

## FAQs for Employers – COBRA Subsidy American Recovery and Reinvestment Act of 2009

### 1. How does the Stimulus Package affect Employers?

The Economic Stimulus package (now known as The American Recovery and Reinvestment Act of 2009, or ARRA) provides for a COBRA premium subsidy that applies to Assistance Eligible Individuals (AEI) who experienced an involuntary loss of employment (for reasons other than gross misconduct) between September 1, 2008 and December 31, 2009.

Under the subsidy, the AEI pays 35% of the applicable COBRA premium. The remaining 65% is subsidized by the employer. The subsidy is available for any health coverage (including medical, dental, vision, EAP, health reimbursement arrangements). Health FSA coverage offered through a cafeteria plan is not eligible for the subsidy.

The employer is reimbursed by the government by claiming the amount of subsidy as a credit against its payroll taxes. Payroll tax penalties apply if the subsidizing entity reduces its payroll taxes for subsidy amounts that are not eligible. The subsidy would expire after the lesser of nine months or the end of the COBRA coverage period, leaving the remaining months unsubsidized.

### 2. Is the 55/10 extension part of ARRA?

No. The House version of the bill would have expanded COBRA for those individuals who are at least 55 years old or who have at least 10 years of service. This provision was eliminated by the conference committee and was not in the final bill signed by the President.

### 3. Who qualifies as an AEI?

An individual must be an AEI to be eligible for the subsidy. Under ARRA, an AEI is a qualified beneficiary as the result of an involuntary termination that occurred during the period from September 1, 2008 through December 31, 2009, is eligible for COBRA continuation coverage at any time during that period, and elects the COBRA continuation coverage. In order to be a qualified beneficiary, the individual must be covered under the group health plan on the day before the involuntary termination (except in the case of a child born to or adopted by a covered employee during a period of COBRA continuation coverage or in certain circumstances where coverage was wrongfully denied the individual). For purposes of Federal COBRA, an individual who loses group health coverage in connection with the termination of a covered employee's employment by reason of the employee's gross misconduct is not a qualified beneficiary and thus cannot be an AEI.

### 4. If COBRA continuation coverage is provided under a State program that provides comparable continuation coverage does the subsidy apply to portions of the premium attributable to COBRA continuation coverage for individuals who would not be qualified beneficiaries under Federal COBRA if the coverage were provided under Federal COBRA?

No. While section 3001(a)(10)(B) of ARRA defines COBRA continuation coverage eligible for the subsidy to include comparable State continuation coverage, qualified beneficiary is defined under section 3001(a)(10)(E) by cross reference to ERISA. Thus, the subsidy is

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limited to the premium attributable to the coverage of the involuntarily terminated employee and the employee's spouse or dependent children who are qualified beneficiaries under Federal COBRA, even if the State law requires a group health plan to provide continuation coverage to a broader group.

### **5. What is the duration of the subsidy?**

The subsidy lasts for nine months but may be terminated early if: 1) the AEI becomes eligible for coverage under Medicare or another group health plan, including coverage available through a spouse's employer; 2) the maximum COBRA coverage period ends; 3) COBRA coverage terminates for nonpayment of premium.

"Eligible for coverage" under ARRA means the individual is eligible to enroll, not necessarily covered by the new group health plan. The subsidy will end simply due to eligibility unless they are in a waiting period for the new group health plan coverage. COBRA coverage would continue as long as the individual was not enrolled in another group health plan.

### **6. Is the subsidy available after December 31, 2009?**

Yes, the subsidy may be available after December 31, 2009, for individuals who qualify as AEI on or before December 31, 2009. For example, an AEI whose period of COBRA continuation coverage for which the subsidy first applies begins on December 1, 2009, could receive the subsidy until August 31, 2010, assuming the individual does not become eligible for other group health plan coverage or Medicare or lose eligibility for COBRA continuation coverage before that date.

### **7. When does it go into effect and what are the deadlines I need to consider?**

The ARRA enactment date was February 17, 2009. The COBRA revisions are effective March 1, 2009. Notices explaining the subsidy and who is eligible must be mailed to all qualified beneficiaries, not just AEIs, no later than April 18, 2009. During March 2009, Discovery sent to employers a list of all qualified beneficiaries who experienced a qualifying event September 1, 2008 or later that it has on record for the employers' review to determine which qualifying events were due to involuntary termination. This list will be used to determine who is eligible for the subsidy when qualified beneficiaries return their election notices to Discovery.

