

## Employee Benefits & Executive Compensation ADVISORY

February 18, 2009

### COBRA Subsidy Provisions Included in the Stimulus Act: What Plan Sponsors and Administrators Need to Do NOW

Late last week, the House and the Senate passed the American Economic Recovery and Reinvestment Plan (the "Act"). President Obama signed the Act into law on February 17th (the "Enactment Date"). The Act provides Government-funded COBRA premium assistance ("COBRA Subsidy" or "Subsidy") equal to 65 percent of the COBRA premium to COBRA qualified beneficiaries receiving COBRA by virtue of the covered employee's involuntary termination of employment occurring between September 1, 2008, and December 31, 2009 ("Assistance Eligible Individuals" or AElS). The Subsidy is available for any health coverage (including dental, vision, EAP, etc.) other than health FSA coverage offered through a cafeteria plan. Individuals who would be Assistance Eligible Individuals as a result of an involuntary termination between September 1, 2008, and February 16, 2009, but who failed or have yet to make a COBRA election or who elected COBRA and lost it prior to the Enactment Date, are entitled to a special election period and prospective COBRA continuation coverage to the extent they take advantage of the special election period. The Act does not include the COBRA expansion (originally included in the prior House version) that would have expanded COBRA eligibility until Medicare for certain individuals age 55 or older, or with 10 or more years of service.

Under the Act's COBRA Subsidy rules, the Assistance Eligible Individual is treated as having paid the full COBRA premium to the extent he/she (or anyone else other than the employer) pays 35 percent of the required premium. The employer or insurer is then reimbursed by the Government for the remaining 65 percent. The COBRA Subsidy applies to an Assistance Eligible Individual's COBRA premium for "periods of coverage" beginning on or after the Enactment Date, and it extends up to nine months; however, the COBRA Subsidy may end earlier if the Assistance Eligible Individual becomes *eligible* for certain other group health coverage or Medicare, or if COBRA coverage otherwise ends. There is also a special enrollment provision that allows Assistance Eligible Individuals to elect a coverage option they did not otherwise have at the time of the qualifying event to the extent such special enrollment provision is adopted by the employer.

This COBRA premium assistance program requires immediate action by plan sponsors and administrators. For example, COBRA election notices must be revised to include information regarding the Subsidy, and special notices must be sent within 60 days of the Enactment Date to *those who would otherwise be Assistance Eligible Individuals who are entitled to a special election period and those AElS receiving COBRA continuation coverage as of the Enactment Date*.

Other action is also required to ensure compliance. This advisory walks through the practical impact the COBRA provisions of the Act have on employers, and what employers must do to comply.

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**Practice Pointer:** Before reading any further, plan administrators and third party administrators should consider the following high level action items:

1. Be able to identify “Assistance Eligible Individuals,” including those who would be AEIs between the period from September 1, 2008, and February 16, 2009, but who are currently not on COBRA.
2. Allow a special extended election period for those individuals identified in (1) who are not on COBRA as of the Enactment Date.
3. Send a special notice to all individuals identified in (1) who are entitled to a special election period and all AEIs who are on COBRA as of the Enactment Date.
4. Analyze the mechanics of the special enrollment requirements for other coverage options and determine whether to adopt.

### Who Is an Assistance Eligible Individual?

Fundamental to understanding and complying with the Act’s COBRA Subsidy rules is identifying Assistance Eligible Individuals. An “Assistance Eligible Individual” or “AEI” means any COBRA qualified beneficiary eligible for COBRA continuation by virtue of the covered employee’s involuntary termination of employment (for reasons other than gross misconduct) occurring between September 1, 2008, and December 31, 2009.

**Practice Pointer:** The triggering event is involuntary termination of employment, which may or may NOT occur as part of a reduction in force. Thus, an employee fired for poor performance during the applicable period will qualify for the Subsidy.

The definition of an AEI is tied to the definition of a “qualified beneficiary” under ERISA 607(3), which includes only the employee, the employee’s spouse (as defined by federal law) and the employee’s dependent child (as defined by the plan) that are covered under the plan as of the date of the qualifying event. Thus, even if the covered employee does not elect COBRA, a covered spouse or covered child of the covered employee that is involuntarily terminated will qualify for the Subsidy if they elect to continue COBRA coverage.

