

March 31, 2009

COBRA Fact Sheet

Summary of COBRA Changes in the American Investment and Recovery Act

On Tuesday, February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the Act). Certain provisions in the Act will affect COBRA and Colorado Continuation of Coverage (CCOC) rights and responsibilities for employers, Rocky Mountain Health Plans (RMHP), and employees. We expect federal guidance and regulations to be issued by the Department of Labor, the Department of Health and Human Services and/or the Treasury Department. We will provide more information as it becomes available. Following is a brief summary of the new COBRA/CCOC provisions. This is only a summary and should not be considered as legal advice; you are encouraged to seek advice from your own consultants and counsel. This March 31, 2009 COBRA Fact Sheet supersedes our February 27, 2009 COBRA Fact Sheet previously posted at rmhp.org.

Summary of New COBRA/CCOC Law

1. Employers Affected by the Act – Although COBRA normally only affects employers with 20 or more employees, the Act's specific changes to COBRA will also apply to employers with fewer than 20 employees who previously were regulated only under the CCOC law. The Act does not apply to flexible spending accounts (FSAs); in other words, there is no subsidy for an ex-employee who elects to continue coverage under his or her FSA.
2. Known Dates – Certain dates and timeframes under the Act have known significance:
 - September 1, 2008 – the date on or after which a person was involuntarily terminated and who will qualify for the subsidy
 - February 17, 2009 – the date the Act was passed
 - March 1, 2009 – the date the subsidy commences for COBRA/CCOC coverage (for plans like RMHP that bill for and provide COBRA in whole calendar month intervals)
 - March 19, 2009 – the date by which new and revised model COBRA notices must be provided by federal government agencies
 - April 18, 2009 – the date by which the new and revised COBRA notices must be distributed/used by employers
 - Nine months – the maximum length of time for which qualified individuals can take the COBRA premium subsidy
 - Eighteen months – in general, the maximum length of time for COBRA coverage due to termination of employment, unless the COBRA beneficiary qualifies for the disability extension (governed by current COBRA law)
 - Twenty-nine months – the maximum length of time for COBRA coverage under the disability extension
 - Thirty-six months – the maximum length of time for COBRA coverage if another "qualifying event" (death of employee, divorce) occurs during the initial eighteen months of COBRA coverage (governed by current COBRA law)

Because the date the subsidy commences is before the date that employers must notify ex-employees and their dependents of the subsidy, there will be a period of time when premiums

billed will not reflect the subsidy. Premium bills will have to be reconciled and adjusted once the identity of persons electing COBRA/CCOC and the subsidy is known.

3. Federal Government Subsidy – Certain individuals (**those who are involuntarily terminated from their employment**) who elected or who are eligible to elect COBRA/CCOC from September 1, 2008 through December 31, 2009 are eligible for a federal subsidy of their COBRA/CCOC premiums. The Act calls these persons “Assistance Eligible Individuals.”
 - Eligibility for Subsidy – Individuals who have been involuntarily terminated between September 1, 2008 and December 31, 2009, who either elected or are eligible to elect COBRA/CCOC, along with their dependents are eligible for a 65 percent subsidy toward their COBRA/CCOC premium.
 - Repayment of Subsidy – Only persons with incomes above \$125,000 (single) and \$250,000 (couples filing jointly), if they accept the subsidy, will be required to repay the subsidy by an addition to their income tax liability in the amount of the subsidy. However, they can waive the subsidy to avoid inclusion of the subsidy amount as an income tax liability.
 - Employers and insurers are not required to track income limits of the COBRA/CCOC beneficiary, but both employers and insurers as applicable must pay the subsidy even to high income COBRA/CCOC beneficiaries, unless those individuals affirmatively waive the subsidy.
 - Subsidy Effective Date and Duration– Individuals eligible for the subsidy will pay the reduced premium of 35 percent for COBRA/CCOC coverage periods beginning March 1, 2009. The subsidy is not available for COBRA/CCOC coverage in effect before that date. The subsidy will expire the earlier of:
 - 1) when the individual becomes **eligible (actual coverage is not required)** for another group health plan or Medicare, or
 - 2) the earliest of two dates:
 - a) nine months after the subsidy period begins to apply to that individual, or
 - b) the end of the original maximum period of COBRA/CCOC if the person either currently has COBRA/CCOC or had the person elected COBRA/CCOC; i.e., the regular COBRA coverage period commences from the date coverage was lost due to the qualifying event of involuntary termination.
 - 3) If an individual becomes eligible for other coverage and fails to report the coverage, that individual is subject to a repayment penalty equal to 110 percent of the subsidy amount.
 - Amount of Subsidy – Plan sponsors can only charge these eligible qualified individuals 35 percent of the applicable COBRA/CCOC rate for the nine month period. Employers or insurers will pay the 65 percent difference, and then are permitted to reduce their payroll taxes dollar for dollar to offset the 65 percent.
4. Payroll Tax Credit – The payroll tax credit can be taken even if the person on whose behalf the subsidy is paid was not an employee of the subsidy payer (i.e., the dependents of ex-employees were not ever on the employer’s payroll).
 - Who pays subsidy –
 - Employers subject to COBRA – the employer is responsible for paying the 65 percent subsidy and recovering the tax credit.

