

A Practical Guide to Surviving the New COBRA Minefield

Under the guise of stimulus and recovery, the American Recovery and Reinvestment Act of 2009 (ARRA) includes new COBRA provisions to help eligible unemployed individuals elect and pay for continuation coverage. As if COBRA was not complex enough, these new rules add to the minefield employers must travel. Rather than simply provide a summary of the new law, the Baker & Daniels Benefits and Executive Compensation Group believes that sharing answers to our clients' common questions will provide more practical advice.

To that end, this Guide provides our thoughts and advice on a variety of questions raised by ARRA, based upon the statutory language and informal comments from the IRS and DOL. We will regularly update this list of questions and answers on our web site as we receive more questions from our clients and guidance from government agencies, so please use this link to check back often.

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A. IN GENERAL

1. *Do the new rules change which employers are subject to COBRA?*

No. If your company was not subject to COBRA before ARRA, the new rules will not change that status.

MINEFIELD GUIDANCE: Now is a good time to confirm whether or not your company is subject to COBRA. Many employers believe, incorrectly, that they are exempt from COBRA if they have fewer than 20 employees covered by their group health plan. In fact, an employer is subject to COBRA for a plan year if it had the equivalent of 20 or more full-time employees on at least 50% of its business days in the prior plan year, even if fewer than 20 of those employees participate in the health plan.

2. *Who is eligible for the new COBRA subsidy?*

ARRA provides a 65% subsidy — more aptly described as a *premium reduction* of the COBRA premium for "assistance eligible individuals," generally defined as COBRA qualified beneficiaries (employees and dependents eligible to elect COBRA continuation coverage because of a qualifying event) who meet the following requirements:

- The qualifying event that makes the qualified beneficiary eligible to elect COBRA is an involuntary termination of employment (for a reason other than gross misconduct) that occurred between September 1, 2008 and December 31, 2009. The qualified beneficiary could either be an employee involuntarily terminated during this period or a dependent of the employee who becomes eligible for COBRA due to the employee's involuntary termination; and
- The qualified beneficiary timely elects COBRA during the initial election period or the new special election period required by ARRA.

Individuals making more than \$145,000 (single filers) or \$290,000 (joint filers) for the taxable year in which they pay the COBRA premium are not eligible for the subsidy and must repay to the government any subsidy they receive. Those making more than \$125,000 (single) or \$250,000 (joint) are eligible for a portion of the subsidy.

MINEFIELD GUIDANCE: A person making more than the above amounts is still eligible to elect COBRA continuation coverage during the special election period discussed in Question C.1, unless the individual affirmatively waives his or her right to premium assistance (in which case the he or she is no longer treated as an assistance eligible individual).

3. *How do I, as plan sponsor, monitor and verify whether someone is over the income limits for the subsidy?*

You don't. Employers and their health plans are not responsible for enforcement of the income limits. The employer must provide the subsidy to any individual who is otherwise eligible, and if the individual is not entitled to the subsidy because of the income limits, the individual has the responsibility either to decline the subsidy or to report the ineligibility on his or her federal tax return and repay the government for any ineligible subsidy received.

4. *We just went through open enrollment for January 1, 2009. What if a person elected to drop medical coverage during open enrollment and now he is being terminated?*

We do not believe this person will be eligible for ARRA COBRA rights because he dropped health coverage during open enrollment and, therefore, won't be a qualified beneficiary eligible to elect COBRA coverage at the time of his termination.

5. *Does ARRA provide a subsidy to an employee terminated for gross misconduct or allow that employee to elect COBRA coverage?*

No. ARRA COBRA rights do not apply to someone who is not otherwise eligible to elect COBRA. A plan does not have to offer COBRA coverage to an employee (or the employee's dependents) if the employee was terminated for gross misconduct. ARRA does not change this rule.

MINEFIELD GUIDANCE: In light of ARRA, employers may be tempted to re-evaluate whether the reason for an employee's termination constituted gross misconduct. If an employee was offered COBRA at the time of termination, we would caution against trying to avoid ARRA COBRA rights under the gross misconduct exception.