### **8. How is "Involuntary Termination" defined?**

The IRS released Notice 2009-27 that provides definitions of involuntary termination for purposes of determining who is an AEI and therefore eligible for the ARRA subsidy. A summary of the key definitions included in the Notice are as follows:

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### **Considered involuntary termination and eligible for the subsidy:**

- A layoff, furlough or lockout initiated by the employer, including a reduction in hours to zero
- An employee-initiated termination, such as a constructive discharge or a termination for good reason (see Q&A 1 below)
- An employer's failure to renew a contract if the employee is willing to continue providing the service
- Termination due to a material change in the geographic location of employment for the employee

### **Not considered involuntary termination and not eligible for the subsidy:**

- Qualifying events that are divorce, loss of dependent status and death
- A work stoppage initiated by employees or their representatives
- A reduction in hours (but not to zero) (see Q&A 3 for a situation where it may be involuntary)
- Death of an employee or absence from work due to illness or disability

### **Determination Based on Facts and Circumstances**

The determination of whether a termination is involuntary is based on all the facts and circumstances. An example included in Q&A 2 states: "If a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary."

The IRS Q&A contained in 2009-27 relating to the definition of involuntary termination are included below:

Q-1. What circumstances constitute an involuntary termination for purposes of the definition of an assistance eligible individual?

A-1. An involuntary termination means a 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. An involuntary termination may include the employer's failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services. In addition, an employee-initiated termination from employment constitutes an involuntary termination from employment for purposes of the subsidy if the termination from employment constitutes a termination for good reason due to

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employer action that causes a material negative change in the employment relationship for the employee.

Involuntary termination is the involuntary termination of employment, not the involuntary termination of health coverage. Thus, qualifying events other than an involuntary termination, such as divorce or a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan (such as loss of dependent status due to aging out of eligibility), are not involuntary terminations qualifying an individual for the subsidy. In addition, involuntary termination does not include the death of an employee or absence from work due to illness or disability.

The determination of whether a termination is involuntary is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.

Q-2. Does an involuntary termination include a lay-off period with a right of recall or a temporary furlough period?

A-2. Yes. An involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment, resulting in a loss of health coverage is an involuntary termination for purposes of the subsidy.

Q-3. Does an involuntary termination include a reduction in hours?

A-3. Generally no. If the reduction in hours is not a reduction to zero, the mere reduction in hours is not an involuntary termination. However, an employee's voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee.

Q-4. Does involuntary termination include an employer's action to end an individual's employment while the individual is absent from work due to illness or disability?

A-4. Yes. Involuntary termination occurs when the employer takes action to end the individual's employment status (but mere absence from work due to illness or disability before the employer has taken action to end the individual's employment status is not an involuntary termination).

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Q-5. Does an involuntary termination include retirement?

A-5. If the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's services, and the employee had knowledge that the employee would be terminated, the retirement is an involuntary termination.

Q-6. Does involuntary termination include involuntary termination for cause?

A-6. Yes. However, for purposes of Federal COBRA, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event and the employee and other family members losing health coverage by reason of the employee's termination of employment are not eligible for COBRA continuation coverage.

Q-7. Does an involuntary termination include a resignation as the result of a material change in the geographic location of employment for the employee?

A-7. Yes.

Q-8. Does an involuntary termination include a work stoppage as the result of a strike initiated by employees or their representatives?

A-8. No. However, a lockout initiated by the employer is an involuntary termination.

Q-9. Does an involuntary termination include a termination elected by the employee in return for a severance package (a "buy-out") where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee's group will be terminated?

A-9. Yes.

### **9. Who determines if a qualified beneficiary qualifies for the subsidy?**

The employer is responsible to determine who is eligible for the subsidy based on the facts and circumstances of the termination.

In March, Discovery distributed lists of qualified beneficiaries who experienced a qualifying event September 1, 2008 or later to employers and requested employers confirm back to Discovery those individuals who were terminated involuntarily. Discovery will use the list provided as verification of which individuals are eligible for the subsidy and considered AEs. Only individuals who were terminated involuntarily September 1, 2008 through December 31, 2009 are eligible for the subsidy. Discovery has a process in place to carefully audit requests for the subsidy it receives from qualified beneficiaries. Part of that process

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includes the information employers provide to Discovery so reviewing the list and sending it back in a timely manner is very important to the process. ARRA includes payroll tax penalties if an employer incorrectly reduces its payroll taxes for a subsidy that should not have been offered.

