

OVERVIEW OF COBRA PROVISIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT

	CURRENT LAW	THE AMERICAN RECOVERY AND REINVESTMENT ACT (H.R. 1) ¹	COMMENTS
PREMIUM SUBSIDY			
GENERAL <i>Box 1</i>	<p>The Employee Retirement Income and Security Act of 1974 (“ERISA”), includes certain health continuation coverage rules that were added by the Consolidated Omnibus Budget and Reconciliation Act of 1985 (“COBRA”). These rules, which are commonly referred to as “COBRA”, generally allow an employee who has a qualifying event (<i>i.e.</i>, an event that causes the individual to lose group health plan coverage), to elect to continue coverage under the employer’s group health plan for up to a specified period of time (typically 18 months).</p> <p>There is no mandatory government or employer subsidy for the purchase of COBRA coverage. An employer generally may charge up to 102% of the applicable health plan’s premium (hereinafter the “COBRA premium”).</p>	<p>The American Recovery and Reinvestment Act (“Act”) provides a government-funded subsidy to eligible individuals for the purchase of most COBRA coverage. The subsidy is equal to 65% of the monthly COBRA premium charge and is available for up to 9 months. (See Boxes 4 and 6.) The subsidy must be made available by employers to individuals involuntarily terminated on or after September 1, 2008 and before January 1, 2010. (See Box 2.) The subsidy is limited to individuals who have a modified adjusted gross income (“MAGI”) of less than \$145,000 (\$290,000 for joint filers) and is subject to a phase-out beginning at \$125,000 (\$250,000 for joint filers). (See Box 7.) Individuals may make a “permanent election” to forego the subsidy. (See Box 8.)</p> <p>The premium subsidy is delivered to eligible individuals via a reduced premium charge by employers. Employers may seek a reimbursement of subsidies paid to employees by offsetting the amount of federal payroll taxes otherwise owed by the amount of any premium subsidies paid. (See Box 9.)</p> <p>The new provisions are effective for periods of coverage beginning on or after the date of enactment. (See Box 12.)</p>	<p>Employers, insurers and third party administrators will have to undertake certain timely actions to implement the mandatory subsidy provisions. These include (i) identifying subsidy-eligible individuals (see Box 2), (ii) identifying subsidy-eligible coverage (see Box 3), (iii) determining the amount of the subsidy and the duration of the subsidy period (see Boxes 4 and 6), (iv) providing the requisite notice within the specified time frame (see Boxes 10 and 11); (v) educating employees about the one-time “opt-out” election (see Box 8), (vi) seeking recoupment of subsidies granted via the provide payroll tax credit (See Box 9), and (vii) deciding whether to take advantage of certain transition relief provided under the Act (see Box 13).</p> <p>Notably, the Act does not include the House bill provision that would have allowed individuals who are at least age 55 or with at least 10 years of service to continue COBRA coverage until Medicare-eligible age. (See Box 18.)</p>
SUBSIDY-ELIGIBLE INDIVIDUAL <i>Box 2</i>	<p>N/A. An employer is not obligated to provide any subsidy for the purchase of COBRA coverage (although it may elect to do so as long as such subsidy is provided on a nondiscriminatory basis). There is no government subsidy available under current law.</p>	<p><u>Need Involuntary Termination.</u> The COBRA premium subsidy is available to individuals who have an “involuntary termination” on or after September 1, 2008 and before January 1, 2010 (hereinafter referred to as a “Subsidy-Eligible Individual”).</p> <p><u>Termination by Reason of Gross Misconduct is Disqualifying.</u> A termination for “gross misconduct” does not qualify as involuntary termination for purposes of the subsidy.</p> <p>As discussed in Box 7 below, individuals whose income exceed certain specified limits will be subject to a subsidy</p>	<p>The Act does not define what constitutes an “involuntary termination”. Thus, for many employers, the absence of a clear definition of “involuntary termination” is going to pose some difficulties.</p> <p>For example, if an individual terminates employment to avoid being laid off, is that voluntary or involuntary? Unfortunately, there is no clear “conservative” path to take on this issue. If an employer incorrectly treats a termination as voluntary, it would be violating COBRA by</p>

¹ H.R. 1, The American Recovery and Reinvestment Act of 2009 (“ARRA”), more commonly referred to as the “Stimulus Bill”, was passed by both the House and Senate on February 13, 2009 and was signed into law by President Obama on February 17, 2009.