**Practice Pointer:** AEI would not include same-sex domestic partners or any other person who is not (i) a covered spouse defined by federal law or (ii) a covered dependent child. Even if offered continuation coverage by the plan, such an individual is not a “qualified beneficiary” for purposes of federal COBRA. While not entirely clear, it would appear that the COBRA Subsidy could apply to any COBRA coverage elected by a covered employee who is an AEI (even coverage for a same-sex domestic partner). However, it is clear that a same-sex domestic partner or any other person who is not a qualified beneficiary under COBRA but is otherwise offered continuation coverage under the plan would not have an independent right to the Subsidy in the event the covered employee fails to elect coverage. In preparing the special notice for employees, employers will need to keep these issues in mind and make sure their communications to employees and qualified beneficiaries clearly explain these consequences.

The Act requires that a special election period be extended to individuals who *would* be AEIs but for the fact that they have yet to elect COBRA or that they elected COBRA but lost COBRA coverage prior to the Enactment Date (e.g., they were unable to pay a premium). Plan administrators must extend a special election period to such individuals (described in more detail below). However, if an election is made solely by virtue of the special election period (and not within the individual's original COBRA election period), COBRA coverage will only reach back to the period of coverage beginning on or after the Enactment Date (i.e., March 1) and the maximum COBRA period will be measured from the date of the original qualifying event (i.e., the date of the involuntary termination of employment).

**Practice Pointer:** The Act clarifies that, for those who elect coverage through the special election period, any gap in coverage arising prior to the Enactment Date is not considered a break in coverage for purposes of HIPAA's creditable coverage rules. Certificates of Creditable Coverage issued by plan administrators for such individuals must reflect this rule.

Although certain highly compensated individuals will qualify as AEIs, their Subsidy will be "recaptured" if their income exceeds a certain threshold in the same taxable year in which they received any premium assistance under the Act. This "recapture" process is described in more detail below.

### Extra-Plan Appeal Procedure to DOL

The Act provides an appeals procedure for individuals who claim eligibility for the Subsidy, but who are denied eligibility by the plan. Such individuals may appeal the denial (in a form and manner as yet to be prescribed) to the Department of Labor (DOL) or to the Department of Health and Human Services (HHS) in the case of COBRA continuation coverage provided pursuant to the Public Health Service Act. The DOL or HHS must provide an expedited review and rule on the appeal within 15 business days of receiving the individual's application for review. A determination upon review shall be de novo, and will be the final determination by the DOL or HHS. If the appeal is denied, the individual could then sue under ERISA § 502(a)(3) for treatment as an assistance eligible individual, but the Act provides that the reviewing court is required to grant deference to DOL's or HHS's determination.

**Practice Pointer:** Although not required by the Act, it may be a "best practice" to include a notice of this right to review by the DOL or HHS in the special notice materials sent to individuals, and perhaps even refer to this right on any forms the employer is using for an attestation of Subsidy eligibility.

### How Much is the COBRA Subsidy?

The COBRA Subsidy provided by the Government is 65 percent of the amount required to be paid by the AEI. AEIs will not receive the COBRA Subsidy in the form of cash; rather they are deemed to have paid the full COBRA premium if they pay 35 percent of the required premium. So, essentially, the process works as follows: the AEI pays the portion not covered by the Government to the employer, plan or insurer (as applicable) and the employer, plan or insurer (as applicable) covers the Government for the Subsidy until such time as the Government reimburses the applicable entity for its share of the COBRA Subsidy.

If an AEI pays the full premium with respect to the first or second consecutive period of COBRA continuation coverage that commences on or after the Enactment Date, the entity entitled to reimbursement from the Government must either reimburse the individual for the amount of premium that exceeds 35 percent of the total premium or provide a credit for such amount that reduces one or more subsequent premium payments. If the credit method is used, such credit must be used within 180 days. If, at any time during the 180-day period, it is reasonable to believe that such credit will not be used, payment equal to the remaining credit must be made within 60 days.