- Multi-employer plans – the plan is responsible for paying the subsidy and recovering the tax credit.
 - Employers not subject to COBRA – RMHP is responsible for paying the subsidy and recovering the tax credit. CCOC groups are by definition not covered by COBRA, so RMHP will be paying the subsidy and recovering the tax credit. Church plans and certain plans sponsored by governmental entities are also not subject to COBRA.
 - Credit is earned on the date the individual's 35 percent payment is received, not the date of the employer's or insurer's 65 percent payment. This means that payroll tax reductions in the amount of the credit should not be taken before confirmation that the COBRA/CCOC beneficiary has paid his or her 35 percent. If the COBRA/CCOC beneficiary does not timely pay his or her 35 percent, then the 65 percent subsidy payment will be refunded/credited back to the payor.
 - The person claiming the credit must maintain supporting documentation, such as an attestation of involuntary termination. For more information, visit the IRS FAQs at this link: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>. When RMHP is taking the credit on its payroll taxes, RMHP will expect its employer clients to provide the attestation to RMHP.
5. Special Election Period – The Act also creates a new special election period for those involuntarily terminated employees and their dependents who initially declined COBRA, or who dropped COBRA coverage, and who became or become eligible for COBRA between September 1, 2008 and December 31, 2009.

As of the date of this COBRA Fact Sheet, the State of Colorado has not provided for a similar special election period for CCOC. Thus, those persons who were offered CCOC on or after September 1, 2008 but who did not elect CCOC before February 17, 2009, or who did elect CCOC but then subsequently dropped CCOC before February 17, 2009 are not now legally entitled to enroll in CCOC to obtain the subsidy for CCOC commencing March 1, 2009.

- **60 Day Election Period for COBRA** – Eligible individuals as described above will have until 60 days after they receive the notice of this new special election period to elect COBRA and receive the subsidy.
- **60 Day Election Period for CCOC** – No later than April 18, 2009, RMHP will offer eligible CCOC individuals as described above a special election period to elect CCOC for coverage lost on or after February 17, 2009. Eligible CCOC individuals will have until 60 days after they receive the notice of this new special election period to elect CCOC and receive the subsidy.
- **COBRA/CCOC coverage** elected during the special election period cannot take effect prior to March 1, 2009, and will end 18 months from the date of **initial** eligibility for COBRA/CCOC, not from the special election date.
- **Retroactivity** – The subsidy is not available for periods of COBRA/CCOC coverage before March 1, 2009.
 - **Example #1** – Involuntary termination after date new COBRA law takes effect
 - On June 1, 2009, John is involuntarily terminated and loses coverage.
 - On June 15, 2009, John's employer sends new notice of election and subsidy right (consistent with current law).
 - On August 14, 2009 (within 60 days) John elects to take COBRA/CCOC coverage.

- The COBRA coverage and subsidy effective date is June 1, 2009 (retroactive, consistent with current law). For employers subject to COBRA, the employer must begin paying the subsidy as of June 1, 2009. For employers subject to CCOC, RMHP will begin paying the subsidy as of June 1, 2009.
 - Note: The 18-month period of COBRA/CCOC coverage is measured from June 1, 2009 and the 9-month period of subsidy eligibility also begins on June 1, 2009.
 - Example #2 – Middle of COBRA election period when law is passed
 - January 1, 2009, Sarah is involuntarily terminated and loses coverage.
 - On January 15, 2009, Sarah's employer sends standard version of notice of COBRA election.
 - On February 17, 2009 the new COBRA law takes effect.
 - On March 16, 2009 (within 60 days, consistent with current law), Sarah elects to take COBRA coverage.
 - On April 14, 2009, Sarah's employer provides new notice of special election and subsidy.
 - On June 14, 2009, Sarah elects to take the COBRA subsidy (even though COBRA was already elected, the individual still has 60 days to declare eligibility to obtain subsidy).
 - January 1, 2009 is the effective date of Sarah's initial COBRA coverage.
 - March 1, 2009 is the effective date of the subsidy. For employers subject to COBRA, the employer must begin paying the subsidy effective March 1, 2009.
 - Note: The 18-month period of COBRA coverage is measured from January 1, 2009. The 9-month period of subsidy eligibility begins on March 1, 2009.
 - Example #3 – In CCOC election period when new notice is provided
 - On February 17, 2009 the new COBRA/CCOC law takes effect
 - February 20, 2009, Mallory is involuntarily terminated and loses coverage effective February 28, 2009.
 - On February 28, 2009, RMHP on behalf of Mallory's employer sends standard version of notice of CCOC election.
 - On March 17, 2009, Mallory elects to take CCOC coverage and pays full CCOC premium.
 - On April 18, 2009, RMHP provides new notice of special election and subsidy.
 - On June 14, 2009, Mallory elects to take the CCOC subsidy (even though CCOC was already elected, the individual still has 60 days to declare eligibility to obtain subsidy).
 - March 1, 2009 is the effective date of Mallory's initial CCOC coverage.
 - March 1, 2009 is the effective date of the subsidy. For employers subject to CCOC, RMHP must begin paying the subsidy effective March 1, 2009.
 - Note: The 18-month period of CCOC coverage is measured from March 1, 2009. The 9-month period of subsidy eligibility begins on March 1, 2009.
 - RMHP adjusts Mallory's premiums paid in March, April, May and June, 2009 by crediting her future CCOC premiums and/or by refunding premium if future credits to premium will be less than amount owed by RMHP to Mallory as refund.
 - Example #4 – Never elected COBRA
 - On September 1, 2008, Darin is involuntarily terminated and he does not elect to take COBRA.

