

Employee Benefits Attorneys

[Donald J. Christl](#)
[Thomas E. Funk](#)
[Jeffrey R. Fuller](#)
[Mary A. Brauer](#)
[Steven D. Huff](#)
[Anne W. Reed](#)
[Kristin M. Bergstrom](#)
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[Daniel R. Peterson](#)
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Paralegals

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[Laurie Matthews](#)
[Jennifer Tatarek](#)
[Mary Kaminski](#)
[Tammy Taddey](#)
[Kerri Voelz](#)
[Nicole D. Winters](#)

1000 North Water Street
P.O. Box 2965
Milwaukee, WI 53201-2965
414-298-1000
800-553-6215

22 East Mifflin Street
P.O. Box 2018
Madison, WI 53701-2018
608-229-2200
800-728-6239

N16W23250 Stone Ridge Drive
Waukesha, WI 53188
262-951-4500
800-928-5529

2215 Perrygreen Way
Rockford, IL 61107
815-633-5300
800-840-5420

www.reinhartlaw.com

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AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 – URGENT NEW COBRA COMPLIANCE REQUIREMENTS

The American Recovery and Reinvestment Act of 2009 (the Act), enacted on February 17, 2009, imposes two new COBRA compliance obligations on employers, administrators and insurers who provide COBRA coverage—a COBRA premium subsidy and a second COBRA election period. These compliance requirements are generally effective for COBRA premiums charged on or after March 1, 2009.

Due to the rapidly approaching effective date, employers will have to act quickly to comply with the new requirements. Required actions may include, among others, identifying "assistance eligible individuals," revising and/or drafting required COBRA notices to include descriptions of the subsidy and/or special election period and coordinating payroll and COBRA administration.

Reinhart is currently developing model language for the notice requirements and checklists for compliance with the new rules.

COBRA Subsidy. In general, the Act provides a federal government subsidy of COBRA premiums for eligible COBRA "assistance eligible individuals."

- **Eligibility.** Any employee or dependent who loses coverage under a group health plan as a result of an "involuntary termination" of employment between September 1, 2008 and December 31, 2009 (assistance eligible individual) is eligible for a COBRA subsidy if he or she is otherwise entitled to COBRA, and is not eligible for either Medicare or other group health coverage. The law does not define "involuntary termination," so there are some open questions about whether certain terminations fit within this category.
- **Benefits.** The COBRA subsidy applies to all group health plan benefits except health flexible spending accounts (FSAs).
- **Amount.** An "assistance eligible individual" cannot be required to pay more than 35% of the COBRA premium actually charged; the remaining 65% is federally subsidized through a payroll tax credit available to the employer.
- **Duration.** The subsidy is available for a maximum of nine months, but will end earlier if the "assistance eligible individual" becomes eligible for either Medicare or other group health coverage, regardless of whether the individual enrolls in such coverage.
- **Phase-Out.** The available subsidy phases out when adjusted gross income exceeds \$125,000 (single) or \$250,000 (joint) and ceases to be available when gross income exceeds \$145,000 (single) or \$290,000 (joint). (Employers will "front" the subsidy without regard to these income limits. The subsidy will be recaptured as additional federal income tax to the individual to the extent it exceeds the above limitations.)

- Notice. Notice of the subsidy must be provided to all individuals who become COBRA qualified beneficiaries between September 1, 2008 and December 31, 2009. This includes any individual who has become eligible for COBRA since September 1, 2008.

Alternative Coverage

Availability. Employers can but are not required to provide "alternative coverage." Employers must make a determination whether it will make available to "assistance eligible individuals" alternative coverage that:

- (a) consists of coverage other than coverage limited to dental, vision, counseling, referral services, flexible spending accounts or on-site first aid clinics; and
- (b) is equal or less in cost than the COBRA coverage otherwise available to the "assistance eligible individual;" and
- (c) is also available to the employer's active employees.

Notice. In addition to the premium subsidy notice, if an employer offers alternative coverage, notice of the alternative coverage must also be provided.

Election. "Assistance eligible individuals" have 90 days to enroll in the alternative coverage from the date of the notice of the availability of such coverage.

"Second Chance" COBRA Enrollment. An "assistance eligible individual" who would be eligible for a COBRA subsidy if he or she were enrolled in COBRA as of February 17, 2009 must be given a second chance to elect COBRA coverage.

- Notice. The plan administrator must provide a notice of this special enrollment opportunity within 60 days after February 17, 2009 (by April 18, 2009).
- Special Election Period. An "assistance eligible individual" has 60 days to elect COBRA coverage beginning on the date that a notice of the special election period is provided. The notice must also describe the subsidy.
- Effective Date of Coverage. If an "assistance eligible individual" elects COBRA during the second election period, COBRA coverage is effective March 1, 2009. Coverage ends no later than 18 months after the date of the original qualifying event (or the date coverage originally terminated, if so provided by the plan).
- Preexisting Condition Limitations. Gaps in coverage between the date of the original qualifying event and the date of the first subsidized COBRA premium period do not count towards the 63-day significant break in coverage under the HIPAA portability rules that apply to preexisting condition limitations.

This *Headlines in Employee Benefits Law E-Alert* provides general information about employee benefits issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.