**Practice Pointer:** Individuals earning more than \$145,000 (\$290,000 for joint returns) will have their income tax increased by the total amount of Subsidy they receive. Individuals earning more than \$125,000 but less than \$145,000 (or more than \$250,000 but less than \$290,000 for joint returns) will have their income tax increased by a percentage of their total Subsidy received in that year. This recapture will occur when they file their personal income tax return. In order to avoid this recapture, individuals can *permanently* waive their rights as AEIs. Individuals must provide these waivers in the form and manner as yet to be prescribed by the Secretary of Treasury. The AEI will then need to inform the plan, employer or insurer of the waiver—whichever entity is entitled to the Subsidy. An individual who waives his or her right to the Subsidy cannot claim it in a subsequent year (e.g., 2010) if their income level qualifies. As a result, individuals who will not qualify in 2009 (due to income) may choose to pay the taxes associated with the recapture rather than waive the Subsidy.

The entity entitled to reimbursement for the 65 percent premium assistance varies depending on which of the following types of arrangement it is:

- In the case of a multi-employer plan (such as a Taft-Hartley plan), it is the plan;
- In the case of any other employer-sponsored plan subject to ERISA's, the Code's or the PHSA's COBRA provisions, or any other employer-sponsored plan not subject to those rules (e.g., a Church plan) that is fully or partially self insured, it is the employer/plan sponsor;
- In the case of a fully insured plan not described above, it is the insurer.

These entities will receive reimbursement of 65 percent of the premium in the form of an offset in the amount of payroll tax due by the amount of Subsidy reimbursement. Such entities must file a claim for reimbursement with the IRS when they submit their payroll taxes. That process, however, is yet to be developed. There are, however, specific reporting requirements applicable to the reimbursement process. See "What are the reporting requirements?" below for more details.

It is important to note that the premium assistance is tied to the amount of premiums not paid by AEIs *by reason of* the Act. Language was added to the final version that clarifies this concept. However, the term "premium" is not defined in the Act, which leads to two possible interpretations of this provision.

First, the Act provides that an AEI is treated, for purposes of any "COBRA Continuation Provision," as having paid the amount of "such premium." "Premium" may refer to the "applicable premium" as defined in COBRA as the "cost to the plan" with regard to a period of coverage, "without regard to whether such cost is paid by the employer or employee." Assuming that the Act follows the COBRA definition of "applicable premium," it would seem that the Subsidy is available only if an AEI is already paying *more* than 35 percent of the "applicable

premium.” So, for example, if the “applicable premium” is \$1,000, and the employer subsidizes 80 percent, then the employee is not eligible for the Subsidy because the employee is already paying only 20 percent of the “applicable premium.” We do not think this view is correct because the drafters could have defined “premium” in the Act or referenced the “applicable premium” as defined in COBRA, but they did not.

Another, and we think correct, view is that the “premium” referenced in the Act refers to the amount required by the plan to be paid by the qualified beneficiary. In support of this view we note that the Act specifically states that the AEI will be deemed to have paid 100 percent of the premium so long as the AEI, or anyone other than the AEI’s employer, pays, on the AEI’s behalf, 35 percent of “such premium.” The effect of reading “such premium” to mean “any amount owed by the AEI other than amounts paid by the AEI’s employer” rather than the “applicable premium” is that the AEI need only pay 35 percent of whatever the AEI’s premium obligation is, as determined by the plan. For example, if the employer is paying a portion of the individual’s COBRA premium—say 80 percent on a \$1,000 premium as in the example above—then the AEI only needs to pay 35 percent of \$200 (\$70), and the other 65 percent (\$130) will be reimbursed to the employer. No Subsidy, however, would be reimbursed for the \$800 that the employer paid on the AEI’s behalf.

Under either interpretation, employers who are paying 100 percent of a qualified beneficiary’s COBRA premium will not be entitled to any payroll tax offset for such individuals. Thus, employers considering subsidizing COBRA coverage for employees (e.g., in connection with a termination or reduction in force program) may wish to reconsider, in light of the possible impact on the premium. Clarification as to the definition of “such premium” is needed.

