

Information on Temporary COBRA Subsidy for Laid-off Workers

NYSUT local associations and benefit funds need to be aware that the recent federal stimulus law provides temporary premium payment assistance for involuntarily laid-off employees and that action is required.

This information is targeted to benefit funds providing ancillary benefits such as dental, vision and catastrophe major medical (CMM) to their participants. Funds must be aware that they must take steps to comply or ensure that their third-party administrator (TPA) does so.

Background

The American Recovery and Reinvestment Act of 2009 (ARRA), provides for a **temporary government subsidy of COBRA premiums for certain employees**, and their eligible family members, who were involuntarily terminated from employment during the period from Sept. 1, 2008 through Dec. 31, 2009. "Assistance eligible individuals" (AEIs) who elect COBRA continuation health coverage are provided a 65 percent reduction in the premium otherwise payable for a period of up to nine months. Group health plans must generally treat AEIs who pay 35 percent of the premium otherwise payable for COBRA continuation coverage as having paid the full amount of the premium.

The *NYSUT Handbook for Laid-Off Employees* contains more details about COBRA, including what is an "involuntary termination," at http://www.nysut.org/cps/rde/xchg/nysut/hs.xsl/careers_12697.htm.

The 65 percent premium subsidy is available for COBRA coverage. The premium reduction also applies to coverage under **state programs** that provide coverage comparable to COBRA continuation coverage. The NYSUT Member Benefits Trust-endorsed Group CMM Plan falls into this category.

In order to **qualify for the 65 percent COBRA subsidy**, participants must meet all of the following requirements:

- Be "involuntarily terminated" and lose health coverage resulting in being eligible for COBRA continuation coverage at any time during the period beginning Sept. 1, 2008 and ending Dec. 31 2009;
- Elect COBRA coverage when first offered or during the additional extended election period if the initial election period has already ended; and
- Generally, not be eligible for other group health coverage, such as a spouse's plan or Medicare.

The premium subsidy is not included in the individual's income. However, there is a **phase-out of eligibility for the subsidy, which will increase some high-income individuals' tax liability if they receive the subsidy**. The phase-out impacts individuals whose modified adjusted gross income exceeds \$125,000, or \$250,000 for those filing joint returns. Tax liability is increased, to achieve repayment of a portion of the subsidy, for those taxpayers whose modified adjusted gross income is between \$125,000 and \$145,000, or \$250,000 and \$290,000 for those filing joint returns. If a taxpayer's modified adjusted gross income exceeds \$145,000, or \$290,000 for those filing joint returns, the full amount of the subsidy must be repaid as an additional tax. There is no additional tax for individuals with modified adjusted gross income less than these income levels.

An individual may elect to permanently waive the right to the premium reduction (for example, to avoid receiving and then repaying the premium reduction).

Individuals who are denied treatment as AEIs and thus denied eligibility for the premium reduction may request an **expedited review of the denial**. The Department of Health and Human Services, Centers of Medicare and Medicaid Services (HHS) will handle the appeals for participants of public sector funds. That department must make a determination within 15 business days of receipt of a completed request for review. Individuals can request an application form from HHS online or by calling HHS toll-free at 866 400-6689. To request online, visit <http://www.continuationcoverage.net>. HHS expects this site to be up and running very soon. According to HHS, if the site asks for a password, that means the site is not yet up and running.

The premium reduction applies as of Feb. 17, 2009 (the date of enactment of ARRA). The premium reduction period ends if the individual becomes eligible for coverage under any other group health plan with some exceptions. AEIs receiving the premium reduction are required to notify the group health plan of eligibility for the other coverage. If the individual fails to do so, he or she is subject to a tax penalty of 110 percent of the premium reduction improperly received after eligibility for the other coverage. The premium reduction is for up to nine months of coverage and does not extend beyond the period of COBRA continuation coverage.

Individuals involuntarily terminated and their qualified beneficiaries who lost coverage from Sept. 1, 2008 through Feb. 16, 2009, did not elect COBRA when it was first offered, or did elect COBRA but are no longer enrolled have **another opportunity to enroll**. Funds had to notify affected workers no later than April 18, 2009, regarding this extended election period. This extended election period was not available under plans subject to state continuation.

