

# COBRA Subsidy Update -- The Temporary Extension Act of 2010 Extends the Subsidy Eligibility Period by One Month and Makes Other Changes and Clarifications to ARRA

## March 4, 2010

On March 2, 2010, President Obama signed the *Temporary Extension Act of 2010* (TEA or the Act), which extends the COBRA subsidy eligibility period, expands the group of individuals who may receive the subsidy, and makes other changes and clarifications to the premium subsidy provisions originally included in the American Recovery and Reinvestment Act of 2009 (ARRA). It is expected that this legislation is a precursor to a longer extension of the eligibility period (possibly through the end of 2010).

As we have previously reported in earlier Client Alerts, ARRA (as amended by the Department of Defense Appropriations Act, 2010 (DOD Act)) provides for a 65 percent COBRA premium subsidy for a period of up to 15 months for eligible employees who were involuntarily terminated from employment during the period from September 1, 2008 through February 28, 2010, and their eligible family members. [[February 2009 client alert: Important News For Employers and Other Health Plan Sponsors](#) and [December 2009 client alert: President Obama Extends COBRA Subsidy Duration and Eligibility Period](#)].

As described below, TEA now extends the subsidy eligibility period to involuntary terminations of employment occurring through *March 31, 2010*, expands the class of eligible individuals to include certain employees who are involuntarily terminated from employment after having lost group health coverage due to reduced hours of employment, and includes other changes and clarifications to ARRA. The 15-month maximum subsidy period and the amount of the subsidy remain unchanged.

### ***Extended Eligibility Period***

TEA amends ARRA to extend the eligibility period for the COBRA subsidy for one additional month. Accordingly, individuals who experience an involuntary termination of employment between March 1, 2010 and March 31, 2010 also will be eligible for the subsidy. Employers and plan administrators should watch for additional legislation that may extend the eligibility period further, possibly through the end of 2010. In addition, employers and administrators should identify any qualified beneficiaries who were previously notified of COBRA rights due to an involuntary termination of employment occurring after February 28, 2010. If those individuals already received notice of their COBRA rights and the notices indicated that a subsidy would not be available, they should be re-notified and consideration should be given as to whether to extend the COBRA election period due to this new information.

### ***Reduced Hours of Employment Followed by Involuntary Termination of Employment***

TEA expands the group of individuals who may be eligible for the subsidy by including employees who experienced a COBRA qualifying event of *reduction of hours of employment* (occurring some time on or after September 1, 2008) followed by an involuntary termination of employment occurring on or after the date of enactment of the Act (*i.e.*, on or after March 2, 2010). However, a COBRA premium subsidy for these individuals only applies to periods of coverage beginning after March 2, 2010, and the maximum period of COBRA coverage for these individuals still will be counted from the date of the earlier reduction in hours of employment.

For example, assume that one of the affected individuals elected COBRA coverage at the time of his or her reduction in hours of employment and is still receiving COBRA coverage at the time of involuntary termination from employment (occurring between March 2 and March 31, 2010). This individual may now claim the subsidy for periods of coverage beginning after March 2, 2010 (typically, beginning with the month of April). If this individual did *not* make a COBRA election at the time of the loss of coverage due to reduced hours of employment (or made a COBRA election and subsequently discontinued coverage), he or she will have additional COBRA election rights under the Act to get back on coverage and start claiming a subsidy (beginning with the period of coverage that starts after March 2, 2010), although his maximum period of COBRA coverage will be measured from the earlier reduction in hours of employment.

TEA clarifies that individuals to whom the additional election rights apply will not be required to pay for COBRA coverage for periods between the reduction in hours of employment and the involuntary termination of employment. Also, any lack of coverage during this period will not count in determining whether there has been a 63-day gap in coverage for purposes of HIPAA's pre-existing condition rules. The statutory language is not clear as to whether a qualified beneficiary could voluntarily choose to elect to be covered retroactively to the date coverage ended due to the reduction in hours of employment. This does not appear to be the intent of the provision; however, the literal statutory terms are not clear. We expect clarification in future guidance.