For those clients new to Discovery effective September 1, 2008 or later, where Discovery does not have qualifying event information for events that occurred prior to the employer's effective date with Discovery, Discovery will need that employer to send us a list of those qualified beneficiaries. This information would need to be provided for qualifying events that occurred September 1, 2008 up to the company's effective date with Discovery.

**10. Is an individual currently enrolled in Medicare who is a qualified beneficiary as the result of an involuntary termination of employment that occurred during the period from September 1, 2008 through December 31, 2009, able to elect COBRA continuation coverage and receive the subsidy?**

No. An individual currently enrolled in Medicare who becomes a qualified beneficiary as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, may be eligible to elect COBRA continuation coverage but is not eligible for the subsidy.

**11. If the involuntary termination occurs before September 1, 2008, but the loss of coverage resulting in eligibility for COBRA continuation coverage occurs after September 1, 2008 (but no later than December 31, 2009), can the individual become an AEI?**

No. The involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009. Although section 4980B(f)(8) allows a plan to provide that the COBRA continuation coverage does not begin until the loss of coverage, that does not change the date of the involuntary termination.

**12. If an individual's involuntary termination occurs no later than December 31, 2009, but the loss of coverage resulting in eligibility for COBRA continuation coverage occurs after December 31, 2009, is the individual an AEI?**

No. Both the involuntary termination and eligibility for COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009. If the loss of coverage is after December 31, 2009, the individual cannot become an assistance eligible individual.

**13. For purposes of Federal COBRA, if an employer provides health coverage for an involuntarily terminated employee after the involuntary termination on the same terms as for similarly situated active employees, when is a loss of coverage under the group health plan considered to occur (and, consequently, when does COBRA continuation coverage begin)?**

For purposes of Federal COBRA, the effect on when a loss of coverage under a group health plan is considered to occur depends on how the employer treats the provision of health

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coverage for the involuntarily terminated employee. If the employer treats the provision of health coverage as deferring the loss of coverage, then for purposes of the ARRA subsidy the loss of coverage (and eligibility for Federal COBRA) will be considered to occur when the employer's provision of health coverage on the same terms as for similarly situated active employees ends. However, if the employer treats the provision of health coverage after the involuntary termination as part of its obligation to provide COBRA continuation coverage for the involuntarily terminated employee, then the loss of coverage will be considered to have occurred as of the date for which the employer begins making the provision of such COBRA continuation coverage.

**Example.** An individual is involuntarily terminated from employment on November 15, 2009. Health coverage in connection with the November 15, 2009 termination of employment would normally end on November 30, 2009. However, the individual is provided with severance benefits that include six months of health coverage for which no premium is required, running from December 1, 2009, through May 31, 2010. The employer considers no loss of coverage to have occurred until the six months of severance benefits have been exhausted. Under these facts, for purposes of Federal COBRA, the loss of coverage does not occur until May 31, 2010, which is after December 31, 2009. Although the individual's involuntary termination occurs during the required time period, the beginning of eligibility for COBRA continuation coverage does not. Consequently, the individual cannot become an AEI.

However, if the employer considered the payment of health coverage during the severance benefits period to be the provision of COBRA continuation coverage on behalf of the involuntarily terminated individual, for purposes of Federal COBRA, the loss of coverage would be considered to have occurred on November 30, 2009, and thus the individual could become an AEI.

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination, November 15, 2009. If the plan does provide for the optional extension of required periods, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage, May 31, 2009.

#### **14. Does an involuntary termination of an employee following another qualifying event, such as a divorce, satisfy the requirements for the qualified beneficiary from the first qualifying event to be an AEI?**

No. Generally, if COBRA continuation coverage is based on a qualifying event before the involuntary termination, the later involuntary termination does not cause the qualified beneficiary to become an AEI. However, if, in anticipation of an involuntary termination that would otherwise qualify an individual as an AEI, the employer takes action other than the involuntary termination of the individual that results in a loss of coverage for the individual

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(for example, a reduction in hours for the employee in anticipation of involuntarily terminating the employee), the action causing the loss of coverage prior to the involuntary termination is disregarded in determining whether involuntary termination is the qualifying event that results in the COBRA continuation coverage for the individual.

Example 1. An employee is divorced after September 1, 2008, and before December 31, 2009. The divorce results in a loss of health coverage for the spouse of the employee. The spouse is eligible for and timely elects COBRA continuation coverage. After the divorce, and before December 31, 2009, the employee is involuntarily terminated and loses health coverage. The employee elects COBRA continuation coverage that begins before December 31, 2009. The spouse is not an AEI because the qualifying event with respect to the spouse's COBRA continuation coverage is not an involuntary termination. The employee is an AEI.

