it will take some time for employers and insurers to implement internal systems capable of handling the division of premium payments that the subsidy program requires. However, if a covered individual is charged the full amount in March and April, the employer or insurer must repay their 65% portion of the premium to the individual within 60 days, or may credit the individual for the 65% portion if the credit can be used up within 180 days of the date of overpayment.

50. How long does the subsidy last?

A: The maximum subsidy period is nine months, and it ends the earlier of (1) nine months after it started; (2) the individual's COBRA coverage ends; or (3) the individual becomes eligible for coverage under another group health plan or Medicare. This means the subsidy could last less than nine months depending on the individual situation.

If an individual becomes eligible for other health coverage the individual is required to notify the group health plan in writing.

Significantly, the law does not change the total maximum duration for COBRA, which is 18 months in cases of involuntary terminations. Thus, if a person was involuntarily terminated on September 1, 2008 but did not elect COBRA at that time, yet subsequently elects it on May 1, 2009 under the second-chance provision of the new law, the person's maximum COBRA period is measured as if the person had originally elected COBRA back in September 2008.

51. Who is responsible for paying the subsidy?

A: The entity to which premiums are payable, that is, the multiemployer group health plan, the employer maintaining a self-funded plan, or an insurance company providing coverage under an insured plan.

Note that insurers (not employers) are responsible for subsidizing individuals participating in State Continuation Coverage plans (separate from COBRA plans, where the employer is responsible for subsidies), and those participating in multi-employer

plans. Otherwise, it is the employer who is responsible for paying the subsidies, and only the employer is eligible to collect the subsidy regardless of contracts or agreements with administrators or insurers.

52. How is the subsidy recouped through the payroll tax?

A: The entity to which premiums are payable is the entity that is eligible for the payroll tax credit, and recoups the subsidy by claiming an equivalent refundable credit against the requirement to make deposits or payments of payroll taxes, i.e., on the Form 941. Thus, for multi-employer plans, the subsidy will come in the form of a check via Form 941. The IRS is expected to modify Form 941 to facilitate recoupment of the COBRA subsidies.

Note that no payroll tax credit can be claimed until the reduced COBRA premium has been received from an assistance-eligible individual. The credit is not earned on the date the plan sponsor pays its portion of the premium. Thus, entities must take care to ensure that they do not claim the payroll tax credit before they actually receive the individual's COBRA premium payment, because such a premature claim could result in the IRS assessing a penalty for late deposit of payroll taxes. Accordingly, employers must carefully track the dates on which payments are received from assistance-eligible individuals because those will be the dates on which the payroll tax credits arise.

53. What coverage is eligible for the subsidy?

A: The subsidy applies to all group health plans subject to COBRA. Thus, for example, medical, dental, vision, and health reimbursement arrangements qualify as eligible coverage. But health flexible spending arrangements under a cafeteria plan are not eligible for the subsidy.]

In addition, the subsidy applies not only to plans that are subject to COBRA, but to coverage under state laws that require "continuation coverage comparable to" that under federal COBRA for plans not subject to COBRA, such as small plans. This could mean, for example, that the subsidy applies to church plans that are subject to state laws but are not subject to ERISA. And the subsidy applies to continuation of coverage under requirements that apply to health plans maintained by the federal government or a state Government.

Note that under the new law an employer or plan sponsor has the option to allow individuals to change their coverage in conjunction with electing COBRA to coverage that has the same or lower health insurance premiums. The determination of which coverage is cheaper is based on the premium charge to the individual, not the total cost of coverage. Such alternative coverage must also be offered to active employees, and must not consist solely of non-core coverages (e.g., dental, vision, referral services) or combinations of non-core services.

54. What are the new notice rules for COBRA?

A: For individuals who become eligible for COBRA coverage during the September 1, 2008-December 31, 2009 period, the notice generally required to be provided must include the following additional information: (1) the availability of the subsidy; (2) the individual's obligation to provide written notification of his/her eligibility for other health coverage or Medicare and the penalty for not doing so; (3) the second chance to elect COBRA; and (4) the option of electing less expensive coverage, if the plan or employer decides to offer such an option.

There is a special notice timing rule for certain individuals: the notice described above must be provided by April 18, 2009 to assistance-eligible individuals (or those who would have been eligible if they had elected COBRA) who are (1) covered by COBRA as of February 17, 2009; (2) previously elected COBRA but are no longer covered as of February 17, 2009; or (3) did not elect previously available COBRA coverage. For example, this special rule would apply to an individual who was involuntarily terminated in the fall of 2008 and who has already elected and is covered by COBRA, or an individual who was involuntarily terminated in the fall of 2008 and elected COBRA but is no longer covered because they stopped paying their premiums.

It should be noted that because of some vagueness in the law's language, the special COBRA notices should be provided to all individuals who become eligible for COBRA for any reason during the period beginning September 1, 2008 and ending December 31, 2009, including individuals who clearly would not be eligible for the subsidy. Moreover, new notices should be provided to any individuals who became eligible for COBRA beginning September 1, 2008 and had already been given a COBRA notice before the new law's enactment.

Finally, note that even if an insurance company is responsible for the subsidy, the employer is still responsible for providing the COBRA notice (absent an agreement with the insurer to the contrary.)

The Department of Labor will publish, by March 19, 2009, model notices that may be used.

55. What are the new reporting requirements?

A: The legislation requires any entity eligible for reimbursement of the subsidy (that is, the employer or the insurer) to submit such reports as the Treasury Department may require, including (1) an attestation of the involuntary termination of each person for

whom subsidy reimbursement is claimed, (2) a report of the amount of payroll taxes offset for a reporting period and the estimated offsets for the next period, and (3) a report containing the tax IDs of all covered employees, the amount of subsidy reimbursed with respect to each, and a designation as to whether the reimbursement is for one individual or two or more individuals.

Congress indicated that these reports are to be provided at the same time as the deposits of payroll taxes would have been required, absent the offset, or at such time as the Treasury Department determines. It is expected that the IRS will revise the forms used by employers to report payroll taxes, and also possibly the Form W-2, to accommodate the reporting of the amount of COBRA premium assistance payments and the number of subsidy recipients. The Treasury Department may also address mechanisms for making other reports, such as the attestations of involuntary termination, in regulations to implement the new law