- On February 17, 2009, the new COBRA law takes effect.
 - On April 15, 2009, Darin's previous employer provides notice of special election right.
 - On June 14, 2009, Darin elects to take COBRA coverage (within 60 days).
 - March 1, 2009 is the effective date of Darin's COBRA coverage and subsidy. For employers subject to COBRA, the employer must begin paying the subsidy effective March 1, 2009.
 - Note: The 18-month period of COBRA coverage is measured from September 1, 2008. The 9-month period of subsidy eligibility began on March 1, 2009. Under these facts, the result would be the same if the person had originally elected COBRA and then let it lapse before the effective date of the new law.
 - Further note: the period of time between the initial loss of coverage or of dropped COBRA coverage until the date of coverage under the new COBRA special election right will not count as a "break in coverage" for purposes of pre-existing condition limitation periods.
- Example #5 – Never elected CCOC
 - On September 1, 2008, Juan is involuntarily terminated and he does not elect to take CCOC.
 - Unless Colorado law is amended, Juan is not entitled to retroactively enroll in CCOC and obtain the subsidy.
6. Notices – The U.S. Department of Labor and other agencies issued new model notices approximately March 19, 2009.

- Who Must Send Notice

- 1) Employers subject to COBRA – Employers or COBRA administrators must provide new COBRA notices by April 18. The new notice must be sent regardless of whether COBRA was elected.
- 2) Employer subject to CCOC – Health insurance issuers such as RMHP must provide new CCOC notices by April 18. The new notice must be sent to all individuals who may be eligible for the premium subsidy, including individuals who were involuntarily terminated between September 1, 2008 and December 31, 2009, and who either elected and are currently covered by CCOC, or who are eligible to elect CCOC on or after February 17, 2009.

- Content of New Special Enrollment Notice – the notice must inform individuals of:

- 1) The availability of the premium subsidy.
- 2) The option to enroll in less expensive coverage than what the individual had the day before the involuntary termination, but only if permitted by the employer plan sponsor and only if there are other enrollment options (i.e., at least dual coverage of health care; other dental and vision stand alone plans do not count as "dual option"). Individuals will have 90 days from the date of notice to elect to enroll in the different coverage.
- 3) For individuals who were involuntarily terminated but who did not elect COBRA, the notice must also inform them of their new opportunity to elect COBRA.
- 4) Other detailed notice requirements which are included in the model notice.

- Contents of Revised Initial Notice of COBRA Rights – The Department of Labor issued a model notice for employers to distribute to enrollees under the employer plan. This new notice will contain a description of the premium subsidy. Employers must start using this new Initial Notice of COBRA rights by April 18.
 - RMHP has provided a link to the notices and instructions on its website www.rmhp.org for employers to use to provide notice to eligible individuals.
7. Outreach – In addition to issuing model notices and instructions, the U.S. Department of Labor and other agencies will be providing public education and providing outreach to employers, administrators, and other entities. Below are links to FAQs and new information just recently issued by federal agencies that provide assistance for employers.
- Internal Revenue Service – Information for Employers on the COBRA Health Insurance Continuation Premium Subsidy – <http://www.irs.gov/newsroom/article/0,,id=204505,00.html>
 - U.S. Department of Labor – COBRA Continuation Coverage Assistance Under The American Recovery And Reinvestment Act Of 2009 – <http://www.dol.gov/ebsa/cobra.html>