

The Top 10 Ongoing Issues With ARRA

By Rich Glass, J.D.

The American Recovery and Reinvestment Act of 2009 (ARRA) is now more than half a year old. Most issues related to the COBRA second election right are now in the past tense. But before breathing a collective sigh of relief, prudent employers should understand that ARRA still contains some troubled waters to navigate.

In no particular order of importance, what follows is a top 10 list of continuing issues that we hear from employers on a regular basis:

1. Involuntary Termination of Employment. The IRS addressed this concept in about a dozen questions in Notice 2009-27. Determining whether a termination is voluntary or involuntary is the linchpin of ARRA compliance. A voluntary termination means that all you have to do is include the correct ARRA information in the notice but none of the qualified beneficiaries is eligible for the subsidy. An involuntary termination means that all COBRA coverage (except for health flexible spending accounts) is eligible for the 65-percent subsidy under ARRA for all assistance-eligible individuals (AEIs).

Involuntary termination is defined as “severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.” IRS has provided several clarifications to this definition in both the notice and in some Q&As posted on its Web site. The rule of thumb is simply this: If the employer initiated the action that led to termination, the event will likely be viewed as involuntary.

For more guidance on involuntary terminations, please read the column “Answers to a Difficult COBRA Question” in the August 2009 issue of *Mandated Health Benefits – The COBRA Guide*.

2. Making Exceptions. The adage — “there is an exception for every rule” — does not apply to ARRA. At its core, COBRA is a set of minimum rules. You must provide an election period of at least 60 days. You must provide at least a 30-day grace period for premium payments. An employer can be more generous than the law requires, but that will set a precedent. Employers should pause before making an exception with ARRA. For example, a domestic partner’s coverage is not eligible for the 65-percent ARRA subsidy. If an employer chooses to make an exception, that subsidy will not be available for recapture by offsetting payroll tax obligations. In essence, the employer would be funding a 65-percent discount on COBRA.

3. ARRA Is for Members Only. If one were inclined to make a plaque in honor of ARRA, posting the three eligibility requirements for an AEI would be a good idea. An AEI is a qualified beneficiary who:

- experienced the qualifying event of involuntary termination during the 16-month period starting Sept. 1, 2008;
- elected COBRA (or state continuation coverage, if applicable); and
- was eligible for coverage at any time during the 16-month period.

Thus, a qualified beneficiary who has a qualifying event in December 2009 but a loss of coverage in January 2010 is not an AEI. Likewise, there is a similar result for an August 2008 qualifying event that has a September 2008 loss of coverage.

4. Reallocation and the 2.9 Factor. When ARRA was enacted on Feb. 17, 2009, some qualified beneficiaries may have already paid for future months of coverage (for example, March and April). ARRA says that employers can credit future months by reallocating the full premium payments based on the



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65-percent subsidy. Essentially, what this means is that a full 102-percent COBRA premium buys about 2.9 months of subsidized coverage ($100/35=2.87$). The law says that if the credit extends beyond 180 days, then the employer needs to refund the excess to the AEI. Also, if after the reallocation, the AEI becomes eligible for other coverage and is thus no longer eligible for the subsidy, the AEI may request a refund for future months of coverage.

5. Get the Equation Right, Part I. When calculating the subsidy, it is important to remember that the subsidy is based on the amount of the full COBRA premium, which is 102 percent, not the full insurance premium, which is 100 percent. For example, an employer may pay the insurer \$980 per month for family coverage. The COBRA premium is \$1,000 ($\980×1.02). The ARRA

subsidized premium is \$350 ($\$1,000 \times .35$), not \$343 ($\$980 \times .35$).

6. Get the Equation Right, Part II. Severance packages are common during this economic downturn. The critical ARRA issue is when COBRA starts. If COBRA starts after the severance period ends, the calculation is straightforward: 35 percent of the 102-percent COBRA premium. Most severance situations allow COBRA to run concurrently with the severance-subsidized coverage. In that case, the AEI has an additional 65 percent off the already subsidized coverage. Therefore, given our \$1,000 COBRA premium, subsidized at 80 percent during the severance period, the ARRA-subsidized premium should be \$70 ($\$1,000 \times .80 \times .35$).


7. Follow the Money. Employers should have a thorough understanding of how the subsidized premium recapture works. Only when the AEI has paid for a month of coverage can an employer deduct the amount from the payroll tax deposit. Then, the Form 941 quarter should be the quarter in which the payroll tax offset occurs (which is not necessarily the same as the coverage month). Documentation is essential. You must be able to tie the amount of the COBRA premium to the amount of the subsidy to the amount of the payroll tax offset to the activity on Form 941. Already, we have seen some employers receive audit letters from the IRS, seeking verification of the numbers reported on Form 941.

8. Watch Your Calendar. When it is time to change out calendars, ushering in 2010, you need to make sure that you remove ARRA language from various documents for qualifying events that occur after Dec. 31, 2009. These documents include the summary plan description for all applicable health benefits (medical, dental, vision, health reimbursement accounts), the COBRA general notice and the COBRA election notice.