### **What Are the Reporting Requirements?**

The entity entitled to the Subsidy reimbursement may be required to satisfy the following reporting requirements, if, when and in the manner required by the Secretary:

- 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 connection with reimbursements, and
- a report containing the TINs 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.

### **What Is the Duration of the COBRA Subsidy?**

AEIs are entitled to the COBRA Subsidy for up to nine months; however, their entitlement ends if they merely become eligible for certain other group health coverage or for benefits under Medicare. Thus, an AEI may lose the Subsidy if they become eligible for other coverage, yet still be entitled to continue coverage under COBRA if they do not elect the other coverage.

**Practice Pointer:** An individual is not treated as being “eligible” for coverage under a group health plan prior to the “first date” on which such individual could be covered under such plan. Thus, an AEI who otherwise satisfies the eligibility requirements of another group health plan, but is subject to a waiting period, will continue to receive the Subsidy for the months that the waiting period is in effect. Likewise, an AEI who might otherwise meet the eligibility requirements, but is prohibited from enrolling due to plan or regulatory restrictions (e.g., Code Section 125), would not be treated as “eligible.”

A “group health plan” for which mere eligibility will terminate the Subsidy does not include the following:

- Coverage consisting of only dental, vision, counseling or referral services such as an EAP (or a combination thereof);
- Coverage of treatment that is furnished in an on-site medical facility maintained by an employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination thereof); or
- Coverage under a “health flexible spending arrangement” as defined in Code Section 106(c). According to a footnote in the Joint Committee’s overview, this would include both a Health FSA offered under a cafeteria plan *and* any Health Reimbursement Arrangement (HRA) that otherwise meets the requirements of Code Section 106(c).

**Practice Pointer:** As discussed in more detail below, AEIs must provide notice of eligibility for group health coverage that terminates the COBRA Subsidy. The definition of health flexible spending arrangement under Code Section 106(c) is sufficiently complex, and there is no easy way to explain it. As defined by Code Section 106(c), a “health flexible spending arrangement” is an arrangement where the maximum benefit that can be received is less than 500 percent of the value of such coverage. Thus, it will not be readily apparent to AEIs who become eligible for an HRA as to whether or not the HRA disqualifies the AEI from the Subsidy. Employers who sponsor an HRA may wish to work with counsel/consultants to determine the status of their HRAs under Code Section 106(c) and provide notice to eligible employees regarding this status.

The AEI must provide timely written notice (time and manner as yet to be specified by the Secretary of Labor) to the group health plan providing the COBRA continuation coverage regarding eligibility for Medicare or other group health coverage. Failure of the AEI to provide such notice is punishable by a penalty equal to 110 percent of the Subsidy received after becoming eligible for such other coverage, unless reasonable cause rather than willful neglect can be shown to be the cause of such failure to notify.

Premium assistance eligibility also ends once COBRA coverage ends (in accordance with COBRA’s rules).

## What Are the Special Enrollment Rules?

The Act allows AEIs and individuals eligible to become AEIs to elect a coverage option that is different from the coverage under the plan in which the individual was enrolled when the qualifying event occurred, *provided that the employer makes such an option available*. This is contrary to the minimum requirement under COBRA that plans only allow qualified beneficiaries to initially elect the same coverage they maintained prior to the qualifying event. Since it is optional, employers will need to decide whether they want to allow individuals to switch plan options. Employers that choose to do so must make sure such coverage satisfies these additional mandatory requirements:

- 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;
- the “different” coverage must also be coverage that is being offered to active employees;
- the “different” coverage cannot be limited to any of the following:
  - only dental, vision, counseling and/or referral services;
  - health flexible spending arrangement as defined in Code Section 106(c); and/or
  - coverage for services or treatment furnished 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;

In addition, the special additional notice provided to AEIs (as discussed below) must include notification of the opportunity to make such a special enrollment. The qualified beneficiary is given 90 days to make such an election from the date of the notice of such plan enrollment option.