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<p>SUBSIDY-ELIGIBLE INDIVIDUAL (CONT'D)</p> <p><i>BOX 2 (CONT'D)</i></p>		<p>“recapture” provision. Nonetheless, unless such individuals elect to opt-out of the subsidy (see Box 8 for a discussion of the one-time “opt-out” election), such individuals may qualify as Subsidy-Eligible Individuals and, thus, must be provided the subsidy.</p>	<p>overcharging for COBRA coverage. On the other hand, if an employer incorrectly treats a termination as involuntary and charges a reduced premium, such employer could be subject to certain payroll tax liability if the employer claims a payroll tax credit. (See Box 9 for more information regarding the payroll tax credit.)</p> <p>Although not entirely clear, it appears that nonspouse, nondependent beneficiaries under an employer’s group health plan (such as an employee’s nondependent domestic partner or same-sex spouse) may <u>not</u> qualify as a Subsidy-Eligible Individual. Thus, in situations where a Subsidy-Eligible Individual elects COBRA coverage for himself and a nonspouse, nondependent beneficiary, the premium subsidy will need to be prorated between the coverage attributable to the Subsidy-Eligible Individual (to which it applies) and any coverage attributable to the nonspouse, nondependent beneficiary (to which the premium subsidy does <u>not</u> appear to apply).</p>
<p>SUBSIDY-ELIGIBLE COVERAGE</p> <p><i>BOX 3</i></p>	N/A	<p><u>Includes Most COBRA Coverage.</u> The subsidy applies to all group health plan coverage that would meet the definition of COBRA continuation coverage for purposes of ERISA, the Internal Revenue Code, and the Public Health Safety Act, except (i) health flexible spending arrangements (“Health FSAs”) (see Box 15 for more information), and (ii) coverage described in ERISA section 609 (which includes coverage pursuant to medical child support orders, coverage of adopted children, and coverage of pediatric vaccines).</p> <p><u>Also Includes Required “Comparable” State-Based Continuation Coverage.</u> Subsidy-eligible coverage also includes continuation coverage required under State law that is “comparable” to COBRA continuation coverage.</p>	<p>Certain entities that are excepted from federal COBRA provisions (<i>i.e.</i>, those contained in the Code, ERISA and/or the PHSa (such as small employers) may nonetheless be required to provide the premium subsidy if they are subject to State-Based continuation coverage rules, which provide for “comparable” coverage.</p> <p>Notably, the Act does not define what constitutes “comparable” coverage. The legislative history to the Act does include some discussion thereof. Specifically, it states that comparable coverage “does not include every State law right to continue health coverage, such as a right to</p>

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<p>SUBSIDY-ELIGIBLE COVERAGE (CONT'D)</p> <p><i>Box 3 (CONT'D)</i></p>			<p>continue coverage with no rules that limit the maximum premium that can be charged with respect to such coverage.” The legislative history states that “[t]o be comparable, the right generally must be to continue substantially similar coverage as was provided under the group health plan (or substantially similar coverage as was provided to similarly situated beneficiaries) at a monthly cost that is based on a specified percentage of the group health plan’s cost[.]”</p> <p>Notwithstanding the legislative history, employers will likely need to make some difficult decisions in determining whether their group health plans constitute “comparable coverage”. Notably, as discussed in Box 9, it appears that employers who mistakenly classify a plan as subsidy-eligible, when in fact it is not, could face certain payroll tax liabilities.</p>
<p>AMOUNT OF SUBSIDY</p> <p><i>Box 4</i></p>		<p>The subsidy is equal to 65% of the applicable COBRA premium otherwise payable by an eligible individual. Thus, the employee is only required to pay 35% of the cost of qualifying COBRA coverage.</p> <p><i>Example.</i> If the applicable premium is \$1,000 and the employer charges \$1,020 (i.e., the permitted 102% of the applicable premium), the individual would be required to pay 35% of the \$1,020 amount. A responsible party (in most cases, the employer) would need to make up the difference. As discussed in Box 9 below, the Act provides that certain parties (such as employers in most instances) are permitted to recoup any premium subsidies by offsetting them against federal payroll taxes owed.</p>	<p>Although the Senate bill called for a 50% premium subsidy rate, the Act incorporates the 65% subsidy rate as contained in the earlier House bill.</p> <p>The bill appears to disadvantage employers who currently subsidize their employees’ COBRA coverage. Assume, for example, that an employer currently subsidizes 60% of a \$1,000 monthly COBRA premium. Thus, the employer pays \$600 of the premium and the qualified beneficiary pays the remaining \$400. Under the Act, the qualified beneficiary must be entitled to COBRA coverage upon a payment of 35% of the \$400 amount, i.e., \$140 (versus the unsubsidized \$1,000 premium cost). Accordingly, the employer is entitled to a payroll tax credit of only \$260 (\$400 minus \$140). This result appears to disadvantage the employer in comparison to an</p>

