

**COBRA Subsidy  
Frequently Asked Questions**

**April 2009**

Keenan & Associates recently conducted webinars regarding the new COBRA subsidy incorporated by the American Recovery and Reinvestment Act of 2009 (ARRA). This *Briefing* includes some of the most frequently asked questions from these webinars.

Additionally, on April 1, 2009 the IRS issued Notice 2009-27, which addresses calculation of the premium reduction, coverages eligible for the premium reduction, IRS recapture of premium assistance, the extended election period, and other issues. Specifically, it gives much-needed guidance on involuntary terminations and Assistance Eligible Individuals (AEIs.) Many of the questions asked in and after the webinars are answered by the IRS in that document, which can be found at <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>.

Because questions are continuing to be submitted to us, and because we are still awaiting Federal guidance on some of the questions asked in the webinars, this *Briefing* will be added to and amended as questions and answers come in. If you have a question regarding the COBRA subsidy that is not addressed in this *Briefing* or in Notice 2009-27, please e-mail your question to [COBRAsubsidy@keenand.com](mailto:COBRAsubsidy@keenand.com), and we will make every effort to include it in the next revision.

Following are the categories of questions addressed in this *Briefing* (click on the topic to jump to that section):

**NOTICES**

**SUBSIDY**

**CALCULATING THE SUBSIDY**

**REIMBURSEMENT**

**ELIGIBILITY FOR OTHER GROUP COVERAGE OR MEDICARE**

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## NOTICES

- Q:** Do we have to send election notices to all people who have terminated, or just people who were terminated involuntarily?
- A:** Under COBRA, you have to send a COBRA election notice to every qualified beneficiary (QB) who experiences a COBRA-qualifying event (QE). Recently, the Department of Labor modified its model COBRA notices to be used while the ARRA COBRA subsidy is in effect. Use of these notices will substitute for the use of your regular COBRA notices until December 31, 2009. The notices to be sent to each category of persons are set forth in the table below:

CATEGORY OF QB	MODEL NOTICE	LINK TO MODEL NOTICE
All QBs experiencing <u>any</u> QE (including non-terminations) between February 17, 2009 and December 31, 2009.	General Notice (Full version)	<a href="http://www.dol.gov/ebsa/COBRAgeneralnoticefullversion.doc">http://www.dol.gov/ebsa/COBRAgeneralnoticefullversion.doc</a>
All QBs who experienced any QE between September 1, 2008 and present who have already elected COBRA coverage and still have it.	General Notice (Abbreviated version)	<a href="http://www.dol.gov/ebsa/COBRAgeneralnoticeabbreviatedversion.doc">http://www.dol.gov/ebsa/COBRAgeneralnoticeabbreviatedversion.doc</a>
All AEIs who had a QE between September 1, 2008 and February 16, 2009 and either did not elect COBRA coverage, or elected it, but subsequently discontinued it.	Notice in Connection with Extended Election Periods	<a href="http://www.dol.gov/ebsa/COBRAextendedelectionperiodnotice.doc">http://www.dol.gov/ebsa/COBRAextendedelectionperiodnotice.doc</a>

Complete instructions on how to use these notices can be found at:  
<http://www.dol.gov/ebsa/COBRAmodelnotice.html>.

- Q:** Why do we have to send out a notice to “Non-AEI” individuals if they do not qualify for this subsidy?
- A:** The Model Notices are set up to be complete COBRA notices that include the ARRA subsidy information. While you may think that a person is not an AEI, they may think that they are. The Model Notices allow them to apply for the subsidy. The employer can then use the Model Notice form for denying AEI status. The non-AEI then has an opportunity to appeal that decision to the Department of Labor (for private employers) or Department of Health and Human Services (for public employers.)
- Q:** You mentioned that AEIs who are subject to the extended election period have 60 days for the second chance COBRA election. Are future AEIs also given 60 days to elect the subsidy?
- A:** Yes. Each AEI has 60 days from receipt of the ARRA COBRA notice to elect subsidized COBRA. This is the same period that you would use for regular COBRA, which will make it somewhat easier to track election periods.