**Practice pointer:** If an employer allows such a special enrollment, it is unclear whether the election period is increased from 60 to 90 days. If it is, the extension would only apply to major medical coverage and not to other types of group health coverage not subject to the special enrollment rule such as dental, vision or Health FSA. This dual election period would likely create significant confusion. Such potential for confusion may be enough to cause many plan sponsors to forgo adopting such a special enrollment provision.

## What Are the Plan Administrator’s Additional Notice Requirements?

To analyze the additional notice requirements, plan administrators must understand that there are two categories of notice recipients for notice purposes:

- **Group #1:** Those who experience a qualifying event<sup>1</sup> on or after the Enactment Date and prior to December 31, 2009; and
- **Group #2:** Those who experienced a qualifying event that is the covered employee’s involuntary termination of employment between September 1, 2008 and February 16, 2009.

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<sup>1</sup> There is an apparent ambiguity in that the statute refers to all qualified beneficiaries, whereas the legislative history seems to suggest that only potential AEIs (i.e., individuals who are involuntarily terminated) should receive the new information. We think most COBRA administrators will use a single notice so this may be an inconsequential distinction.

With regard to Group #1, plan administrators must revise the standard COBRA election notice that it sends to include the following information:

- Forms establishing eligibility for the COBRA Subsidy;
- The name, address and phone number of the plan administrator, as well as any other person “maintaining relevant information in connection with such premium reduction”;
- A description of the qualified beneficiary’s obligation to notify the plan if the individual becomes *eligible* for subsequent coverage under another group health plan or under title XVIII of the Social Security Act (i.e., Medicare), and a description of the penalty for failing to notify the plan;
- A description “displayed in a prominent manner” of the qualified beneficiary’s right to a reduced premium and any conditions on entitlement to the reduced premium; and
- A description of the special enrollment option discussed above (if the employer chooses to allow such enrollment for AEIs).

The first requirement noted above is to include with the election notice all forms establishing eligibility for the Subsidy; however, it is not clear from the Act what the purpose of the forms is or what should be included in them. One form might be a form confirming a highly paid individual’s waiver of the Subsidy.

**Practice Pointer:** Employers can either amend their current COBRA election notices to add this information, or they can include the information in a separate document (e.g., a supplement) to be sent along with the election notice. Regardless, it appears that the notice of the new Subsidy must be sent to all qualified beneficiaries who are eligible for COBRA by virtue of the covered employee’s termination of employment occurring on or after the Enactment Date — even those that terminate voluntarily.

With regard to Group #2, a notice revised to include the items mentioned above must be sent within 60 days of the Enactment Date; however, it must also describe the special election period for those who have yet to make an election as of the Enactment Date (which is 60 days after receiving the election notice) and, for such individuals, it should also make clear that, while COBRA coverage begins on the first period of coverage commencing on or after the Enactment Date (March 1, in most cases), the COBRA duration (e.g., generally 18 months) is measured from the date of the original qualifying event.

The Department of Labor is required to issue model notices within 30 days of the Enactment Date.

**Practice Pointer:** Should you wait until the DOL issues model notices? Since you have 60 days, you can wait, but we do not recommend you wait the entire 30 days. It may be prudent to wait a couple of weeks to see if the DOL issues such notices. If not, we think you should prepare notices (or revise your existing notices according to the rules), which we believe are sufficient enough to guide those making the necessary revisions. Those that choose to wait should, at a minimum, begin compiling their distribution lists, so that you are ready to send the notices immediately upon issuance of the model notices.