6. We have an insured small group plan that is exempt from COBRA (under the small employer exemption), but state law requires our plan to offer continuation coverage similar to COBRA coverage. Does the ARRA subsidy requirement apply to our plan?

Yes. The subsidy requirement also applies to small group plans that are exempt from COBRA but are required to provide similar continuation coverage under applicable state insurance law.

MINEFIELD GUIDANCE: While ARRA's subsidy requirement applies to small plans subject to state law continuation coverage requirements, ARRA's special election rights discussed in Part C below do not apply to small employer plans that are exempt from COBRA and only subject to state law continuation coverage requirements.

7. Do the new subsidy requirements apply to plans of state and local governments and the federal government?

Yes. They apply to state and local government plans subject to the continuation coverage requirements of the Public Health Service Act and to plans in the Federal Employee Health Benefits Program (FEHBP).

8. Do the new subsidy requirements apply to plans of tax-exempt employers?

Yes — as long as the plan is subject to COBRA's continuation coverage requirements (or similar state law continuation coverage requirements). For example, the new requirements apply to a 501(c)(3) charitable organization that had the equivalent of at least 20 full-time employees on at least 50% of the business days in its preceding plan year (so that its plan wouldn't be exempt from COBRA as a small employer plan) and that is not a church or a church-controlled organization (so that its plan wouldn't be exempt from ERISA as a church plan). The new rules, however, do not apply to a church plan that is exempt from ERISA or to a small employer plan that is exempt from COBRA — unless the plan is an insured plan subject to state law continuation coverage requirements similar to those imposed by COBRA (see Question 6).

B. INVOLUNTARY TERMINATION

1. My company's laid off employees are considered "inactive employees," but we do not consider them terminated from employment while they still have recall rights. Are they eligible for this subsidy?

ARRA does not define "involuntary termination," but we expect the Department of Labor guidance to be very liberal in defining what constitutes an involuntary termination for purposes of eligibility. In fact, in the little guidance it has issued to date on this subject, the DOL said "Being told not to come back to work until further notice is a termination of employment for purposes of COBRA and the ARRA premium reduction provisions." Accordingly, if an employee is "laid off" indefinitely as part of a reduction in force, restructuring, downsizing or similar event and thereby loses regular health coverage (and can elect COBRA), the employee should be considered "involuntarily terminated" and eligible for ARRA's COBRA rights, even if the employee's employment status is technically classified as "inactive" rather than "terminated."

2. What if a layoff is offered to employees on a voluntary basis?

The answer likely turns on the particular facts and circumstances. Informal guidance from the DOL indicates that under some facts and circumstances, individuals volunteering for a layoff may be considered "involuntarily terminated" and, therefore, eligible for ARRA COBRA rights. That said, employers should wait, if possible, until further guidance is issued before offering ARRA COBRA rights to employees who volunteer for layoff or termination (such as employees who voluntarily terminate in exchange for enhanced severance benefits under a "window" or "buyout" program).

3. What if an employee was terminated for poor work performance or violation of our attendance policy?

ARRA's COBRA rights apply to involuntary terminations for any reason, other than gross misconduct — not just to layoffs and reductions in force. If the involuntary termination was for a reason other than gross misconduct and occurred between September 1, 2008 and December 31, 2009, it triggers ARRA's COBRA rights.

4. What if the employee is given the option to resign in lieu of being terminated?

If the employee is told that he or she will be terminated by the employer if he or she does not resign, then we expect that the DOL will regard the termination as involuntary, rather than voluntary, for ARRA purposes. While labeling the termination as a "resignation" may create an initial presumption of voluntariness, we expect that the presumption would be treated as rebutted where the facts and circumstances, taken as a whole, show that the resignation was tendered only as an alternative to being terminated by the employer between September 1, 2008 and December 31, 2009.