### ***Additional Notification Requirement***

TEA requires that certain assistance eligible individuals be provided with notice of the availability of the ARRA premium subsidy. The group to whom notice must be provided consists of individuals who were previously affected by a reduction in hours of employment (as far back as September 1, 2008) causing a loss of coverage followed by an involuntary termination of employment occurring on or after March 2, 2010 (through March 31, 2010). The plan administrator must notify each of these individuals, *within 60 days of the individual's involuntary termination of employment*, of the availability of the subsidy and his or her election rights, as described above. Note that even though these individuals are not covered by the plan at the time of the involuntary termination of employment, they are to be treated as having a new 60-day COBRA election period due to the involuntary termination of employment and potentially will need to be added back to the plan. Employers and administrators should coordinate with any insurance carriers if this applies.

### ***Deference to Employer Determinations***

TEA expressly provides that if, based on a reasonable interpretation of ARRA and the guidance issued thereunder, an employer determines that an individual has experienced a qualifying event that is an *involuntary termination of employment*, and the employer maintains supporting documentation with respect to such determination (*including an attestation by the employer as to the involuntary termination of employment*), then the qualifying event “shall be deemed to be involuntary termination of the covered employee’s employment.” This provision should give employers some comfort that their determinations of involuntary termination of employment will not be subject to challenge by the government, provided that the statutory requirements are met. This does not preclude the government from overturning an employer’s finding that a termination was voluntary through the normal ARRA appeal process.

### ***Additional Penalties***

TEA adds penalty provisions applicable to plan sponsors and insurers that fail to adhere to the DOL’s (or HHS’s) determination on a review of a subsidy denial. Specifically, the Act states that an affected individual or the Secretary of Labor (or the Secretary of HHS, as the case may be) may bring a civil action to enforce the Secretary’s determination on review of a subsidy denial, and that the Secretary may assess a penalty against a plan sponsor or insurer in the amount of up to \$110 per day for each failure to comply with such a determination after 10 days after the plan sponsor or insurer receives the determination.

### ***Clarifications to Premium Payment Provisions for those in Transition Periods***

TEA includes a section entitled “Codification of Current Interpretation,” which clarifies the statutory language relating to the time period within which reduced premium payments must be made by individuals whose nine-month COBRA subsidy period expired before it was extended to 15 months by the DOD Act. The Act clarifies that payment must be made by the latest of (i) 60 days after the date of enactment of the DOD Act, (ii) 30 days after the provision of the notice required by the DOD Act, or (iii) the end of the otherwise applicable grace period.

### ***Effective Date***

TEA’s provisions are effective as if included in ARRA, *except that* (i) the provisions relating to reductions in hours of employment apply only to periods of coverage beginning after the date of enactment, (ii) the clarifications to the premium payment rules for those in transition periods due to the DOD Act extension are effective as if included in the DOD Act, and (iii) the penalty provisions are effective as of the date of enactment of the Act.

### ***Conclusion***

As explained above, ARRA's COBRA subsidy provisions have been extended by one month, and the eligibility provisions have been revised to expand the group of eligible individuals who may receive the subsidy. As a result, plan sponsors and administrators will need to revise their existing COBRA notices to account for these changes and also provide notification of the availability of the subsidy to certain affected individuals. In addition, changes will need to be made to internal administrative processes and any applicable insurance coverage in order to take into account the new provisions. Of course, plan sponsors and administrators should continue to monitor legislative developments and interpretations issued by the government.

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If you have questions relating to the COBRA subsidy program, please feel free to contact any member of our COBRA Subsidy Team.

#### [Related Professionals](#)

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- **Ira M. Golub**
- **Robert M. Projansky**  
Partner
- **Steven D. Weinstein**  
Partner
- **Roberta K. Chevlowe**  
Senior Counsel