

**2009 American Recovery & Reinvestment Act (ARRA) Under COBRA**

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  - Cafeteria, Flex, COBRA, HRA, Transit, HSA
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**Overview**

- COBRA and the new ARRA
- Assistance Eligible Individuals (AEIs)
- The Subsidy – Premium Assistance
- Benefits Covered Under ARRA
- Extended Election Period
- How the Money Works
- Notices
- Non-compliance Penalties
- Questions

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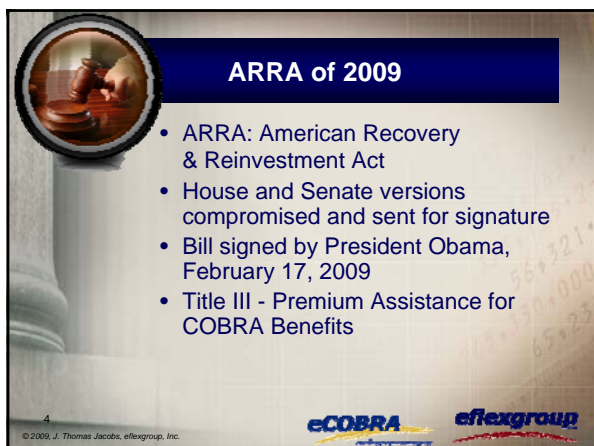
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**ARRA of 2009**

- ARRA: American Recovery & Reinvestment Act
- House and Senate versions compromised and sent for signature
- Bill signed by President Obama, February 17, 2009
- Title III - Premium Assistance for COBRA Benefits

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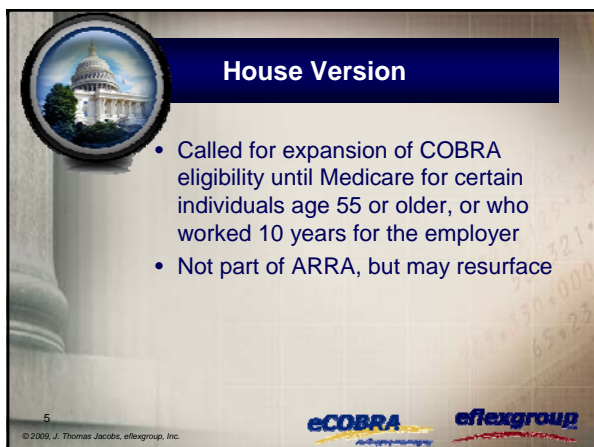
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**House Version**

- Called for expansion of COBRA eligibility until Medicare for certain individuals age 55 or older, or who worked 10 years for the employer
- Not part of ARRA, but may resurface

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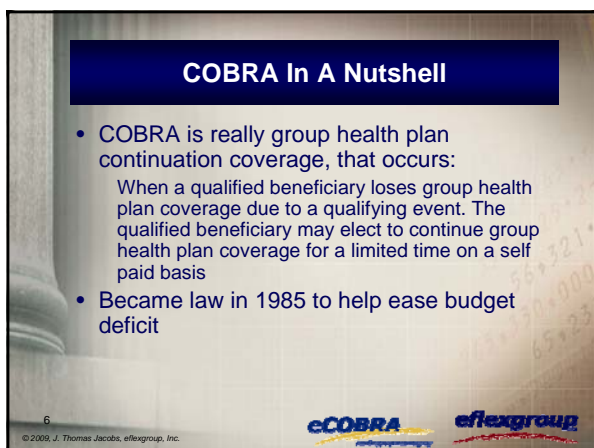
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**COBRA In A Nutshell**

- COBRA is really group health plan continuation coverage, that occurs:  
When a qualified beneficiary loses group health plan coverage due to a qualifying event. The qualified beneficiary may elect to continue group health plan coverage for a limited time on a self paid basis
- Became law in 1985 to help ease budget deficit

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## COBRA Intent

Why was it passed?

- 43 million (at one point) were uninsured
- When the uninsured do not pay claims, there is massive cost shifting to the insured population and Feds
- 75% of uninsured are between jobs
- Main purpose was to stop the bleeding and keep costs on former employer's health plan
- Paid by qualified beneficiary (QB)

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## American Recovery & Reinvestment Act of 2009

- Address economic turmoil
- Address increasing layoffs and increasing number of uninsured
- Encourage unemployed to get health coverage, with government picking up 65% of the premium
- Require IRS and DoL to provide model notices and guidance
- Intent: assist QBs in maintaining health insurance policies while out of work

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## American Recovery & Reinvestment Act of 2009

- Provides for a government-funded **COBRA premium assistance equal to 65%** of the COBRA premium for certain qualified eligible COBRA beneficiaries, for up to 9 months
- The full COBRA payment by the QB is deemed made when the QB pays 35% of the COBRA premium to the employer



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**American Recovery & Reinvestment Act of 2009**

- In most cases, coverages under the Act commence March 1, 2009
- Assistance available for period of coverage beginning on or after February 17, 2009
  - “Period of Coverage” means a monthly or shorter period of coverage for which premiums are charged

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**American Recovery & Reinvestment Act of 2009**