9. Pay Attention to the State Capitals. Most of us learned this by the fifth grade and should not forget it now. More than three-fourths of the states have “comparable continuation coverage” laws. At least one state, Pennsylvania, recently enacted a continuation coverage law for the first time. Many others have made changes to their laws, extending them to at least nine months to take advantage of the nine months of subsidy. In New York, the maximum coverage period was increased from 18 to 36 months (see story on p. 3).

10. Pay Attention to the Nation’s Capital. Will the COBRA subsidy continue beyond the end of this year? In one sense, the answer is clearly yes. Qualifying events

ARRA’s Top 10 Issues

- 1) What is an involuntary termination of employment?
- 2) Making exceptions — Pause before doing so with ARRA.
- 3) ARRA is for “members” only.
- 4) Reallocation and the 2.9 (months) factor.
- 5) Get the equation right, Part I — Remember the subsidy calculation is based on the amount of the full COBRA premium.
- 6) Get the equation right, Part II — A critical ARRA issue is when COBRA starts when a severance package is offered.
- 7) Follow the money — Employers should have a thorough understanding of how the subsidized premium recapture works.
- 8) Watch your calendar — When it is time to change out calendars, ushering in 2010, you need to make sure that you remove ARRA language from various documents.
- 9) Pay attention to the state capitals — Most states have “comparable continuation coverage” laws.
- 10) Pay attention to the Nation’s Capital — Will the COBRA subsidy continue beyond the end of this year? 

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COBRA Extension Passed by House Committee

A provision that would extend COBRA coverage was added to the House health care reform measure passed July 17 by the Education and Labor Committee. Thus far, however, other committees considering the measure have not included the extension in their own bill mark-ups, and what will ultimately constitute a health care reform bill is still in flux.

Under the COBRA provision in the America's Affordable Health Choices Act (H.R. 3200), individuals who are still covered under federal COBRA or comparable state continuation coverage could keep that coverage until the earlier of the date they become eligible for: (1) other group health coverage under an employment-based health plan; or (2) health coverage through a Health Insurance Exchange (or a state-based exchange). The exchange would be a new vehicle under which individuals could shop for and/or procure health insurance.

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will feel the financial impact, although it will be making some adjustments.

“Unfortunately the federal law only allows the employer to charge the individual COBRA participant 2 percent more than an active employee's previous years' health care cost plus current trend,” Rawson stated. “Since the cost of the average COBRA participant is twice that of a regular participant, that mismatch has to be paid for by someone. That someone is either the employer or the current plan participants. In most cases, the costs are socialized and paid for by all plan participants in higher future rates.

“In our case, we will be absorbing this additional cost for about two quarters while we pass along these costs in the form of price allocation increases,” Rawson explained. “We have added 1 percent to our regularly scheduled price increases to all new business quoted after August 1 and on all current customers at renewal. We will also benefit from the regularly scheduled COBRA premium increase for all COBRA participants beginning January 1st of next year.”

For More Information

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The Secretaries of Labor, Treasury and Health and Human Services would be required to issue notice rules regarding the COBRA coverage extension. Health flexible spending accounts would not be subject to the extension.

The provision, offered in the form of an amendment to the original bill by Rep. Susan Davis (D-Calif.), passed the Education and Labor Committee by voice vote. Although that committee approved the measure, the Ways and Means and Energy and Commerce Committees approved the bill in July without that language. Even if the language is part of a final House bill, it would still have to be considered by the Senate, which generally has rejected attempts to extend the COBRA coverage period.

However, Sen. Roland Burris (D-Ill.) on July 21 introduced a bill that would temporarily extend COBRA's 18-month period to 24 months. Burris explained that the bill is designed to help job seekers who lost their jobs before September (the start of the COBRA premium subsidy period, see ¶1286 of the *Guide*), and face a “dire” situation regarding health coverage as they continue to look for work. The bill would “give job seekers the opportunity to continue their COBRA coverage for up to an additional six months,” he noted. “The bill applies to all of those utilizing COBRA benefits as of the date of bill passage, and would not extend anyone's coverage beyond 12 months from the date of bill enactment.” The bill, The COBRA Coverage Extension Act of 2009 (S. 1488), has been referred to the Senate Committee on Health, Education, Labor and Pensions.

Finally, the July 20 *The Hill* newspaper reported that some congressional Democrats would like to extend the premium subsidy program as part of push to extend provisions of the February economic stimulus law. 📌

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that occur now until the end of the year will have subsidy periods that stretch into 2010. Already one health care reform proposal would define COBRA's maximum coverage period not on the normal 18, 29, or 36 months, but on one's eligibility for other coverage. (See story above.)

But will the ARRA program be expanded, either by adding more time to the 16-month qualifying event period (Sept. 1, 2008, to Dec. 31, 2009) or the nine-month subsidy period? As of this writing, nothing has been proposed. A good bellwether is the federal unemployment rate. If it remains above nine percent, do not be surprised if there is a sequel to the ARRA blockbuster. 📌

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