5. What if a reduction in hours caused the loss of health coverage?

ARRA's COBRA rights do not apply to COBRA qualifying events other than an involuntary termination of employment, but the DOL has not yet spoken (either formally or informally) on whether a reduction in hours might in some cases constitute an involuntary termination. Based upon the DOL's responses to other questions, it would not surprise us if the DOL concludes that, in at least some circumstances, a reduced schedule, unpaid leave, or furlough constitutes an "involuntary termination," particularly where the reduction, leave or furlough immediately precedes termination of employment. That said, the IRS, which also has regulatory authority over COBRA, has informally indicated that a reduction in

hours would not be considered an "involuntary termination" for purposes of qualifying for the ARRA COBRA subsidy. Because the IRS holds the government's purse strings, our call is that the IRS' position will prevail. At this point, however, this is a "wait and see" issue.

6. If we're not sure whether an event constitutes an involuntary termination, isn't it best just to err on the side of caution and offer ARRA COBRA and the subsidy?

Although an employer may certainly provide greater COBRA rights than required by statute, we strongly advise against a blanket application of ARRA rights for the following reasons:

- If you do not provide the subsidy where required, then you'll violate the new COBRA rules. On the other hand, if you provide a subsidy to an individual who turns out to be ineligible, you will not be able to receive a tax credit for the subsidy. That's why the risks of each "close call" situation must be assessed on a case-by-case basis.
- More importantly, we expect that many insurers and stop-loss carriers will audit whether an individual was "involuntarily terminated." A blanket offer of ARRA COBRA rights could result in a denial of coverage and expose the employer to unexpected liability.

7. If we determine that an individual has not been involuntarily terminated, how can an individual challenge that determination?

The Department of Labor is required to offer an expedited appeal process under which an individual treated as ineligible for the COBRA subsidy can appeal to the Department for a determination as to whether the termination was involuntary. (Presumably, where the group health plan is subject to ERISA, the individual could also pursue a claim and appeal under the plan's normal claims and appeals procedures required by ERISA, although that process does not have to be expedited.)

8. Who isn't eligible for ARRA COBRA rights?

An individual isn't eligible if:

- The qualifying event giving rise to COBRA rights is not an involuntary termination of employment;
- The triggering termination was for "gross misconduct;"
- The triggering termination occurred before September 1, 2008 or after December 31, 2009;
- The individual is eligible for comprehensive medical coverage under another group medical plan or Medicare;
- The individual is a domestic partner or same-sex spouse who is not a tax law dependent of the covered employee and to whom the plan has extended COBRA rights voluntarily (rather than pursuant to a legal requirement);
- The individual participates in a "church plan" that is exempt from ERISA but voluntarily provides continuation coverage that mirrors COBRA coverage.

9. Unfortunately, we are going out of business. Will the ARRA COBRA subsidy apply?

We assume that the employer has or will terminate all of its group health plans, including those of any

related employer. Upon the termination of all group health plans, the obligation to offer or continue COBRA ends. Even though this would be an involuntary termination, the ARRA COBRA subsidy would not apply because COBRA rights are extinguished when all of the group health plan(s) are terminated.

MINEFIELD GUIDANCE: The COBRA rules become even more complex when dealing with controlled groups of corporations or corporate transactions (such as an asset sale). Even if one employer of a controlled group terminates its group health plan, a group health care plan offered by a sister company may have COBRA obligations, and in that case the subsidy would remain available with respect to COBRA coverage under the plan of the remaining controlled group member.

C. SPECIAL ELECTION RIGHTS AND NEW NOTICE REQUIREMENTS

1. What is the special election period?

ARRA creates a second COBRA election period for individuals who involuntarily terminated on or after September 1, 2008, and before ARRA's enactment, but who are not currently enrolled in COBRA coverage. ARRA's premise is that at least some individuals terminated since September 1, 2008 did not elect COBRA because of the cost, so ARRA gives those individuals (and dependents who are also qualified beneficiaries) another chance to elect COBRA and take advantage of the newly available subsidy.