In order to qualify for the premium subsidy, both the involuntary termination and the loss of coverage resulting in eligibility for COBRA continuation coverage must occur during the period of Sept. 1, 2008 – Dec. 31, 2009. If the loss of coverage begins Jan. 1, 2010 or later, the individual is not considered an AEI and will not be entitled to the subsidy. Eligibility for COBRA itself is not affected.

AEIs can be any **qualified beneficiary** under the COBRA rules, which exclude same-sex marriages and domestic partnerships (with some exceptions under state continuation coverage for same-sex marriages). Any qualified beneficiary may independently elect COBRA and receive the subsidy.

The federal government will reimburse the **remaining 65 percent of the premium that is not paid by AEIs** through a credit against its payroll taxes. The credit is claimed on the entity's payroll tax return, in most cases, **IRS Form 941**, filed quarterly. **Note that this rule should still apply to funds that have no payroll tax liability.*** If the amount of the credit exceeds payroll tax liabilities (this should generally be the case for funds), the entity would be entitled to a refund. In certain cases, the insurer will file for the reimbursement.

***NOTE: ARRA provides, and IRS has reiterated through its guidance, that only "multiemployer plans," "employers maintaining the plan," and "insurers providing the coverage under the group health plan" are entitled to take the credit for the remaining 65 percent of the premium. Though**

benefit funds appear not to fall within any of these categories, because IRS has not formally stated otherwise through guidance, a reasonable position is that benefit funds should be equally entitled to take the credit and seek reimbursement. Nonetheless, NYSUT Member Benefits suggests you discuss this issue with your legal counsel before seeking reimbursement. The following information is based on this interpretation of ARRA as it relates to benefit funds.

Benefit fund responsibilities

Funds that contract with a TPA should confirm with the TPA that it is prepared to handle the temporary subsidy. Funds should communicate information regarding AEIs to their TPAs.

Where a fund handles COBRA/state continuation on its own, there is more work involved:

1. Determine what notices must be sent

Certain COBRA notices have been revised and are to be used for the remainder of 2009. Unless specifically modified by ARRA, the existing COBRA notice manner and timing requirements continue to apply.

The U.S. Department of Labor has created several “notice packages” – model notices that may be used by benefit funds. The type of notice used depends on a number of circumstances, which are outlined below. The notices can be found at <http://www.dol.gov/ebsa/COBRAmode notice.html>.

(a) **General Notice (Full version)** – usually known as the “**Election Notice**” – Funds must send the General Notice to all qualified beneficiaries, not just covered employees, whether they are currently enrolled in COBRA coverage or not, who experienced a qualifying event at any time from Sept. 1, 2008 through Dec. 31, 2009, *regardless of the type of qualifying event*, and who either have not yet been provided an election notice or who were provided an election notice on or after Feb. 17, 2009 that did not include the additional information required by ARRA. This full version includes information on the premium reduction as well as information required in a COBRA election notice.

(b) **General Notice (Abbreviated version)** – The abbreviated version of the General Notice includes the same information as the full version regarding the availability of the premium reduction and other rights under ARRA, but does not include the COBRA coverage election information. It may be sent in lieu of the full version to individuals who experienced a qualifying event on or after Sept. 1, 2008, have already elected COBRA coverage, and still have it. Like the full version of the general notice, it does not matter what type of qualifying event made the individual eligible for COBRA.

(c) **Notice in Connection with Extended Election Periods** – Funds must send this notice to any AEI or any individual who would be an assistance eligible individual if a COBRA continuation election were in effect who: (1) had a qualifying event at any time from Sept. 1, 2008 through Feb. 16, 2009; ***and*** (2) either did not elect COBRA continuation coverage or elected it but subsequently discontinued COBRA. This notice includes information on ARRA’s additional election opportunity as well as premium reduction information. **This notice must have been provided by April 18, 2009.** This notice is not

required to be provided with respect to state continuation coverage that is provided pursuant to state insurance law.

Essentially, funds are required to implement up to three different notices, depending upon the circumstances involved. In addition, **the initial COBRA notice (often called a “general notice”)** that funds provide to new participants has not changed, but it is suggested that funds make new participants aware of the temporary COBRA subsidy, just in case they get laid off by Dec. 31, 2009, by providing new participants with the same general notice as always, and include as an attachment a *portion* of the newly revised, full version “general notice” described in section (a) above, entitled “Summary of the COBRA Premium Reduction Provisions Under ARRA,” which appears on page 10 of the newly revised, full version “general notice.”