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<p>AMOUNT OF SUBSIDY (CONT'D)</p> <p><i>Box 4 (CONT'D)</i></p>	N/A		<p>employer who does not currently subsidize coverage because, if the employer had not subsidized COBRA coverage, the employer would have been eligible for a payroll tax credit of \$650 (i.e., 65% of \$1,000).</p>
<p>WHO PROVIDES THE SUBSIDY?</p> <p><i>Box 5</i></p>	N/A	<p>The Act does NOT require that a specific party provide the premium subsidy (e.g., employer, COBRA administrator, insurer, etc.). However, as discussed in Box 9 below, the Act includes express rules regarding who is eligible for a corresponding federal payroll tax credit that can be used to offset the cost of premium subsidies granted to Subsidy-Eligible Individuals.</p>	<p>As discussed in Box 9 below, in nearly all circumstances the party that will have the right to the payroll tax credit will be the employer who sponsors the subsidy-eligible coverage. Thus, in most instances, it will make sense for the employer to pay the premium subsidy either directly or indirectly via their contractual relationship with an insurer, COBRA administrator, or other third party provider administrator.</p> <p>In certain limited circumstances, the payroll tax credit is payable to a multiemployer plan or an insurer (see Box 9).</p>
<p>DURATION OF SUBSIDY PERIOD</p> <p><i>Box 6</i></p>	N/A	<p><u>Maximum 9-Month Subsidy Period.</u> The subsidy is available for up to a 9-month period (the “Subsidy Period”) for Subsidy-Eligible Individuals who elect COBRA coverage. The duration of the Subsidy Period with respect to a given individual begins on the “Start Date” and closes on the “End Date” as set forth below:</p> <p><u>Subsidy Period Start Date.</u> The Subsidy Period begins on the later of:</p> <ol style="list-style-type: none"> 1. The coverage period that begins immediately after an individual’s involuntary termination (e.g., the first day of the month following their involuntary termination for employers that provide plan coverage on a monthly basis); OR 	<p>The Act incorporates a shorter 9-month subsidy period rather than the 12-month subsidy period provided for in the versions of the bill that passed both the House and Senate.</p> <p>Employers and administrators should carefully compute the Start Dates and End Dates of the Subsidy Period given the complex nature of the computation.</p> <p>It seems unlikely to us that the End Date will turn on the occurrence of criteria 3 or 4 given that the maximum Subsidy Period is only 9 months in comparison to the general 18-month COBRA coverage period or the Modified</p>

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<p>DURATION OF SUBSIDY PERIOD (CONT'D)</p> <p><i>Box 6 (CONT'D)</i></p>		<p>2. The first date of the first coverage period that begins on or after the enactment of the Act (see Box 12 below for more information).</p> <p><u>Subsidy Period End Date:</u> The Subsidy Period ends on the earliest of:</p> <ol style="list-style-type: none"> 1. The close of the ninth month following the “Start Date”; 2. The date upon which a Subsidy-Eligible Individual becomes eligible for coverage under Medicare or another major medical group health plan; 3. The termination of the general COBRA coverage period (typically 18 months) that applies with respect to the Subsidy-Eligible Individual; and 4. For Subsidy-Eligible Individuals who elect COBRA coverage pursuant to the extended election window, the termination of their Modified COBRA Coverage Period. (See Box 10 below for more information.) <p>For purposes of this provision, a major medical group health plan does not include “Excluded Lower-Cost Coverage Options” (see Box 14 for description thereof).</p>	<p>COBRA Coverage Period (see Box 10 below), which is likely to exceed at least 10 months.</p> <p>Regarding the Start Date, criteria 2 is likely to only apply to Subsidy-Eligible Individuals who have an involuntary termination prior to the Act’s enactment date.</p>
<p>SUBSIDY RECAPTURE FOR INDIVIDUALS WITH INCOME EXCEEDING STATED LIMITS</p> <p><i>Box 7</i></p>	N/A	<p>If a Subsidy-Eligible Individual receives a subsidy in a given year and such individual’s modified adjusted gross income (“MAGI”) exceeds \$145,000 (\$290,000 for joint returns), then, under the Act, the amount of any subsidy received must be added to the amount of federal income tax owed by the individual. Notably, the Act does provide a small window of proportional phase-in for the subsidy recapture for individuals whose MAGI is between \$125,000 and \$145,000.</p>	<p>The conference report makes clear that if an individual’s subsidy period crosses tax years (for example, tax years 1 and 2) and he is subject to the “recapture” for premium subsidies received in just one of those tax years (such as year 1), he is not necessarily subject to the recapture for the other tax year unless his MAGI also exceeds the stated limits for that specific tax year.</p>