ARRA requires employers to notify eligible individuals of their new COBRA rights by April 17, 2009, and allow them a new 60-day period, running from the date the new notice is sent, within which to elect COBRA coverage. The DOL issued model notices on March 19, 2009, which are available at <http://www.dol.gov/ebsa/COBRAModelNotice.html>.

MINEFIELD GUIDANCE: As noted, the new 60-day election period runs from the date the new ARRA notice is sent. Now that the model notice has been issued, we believe that best practice is to mail the notice as soon as possible to start the election period sooner rather than later.

2. Our company terminated an employee in October of 2008 for poor work performance, and he did not elect COBRA within his 60-day election period. Must we now offer him another chance to elect COBRA?

Yes. Because this employee was involuntarily terminated after September 1, 2008, and did not enroll in COBRA (and poor work performance doesn't constitute "gross misconduct"), you will need to offer him (and any of his dependents who became qualified beneficiaries due to his termination) the opportunity to elect COBRA during the special election period. Any COBRA coverage elected during the special election period will be effective as of the first coverage period on or after February 17, 2009 (March 1 for plans with monthly coverage periods).

3. Not to be morbid, but what if an individual entitled to a special election period was in a car accident on February 2, 2009? Can we apply the pre-existing condition exclusion to any expenses relating to the accident?

No, but you don't have to cover expenses incurred before the effective date of COBRA coverage.

As background, the HIPAA portability rules significantly curtailed the use of pre-existing condition exclusions. ARRA provides that any coverage gap since September 1, 2008, cannot be counted towards a break in coverage under HIPAA, which essentially negates any pre-existing condition clause.

If the individual timely elects COBRA coverage during the special election period and your plan has monthly coverage periods, his COBRA coverage would be retroactively effective as of March 1, 2009 (the first coverage period beginning on or after February 17, 2009). Your plan would not be required to pay claims incurred prior to March 1, 2009, but would be required to process and pay eligible claims incurred on and after March 1, 2009, including claims arising from the accident.

4. An employee who was involuntarily terminated in September of last year timely elected COBRA coverage but then failed to pay the premium for it, so her COBRA coverage was terminated. Do we now have to offer her a second chance to elect COBRA coverage?

Yes. She is an assistance eligible individual (a COBRA qualified beneficiary involuntarily terminated from employment between September 1, 2008 and December 31, 2009) whose qualifying event preceded the enactment of ARRA and who is not currently enrolled in COBRA. The informal guidance available to date indicates that her previous failure to pay on time does not disqualify her from ARRA's special election rights. (This would be consistent with the premise for the special election rights — that some eligible individuals previously able to obtain COBRA couldn't afford to elect or maintain it absent the subsidy.)

5. Does ARRA impose any other special COBRA notice requirements?

Yes. ARRA requires plans to provide notice of the new ARRA COBRA rights (including information about premium assistance) to all qualified beneficiaries (not just covered employees) who experienced any COBRA qualifying event (not just involuntary termination) during the period September 1, 2008 through December 31, 2009. The additional notice can be included in the notice that the beneficiary is required to receive upon a qualifying event, or it can be a separate notice. The Department of Labor has issued a new model General Notice for qualifying events, which includes all of the new provisions required to satisfy the ARRA notice requirements for qualified beneficiaries who have a qualifying event during the relevant period.

MINEFIELD GUIDANCE: In guidance issued on March 19, 2009, the DOL appeared to interpret the new ARRA COBRA notice provisions to effectively give an additional election opportunity to all qualified beneficiaries who experience any qualifying event (for example, death or divorce) between September 1, 2008 and December 31, 2009 — by opining that the beneficiary's 60-day COBRA election period doesn't end until the beneficiary has received the new ARRA notice. ARRA's statutory language provides that, for qualified beneficiaries experiencing a qualifying event during the relevant period, the COBRA qualifying event notice requirements are not satisfied until the beneficiary receives notice of the new ARRA premium assistance provisions. In a footnote to the Federal Register