2. Calculate premium

The earliest that the COBRA premium subsidy can apply is for **the first period of coverage beginning on or after Feb. 17, 2009**. Premium reduction may be available after Dec. 31, 2009 for individuals who qualify as AEIs on or before Dec. 31, 2009.

If an AEI pays 100 percent of the premium, for example, in March or April for coverage for those months, any overpayment can be applied as a credit toward subsequent premiums as long as it can be used within 180 days of the overpayment. Otherwise, the overpayment must be reimbursed to the AEI within 60 days of receipt.

The premium used to determine the 35 percent share that is paid by the AEI is the cost that would be charged to the AEI for COBRA continuation coverage, if the individual were not an AEI. Typically, this would be 35 percent of the 102 percent of the monthly premium. If the premium that would be charged to the AEI is less than the maximum COBRA premium, the amount actually charged the AEI is used to determine the AEI’s 35 percent share.

3. Collect premium and submit to insurer or TPA

After a fund collects premium from AEIs, it must generally send it to its TPA or insurer, **along with the balance of the COBRA premium due (i.e., 65 percent of the premium)**. The fund should then be entitled to the tax credit representing 65 percent of the premium, requiring the fund to submit IRS Form 941.

Note that in the case of **an insured plan subject solely to state law** with respect to the requirement to provide continuation coverage (e.g., the Member Benefits-endorsed Group CMM Plan), the only entity entitled to be reimbursed for the premium reduction is the insurer. Funds with questions about CMM should contact the administrator, The Preferred Group Plans, Inc.

4. Monitor the premium reduction period - The nine-month period of reduced premiums

As was stated above, the COBRA premium subsidy is not retroactive. The earliest it can apply is for the first period of coverage beginning on or after Feb. 17, 2009 – there is no premium reduction for premiums paid for periods of coverage prior to Feb. 17, 2009.

Where a fund provides coverage on a calendar month basis, **the first period of coverage is the month beginning March 1, 2009.**

The premium reduction applies until the earliest of: (1) generally, the first date the AEI becomes eligible for other group health plan coverage, (2) the date that is nine months after the first day of the first month for which the premium reduction provisions apply to the AEI; or (3) the date on which the AEI ceases to be eligible for COBRA continuation coverage.

5. File Form 941 with the IRS to obtain the refund of the 65 percent of premium

Because ARRA provides for reimbursement of the subsidy through the employment tax process, **Form 941** is the exclusive form to be used, even by funds that do not have employment tax liability. Form 941 is filed on a quarterly basis.

The credit is claimed on Line 12a of the Jan. 2009 version of Form 941 (including the instructions for the COBRA subsidy), which was posted on the IRS Web site on Feb. 20, 2009 at <http://www.irs.gov/newsroom/article/0,,id=204505,00.html>.

Form 941 filers need to include the number of individuals provided COBRA premium assistance on Line 12b.

If Line 12a is larger than Line 10, Line 13 would also be larger than Line 10, resulting in an overpayment that could be requested as a refund.

The due date for the first quarter of 2009 was April 30, 2009 and will not be extended. However, the subsidy credit may be claimed in later quarters in 2009. Form 941 filers are not required to claim the credit for the quarter during which the subsidy is provided to AEIs. Instead of claiming the credit for the quarter during which the subsidy is provided, filers may generally choose to claim the credit for a later quarter in the same calendar year.

No additional information relating to the subsidy is to be submitted with Form 941, either electronically or in paper form. However, filers must maintain supporting documentation for the credit claimed. Such documentation includes:

- Information on the receipt, including dates and amounts, of the AEI's 35 percent share of the premium.
- In the case of an insured plan, copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA.
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the AEIs.
- Attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from Sept. 1, 2008, to Dec. 31, 2009), for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.

- Proof of each AEI's eligibility for COBRA coverage at any time during the period from Sept. 1, 2008, to Dec. 31, 2009, and election of COBRA coverage.
- A record of the Social Security numbers of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or two or more individuals.

For further assistance

Funds requiring further assistance regarding the temporary COBRA premium subsidy should contact their legal counsel. Should you have questions related to the information contained here, please contact Laura Calhoun at 800-626-8101, ext. 1302 or lcalhoun@nysutmail.org, or Betsy Porter at 800-626-8101, ext. 1247 or bporter@nysutmail.org.