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<p>ONE-TIME PERMANENT “OPT-OUT” ELECTION</p> <p><i>Box 8</i></p>	N/A	<p>Individuals who expect to be subject to the subsidy “recapture” rule (see Box 7) may make a “permanent election” to opt-out of the subsidy by notifying the entity that is responsible for providing the subsidy (such as the employer) of the decision to opt out of the subsidy.</p> <p>The conference report makes clear that the “opt-out” election is made separately by each qualified beneficiary (who could be a Subsidy-Eligible Individual). Put differently, an individual’s spouse and qualifying dependents have their own “opt-out” election.</p>	<p>Because the “recapture” amount is equal to the subsidy paid (see Box 7), and is not subject to interest or other penalties/additions, Subsidy-Eligible Individuals might be wise to accept the subsidy (versus opting out) if there is any possibility that their MAGI will not exceed \$145,000 (\$290,000) for joint filers. This is especially so because it appears that if an individual opts out of the subsidy but later determines that his MAGI is within the stated limits, he cannot recoup the subsidy at that time (such as via a tax credit on his Form 1040).</p> <p>Although unclear, it appears that an individual’s election to forego the subsidy is only applicable with respect to a given employer and does not apply to an unrelated third party employer.</p> <p>The Act states that the permanent opt-out election must be made “at such time and in such form and manner as the Secretary of the Treasury may prescribe.” Thus, in the short term, and prior to the issuance of guidance on the issue of “opt-out”, employers will likely need to make some decisions as to what they will deem to be a valid opt-out election. There will also be issues that likely arise regarding how and/or whether a former employee can waive the subsidy for all qualified beneficiaries.</p>
<p>PAYROLL TAX CREDIT</p> <p><i>Box 9</i></p>		<p>The Act provides a federal payroll tax credit to certain parties to offset the cost of premium subsidies granted to eligible individuals.</p> <p><i>Only Certain Parties Are Eligible for the Credit – It Will Usually Be the Sponsoring Employer, But Not Always.</i> The Act includes express rules regarding who is eligible for the payroll tax credit. With two exceptions, the party that is eligible for the payroll tax credit is the employer that sponsors the subsidy-eligible coverage at issue. The two exceptions are as follows.</p>	<p>Employers will need to revise their payroll systems to account for this new payroll tax credit.</p> <p>Notably, the Act states that “any overstatement of the reimbursement to which a person is entitled... shall be treated as an underpayment of payroll taxes[.]” Thus, misclassifying an individual as subsidy-eligible (for example, because the employer incorrectly believed he was involuntarily terminated) would likely constitute</p>