publication of its new model notices, the DOL stated that because a beneficiary's COBRA election period doesn't end until 60-days after the beneficiary receives a complete COBRA notice, any qualified beneficiary entitled to notice of the new ARRA rights may elect COBRA coverage within 60-days after receiving the new notice irrespective of the type of qualifying event or whether they are an assistance eligible individual entitled to premium assistance. The DOL did say, however, that if such a qualified beneficiary elects COBRA coverage in response to the new notice, that coverage will not be retroactive to a date before March 1, 2009 (even though COBRA coverage is generally retroactive to the date of the qualifying event). The DOL's Footnote 3 has set off a firestorm of controversy, and some sources are reporting that the DOL plans to back track on this position, in which case the failure to include subsidy information in an election notice issued before February 17, 2009 would not extend the 60-day COBRA election period for a qualifying event that is not an involuntary termination. We understand the DOL will likely restate its position and not require a second COBRA election period to be offered to non-assistance eligible individuals. Accordingly, we recommend not sending the ARRA COBRA general notice to non-assistance eligible individuals (such as a person whose qualifying event was death or divorce) who failed to timely elect or maintain COBRA coverage until further guidance is issued by the DOL or IRS. Remember, employers have until April 17, 2009 to send this general notice — and in cases involving qualifying events triggered other than by involuntary termination, we believe employers should wait. Stay tuned for further developments.

6. An employee's divorce became final on September 3, 2008, and we sent his ex-wife a COBRA qualifying event notice on September 30, 2008. She didn't elect COBRA. I understand that, even though she's not eligible for the subsidy, we have to send her a notice of ARRA COBRA rights. The DOL's model general notice says, in its caption, that it's only for beneficiaries who haven't already received a COBRA notice. What form of model ARRA notice do we use for this ex-wife?

It's not entirely clear. There's an inconsistency between the heading of the model general notice — which indicates that the notice is for qualifying beneficiaries who haven't already received a COBRA notice — and the DOL's other published guidance on the new ARRA notices, which indicates that the new model general notice is for any qualified beneficiary who experienced a qualifying event between September 1, 2008 and December 31, 2009 and still needs to be notified of ARRA COBRA rights.

7. Can an assistance eligible individual simply reduce his or her COBRA payments to 35% of the regular charge before he or she gets the ARRA notice?

Yes. If an assistance eligible individual hears about the subsidy and simply sends in a reduced payment for March, 2009 or a subsequent month, the plan must treat the COBRA premium as paid in full as long as the reduced amount the individual paid was at least 35% of the regular COBRA premium the individual was otherwise obligated to pay.

D. THE ARRA COBRA SUBSIDY

1. How is the 65% COBRA provided? Who pays it?

Essentially, the employer (or, in some limited cases, an insurer) fronts the cost of providing the 65% subsidy and then collects it from the federal government in the form of a credit against payroll taxes (income, FICA, and Medicare taxes). If an eligible individual elects ARRA COBRA rights, he or she can only be required to pay 35% of the COBRA premium otherwise charged by the employer. ARRA requires that employers fund the difference.

The employer can then recover its cost for the subsidy by taking a tax credit against the employer's wage withholding and FICA payroll taxes (or by a direct payment from the Department of Treasury, if the amount of the credit for a quarter exceeds the payroll taxes due for that quarter).

2. How does an employer claim the tax credit?

An employer claims the tax credit on IRS Form 941, which has been revised to allow for the credit. (The revised form is posted on the IRS website, www.irs.gov.) The employer claims the credit on Line 12a of the revised form and indicates on Line 12b the number of assistance eligible individuals to whom it provided the COBRA subsidy for the calendar quarter for which the form is filed.

3. When can an employer take the tax credit?

An employer can take the tax credit for the cost of the subsidy in (a) the calendar quarter in which the employer provides the subsidy to assistance eligible individuals, or (b) a later calendar quarter in the same calendar year.

4. When is the employer considered to have "provided the subsidy" to an assistance eligible individual?

The employer is treated as having provided the subsidy to an individual during the quarter in which the individual pays his or her 35% of the COBRA premium (the unsubsidized portion). The subsidy is treated as a deposit of payroll taxes made by the employer as of the first day of that calendar quarter. So the employer could claim the tax credit for that individual's COBRA subsidy on the Form 941 filed for that calendar quarter or for any later quarter in the same calendar year.

