

Stated Another Way: A Mini-COBRA Review (Part II)

By Rich Glass, JD



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The point of the popular game “Simon Says” is to copy only the things that are preceded by those two magic words. It can be confusing sometimes.

A similar situation occurred last year when the American Recovery and Reinvestment Act (ARRA) was enacted. It applied a 65-percent premium subsidy to both COBRA and state continuation coverage. (See ¶1286 of the *Guide*.) The IRS and the U.S. Department of Labor (DOL) issued considerable guidance to clear up any confusion, not the least of which was how to apply a federal program to a state law.

Last month, we looked at three major areas of concern for state continuation: federal preemption, small-group state continuation and post-COBRA state continuation. This month we will focus on the ARRA subsidy and health care reform as they apply to state continuation. As a reminder, the *COBRA Guide* has extensive material behind the State Laws tab (Tab 2000) on this topic, and it is important to stay current on the laws in your state (this website is a good resource: http://www.naic.org/state_web_map.htm).

The ARRA Subsidy

The ARRA subsidy program caused a ripple effect throughout many states for a simple reason. Many states provided continuation coverage with a maximum coverage period of six or fewer months. The initial maximum subsidy period was nine months (extended to 15 months by the Department of Defense Appropriations Act). Thus, to allow the maximum benefit to many Americans subject to small-employer state continuation coverage, most state legislatures amended their laws to allow for at least a nine-month period and a special election period for those who did not have coverage when ARRA was enacted. Some extended it to 18 or more months; some left it at nine months. Oregon was unusual in that it allowed its Director of

Consumer and Business Services to set special ARRA-related rules through Jan. 1, 2012. As of this writing, the ARRA subsidy program ended with qualifying events through May 31, 2010.

ARRA includes state continuation coverage in its definition of “COBRA Continuation Coverage.” Therefore, the ARRA subsidy is available for state continuation coverage of both small employers (that is, two to 19 employees) and post-COBRA large employers (that is, 20 or more employees). The IRS has also provided this clarification: state continuation coverage qualifies for the subsidy even after the employer has gone out of business and the group health plan has been terminated.

The Differences

For ARRA purposes, differences exist between COBRA and state continuation laws. First, the ARRA subsidy is essentially provided upfront to the assistance-eligible individual (AEI) and reimbursed later. For COBRA coverage, the employer is entitled to reimbursement via a payroll tax credit as reported on Form 941. For state continuation coverage, the insurance carrier is the entity entitled to reimbursement, even if the employer collects premiums for state continuation coverage.

Second, a state law may be more expansive in who is covered. For example, some states require continuation coverage for domestic partners. COBRA, however, does not require coverage of domestic partners because of the Defense of Marriage Act. ARRA uses the COBRA definition of a qualified beneficiary. The solution is that state law determines *coverage eligibility*, but ARRA determines *subsidy eligibility*.

Third, the ARRA subsidy is not viewed as taxable income for federal tax purposes.

See *Mini-COBRA Review*, p. 11

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However, each state has its own view of what constitutes income for state tax purposes. We are not aware of any states that have chosen to tax citizens on the value of the subsidy.

Fourth, the DOL provided several model notices for ARRA purposes, including a separate one for state continuation coverage. Copies of the model notices are available in ¶1360 and at <http://www.dol.gov/ebsa/cobramodelnotice.html>.

Fifth, the right to an expedited review is specifically spelled out in the ARRA law. AEIs who are denied the subsidy do not have to sue in federal court, waiting months or years for a proper hearing. Under ARRA, a subsidy denial can be submitted for expedited review, which must be concluded within 15 business days. For COBRA coverage, DOL directs the review; for state continuation, the Centers for Medicare and Medicaid Services is in charge.

In some states, a person can start on COBRA coverage and then continue on post-COBRA state continuation coverage. California, New York and Texas are such states. Because the ARRA subsidy program applies to qualifying events dating back to Sept. 1, 2008, we are currently seeing scenarios where a qualified beneficiary exhausts his or her 18 months of COBRA coverage and continues on state continuation coverage with at least one month of subsidy left. The subsidy needs to continue, but keep in mind that the entity entitled to reimbursement changes from the employer to the insurer.

In addition, keep in mind that many state continuation laws are medical-only; therefore, COBRA dental, vision and other coverage would terminate with COBRA.

Health Care Reform

When the Affordable Care Act (ACA) became law in March 2010, one of the well-documented changes was the mandate that group health plans cover adult children up to age 26, regardless of residency, level of support or income or student status. Some states already had adult children mandates in place.

Illinois, for example, mandates coverage for adult children who are veterans until age 30. New Jersey requires coverage of adult children until age 31, but imposes a residency requirement. Pennsylvania has an age-30 threshold.

The ACA requirement takes effect for plan years starting on or after Sept. 23, 2010. Adult children under age 26 who are affected by the change are entitled to a special notice and enrollment period, even if they are currently covered under COBRA because of the qualifying event of ceasing to be a dependent.

What is an employer to do if it has coverage in a state with a different coverage mandate for adult children? Simply apply a two-step process.

First, if the plan is self-insured (for example, a health flexible spending account or health reimbursement arrangement), then the state rule does not apply. Apply the ACA rule.

Second, if the plan is fully insured, then apply the rule that provides the greatest benefit. The ACA rule does not have preemption authority like COBRA has over state continuation laws.

It is sometimes said that state continuation laws mirror COBRA. That is true in most respects. Benefits and insurance professional should be aware of the differences, though, and remember that each state's set of rules will differ as well. 🏠

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