- COBRA premium defined as insurance premium plus 2% administration fee
- Employer pays full insurance premium to carrier
- Employer may claim 65% of COBRA premium as a payroll tax credit on next filing (941) with the government

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**Assistance Eligible Individuals**

- ARRA subsidy only available to “Assistance Eligible Individual” (AEI), as defined by the Act.
- AEI: any qualified beneficiary entitled to COBRA coverage by virtue of the covered employee’s involuntary termination of employment between September 1, 2008 and December 31, 2009
- Gross misconduct exception

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### Assistance Eligible Individuals

- QBs eligible as a result of covered employee's involuntary termination between September 1, 2008 and February 16, 2009, but:
  - Failed to make a COBRA election
  - Have yet to make a COBRA election
  - Elected COBRA and lost coverage prior to Enactment Date
- May elect COBRA for prospective COBRA coverage and receive subsidy for up to 9 months

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### Assistance Eligible Individuals

Four ways to think about it:

- 1) Those who could have elected, or did but are not on COBRA now
- 2) Those who are on COBRA now
- 3) Those who are still within COBRA election period, but haven't elected yet  
*Two election options!*
- 4) Those who will have QE dates from now through December 31, 2009

Examples to follow...

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### Assistance Eligible Individuals

- Recapture for higher income individuals
  - Incomes over \$125,000 (\$250,000 joint) have subsidy recaptured when filing annual personal tax forms
  - Phase in of recapture between \$125,000 and \$145,000 (\$290,000 for a joint return)
- Assistance can be waived
  - If waived, not an AEI, just regular COBRA
  - Must notify in writing

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## Involuntary Termination

- Examples of IT – Employer initiated
  - “You’re fired!” -Donald Trump
  - Poor job performance
  - Misconduct
  - Lay offs
  - Etc.
- Not IT – Not employer initiated
  - “I quit!” -Colin Powell
  - Death of covered employee
  - Divorce, ceasing to become a dependent
  - Etc.

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## The Subsidy - Premium Assistance

- 65% of COBRA premium
  - QB pays 35% of COBRA premium
  - QB premium can paid by a third party
- Applies for periods of coverage beginning on or after the enactment date
- Available for up to 9 months of coverage



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## The Subsidy - Premium Assistance

Subsidy may end earlier if:

- AEI becomes *ELIGIBLE* for certain other group health coverage or Medicare
  - AEI MUST report to the former employer
  - 110% penalty
  - Dental, vision, EAP, HFSA, on-site medical doesn't count
- AEI's COBRA coverage otherwise ends
  - After the maximum coverage period if COBRA elected



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## The Subsidy - Premium Assistance

Severance or employer-paid premiums

- No subsidy for premiums employer pays on behalf of QB
- If Employer pays 100%: no subsidy
- If Employer pays 50%:
  - QB pays 35% of the 50%
  - Employer gets a payroll tax credit for 65% of the 50%
  - Will force a change in a number of severance deals

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## PEOs and the Subsidy

- Professional Employer Organizations
- W-2 employers – carry the responsibilities as employers under ARRA
- Plan types:
  - PEO sponsored plans: same rules, 941 tax credit can be claimed as soon as the AEI's premium is received
  - Client sponsored plans: same rules as long as PEO is the W-2 employer

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## PEOs and the Subsidy

- Extended election period: ARRA notices must go out to all QE QBs 9/1/08 to present
  - Challenge: getting info from worksite employer clients re involuntary terms
- 941 reports – many PEOs are daily
- Work with COBRA administrator closely
  - Timing of receipt of premiums

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## Benefits Covered under ARRA

Plans of regular employers subject to COBRA:

- Group health plans of private sector, state and local government employers
- Federal government plan
- State program providing comparable coverage
  - i.e., state 'mini-COBRA' laws
- Health, Vision, Dental, EAP, etc.
- Health Reimbursement Arrangements (HRAs) ?
- Exceptions: ARRA doesn't apply to:
  - HFSAs under Section 125 Cafeteria Plans
  - Church plans

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## Benefits Covered Under ARRA

Employer has **option** to allow AEI to select other available benefits

- Original rule: What you had is what you get
- Now: focus on major medical
- Coverages offered to active employees
- Plan administrator has 60 days to give notice; AEI has 90 days after the notice to elect



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## Benefits Covered Under ARRA

- Optional other available benefits can't:
  - Be only dental, vision or EAP
  - Be Health FSAs
  - Be on-site medical or wellness care
  - Have a premium that's more than the premium for coverage the AEI originally had
- Information must be included in notices

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**Extended Election Period**

AEI: Could have elected, or did, but not on COBRA now:

- QB doesn't have election in effect as of Enactment Date (ED)
- Employer has 60 days from ED to send ARRA notice
- QB has 60 days to elect, and does so
- Employer must authenticate QB's eligibility as an AEI and that there was an involuntary termination
- HIPAA 63-day gap in coverage rule is waived

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**Extended Election Period**

AEI: Could have elected, or did, but not on COBRA now:

- ER must certify that QB is an AEI
- AEI's coverage begins 3/1/09; subsidy goes for 9 months. AEI can continue COBRA up to 18 months following QE date, paying 100% of the COBRA premium (no reach back)
- March and April premiums: catch up rule
  - If AEI pays full premium, employer must reimburse or provide a credit, in some cases within 60 days
- Employer must notify AEI that subsidy is ending
- Employer must notify that coverage is ending

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**Extended Election Period**

On COBRA now:

- Employer sends ARRA notice; may be eligible for COBRA premium subsidy
- For those involuntarily terminated, subsidy begins March 1, 2009, for 9 months
- QB may contest determination of voluntary term by filing a complaint with the DoL
  - Special 15-day fast track, trial de novo, court on appeal must defer to the ALJ
- Employer must notify AEI that subsidy is ending
- Employer must notify that coverage is ending

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## Extended Election Period

Within COBRA election period, but haven't yet elected:

- Employer sends ARRA notice; may be eligible for COBRA premium subsidy
- Employer must certify that QB is an AEI
- QB that is an AEI has two options:
  1. Elect regular COBRA coverage, pay premiums back to QE date, get subsidy for 9 months starting 3/1/2009, finishing out COBRA paying 100% of the COBRA premium
  2. Elect to commence COBRA coverage on 3/1/2009, get subsidy for 9 months starting 3/1/2009, finishing out COBRA paying 100% of the COBRA premium
- Subsidy and coverage ending notices must be sent

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## Extended Election Period

QE dates now through December 31, 2009

- COBRA notice must go out in accordance with regular COBRA timeframes, including ARRA language
- QB has 60 days to elect, and does so
- Employer must authenticate QB's eligibility as an AEI and that there was an involuntary termination
- AEI commences coverage, getting subsidy for 9 months
- Employer must notify AEI that subsidy is ending
- Employer must notify that coverage is ending

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## "Follow the money" -Deep Throat

- Employer collects 35% of COBRA premium from AEI
- No reimbursement until AEI pays 35% of the COBRA premium
- Employer pays 100% of insurance premium to the carrier
- Payroll taxes in the employer-paid amount deemed to have been paid
- Employer takes reimbursement tax credit when filing payroll taxes – Form 941

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**“Follow the money”** -Deep Throat

- If premium amount is greater than the payroll tax liability, employer can receive credit or refund as overpayment of payroll taxes
- Overstatement of the amount reimbursed treated as underpayment of payroll taxes; employer assessed penalty which will be collected
- Employer usually the entity that is reimbursed
- Carriers may be responsible entity under “mini-COBRA” coverages in many states

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**Notices**

- Additional ARRA notice
  - Must notify of availability of premium reduction
  - Must notify of option to enroll in different coverage, if employer offers this option
- Notice requirement satisfied by either amending the current QE notice, or by sending out separate notice
- Extended period ARRA notice

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**Notices**

- Content requirements in the ARRA
- Model notices required to be issued by DoL within 30 days of Enactment Date
- Most employers sending notices sooner to contain adverse selection
- Revisions to Initial Notices and SPDs may be necessary
- AEI must provide a Notice of Eligibility of other coverage

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## Non-Compliance Penalties

- Conference report: “A violation of the new notice requirements is also a violation of the notice requirements of the underlying COBRA provisions”
  - ERISA: \$110/day penalty for failure to provide COBRA notices
  - IRS: \$100/day in excise taxes for failure to comply
  - Civil liability

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## Non-Compliance Penalties

- DoL charged with fast-tracking complaints from potential AEIs denied AEI treatment
  - AEI requests treatment as an AEI and is denied coverage or subsidy
- Denials on a 15 business day fast-track or expedited review by DoL
  - To determine if AEI eligible
  - This is a ‘trial de novo’, or new trial without regard for any past determinations
  - Appeal of decision: Trial courts required to grant deference to judgment of ALJ that heard case at DoL level

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## Thank You

Questions

Additional resources:

New 941 form  
[www.irs.gov/pub/irs-pdf/f941.pdf](http://www.irs.gov/pub/irs-pdf/f941.pdf)

New 941 Instructions  
[www.irs.gov/pub/irs-pdf/i941.pdf](http://www.irs.gov/pub/irs-pdf/i941.pdf)

The American Recovery and Reinvestment Act of 2009  
[www.dol.gov/ebsa/pdf/COBRAPremiumReductionProvision.pdf](http://www.dol.gov/ebsa/pdf/COBRAPremiumReductionProvision.pdf)

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**Thank You**



- Questions
- Additional resources:
  - New 941 form
    - [www.irs.gov/pub/irs-pdf/f941.pdf](http://www.irs.gov/pub/irs-pdf/f941.pdf)
  - New 941 Instructions
    - [www.irs.gov/pub/irs-pdf/i941.pdf](http://www.irs.gov/pub/irs-pdf/i941.pdf)
  - The American Recovery and Reinvestment Act of 2009
    - [www.dol.gov/ebsa/pdf/COBRAPremiumReductionProvision.pdf](http://www.dol.gov/ebsa/pdf/COBRAPremiumReductionProvision.pdf)
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- All other, email:
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