## SUBSIDY

**Q:** Does the 65% subsidy apply for all plans (medical, dental, vision)?

**A:** Yes, the subsidy applies to medical, dental, vision and EAP (if the EAP qualifies as a group health plan under ERISA.) A person can apply for the subsidy for every eligible coverage they had on the day before their qualifying event.

*Definition:*  
**ERISA** – Employee Retirement  
Income Security Act

**Q:** If we do not contribute to dependent coverage do we still have to subsidize premiums for dependent coverage under ARRA?

**A:** Yes. The subsidy is available to all AEIs (including dependent spouses and dependent children) who had coverage the day before the termination, regardless of whether the employer contributed to the coverage. In fact, whether and how much the employer contributed to the premium before the termination makes no difference in whether a person is eligible for the subsidy.

## CALCULATING THE SUBSIDY

**Q:** Does the 65% subsidy go only towards the employee's premiums or the dependent coverage as well?

**A:** If the dependent is an AEI, then the dependent coverage also receives the subsidy. If COBRA coverage is provided to a dependent who is not an AEI, then the cost of COBRA coverage is 35% of the AEI's coverage, plus 100% of the incremental cost increase for the non-AEI dependent. For more information on how to calculate the subsidy, please reference IRS Notice 2009-27, at Q-25.

**Q:** What about the 2% fee that we are allowed to add onto the COBRA premiums for administrative fees?

**A:** The "COBRA premium" from which the subsidy is calculated includes the administrative fees. Therefore, an AEI pays 35% of whatever he would normally be charged, including 35% of the 2% administrative fee. The employer pays 65% of whatever the AEI would normally be charged, including 65% of the administrative fee.

## REIMBURSEMENT

**Q:** Is the reimbursement process different for schools?

**A:** No. The reimbursement process is the same for every entity that applies for the reimbursement. Although generally the entity that provides the subsidy would apply for reimbursement, there are two areas where the law specifies which entity may apply for reimbursement. In a multiemployer plan, the plan must file for reimbursement. In the case of Cal-COBRA, the insurer would apply for the reimbursement.

## **ELIGIBILITY FOR OTHER GROUP COVERAGE OR MEDICARE**

- Q:** So if an employee is eligible for coverage under their spouse, they're not eligible for subsidy?
- A:** That's correct. They may still be eligible for COBRA, but if they are eligible under a spouse's or parent's group health plan, or under Medicare, they are not eligible for the subsidy.
- Q:** Does eligibility for other coverage disqualify eligibility for the subsidy even if the other coverage costs more than employee's COBRA premium?
- A:** Yes.
- Q:** Other than the former employee's affirmation on the model form, is there another way we can confirm whether the former employee is eligible for other group coverage or Medicare?
- A:** The law leaves it up to the AEI to report their eligibility. As the employer, you are under no obligation to confirm or investigate.
- Q:** Is the 110% penalty reimbursed to the employer or is this a reimbursement to the Department of Labor?
- A:** It will be assessed by the IRS. The employer is not expected to refund back to the IRS any subsidy reimbursement it has received from the IRS, but the AEI will be expected to pay the IRS 110% of the subsidy he received when he was eligible for other group health coverage or Medicare.

## **ASSISTANCE ELIGIBLE INDIVIDUALS (AEIs)**

- Q:** What about dependent students who turn 25 years old and are no longer eligible for our benefits, do they qualify for this subsidy?
- A:** Over-age dependents, while eligible for COBRA, are not eligible for the subsidy because they are not AEIs. An AEI is either (1) a COBRA-qualified employee who is involuntarily terminated between September 1, 2008 and December 31, 2009, or (2) the COBRA-qualified spouse or dependent child of an employee who was involuntarily terminated between September 1, 2008 and December 31, 2009.
- Q:** Did I hear that an employee whose hours are reduced and whose benefits are terminated is not eligible for the subsidy?
- A:** That is correct. A person who is still employed is not an AEI, because he or she has not had their employment terminated. A reduction in hours may trigger a right to COBRA, but it does not trigger a right to the subsidy, because there has been no involuntary termination of employment.
- Q:** If an employee drops their spouse from coverage due to divorce, are they an AEI?
- A:** No. That person may be eligible for COBRA, but he or she is not an AEI.