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<p style="text-align: center;">PAYROLL TAX CREDIT (CONT'D)</p> <p style="text-align: right;"><i>BOX 9 (CONT'D)</i></p>	<p>N/A</p>	<p>First, In the case of subsidy-eligible coverage that is sponsored by a multiemployer plan, the plan itself is eligible for the payroll tax credit, not the employers who participate in the plan. Second, in the case of subsidy-eligible coverage that is fully-insured coverage and is subject to the Act's provisions by application of a state-based continuation coverage rule, the party that is eligible for the payroll tax credit is the insurer of the underlying plan versus the sponsoring employer.</p> <p><i>Credit is "Refundable" if Subsidies Exceed Payroll Taxes.</i> If the premium subsidies exceed the entity's federal payroll tax liability, the Act states that "the Secretary shall credit or refund such excess in the same manner as if it were an overpayment of [payroll] taxes."</p> <p><i>Subsidy First, Payroll Tax Credit Second.</i> The Act makes clear that a payroll tax credit/reimbursement cannot be obtained before a premium subsidy is granted to a Subsidy-Eligible Individual.</p> <p><i>Specific Information That Must Be Remitted to the IRS to Secure Subsidy Reimbursement.</i> In order to receive the applicable payroll tax credit/refund, the following information must be remitted to the IRS in connection with the deposit of payroll taxes:</p> <ol style="list-style-type: none"> 1. An attestation of involuntary termination of employment for each employee for which a reimbursement is claimed; 2. A report of the amount of payroll taxes offset for the applicable reporting period; 3. A report of the estimated offsets of such taxes for the subsequent reporting period; and 4. A report containing the taxpayer identification numbers of all covered individuals and their qualified beneficiaries, the amount of any subsidy reimbursed with respect thereto, and a designation as to whether the subsidy was for coverage of 1 individual or 2 or more individuals. 	<p>an "overstatement". Thus, care should be taken to both accurately classify individuals as subsidy-eligible and to correctly compute the requested subsidy reimbursement.</p> <p>As noted, in most instances the party that is eligible for the payroll tax credit is the employer sponsoring the subsidy-eligible coverage. Thus, it probably makes best sense for the employer to pay the subsidy either directly or indirectly via their contractual relationship with an insurer, COBRA administrator, or other third party provider administrator.</p> <p>Most small employers (<i>i.e.</i>, with fewer than 20 employees) sponsor fully-insured group health plans and are generally excepted from federal COBRA provisions. For these employers who find themselves subject to the Act's subsidy provisions only by reason of state-based continuation coverage rules, the Act provides that the third party insurer versus the small employer is the eligible party for purposes of the payroll tax credit. This provision seems designed to place the burden of administering the subsidy program on the insurer versus small employers.</p>

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<p style="text-align: center;">EXTENDED COBRA ELECTION PERIOD</p> <p style="text-align: right;"><i>Box 10</i></p>	<p>Generally, an individual has a 60-day window to elect COBRA coverage following the delivery of notice of COBRA election rights.</p>	<p><u>Extended 60-Day Election Window.</u> With respect to any Subsidy-Eligible Individual (i) who did not originally elect COBRA coverage within the 60-day window after involuntary termination, or (ii) who elected COBRA coverage but such coverage has lapsed (e.g., because of nonpayment of COBRA premiums), such individual now has an additional 60-day window to elect COBRA coverage following delivery of the new subsidy notice (see Box 11 below).</p> <p><u>Modified COBRA Coverage Period.</u> For Subsidy-Eligible Individuals who elect COBRA coverage by operation of this extended COBRA election window, the COBRA coverage is <u>not</u> retroactive to the date of the qualifying event, but is only retroactive to the first coverage period beginning on or after the date of the Act’s enactment (hereinafter referred to as “Modified COBRA Coverage Period”). (See Box 12 below for more information regarding the effective date.)</p>	<p>In light of the extended COBRA election period, certain individuals may get a second “bite at the apple” in terms of electing COBRA coverage. This will likely raise issues of adverse selection and negative experience rating for some employers because individuals with knowledge or anticipation of near-immediate medical claims may take advantage of this second opportunity to elect COBRA. Notably, however, any COBRA coverage elected during this extended COBRA election period is not retroactive to the date of the qualifying event. Thus, this should operate to exclude from coverage any claims incurred by an individual during the period after the qualifying event and prior to a COBRA election.</p> <p>Notably, for Subsidy-Eligible Individuals who elect COBRA coverage by operation of the extended COBRA election window, the period of time between (i) the date of involuntary termination, and (ii) the start of the Modified COBRA Coverage Period, is disregarded for purposes of determining the 63-day period applicable to pre-existing condition exclusions.</p>
<p style="text-align: center;">NEW SUBSIDY NOTICE REQUIREMENTS</p> <p style="text-align: right;"><i>Box 11</i></p>	<p>COBRA generally requires that an employer provide a series of notices to employees regarding their COBRA rights, including at the time of initial employment and upon the occurrence of a qualifying event.</p>	<p>Employers will now be required to provide notice of the new COBRA subsidy in addition to certain other information to all COBRA-eligible individuals, even if they are not Subsidy-Eligible Individuals.</p> <p><u>Persons to Whom the Notice Must Be Sent.</u> The new subsidy notice must be sent to all individuals who have/had a qualifying event on or after September 1, 2008 and before January 1, 2010.</p> <p><u>Timing.</u> Generally, the subsidy notice must be provided within the normal 60-day window following an individual’s COBRA qualifying event. With respect to individuals who had a qualifying event prior to the date of enactment., the notice must be provided to them within 60 days of enactment.</p>	<p>The Act appears to require that the new subsidy notice be sent to all individuals who have/had a qualifying event on or after September 1, 2008 and before January 1, 2010 <u>regardless of whether they are a Subsidy-Eligible Individual and regardless of whether they elected COBRA coverage as a result of the qualifying event.</u> This seems a bit odd given that individuals who are not subsidy-eligible should not need the notice; nonetheless, the Act appears to require this.</p> <p>The Act states that the Department of Labor “shall” prescribe model notice language within 30 days of enactment.</p>