Example 2. An employee experiences a reduction in hours in March 2009 that does not constitute (and is not in anticipation of) an involuntary termination. The reduction in hours results in a loss of coverage for the employee. The employee is eligible for and timely elects COBRA continuation coverage that begins as of April 1, 2009. In November 2009, the employee is involuntarily terminated from employment. The employee cannot become an AEI in connection with the November 2009 involuntary termination because the qualifying event with respect to the COBRA continuation coverage is not involuntary termination.

**15. If, as the result of an involuntary termination that occurred during the period from September 1, 2008 through December 31, 2009, an individual loses coverage under a health plan that is not subject to the COBRA continuation coverage requirements (as defined under ARRA) and the individual is offered and elects continuation coverage provided voluntarily by an employer, is the subsidy applicable and the related payroll tax credit for the employer (or other entity) available with respect to the continuation health coverage?**

No. In order for the COBRA continuation coverage subsidy and the related payroll tax credit to apply, the plan must be subject to the COBRA continuation coverage requirements as defined in ARRA.

Example. A group health plan maintained by an employer that is not subject to COBRA continuation coverage requirements under Federal COBRA, under the FEHBP, or under State law nevertheless provides continuation health coverage to involuntarily terminated employees. Because the terminated employees are not eligible for COBRA continuation coverage (as defined under ARRA), they are not AEIs and the subsidy does not apply.

**16. Can an individual become an AEI more than once?**

Yes. An individual who becomes a qualified beneficiary as the result of an involuntary termination and who otherwise meets the requirements to be an AEI is treated as an AEI even if previously treated as an AEI.

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**17. How long is the period of subsidy for an individual who becomes an AEI a second time?**

An AEI is eligible for up to nine months of subsidy for each involuntary termination.

**18. If an individual has a loss of coverage and becomes a qualified beneficiary eligible for COBRA continuation coverage as the result of an involuntary termination no later than December 31, 2009, and timely elects COBRA continuation coverage after December 31, 2009 (with the COBRA continuation coverage beginning retroactively back to the loss of coverage), is the individual an AEI eligible for the subsidy?**

Yes. The election of COBRA continuation coverage is not required to occur during the period from September 1, 2008, through December 31, 2009, as long as the resulting COBRA continuation coverage begins during that period.

**19. Is the death of an employee an involuntary termination of employment that would make qualified beneficiaries such as the spouse and dependent children of the employee AEIs?**

No. The death of an employee is not an involuntary termination of employment.

**20. Can retiree health coverage be treated as COBRA continuation coverage for which the subsidy is available?**

Yes, but only if the retiree coverage does not differ from the coverage made available to similarly situated active employees (though the amount charged for the coverage may be higher than that charged to active employees and the retiree coverage may still be eligible for the ARRA subsidy as long as the charge to retirees does not exceed the maximum amount allowed under Federal COBRA).

**21. What is the effect on eligibility for the subsidy if retiree health coverage that is not COBRA continuation coverage is offered at the same time that COBRA continuation coverage is offered?**

It depends on whether the retiree coverage is offered under the same group health plan as the COBRA continuation coverage or under a different group health plan. If offered under the same group health plan, the offer of the retiree coverage has no effect on an individual's eligibility for the ARRA subsidy.

If offered under a different group health plan, the offer can affect the individual's eligibility for the subsidy. If offered to an individual whose eligibility for COBRA continuation coverage arises in connection with an involuntary termination on or after February 17, 2009, the offer of retiree coverage that is not COBRA continuation coverage under a different group health plan than the one under which COBRA continuation coverage is being offered will make the individual ineligible for the ARRA subsidy. If offered to someone whose eligibility for COBRA continuation coverage arose on or after September 1, 2008, but before February 17, 2009, the offer will make the individual ineligible for the subsidy only if the period the individual is given for enrolling in the retiree coverage extends to at least February 17, 2009.

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### **22. Who will receive the new COBRA premium subsidy notices?**

All qualified beneficiaries who experienced a qualifying event September 1, 2008 or later will receive a notice informing them of the subsidy. Only individuals who were involuntarily terminated September 1, 2008 through December 31, 2009 will be considered AEIs and be eligible for the subsidy.