## The Who, What and When of Notices Related to the COBRA Subsidy

Who	What	When
All AEIs (i.e., already on COBRA) who experienced a qualifying event between September 1, 2008, and February 16, 2009	<ul style="list-style-type: none"> <li>• Additional Notice</li> <li>• Required only if allowed by employer: Election Notice pursuant to a special enrollment right to elect a coverage option that is different from the coverage under the plan in which the individual was enrolled when the qualifying event occurred.</li> </ul>	Additional Notice and any applicable Election Notice must be sent within 60 days after February 17, 2009 (i.e., by April 18, 2009).
Those who experienced a qualifying event that is the covered employee's involuntary termination of employment between September 1, 2008, and February 16, 2009, but who failed to elect, affirmatively declined coverage, or continued COBRA coverage for a limited period of time and let it lapse prior to February 17, 2009 (i.e., individuals who may be AEIs if coverage is elected)	<ul style="list-style-type: none"> <li>• Additional Notice</li> <li>• Election Notice pursuant to the extended special election period (even if an election notice was recently sent and the individual's initial COBRA election period is still in effect)</li> <li>• Required only if allowed by employer: Notice of special enrollment option to elect a coverage option that is different from the coverage under the plan in which the individual was enrolled when the qualifying event occurred.</li> </ul>	Additional Notice and any applicable Election Notice must be sent within 60 days after February 17, 2009 (i.e., by April 18, 2009).
Those who experience a qualifying event* on or after February 17, 2009, and prior to December 31, 2009	<ul style="list-style-type: none"> <li>• Additional Notice</li> <li>• Election Notice pursuant to the regular COBRA election period</li> <li>• Required only if allowed by employer: Notice of special enrollment option to elect a coverage option that is different from the coverage under the plan in which the individual was enrolled when the qualifying event occurred.</li> </ul>	Additional Notice and Election Notices must be provided in accordance with the regular COBRA election notice requirements.

\* As noted above, there is an apparent ambiguity in that the statute refers to all qualified beneficiaries, whereas the legislative history seems to suggest that only potential AEIs (i.e., individuals who are involuntarily terminated) should receive the new information. We think most COBRA administrators will use a single notice so this may be an inconsequential distinction.

### What Is the Special Election Period?

As indicated above, qualified beneficiaries who were involuntarily terminated on or after September 1, 2008, are entitled to a special election period, even if they were offered COBRA upon termination and either failed to elect, affirmatively declined coverage, or continued COBRA coverage for a limited period of time and let it lapse. These individuals must be provided an election notice within 60 days of the Enactment Date and be given 60 days following the date such notice is provided to elect the coverage. If the notice is late, this special election period continues until 60 days after the qualified beneficiary is provided with a COBRA election notice describing the special election provisions. In addition, the plan administrator would be liable for penalties for failing to issue the special COBRA notice in the same manner as a plan administrator who fails to send any other notice required by COBRA. Thus it is irrelevant that such an individual already received an election notice; failure to send the special election notice will also trigger penalties.

If coverage is elected during the extended election period, the COBRA coverage commences with the first “period of coverage” beginning on or after Enactment Date (not back to the date of the event). On the other hand, the COBRA coverage period for such an AEI is measured from the date of the original qualifying event. The “period of coverage” is defined by the Act as a “monthly or shorter period of coverage with respect to which premiums are charged.”

If a qualified beneficiary who would otherwise be an AEI is still within his/her election period and makes a timely election in accordance with COBRA, then he or she is not subject to the same adjusted coverage rules described above.

**Practice Pointer:** So when is the first “period of coverage”—the Enactment Date or March 1 (the first day of the first month following the Enactment Date)? The Joint Committee indicates that the first “period of coverage” following the Enactment Date for a plan that charges for COBRA on a calendar month basis would generally be March 1 for individuals terminated before the Enactment Date.

So, assume that Bob is involuntarily terminated on September 1, 2008, and he is otherwise eligible for COBRA but does not elect COBRA. Within 60 days of the Enactment Date, Bob must be offered another opportunity to elect COBRA. He will have 60 days to elect coverage. Assume further that he elects March 15. The plan charges monthly COBRA premiums. His coverage will not begin until March 1, but the measurement for the 18-month COBRA continuation coverage period (assuming no extensions apply) would begin on September 1, 2008, even though coverage did not become effective until March 1. The gap between the event and the coverage effective date is not considered a break in coverage for purposes of HIPAA’s pre-existing limitation rules.