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<p style="text-align: center;">NEW SUBSIDY NOTICE REQUIREMENTS (CONT'D)</p> <p style="text-align: center;"><i>Box 11 (CONT'D)</i></p>		<p><u>Mandatory Notice Provisions.</u> In addition to certain other general COBRA requirements, the notice must state:</p> <ol style="list-style-type: none"> 1. The availability of a premium reduction and subsidy, 2. The conditions of the subsidy; 3. The option to enroll in different coverage if offered (see Box 14 below); 4. A description of the extended election period (see Box 7 above for more information); 5. The obligations of the participant to notify the plan of eligibility under another plan or eligibility of Medicare; and 6. The penalty for failure to provide this notice. <p><u>Penalty Provisions.</u> Employers who fail to provide the requisite subsidy notice to Subsidy-Eligible Individuals are liable for a penalty equal to 110% of the subsidy otherwise available to such individuals. However, the Act states that no penalty shall be imposed if the notice failure is due to reasonable cause and not willful neglect.</p>	<p>Given the imminent effective date of the Act's COBRA subsidy provisions (see Box 12 below for more information), employers should immediately begin the task of drafting and/or revising existing COBRA notices to meet these new notice requirements. Employers should also begin the task of identifying those individuals who will need to receive this notice.</p>
<p style="text-align: center;">EFFECTIVE DATE</p> <p style="text-align: center;"><i>Box 12</i></p>	N/A	<p><u>The new provisions are effective for periods of coverage beginning on or after the date of the enactment of the bill.</u> Thus, for example, if the employer's health coverage is provided on a monthly basis (e.g., via monthly payroll period deductions), the subsidy provisions would be effective with respect to coverage beginning on or after March 1, 2009 for employers who provide coverage on a monthly basis.</p>	<p>The Act adopts the effective date provisions contained in the House bill. The Senate bill had included a more delayed effective date (<i>i.e.</i>, the first day of the first month beginning 30 days after enactment).</p> <p>Given the imminent effective date, responsible parties should prepare to administer the mandatory subsidy. This should include (i) identifying subsidy-eligible individuals (see Box 2), (ii) identifying subsidy-eligible coverage (see Box 3), (iii) determining the amount of the subsidy and the duration of the subsidy period (see Boxes 4 and 6), (iv) providing the requisite notice (see Boxes 10 and 11); and (v) educating employees about their "opt-out" election.</p>