5. Can our company pay the individual's 35% share on behalf of an assistance eligible individual and then claim the tax credit for our 65% share?

No. The employer can't claim the tax credit if the employer pays the individual's 35% share. However, the employer can still claim the tax credit for the subsidy if someone else (such as a health care provider or a new employer) pays an individual's 35% share on the individual's behalf. (For example, a new employer may offer to pay for an employee's COBRA coverage under a former employer's plan until the employee becomes eligible for coverage under the new employer's plan.)

6. What information must an employer provide to claim the tax credit?

On Form 941, the employer provides the total amount of the credit being claimed for the quarter and the total number of assistance eligible individuals for whom the employer provided the subsidy during

the quarter. In addition, the employer must maintain supporting documentation for the credit, including the following:

Documentation of receipt of the 35% portion of the COBRA premium payable by each assistance eligible individual for which the employer provided the subsidy.

For an insured plan, proof of the employer's timely payment to the insurer of the 65% portion of the COBRA premium that the employer subsidized on behalf of each assistance eligible individual for which the employer claims the credit.

For a self-insured plan, documentation of the premium amount otherwise charged for COBRA continuation coverage and proof that coverage was provided to the assistance eligible individuals for whom the employer claims the subsidy credit.

Documentation of the involuntary termination, including the date of the termination (which must be between September 1, 2008 and December 31, 2009), for each individual for whom the employer claims the subsidy credit.

Documentation of each assistance eligible individual's eligibility for COBRA coverage during the period for which the employer claims the subsidy credit.

Documentation of the names and social security numbers of the covered employees, the amount of the subsidy provided with respect to each covered employee, and whether the subsidy was for one assistance eligible individual or two or more assistance eligible individuals.

Any other documents necessary to verify the correct amount of the subsidy for which the employer claims the credit.

7. What if the amount of the tax credit to which our company is entitled for a quarter is more than our payroll tax liability for a quarter?

You will be treated as having an overpayment of taxes, which you can either apply to your next quarterly payroll tax return or request as a refund.

8. Under our severance plan, our company already subsidizes a portion of the normal COBRA premium for laid off employees. Do we get to claim the tax credit for providing this subsidy?

No. Under the language of the statute, the subsidy is based upon the amount the individual is required to pay for COBRA, not the actual "applicable premium" for COBRA coverage.

As an example, let's say the monthly COBRA premium for a laid off employee and his family is \$1,000, and under your severance plan, the employer subsidizes 70% of that premium (\$700), so that the laid off employee only has to pay \$300 for COBRA coverage. Under ARRA, the subsidy and tax credit will be based on the \$300 that the employee is required to pay absent the ARRA subsidy, not the full amount of the COBRA premium. Under ARRA, the employee will pay 35% of \$300 (\$105) and

the government will subsidize 65% of \$300 (\$195). Your company is still on the hook for the \$700 it agreed to pay under the severance plan, and it cannot take any tax credit for it.

In contrast, an employer that does not otherwise subsidize COBRA fares far better under ARRA. The individual's required COBRA premium is \$1,000 and so his 35% cost is \$350.00. The employer initially absorbs the remaining \$650, but then recovers all of it from the government through the payroll tax credit.

MINEFIELD GUIDANCE: Employers should re-evaluate any COBRA subsidy offered to terminated individuals (such as through a severance plan or individual severance agreements) and determine whether it can contractually stop subsidizing COBRA for employees involuntarily terminated between now and December 31, 2009. Such a change in approach would effectively shift to the government the cost of subsidizing 65% of the COBRA premium. An employer should review its current plan documents, severance agreements, collective bargaining agreements, etc. to evaluate what the employer currently does, and what it can and should change in light of ARRA.

9. Our company has a fully insured health plan. Who fronts the 65% subsidy and who gets the tax credit — our company or our insurer?