- Q:** If an employee covered a domestic partner under an active plan, can he or she cover the domestic partner under ARRA?
- A:** Whether a domestic partner's coverage can be continued under COBRA is different from whether a domestic partner can receive a subsidy. The only people whose coverage can be subsidized under ARRA are AEIs. COBRA-eligible spouses and dependent children of people involuntarily terminated between September 1, 2008 and December 31, 2009 are AEIs. Domestic partners are not spouses under Federal law. They therefore do not fit the ARRA definition of AEIs and cannot receive the subsidy.
- Q:** If an employee only had single coverage the day before termination, can he get family coverage under ARRA?
- A:** No. ARRA does not change the COBRA rule that the only people who can elect COBRA coverage are those who had coverage under the plan the day before the COBRA-qualifying event.
- Q:** If an AEI covered their dependents and dies, do the dependents keep the subsidy?
- A:** Yes. Each AEI has an independent right to the subsidy. For example, a terminated employee, his spouse and his dependent child are all AEIs receiving the subsidy. If the terminated employee dies during the subsidy period, the spouse and dependent child are still eligible for the subsidy.

## **INVOLUNTARY TERMINATION**

- Q:** What is involuntary termination?
- A:** According to the new IRS guidance, an involuntary termination is a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment where the employee was willing and able to continue performing services. Whether a termination was voluntary or involuntary will depend on all of the facts and circumstances of each termination.
- Q:** If we terminated an employee for cause is that employee still qualified for this subsidy?
- A:** Termination for cause is still an involuntary termination. However, a person who is terminated for gross misconduct is not eligible for COBRA, and therefore would not be eligible for subsidized COBRA.
- Q:** What if the employee quits?
- A:** Generally, resignations are considered voluntary terminations. But, if the employee quits for good reason due to an employer action that causes a material negative change in the employment relationship for the employee, that resignation would be considered an involuntary termination for purposes of ARRA. And if the facts and circumstances of a resignation indicate that, absent the resignation, the employer would have terminated the employee's services, and the employee was aware that they would be terminated, that resignation would also be considered an involuntary termination for purposes of ARRA.

**Q:** Does an involuntary termination include a lay-off period with a right of recall, or a temporary furlough?

**A:** Yes.

**Q:** Is a person who finishes a one-year contract that is not renewed eligible for the subsidy?

**A:** Yes, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing those services.

## **ELIGIBLE PLANS**

**Q:** What plans are eligible for the subsidy?

**A:** All group health plans eligible for regular COBRA, with the exception of FSAs. This means that medical, dental, vision, and some EAP plans (those that are considered group health plans under ERISA) may be subsidized. FSAs are not eligible for the subsidy.

*Definitions:*  
**FSA** – Flexible Spending Account

**EAP** – Employee Assistance Program

**Q:** Are dependent care plans (DCAPs) eligible for the subsidy?

**A:** No. DCAPs are not group health plans, and therefore are not eligible for COBRA continuation coverage, and are therefore not eligible for the subsidy.

**Q:** Are Health Savings Accounts (HSAs) eligible for the subsidy? What about Health Reimbursement Account (HRA) plans, are they eligible for the subsidy?

**A:** Under Department of Labor guidance released in 2004, HSAs are generally not considered employee welfare benefit plans, subject to ERISA. Therefore, they are not subject to COBRA at all. HRAs, on the other hand are considered group health plans for purposes of the health care continuation coverage requirements under COBRA, and will be subject to the ARRA subsidy.

**Q:** If an AEI has elected only dental and vision insurance through COBRA, are they eligible for the subsidy?

**A:** Yes.

**Q:** What about AEIs who elected COBRA for their medical plan but didn't elect dental and vision? Can those AEIs elect dental and vision effective 3/1/09?

**A:** Only if those AEIs were involuntarily terminated between September 1, 2008 and February 16, 2009. Those AEIs are subject to the extended election period, the "second chance" to elect COBRA with the subsidy even if they did not elect COBRA for that coverage when they were initially eligible.

