




Employee Benefits Broadcast
The Benefits News You Need in 60 Minutes or Less

FOLEY
FOLEY & LARDNER LLP

© 2009 Foley & Lardner LLP 1 08.5055



Employee Benefits Broadcast

**“The Benefits News You Need
in 60 Minutes or Less”**

**Tuesday, March 24, 2009
12:00 p.m. – 1:00 p.m. CST**

FOLEY
FOLEY & LARDNER LLP

© 2009 Foley & Lardner LLP 2 08.5055



Employee Benefits Broadcast

Housekeeping Issues

- Call **866.493.2825** for technology assistance
- Dial ***0** (star/zero) for audio assistance
- Ample time for live Q & A will be allotted at the end of the formal presentation
 - Pull Down Q&A Menu
- We encourage you to Maximize the PowerPoint to Full Screen Usage:
 - Hit F5 on your keyboard



© 2009 Foley & Lardner LLP

3

08.5055



Employee Benefits Broadcast

Introductions and Speakers



Leigh C. Riley



Samuel F. Hoffman



© 2009 Foley & Lardner LLP

4

08.5055



Headline News

Understanding and Implementing the New COBRA Rules



© 2009 Foley & Lardner LLP

5

08.5055



Headline News

Agenda

- COBRA premium subsidy overview
- How the subsidy reimbursement works
- How the second COBRA election period works
- The optional change to plan election
- Content and timing of notices
- Consequences of failing to comply
- Special rules for PBGC-covered and TAA-eligible individuals



© 2009 Foley & Lardner LLP

6

08.5055



Headline News

COBRA Subsidy – Overview

When is the new law effective?

- Included in the American Recovery and Reinvestment Act enacted February 17, 2009
- Subsidy is available for COBRA premiums for a “period of coverage” beginning on or after February 17, 2009
 - “Period of coverage” means a monthly or shorter period of coverage with respect to which premiums are charged
 - March 1 for plans that run COBRA on a monthly basis
 - Immediate on February 17 for plans that start COBRA on date of termination of employment



© 2009 Foley & Lardner LLP

7

08.5055



Headline News

COBRA Subsidy – Overview

What does the subsidy law provide?

- A group health plan
- Must accept from an assistance eligible individual
- A payment of 35% of the COBRA premium
- For a limited period of time
- And will be reimbursed by the U.S. Treasury for the remaining 65%



© 2009 Foley & Lardner LLP

8

08.5055



Headline News

COBRA Subsidy – Overview

What group health plans are covered under the new law?

- All group health plans that provide for continuation coverage under the Code, ERISA, or PHSa or similar state law
 - Medical, dental, vision, HRAs, EAPs
 - Self-insured and fully-insured
 - Includes “small employer plans” typically exempt from COBRA if the plan is subject to state insurance law that provides COBRA-like continuation coverage
 - But not HSAs or health flexible spending arrangements under a Code Section 125 cafeteria plan
- Church plans not subject to ERISA or comparable state program would not be covered



© 2009 Foley & Lardner LLP

9

08.5055



Headline News

COBRA Subsidy – Overview

Who are assistance eligible individuals (AEI)?

- A qualified beneficiary who:
 - Has a qualifying event due to an involuntary termination of employment during the period September 1, 2008 through December 31, 2009
 - Is eligible for and elects COBRA (either during initial period or 2nd special election period)
- Includes terminated employee, spouse and other covered dependents (but probably not domestic partners)
- Does not include reduction in hours, e.g., employee on disability leave



© 2009 Foley & Lardner LLP

10

08.5055



Headline News

COBRA Subsidy – Overview

What does an “involuntary termination of employment” mean?

- Every type of employer-initiated termination other than gross misconduct (as defined under COBRA) or death
 - Poor performance
 - Absenteeism
- Indefinite layoff – considered involuntary
- Expiration (non-renewal) of contract – probably considered involuntary
- Expiration of work visa – probably considered involuntary
- Voluntary quit in lieu of firing – probably considered voluntary

Action Items:

- ☞ List all AEIs since September 1, 2008
- ☞ Provide list to COBRA vendor
- ☞ Develop method for reporting future involuntary terminations to COBRA vendor



© 2009 Foley & Lardner LLP

11

08.5055



Headline News

COBRA Subsidy – Overview

What if employee disagrees with your determination?

- AEIs can appeal denial of subsidy to DOL (for private employers) and DHHS (for governmental employers)
 - Agency required to respond within 15 business days
 - Process not yet implemented
 - No apparent penalty – just start providing the reduced premium

Action Item:

- ☞ If AEI appeals, timely respond to DOL’s request for information



© 2009 Foley & Lardner LLP

12

08.5055



Headline News

COBRA Subsidy – Overview

How does the premium subsidy work?