## What Plan Administrators Need to Do Now

If you are feeling overwhelmed by this fast track Act, you are not alone. There are a number of very important requirements imposed on plan administrators in a very short amount of time. To help you organize your action plan, we have identified the following action steps:

1. Identify all those qualified beneficiaries who are or were eligible for COBRA by virtue of a qualifying event that was an involuntary termination of employment occurring between September 1, 2008, and February 16, 2009, who have not elected COBRA as of the Enactment Date or who elected but lost coverage. This includes spouses and children who were covered at the time of the qualifying event but are not covered now. They will be entitled to a special election period. NOTE: This also includes those whose election period has not yet ended as of the Enactment Date. Such qualified beneficiaries whose election period has yet to expire may choose to take advantage of the special election period but they will receive adjusted coverage dates if they do not make their election within their initial election period. Plan administrators must work with their COBRA administrators to tweak systems to accommodate this.
2. Determine if you wish to offer the ability to elect a different coverage option and the special enrollment period for such election. Due to ambiguities in the application of this otherwise optional provision, you should carefully consider the pros and cons of adopting such an option. For example, an employer would likely be required to send information to its COBRA administrators following a qualifying event that it does not typically send, such as information regarding other benefit options available under the plan.

3. Determine if you wish to wait on model notices or draft notices independently.
4. Schedule time with your COBRA administrator to identify and assess the system changes needed to send notices to those entitled to a special election and the decisions you made in (2) and (3). Revise election notices if you choose not to wait on model notices. In doing so, you must determine whether or not you wish to simply revise your current notices or prepare a supplement to be used with your current notices. Some plan administrators may choose to revise initial notices and SPDs as well, even though not required by the Act.
5. Draft a Subsidy waiver form for highly compensated employees and an “attestation of eligibility” form for all individuals who will be entitled to the premium assistance.
6. Revise HIPAA certificates of creditable coverage for those who take advantage of the special election period to reflect the fact that any gap between the date of the qualifying event and the date coverage begins (which is the first period of coverage following the Enactment Date) is not considered a “gap” in coverage for purposes of HIPAA’s pre-existing condition rules.
7. Begin to develop a credit procedure for those AEIs who pay more than 35 percent during the first two months. For example, if employers choose to apply the excess as a credit, and it is not or will not be used within 180 days, a refund process must be established.
8. Develop a procedure calculating the new premium structure, calculating the amount of Subsidy due in the form of the payroll offset and filing a claim for the Subsidy. Additional guidance will be issued in the future regarding this process, but prudent plan administrators will begin to think through the process now.
9. Review your plan documents, SPDs and related communication materials (e.g., online summaries) to determine what (if any) changes are necessary due to the Act.
10. Find out from your payroll administrator whether they can help you track and maintain the payroll information necessary to fulfill your notice obligations (amount of payroll taxes offset by the Subsidy, etc.).
11. Implement a procedure for sending out notices that the premium assistance is about to be exhausted. Employers should notify AEIs in advance of their COBRA premium increase after the premium assistance is exhausted. Such notice would be provided, for example, upon exhaustion of the maximum nine month premium assistance period, or if the AEI becomes eligible for other coverage under a group health plan or Medicare.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

## Members of Alston & Bird’s Employee Benefits & Executive Compensation Group

Robert A. Bauman  
202.756.3366  
[bob.bauman@alston.com](mailto:bob.bauman@alston.com)

James S. Hutchinson  
212.210.9552  
[jamie.hutchinson@alston.com](mailto:jamie.hutchinson@alston.com)

Andrea Prather  
202.756.3354  
[andrea.prather@alston.com](mailto:andrea.prather@alston.com)

Saul Ben-Meyer  
212.210.9545  
[saul.ben-meyer@alston.com](mailto:saul.ben-meyer@alston.com)

Lindsay Jackson  
202.756.3002  
[lindsay.jackson@alston.com](mailto:lindsay.jackson@alston.com)

Nancy B. Pridgen  
404.881.7884  
[nancy.pridgen@alston.com](mailto:nancy.pridgen@alston.com)

Philip C. Cook  
404.881.7491  
[philip.cook@alston.com](mailto:philip.cook@alston.com)

David C. Kaleda  
202.756.3329  
[david.kaleda@alston.com](mailto:david.kaleda@alston.com)