### **23. Does this apply to qualified beneficiaries who were already offered COBRA and did not elect?**

Yes. Qualified beneficiaries who are AEIs, had a qualifying event September 1, 2008 or later and did not elect COBRA now have a new 60 day election period in which to elect COBRA under ARRA. Coverage would be effective March 1, 2009 through the end of their original COBRA coverage period measured from their original qualifying event date due to involuntary termination. There will be a gap in coverage from the date they lost coverage due to their qualifying event up to March 1, 2009. The gap in coverage is not considered a gap in coverage for purposes of HIPAA's pre-existing condition rules. HIPAA certificates of creditable coverage will be updated with new language to reflect this.

A spouse who became divorced and dependents who have aged out and who have elected and are currently receiving COBRA coverage are considered AEIs and eligible for the subsidy if the original qualifying event was due to involuntary termination.

The subsidy would be provided for the lesser of nine months or the remainder of their COBRA coverage period from the original qualifying event date.

### **24. What about those who elected COBRA and stopped making premium payments prior to the end of their coverage period. Does this apply to them?**

Yes. Qualified beneficiaries who are AEIs, had a qualifying event September 1, 2008 or later, elected COBRA and stopped making premium payments, or ended their COBRA coverage for whatever reason other than the exhaustion of their COBRA coverage period, are also eligible to re-elect COBRA and receive the subsidy. They would have a new 60 day special election period in which to elect COBRA using the subsidy. Coverage would be effective March 1, 2009 through the end of their original COBRA coverage period. There will be a gap in coverage from the date they ended COBRA coverage up to March 1, 2009. The gap in coverage is not considered a gap in coverage for purposes of HIPAA's pre-existing condition rules. HIPAA certificates of creditable coverage will be updated with new language to reflect this.

A spouse who became divorced and dependents who have aged out and who never elected COBRA or who elected COBRA and then dropped it are considered AEIs and eligible for the subsidy if the original qualifying event were due to involuntary termination.

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The subsidy would be provided for the lesser of nine months or the remainder of their COBRA coverage period from the original qualifying event date.

### 25. Who is not eligible for the premium subsidy?

Individuals who are not eligible include:

- Any individual who was not a COBRA qualified beneficiary as a result of involuntary termination occurring on or after September 1, 2008.
- A domestic partner and/or his/her children who are not dependents of the employee; and a spouse or dependent child who did not timely report the divorce or dependent age out as required by COBRA.
- Individuals who experienced a qualifying event prior to September 1, 2008 or who exhausted their COBRA coverage prior to September 1, 2008.
- Individuals currently eligible for other group health plan coverage, including coverage through a spouse's employer, or Medicare. Eligible in this instance does not mean covered by. They merely need to be eligible to be covered to disqualify them receiving from the subsidy.

The subsidy starts to phase out for incomes above \$125,000 for a single individual and \$250,000 for married couples. The subsidy is phased out entirely for incomes above \$145,000 for single individuals and \$290,000 for married couples. The income threshold used is the "modified adjusted gross income" for an individual income tax return for the taxable year in which the subsidy is received (either 2009 or 2010) where the eligible individual is the taxpayer, the taxpayer's spouse or a dependent of the taxpayer.

### 26. Can a plan refuse to provide the subsidy to an individual because of the individual's income?

No. Even if an AEI's income is high enough that the recapture of the subsidy would apply, COBRA continuation coverage must be provided upon payment of 35% of the premium unless the individual has notified the plan that the individual has elected the permanent waiver of the subsidy (or the period for the subsidy has ended).

### 27. How does an AEI make a permanent election to waive the right to the subsidy?

An AEI who wants to make a permanent election to waive the right to the subsidy makes the election by providing a signed and dated notification (including a reference to "permanent waiver") to the person who is reimbursed for the subsidy. There is no separate additional notification to any government agency. If an AEI makes the permanent election to waive the right to the subsidy, the individual may not later reverse the election and may not receive the subsidy for any future period of COBRA continuation coverage in 2009 or 2010, regardless of modified adjusted gross income in those years.

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### **28. What notices will Discovery send?**

Discovery will send the notices required under ARRA that include:

- A special election notice sent to those that experienced a qualifying event September 1, 2008 or later and did not elect COBRA.
- A special notice to existing COBRA participants informing them of the new premium subsidy and the amount of the premiums going forward.
- A Subsidy Waiver Form allowing high income enrollees to opt out of the subsidy.

Discovery will also send notices that:

- Inform the qualified beneficiary when approval is given for their enrollment in the subsidy and COBRA election under the special election period, if applicable. New payment coupons will be provided with the notice.
- Inform the qualified beneficiary when the subsidy no longer applies and the premium goes back to its original amount.
- Inform individuals who applied for coverage and are not eligible for the subsidy. The information will include how to appeal the decision.
- Inform those individuals who applied to enroll in COBRA under the special election period and were determined not to be eligible to enroll. The information will include how to appeal the decision.