- Applies starting with March coverage (or later involuntary termination)
- If AEI (or anyone other than employer) pays 35% of the COBRA premium, U.S. Treasury will pay the remaining 65%
- Current interpretation is 35% of whatever is being charged to the AEI for continuation coverage
 - Example: Full COBRA premium is \$500 (representing 102% of the applicable premium). Employer only charges AEI \$100 (active employee rate). Under law, QB must pay \$35. Subsidy is for \$65.

Action Item:

- ☞ Calculate 35% premium amount



© 2009 Foley & Lardner LLP

13

08.5055



Headline News

COBRA Subsidy – Overview

What if an AEI overpays?

- If AEI overpays for March or April
 - Employer or insurer must reimburse within 60 days or
 - Provide a credit that reduces subsequent payments (must reasonably believe can be used within 180 days)

Action Item:

- ☞ Decide how to handle overpayments



© 2009 Foley & Lardner LLP

14

08.5055



Headline News

COBRA Subsidy – Overview

How long does the subsidy last?

- ❑ Ends on the earliest of:
 - ✓ 9 months after the first day of the first month for which subsidy provided – unclear when 9 months starts
 - ✓ The date following the expiration of the maximum coverage period
 - ✓ The date following expiration of the period of coverage that would have been required if COBRA had been elected (under initial election period)
 - ✓ When the AEI is eligible (not enrolled) for coverage under another group health plan (including spouse's employer) or Medicare, excluding
 - Dental, vision, counseling, or referral services
 - Flexible spending arrangement
 - On-site medical clinic

Action Item:

- ☞ Develop procedure to determine when subsidy ends for each AEI



© 2009 Foley & Lardner LLP

15

08.5055



Headline News

COBRA Subsidy – Overview

How will the plan administrator know if an AEI is eligible for other coverage?

- AEI must notify the plan in writing if eligible for other group health plan coverage or Medicare
 - Notice to be provided in time and manner specified by the DOL
 - Plan administrator not required to “police” AEI’s compliance with notice requirement
- AEI penalty for failure to timely notify plan
 - 110% of the premium reduction after termination of eligibility
 - Reasonable cause exception
 - No plan administrator involvement



© 2009 Foley & Lardner LLP

16

08.5055



Headline News

COBRA Subsidy – Overview

Is there a phase-out of the subsidy?

- Repayment required for high-income individuals
 - Partial repayment for taxpayers whose income exceeds \$125,000 (\$250,000 for a joint return)
 - Full repayment for taxpayers whose income exceeds \$145,000 (\$290,000 for a joint return)
 - High income individual required to repay subsidy with their taxes
 - **No requirement that group health plan “police” income limits**
- High-income individuals can waive permanently waive subsidy by notifying the entity to whom premiums are reimbursed



© 2009 Foley & Lardner LLP

17

08.5055



Headline News

Subsidy Reimbursement

Who is eligible for the premium reimbursements?

- Multiemployer group health plan
- The employer subject to federal COBRA
- Otherwise, the insurer (e.g., for small employer health plans)



© 2009 Foley & Lardner LLP

18

08.5055



Headline News

Subsidy Reimbursement

How is the subsidy reimbursed?

- Reimbursement cannot be claimed until AEI pays reduced premium
- Subsidy amount (65%) treated as payment of payroll tax (FICA and/or income tax withholding)
 - Can offset payroll taxes, deposits or claim subsidy as overpayment at the end of the quarter
 - If reimbursement amount exceeds payroll tax, receive credit or refund as an overpayment of payroll taxes
 - An overstatement of the amount reimbursed treated as an understatement of payroll taxes
 - Assessed and collected as a payroll tax

Action Items:

- ☞ Work with payroll vendor to develop protocol for claiming reimbursement
- ☞ May require information from COBRA vendor



© 2009 Foley & Lardner LLP

19

08.5055



Headline News

Subsidy Reimbursement

What will the employer have to file to obtain the subsidy?

- Only Form 941 required - Credit claimed on Line 12a of Form 941; show number of individuals receiving subsidy on Line 12b
- Maintain supporting documentation showing:
 - Amount paid and date received from AEI
 - Insurer invoice and proof of timely payment
 - Attestation of involuntary termination
 - Proof of AEI's eligibility for coverage
 - SSNs of covered employees plus subsidy amount with respect to each; whether subsidy is for 1 or more individuals
 - Other documents necessary to verify correct amount of reimbursement

Action Item:

- ☞ Designate person responsible for collecting and maintaining supporting documentation



© 2009 Foley & Lardner LLP

20

08.5055



Headline News

Second Election Period

What is the second election period?

- If an AEI does not have a COBRA election in effect on February 17, 2009, may elect continuation coverage during a second election period
 - Includes AEIs who did not elect or who elected but no longer have coverage (e.g., because stopped paying premiums)
 - Election period begins on February 17, 2009
 - Election period ends 60 days after the date on which notification of second election period is provided to the individual
 - Notice of second election period required to be sent by April 19, 2009



© 2009 Foley & Lardner LLP

21

08.5055



Headline News

Second Election Period

If an AEI elects COBRA during the second election period, what coverage must be provided?