## INCOME

**Q:** Is there an income limit that applies?

**A:** Any eligible AEI can receive the subsidy, regardless of income. However, AEIs with a modified adjusted gross income of above \$125,000 (single) or \$250,000 (married, filing jointly) will be required to pay all or part of the subsidy they receive back at tax time.

**Q:** Do we request a copy of their income tax to determine their single/dual income?

**A:** No. You are not required to check income, and you may not refuse to provide the subsidy to a person whom you believe to have an income that will trigger IRS recapture of the subsidy. The choice is up to the AEI as to whether they want to accept the subsidy now and be subject to repaying all or some of it to the IRS the following year.

**Q:** Will we have to submit a signed form from AEIs who waive the subsidy?

**A:** It is not clear whether you will have to submit signed forms to the IRS, but you will have to obtain them from waiving AEIs. An AEI who wishes to make a permanent election to waive the right to the premium reduction must provide to you a signed and dated notification (including a reference to “permanent waiver”) of their intent to waive the subsidy.

## STEP-DOWN

**Q:** What is a step-down?

**A:** This is the term we used for an OPTIONAL provision in ARRA. Employers may choose to offer this option to AEIs, or they may choose not to do so. If the employer decides to offer a step-down option to AEIs, it will allow AEIs to elect a different coverage option than the one they had on the day before termination. There are limits on this option. The new coverage option chosen must be at the same premium or a less expensive one than the coverage the AEI had as an active employee. An AEI cannot step-down from medical to dental-only, vision-only, counseling or referral services-only or a plan that offers treatment at the employer’s on-site medical facility. The plan available to step-down to must be one that is available to active employees. Therefore, an employer cannot set up a special step-down plan just for AEIs. The most common example of a step-down would be from the employer’s PPO plan option to the HMO plan option, if the employer offers both plans to active employees.

An employer considering offering a step-down provision should consult with the health plan for the lower-cost option prior to offering a step-down option to AEIs.

**Q:** Can an AEI move from the higher premium HMO plan to a lower premium HMO plan, if the employer offers two HMO plans?

**A:** Yes, if the employer allows it, and the health plan agrees.

## **TIME FRAME**

- Q:** Can we start COBRA coverage later than March 1 for those who qualified between September 1, 2008 and March 1, 2009?
- A:** AEs who are eligible for the extended election period (those whose eligibility for the subsidy is based on a termination of employment between September 1, 2008 and February 16, 2009) must be provided with a Notice in connection with the Extended Election Period by April 18, 2009. Those AEs will have 60 days to elect COBRA with the subsidy. If they so elect, their coverage and the subsidy must, by law, begin on March 1, 2009. AEs who are not subject to the extended election period will have COBRA coverage and subsidy periods that start under normal COBRA rules.

## **CAL-COBRA**

- Q:** Federal regulations are discussed, are there any state specific regulations we should know about?
- A:** ARRA is a Federal law, so generally no. The only exception is for Cal-COBRA. ARRA specifically applies to state “mini-COBRA” laws, like the Cal-COBRA. There is pending state legislation (AB 23) which would subject Cal-COBRA’s continuation coverage requirements for employers with 2-19 employees to ARRA, and therefore to the COBRA subsidy.

## **RECORDKEEPING AND REPORTING**

- Q:** Can we report people and expenses on a report in one quarter to the IRS from the previous quarter?
- A:** For purposes of reporting and getting reimbursed for the subsidy, yes.
- Q:** Do the attestations need to be notarized?
- A:** As of now we do not know the form or manner of the attestations that will be required by the Department of Labor.

## **DISCLAIMER**

This *Briefing* is provided for employee benefits insurance consulting purposes only. It concerns new areas of the law that are subject to later clarification through regulations, interpretation through court decision and change through further legislation. Nothing in this *Briefing* will constitute legal advice, nor shall it substitute for consultation with your own legal counsel. If you have questions about this *Briefing*, please contact your Keenan employee benefits consultant.