### **29. How will the notices be sent?**

Discovery will send all notices via Proof of Mail to the last known address we have on record for the qualified beneficiaries. This is in compliance with standard COBRA election notice requirements contained in the COBRA regulations.

### **30. What reports are required and what will Discovery provide?**

ARRA has the following employer reporting requirements:

- An attestation of involuntary termination of employment for each covered employee for whom the subsidy is claimed;
- A report of the amount of payroll taxes offset for the reporting period and the estimated offsets of such taxes for the subsequent reporting period in connect with reimbursements;

A report containing the Tax ID numbers (TIN) of all covered employees, the amount of subsidy reimbursed with respect to each covered employee and qualified beneficiaries and a designation with respect to each covered employee as to whether the subsidy reimbursement is for coverage of one individual or two or more individuals.

Discovery will provide the necessary reports for information it retains in its system that includes: a listing of all covered qualified beneficiaries, which qualified beneficiaries are entitled to and have paid the 35% subsidy, the applicable 65% subsidy amount, level of coverage and TIN.

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### **31. How is the ARRA subsidy calculated?**

The ARRA subsidy is calculated based on whatever premium the COBRA qualified beneficiary is currently paying (including the 2% administrative fee). The qualified beneficiary participating in the ARRA subsidy would pay 35% of the premium the AEI is responsible to pay.

When an employer subsidy is already offered, the AEI would pay 35% of the amount the AEI is required to pay after the employer subsidy is applied. The employer would pay 65% plus whatever employer subsidy is already provided.

### **32. Who is responsible to pay the 65% and therefore entitled to the 65% subsidy reimbursement?**

The employer is responsible for paying the 65% subsidy and is entitled to the 65% subsidy reimbursement through its payroll taxes whether the plan is fully-insured or self-insured.

There are two exceptions:

- A multiemployer plans (such as a Taft-Hartley plan), in which case it is the plan that is responsible; or
- When the insurer provides the COBRA administration and is responsible to collect the premium directly from the qualified beneficiaries.

As COBRA administrator, Discovery Benefits is not responsible to subsidize the 65% or collect the 65% reimbursement through its payroll taxes.

### **33. Is the 65% subsidy applied only toward the employee-only premium or is it applied toward the premium for whatever coverage is elected?**

The 65% subsidy is based on whatever coverage was offered and/or elected at the time of the original qualifying event plus the 2% administrative fee. The AEI will not be allowed to "opt in" to coverage that is more expensive (i.e., electing family coverage when they were originally only offered single) than what was originally offered.

### **34. How is the 65% subsidy collected?**

The employer will receive reimbursement of 65% of the premium in the form of an offset in the amount of payroll tax due by the amount of subsidy reimbursement. The employer must file a claim for reimbursement with the IRS when they submit their payroll taxes.

For information related to how it impacts your 941 filing and W-2 reporting, please contact your payroll provider or tax accountant for more information.

The IRS has useful Q&As found at the following web site:  
<http://www.irs.gov/newsroom/article/0,,id=204708,00.html>

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**35. Does a State continuation coverage program provide comparable coverage qualifying for the subsidy under ARRA if the maximum period of continuation coverage under the program differs from the maximum period under Federal COBRA?**

Yes. A different period of continuation coverage under State continuation coverage programs does not disqualify the State program from being comparable. Thus, for example, the mere fact that a State continuation coverage program only provides for six months of continuation coverage (instead of 18 months) would not result in the State program failing to be comparable. Similarly, State programs providing for different qualifying events, different qualified beneficiaries, or different maximum premiums generally do not fail to be comparable solely for those reasons.

**36. In the case of an insured plan subject solely to State law requiring the insurer to provide continuation coverage, if the employer collects the reduced premiums from AEIs and pays the full premium to the insurer, is the employer eligible to take the payroll credit directly?**

No. In the case of an insured plan subject solely to State law with respect to the requirement to provide continuation coverage, the only person entitled to be reimbursed for the subsidy through the payroll credit (unless and until provided otherwise in future guidance) is the insurer providing the coverage under the group health plan.

**37. Does a failure to timely pay the required premium for COBRA continuation coverage end the subsidy?**

Yes. Failure to timely pay the required premium for COBRA continuation coverage ends the period of COBRA coverage, at which time the individual no longer qualifies for the subsidy. Payment is considered timely if it is made by the end of any applicable grace period for making payment.