- Type of coverage in effect on date of qualifying event
- Begins with first period of coverage on or after February 17, 2009 (generally March 1)
 - Not retroactive to date of qualifying event or cessation of COBRA
- Will not extend beyond the original period of COBRA coverage



© 2009 Foley & Lardner LLP

22

08.5055



Headline News

Second Election Period

How do the HIPAA preexisting condition rules work for AEIs who elect during the extended election period?

- Cannot treat period between termination of employment and effective date of coverage (generally March 1) as 63-day break in creditable coverage for HIPAA purposes
- May not be able to impose pre-existing condition exclusion



Headline News

Plan Enrollment Option

- If permitted by employer, AEI may elect to enroll in lower cost coverage option
- Different coverage:
 - Coverage offered to active employees
 - Other than:
 - Only dental, vision, counseling, or referral services
 - Flexible spending arrangement
 - On-site medical facility providing first-aid or wellness care
- Plan administrator has 60 days to give notice, and AEI has 90 days after notice of plan enrollment option to elect
 - Presumably new coverage option elected is prospective only

Action Item:

- ☞ Decide whether to offer option
- ☞ If so, provide notice





Headline News

New Notices Required

DOL has issued model notices that can be used.

- General Subsidy info notice: This goes to any Qualified Beneficiary (“QB”) who is currently covered under COBRA.
- Special Subsidy related 2nd Election notice: This goes to AEI who had qualifying event (“QE”) between 9/1/2008 and 2/16/2009, received general COBRA notice, but did not elect or subsequently discontinued COBRA coverage.
- Combined general COBRA and Subsidy notice: This goes to all QB with QE between 2/17/2009 and 12/31/2009, and to QB with QE between 9/1/2008 and 2/16/2009 who have not yet received a general COBRA notice.
- Special Subsidy notice for Insurers: To be used by insurers who provide state law mandated ‘COBRA-like’ continuation coverage.

Models available at www.dol.gov/ebsa/COBRAModelNotice.html



Headline News

New Notices Required

What information is in the new notices?

- Description (displayed in a prominent manner) of QB’s right to a reduced premium
- Description of the obligation of the QB to notify the plan of eligibility for subsequent coverage
- Description of the extended election period
- Description of the option of the QB to enroll in different coverage (if the employer permits)
- Name, address, telephone number to contact the plan administrator and any other relevant person

Action Item:

- ☞ Identify who will send notices
- ☞ Identify who will receive which notices
- ☞ Customize model notices





Headline News

Consequences of Noncompliance

What are the consequences of failing to comply?

- A violation of the new notice requirements is also a COBRA violation
 - ERISA -- \$110/day penalties for failure to provide COBRA notices
 - Code §100/day excise taxes for failure to comply with COBRA
- Lawsuits under ERISA and PHSA
- Possible “other relief” for COBRA notice failures



© 2009 Foley & Lardner LLP

27

08.5055



Headline News

Other COBRA Changes

- Pension Plan benefits paid by PBGC
 - Qualified beneficiary has vested pension benefits to be paid by PBGC (distress termination)
 - Qualifying event was termination of employment or reduction in hours
 - COBRA continues until
 - Date of death of covered employee
 - For spouse and children, 24 months after date of death
 - December 31, 2010



© 2009 Foley & Lardner LLP

28

08.5055



Headline News

Other COBRA Changes

- TAA (Trade Assistance Act) – Eligible Individuals
 - Covered employee a TAA-eligible individual as of date COBRA would otherwise expire
 - Qualifying event was termination of employment or reduction in hours
 - COBRA continues until
 - Date covered employee ceases to be a TAA-eligible individual
 - December 31, 2010



© 2009 Foley & Lardner LLP

29

08.5055



Headline News

Need More Information?

- www.dol.ebsa.gov/COBRA.html
- www.irs.gov
- www.cms.hhs.gov/COBRAContinuationofCov/



© 2009 Foley & Lardner LLP

30

08.5055



Employee Benefits Broadcast

Questions and Answers



© 2009 Foley & Lardner LLP

31

08.5055



Employee Benefits Broadcast

Contact Information

- **Leigh C. Riley**
414.297.5846
lriley@foley.com
- **Samuel F. Hoffman**
619.685.6414
shoffman@foley.com



© 2009 Foley & Lardner LLP

32

08.5055



Employee Benefits Broadcast

Mark Your Calendar

- Foley will be hosting the remaining session of the 2009 Employee Benefits Broadcast on:
 - April 21, 2009
 - July 21, 2009
 - October 20, 2009



FOLEY & LARDNER LLP

© 2009 Foley & Lardner LLP

33

08.5055



Employee Benefits Broadcast

Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley's website within 24 to 48 hours:
http://www.foley.com/news/event_detail.aspx?eventid=2683
- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:
<http://www.zoomerang.com/Survey/?p=WEB228YHKRKT72>



FOLEY & LARDNER LLP

© 2009 Foley & Lardner LLP

34

08.5055