If your company is an employer subject to federal COBRA requirements under ERISA, then your company must pay 65% of an eligible individual's COBRA premium to your insurer, and then your company (not the insurer) is entitled to claim the tax credit for providing the subsidy. The only time an insurer fronts the subsidy and claims the tax credit is when the employer is a small employer exempt from the federal COBRA continuation requirements but applicable state law imposes continuation coverage requirements upon small group insurers similar to the continuation coverage requirements imposed by COBRA.

MINEFIELD GUIDANCE: There has been some confusion (including in some of the IRS' own guidance) about whether the employer or the insurer claims the credit in states that have so-called "mini-COBRA" laws that impose continuation coverage requirements on small employer groups exempt from COBRA. The answer appears to depend on whether the state law imposes the continuation coverage requirements on the employer (like COBRA) or directly on the insurer. Where the state law is truly a "mini COBRA" law that requires the small employer to offer continuation coverage under its plan, then the employer fronts the subsidy and claims the tax credit. Where, however, the state law instead imposes the obligation directly on the small group insurer to offer continuation coverage to covered individuals who have qualifying events, then the insurer provided the subsidy and claims the tax credit.

10. We sponsor a self-funded group health plan. Must we "pre-pay" or advance the 65% subsidized portion of the COBRA "premium" and consider it a plan asset?

No. Under a self-funded plan, benefits are funded from the employer's general assets — so the employer doesn't actually "pay" the 65% subsidy to the plan as a "premium" on behalf of eligible COBRA recipients. Instead, the employer just absorbs any costs of the plan that exceed the contributions collected from employees and COBRA beneficiaries. The employer needs to be able to

demonstrate, however, that it only charged assistance-eligible individuals 35% of what they would otherwise have to pay for COBRA coverage during the subsidized period, and that the employer paid all valid claims for benefits under its plan.

11. Some terminated employees who will be eligible for the subsidy have already elected COBRA and paid their premiums for March. What do we do with them?

If an individual who is entitled to the subsidy pays the full amount of the COBRA premium for March or April, you, as the sponsoring employer, have the option to either (1) refund the overpayment to the individual, or (2) apply the amount of the overpayment as credit toward future COBRA premiums (if you reasonably expect that the beneficiary will be able to use the credit within 180-days of the overpayment).

MINEFIELD GUIDANCE: The DOL has said that an overpayment of the March or April premium can be applied as a credit as long as it's reasonable to believe that the credit will be used toward future premiums within 180-days of the overpayment. If you have reason to believe that the beneficiary won't be able to use the credit within 180-days of the overpayment, then you must issue a refund for the overpayment instead of applying it as a credit toward future premiums.

12. Does the subsidy apply to dental and vision coverage, as well as medical coverage?

Yes. The subsidy applies to all group health plans that are required to offer COBRA continuation coverage except health flexible spending accounts.

13. I heard something about giving COBRA beneficiaries the option to change to a cheaper coverage option. Do we have to allow that option?

No. While ARRA permits a plan to offer COBRA qualified beneficiaries the option to switch from their current coverage option to a less expensive coverage option available under the plan, a plan is not required to do so — it's optional with the employer sponsoring the plan.

E. DURATION OF SUBSIDY AND COBRA COVERAGE

1. How long does the ARRA COBRA subsidy last?

It lasts for up to nine months. It ends upon the earliest of (a) nine months from the date the assistance-eligible individual first becomes eligible for the subsidy; (b) when the individual ceases to be eligible for COBRA coverage; or (c) when the individual become eligible for other group medical coverage or Medicare.

2. When does the subsidy begin? Is it retroactive for assistance eligible individuals who are already on COBRA because of an involuntary termination that occurred on or after September 1, 2008?

The subsidy applies to periods of COBRA coverage beginning on or after February 17, 2009. Because most plans have monthly coverage periods that begin on the first day of the month, for most plans the

first period of coverage to which the subsidy will apply is the month of March, 2009. The subsidy isn't retroactive for assistance eligible individuals already on COBRA because of involuntary terminations that have occurred since September 1, 2008. For them, the subsidized period of up to nine months will run from March 1, 2009.