**38. If an AEI receiving the subsidy from an employer fails to provide notice of their eligibility for coverage under another group health plan or Medicare and continues receiving the subsidy, is the employer required to refund to the IRS the payroll tax credit relating to the subsidy paid during the period after the individual's eligibility for the subsidy ended due to eligibility for the coverage?**

No. If the employer has claimed a payroll tax credit for the subsidy, the employer is not required to refund to the IRS the excess subsidy received as a credit merely because the AEI failed to provide notice that the individual is no longer eligible for the subsidy due to eligibility for coverage under any other group health plan or Medicare unless the employer otherwise knew of the eligibility for such coverage. The AEI who failed to provide notice may be subject to a federal tax penalty of 110 percent of the subsidy improperly received. The penalty will not apply if it is shown that individual's failure to provide notice was due to reasonable cause and not to willful neglect. The employer who received the credit against payroll taxes in the amount of the excess subsidy has no rights to the penalty payment.

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### 39. How will Discovery remit the 35% subsidy collected?

Discovery offers employers two options for remitting premiums collected from qualified beneficiaries. The first option is to send the premiums collected to the employer who then sends the premiums on to the carrier along with the premiums due for active employees. The second option is Discovery sends the COBRA continuant premiums directly to the carrier on behalf of the employer.

Because Discovery is only collecting the 35% subsidy from qualified beneficiaries, Discovery recommends that employers select the first option where Discovery forwards premiums directly to the employer. The premiums would be remitted via electronic automatic ACH to the employer's bank account. A report is provided detailing for whom the premiums apply and who is receiving the subsidy.

Remitting the premiums to the employer instead of the carrier will create a simpler process for all concerned. The major reasons include:

**Discovery will not be collecting the 65% subsidy amount from employers.** Most employers will want to retain the 65% subsidy in their general assets as long as possible. Sending all premiums to the employer will reduce the reconciliation and reporting complications because of timing issues associated with the collection of the 65% subsidy.

**Reconciliation at the employer level.** A report is provided detailing who has paid and who is receiving the subsidy. The employer can then match its payments to the carrier billing from this report. Discovery contacted several carriers to ask if there were going to be changes to the carrier billings and was told they did not at this time have plans to change their billing process.

**Proper 941 Reporting.** The employer will know who has paid their 35% premiums, ensuring that the employer is correctly identifying the deductions from payroll taxes on their 941 tax reporting. Failure to correctly identify and deduct the subsidy on the 941 will result in payroll tax penalties being applied to the employer if deductions are made for non-AEIs (Assistance Eligible Individuals). By paying the premiums to the carrier, the employer will know exactly which qualified beneficiaries are current AEIs.

**Reconciliation at the carrier level.** By remitting the 35% to the employer, carriers will receive one payment from the employer for the full premium payment, versus two separate checks representing partial payment. This will reduce the issues of a qualified beneficiary's coverage being incorrectly terminated or incorrectly extended due to mistaken reconciliation on the part of the carrier since most carriers reconcile payment to the employer's total billing, not to the individual member or qualified beneficiary. Because the employer will remit the full premium along with the carrier billing, this will help to ensure proper allocation by the carrier.

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### **40. I've heard of a Special Enrollment Rule. What is it?**

The Special Enrollment Rule gives the employer the option to offer AEIs the ability to elect a lower cost coverage option. The special enrollment rule is a voluntary option at the employer level and is not a requirement of ARRA.

Discovery does not recommend an employer offer this option due to the complexity of communicating the different benefit and plan options to qualified beneficiaries and the current ambiguities within ARRA as to the deadlines imposed.

It allows AEIs currently on COBRA to elect another benefit option under certain conditions that include:

- 1) The premium for the “different” coverage cannot exceed the premium for the coverage in which the qualified beneficiary was enrolled at the time of the qualifying event;
- 2) The “different” coverage must also be coverage that is being offered to active employees;
- 3) The “different” coverage cannot be limited to only dental, vision, EAP services, health flexible spending arrangement as defined in 106(c) and/or coverage for services or treatment in an on-site medical facility maintained by the employer that consists mainly of first-aid type services, prevention and wellness care, or similar care.

If the option is offered, the AEI has 90 days after receiving notice of the option to elect the other coverage.