Thomas G. Schendt  
202.756.3330  
[thomas.schendt@alston.com](mailto:thomas.schendt@alston.com)

Patrick C. DiCarlo  
404.881.4512  
[pat.dicarlo@alston.com](mailto:pat.dicarlo@alston.com)

Laurie Kirkwood  
404.881.7832  
[laurie.kirkwood@alston.com](mailto:laurie.kirkwood@alston.com)

John B. Shannon  
404.881.7466  
[john.shannon@alston.com](mailto:john.shannon@alston.com)

Ashley Gillihan  
404.881.7390  
[ashley.gillihan@alston.com](mailto:ashley.gillihan@alston.com)

Johann Lee  
202.756.5574  
[johann.lee@alston.com](mailto:johann.lee@alston.com)

Maya D. Simmons  
404.881.4601  
[maya.simmons@alston.com](mailto:maya.simmons@alston.com)

David R. Godofsky  
202.756.3392  
[david.godofsky@alston.com](mailto:david.godofsky@alston.com)

Blake Calvin MacKay  
404.881.4982  
[blake.mackay@alston.com](mailto:blake.mackay@alston.com)

Carolyn E. Smith  
202.756.3566  
[carolyn.smith@alston.com](mailto:carolyn.smith@alston.com)

Anna Grant  
404.881.7124  
[anna.grant@alston.com](mailto:anna.grant@alston.com)

Emily W. Mao  
202.756.3374  
[emily.mao@alston.com](mailto:emily.mao@alston.com)

Michael L. Stevens  
404.881.7970  
[mike.stevens@alston.com](mailto:mike.stevens@alston.com)

Anne Tyler Hamby  
404.881.4839  
[annetyler.hamby@alston.com](mailto:annetyler.hamby@alston.com)

Sean K. McMahan  
404.881.4250  
[sean.mcmahan@alston.com](mailto:sean.mcmahan@alston.com)

Laura G. Thatcher  
404.881.7546  
[laura.thatcher@alston.com](mailto:laura.thatcher@alston.com)

Amy S. Heppner  
404.881.7272  
[amy.heppner@alston.com](mailto:amy.heppner@alston.com)

Michael G. Monnolly  
404.881.7816  
[mike.monnolly@alston.com](mailto:mike.monnolly@alston.com)

Katherine A. Tritschler  
404.881.7582  
[katie.tritschler@alston.com](mailto:katie.tritschler@alston.com)

John R. Hickman  
404.881.7885  
[john.hickman@alston.com](mailto:john.hickman@alston.com)

Craig R. Pett  
404.881.7469  
[craig.pett@alston.com](mailto:craig.pett@alston.com)

Kerry T. Wenzel  
404.881.4983  
[kerry.wenzel@alston.com](mailto:kerry.wenzel@alston.com)

H. Douglas Hinson  
404.881.7590  
[doug.hinson@alston.com](mailto:doug.hinson@alston.com)

### ATLANTA

One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424  
404.881.7000

### CHARLOTTE

Bank of America Plaza  
Suite 4000  
101 South Tryon Street  
Charlotte, NC 28280-4000  
704.444.1000

### DALLAS

Chase Tower  
Suite 3601  
2200 Ross Avenue  
Dallas TX 75201  
214.922.3400

### LOS ANGELES

333 South Hope Street  
16th Floor  
Los Angeles, CA 90071-3004  
213.576.1000

### NEW YORK

90 Park Avenue  
New York, NY 10016-1387  
212.210.9400

### RESEARCH TRIANGLE

Suite 600  
3201 Beechleaf Court  
Raleigh, NC 27604-1062  
919.862.2200

### SILICON VALLEY

Two Palo Alto Square  
Suite 400  
3000 El Camino Real  
Palo Alto, CA 94306-2112  
650.838.2000

### VENTURA COUNTY

Suite 215  
2801 Townsgate Road  
Westlake Village, CA 91361  
805.497.9474

### WASHINGTON, D.C.

The Atlantic Building  
950 F Street, NW  
Washington, DC 20004-1404  
202.756.3300

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