3. What do we do about assistance eligible individuals currently on COBRA who have already paid the full COBRA premium for March?

Because they are entitled to the 65% subsidy for March, those individuals have overpaid for that month. Your plan can either refund the overpayment or apply it as a credit toward their COBRA coverage for future months.

4. Does the subsidy end if an individual becomes eligible for other group medical coverage or Medicare but doesn't actually enroll in that coverage?

Yes. The subsidy ends upon eligibility for, rather than entitlement to or enrollment in, other group medical coverage or Medicare.

MINEFIELD GUIDANCE: The standard for early termination of the ARRA COBRA subsidy is different from the standard for early termination of COBRA coverage. To lose eligibility for COBRA coverage before the end of the maximum coverage period, a qualified beneficiary must actually become entitled to that coverage by enrolling in it. An assistance-eligible individual will lose eligibility for the subsidy, however, simply by becoming eligible for other group medical coverage or Medicare, irrespective of whether the individual actually enrolls. Note, however, that eligibility for other coverage will only terminate eligibility for the subsidy if the other coverage is Medicare or group medical coverage. Eligibility for the subsidy does not end upon eligibility for a flexible spending account, health savings account, health reimbursement account, or limited scope dental or vision coverage.

5. Assume that a dependent child loses coverage under our plan when we terminate his father in a reduction in force, but the child is then immediately eligible (due to HIPAA special enrollment rights) to be enrolled in comprehensive medical coverage under the plan maintained by the employer of the child's mother. Is the child eligible for the subsidy if the mother doesn't enroll the child in her employer's plan?

The child would not be eligible for the subsidy for any period of coverage in which the child was eligible to be enrolled in the mother's employer's comprehensive medical plan, even if the mother fails to enroll him in her employer's plan. It is the eligibility for, rather than enrollment in another comprehensive group medical plan that cuts off eligibility for the subsidy.

6. Does ARRA extend the length of the COBRA coverage period for an assistance-eligible individual?

No. ARRA does not add to the duration of continuation coverage a qualified beneficiary may elect; it simply provides premium subsidy for any "assistance-eligible individual" for up to nine months. Eligibility for the subsidy ends whenever COBRA coverage ends.

7. Our severance plan subsidizes 100% of the COBRA premium for the first six months after an involuntary termination for lack of work. How does that six months of subsidized coverage affect the period of coverage subsidized under ARRA?

According to informal IRS guidance, the period of ARRA-subsidized coverage runs concurrently with the period of employer-subsidized coverage — so that the six-month period during which your company pays 100% of the COBRA period offsets and reduces the nine-month period during which the ARRA subsidy would be available. This means that a terminated employee entitled to severance benefits under your plan would get six months of fully paid COBRA coverage from the employer (for which your company cannot claim a payroll tax credit) and then three months of coverage subsidized at 65% under ARRA (for which the company can receive a payroll tax credit).

F. WHAT NOW?

1. What should employers subject to COBRA do now?
 - Review all employees offered COBRA since September 1, 2008, and identify which ones were involuntarily terminated and need to receive notice of the subsidy and special election period.
 - Update regular COBRA notices and election forms to include information about the subsidy and prepare the special COBRA notice and election form for individuals entitled to the special election rights.
 - Make arrangements for the special notices to be sent to qualified beneficiaries who may be eligible for the subsidy and special election rights.
 - Work with your COBRA administrator and other vendors to develop procedures for tracking assistance-eligible individuals and the eligibility periods for those who enroll during the special election period.
 - Develop procedures for providing the subsidy and claiming the tax credit.
 - Review and update health plan documents to reflect and incorporate the new COBRA rules.
 - Review current severance plans and arrangements and evaluate whether any changes should be made in light of ARRA (for example, to ensure that your company can obtain the maximum tax credit available for subsidizing COBRA coverage).

As noted, we will continue to update this guidance as we receive more questions and/or guidance.