### **41. How will premiums already received for March and April 2009 be handled once the subsidy is in place for a qualified beneficiary?**

Once the subsidy is approved and if the premiums that have already been paid result in a positive balance of premiums, those premiums will be applied toward future months of coverage (up to six months) for that AEI. Anything paid beyond the six month balance (or to the end of the COBRA period) will be refunded to the AEI at the end of the coverage period. Discovery will remit via check within sixty days any excess premiums in its account that are paid past the end of the COBRA coverage period or any balances that exceed premiums due with the subsidy applied beyond six months of coverage.

### **42. How should current COBRA continuants handle their premium payments until the subsidy is approved?**

Continuants are urged to continue to pay the full COBRA premiums as normal to ensure no lapse in coverage. Discovery will send a notice to the qualified beneficiary letting them know they are an AEI and eligible to receive the subsidy along with information about the

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next steps. If the qualified beneficiary is approved for the subsidy, any premiums paid that create a positive balance will be applied toward future months of coverage up to six months out. Anything paid beyond the six month balance (or to the end of the COBRA period) will be refunded to the qualified beneficiary via check at the end of the coverage period.

### 43. I offer my employees a premium subsidy already. How does the ARRA subsidy affect the subsidy we already offer employees?

If you currently offer qualified beneficiaries an employer subsidy toward their COBRA premium, the amount of the employee paid ARRA subsidy is based on the employee-paid portion of the premium, not the full premium amount. Below are two examples of how this could work:

#### **Example 1**

Situation:

An employer subsidizes 100% of the COBRA premium for the first six months of the COBRA coverage period for a qualified beneficiary who was involuntarily terminated. The qualified beneficiary pays 102% of the premium during months seven through eighteen.

Result:

During the first six months, no ARRA subsidy will apply. Beginning in month seven, the employee will pay 35% of the COBRA premium, the employer will pay the remaining 65% and receive a credit against payroll taxes over the next three months of COBRA coverage as long as the qualified beneficiary remains eligible for the ARRA subsidy and COBRA coverage. The last nine months of the COBRA coverage period, no subsidy will apply.

Monthly Premium is \$1,020 (includes 2% administrative Fee)

First six months of COBRA coverage – No ARRA Subsidy Applies

Employer subsidy is 100% = \$1,020

Qualified beneficiary responsible to pay = \$0

Next three months of COBRA coverage – ARRA Subsidy Applies

Employer responsible to pay 65% = \$663

Qualified beneficiary responsible to pay 35% = \$357

Next nine months of COBRA coverage – No ARRA Subsidy Applies

Qualified beneficiary responsible to pay 102% of premium.

#### **Example 2**

Situation:

An employer subsidizes 50% of the premium for the first six months of the COBRA coverage period for a qualified beneficiary who was involuntarily terminated. The qualified beneficiary pays the remaining 50%. The employer subsidy ends in month seven.

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### Result:

The 35% qualified beneficiary-paid amount under ARRA subsidy rules is based on the 50% that is the qualified beneficiary's responsibility to pay. The employer is responsible to pay the remaining premium (50% plus 65% of the employee's 50%). The employer would receive a credit against payroll taxes for 65% of the 50% premium paid by the qualified beneficiary as long as the qualified beneficiary remains eligible for the ARRA subsidy and COBRA coverage. The last nine months of the COBRA coverage period, no subsidy will apply.

Monthly Premium is \$1,020 (includes 2% administrative Fee)

### First six months of COBRA coverage- ARRA Subsidy Available

Employer subsidy is 50% = \$510

Employer responsible to pay 65% of employee-paid premium (50% or \$510) = \$331.50.

Total employer paid subsidy = \$841.50\*

Qualified beneficiary responsible to pay 35% of 50% (\$510) = \$178.50

\*Amount eligible for 65% subsidy reimbursement through payroll tax reduction = \$331.50.

### Next three months of COBRA coverage – ARRA Subsidy Available

Employer responsible to pay 65% = \$663

Qualified beneficiary responsible to pay 35% = \$357

### Next nine months of COBRA coverage – No ARRA Subsidy Applies

Qualified beneficiary responsible to pay 102% of premium.

#### **44. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium, does the ARRA subsidy apply to the increased premium amount?**

Yes.

#### **45. If I am already offering a subsidy, can I stop it?**

Employers wishing to end their current subsidy programs in light of the ARRA subsidy being available will need to contact their legal counsel for help evaluating what that requires within the guidelines of the employer's current subsidy program.

#### **46. Who should I call if I have more questions about the ARRA subsidy requirements?**

Contact Discovery Benefits COBRA Employer Services at 866-451-3399, option 2, 2 or email COBRAemployerservices@discoverybenefits.com.