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<p style="text-align: center;">LIMITED TRANSITION RELIEF</p> <p style="text-align: right;"><i>Box 13</i></p>	<p>N/A</p>	<p><u>Limited Two-Coverage Period Transition Relief.</u> The Act provides limited transition relief for employers in implementing the subsidy regime. Specifically, the Act provides that for the first and/or second coverage period that begins following the Act’s enactment (which in most cases will be limited to no more than April and May of 2009), employers may elect to charge Subsidy-Eligible Individuals 100% of the applicable COBRA premiums (hereinafter referred to as the “100% Transition Premium”).</p> <p><u>Mandatory Reimbursement to Subsidy-Eligible Individuals of Any Premium Overcharges – Employer Can Choose Either Reimbursement Option or Premium Credit Option.</u> An employer who chooses to take advantage of the limited transition relief and charge the 100% Transition Premium for a given coverage period must reimburse the affected Subsidy-Eligible Individual an amount equal to the lost subsidy.</p> <p>An employer can provide such reimbursement either (i) by paying such reimbursement to the Subsidy-Eligible Individual in “cash” within 60 days of charging the 100% Transition Premium (“Reimbursement Option”), or (ii) by providing a credit to for such amount in a manner that reduces one or more subsequent premium charges to the individual (“Premium Credit Option”) during the Subsidy Period.</p> <p><u>Premium Credit Option Has Limited Availability.</u> The Act states that an employer can only choose the Premium Credit Option if it is “reasonable to believe” that the excess premium charged during the transition period will be fully returned to a Subsidy-Eligible Individual within 180 days. Additionally, if an employer elects the Premium Credit Option and during the proceeding 180-day period it is no longer reasonable to believe that the credit will be used during such period, the employer must provide a “cash” reimbursement of any remaining amounts within 60 days of such day.</p>	<p>If an employer chooses to take advantage of the transition relief and also chooses to use the Premium Credit Option to reimburse Subsidy-Eligible Individuals, it appears that the employer must provide full credit to such individuals by the close of the Subsidy Period; otherwise, such employer will need to reimburse individuals in “cash” for any remaining overpayments at the close of their respective Subsidy Period.</p> <p>In light of the administrative complexities in using the Premium Credit Option, employers might find it easier to use the Reimbursement Option (and thus provide immediate reimbursements to individuals at the close of the transition period.).</p>

	CURRENT LAW	THE AMERICAN RECOVERY AND REINVESTMENT ACT (H.R. 1) ¹	COMMENTS
<p>OPTION TO ELECT LOWER-COST COVERAGE (CONT'D)</p> <p><i>Box 14</i></p>	<p>COBRA rules generally require that an employer make available the same type of coverage that an individual had prior to the qualifying event that gave rise to the COBRA election right. Thus, for example, if an individual had PPO coverage prior to being involuntarily terminated by his employer, his employer generally would be obligated to make available to him the same type of coverage, <i>i.e.</i>, the PPO coverage, for purposes of his COBRA election. The employer generally could not satisfy his COBRA obligations by only making available a more costly or less expensive coverage option, such as full indemnity or HMO coverages.</p>	<p><u>Option to Elect Lower-Cost Coverage Option.</u> An employer may offer Subsidy-Eligible Individuals special enrollment in a group health plan option that is different from the one he was enrolled in at the time of involuntary termination, so long as the option provides for the same or lower priced premiums than the individual's coverage as of the date of the involuntary termination (hereinafter the "Alternate Coverage Option").</p> <p><u>Excluded Lower-Cost Coverage Options.</u> The Alternate Coverage Option cannot be one of the following:</p> <ol style="list-style-type: none"> 1. Coverage providing only dental, vision, counseling, or referral services (or a combination of these); 2. A Health FSA; or 3. Coverage at an on-site medical facility that primarily consists of first-aid or prevention services. <p><u>90-Day Election Window.</u> An individual has a 90-day window from date of notice to elect an Alternate Coverage Option.</p>	<p>In deciding whether to offer this option, employers should be mindful of the likelihood that doing so could significantly alter their COBRA utilization rates (both with respect to sheer numbers and also the allocation of COBRA beneficiaries among plan offerings). There is some possibility that use of this option could lead to adverse selection issues by reason of healthier and younger individuals opting for the lower-cost Alternative Coverage Option, although whether this is likely to occur remains unclear. It is quite conceivable that more people who would otherwise opt out of COBRA coverage (and who might be younger and/or healthier) will elect COBRA and thus stay within the employer's group plan offerings.</p> <p>Notably, the Act does not expressly address whether the alternative coverage may be elected retroactively or only prospectively.</p>
<p>HEALTH FSAS</p> <p><i>Box 15</i></p>	<p>COBRA generally applies to most types of Health FSAs. Therefore, an individual who has a qualifying event, such as termination of employment, is generally permitted to elect COBRA coverage with respect to a Health FSA.</p>	<p><u>Health FSAs are Not Eligible for the Subsidy.</u> Although Subsidy-Eligible Individuals may elect COBRA with respect to their Health FSAs, the Act excepts these types of medical savings accounts from the subsidy. (See Box 3.) Thus, individuals who elect such coverage must pay the full 100% COBRA premium charged by the employer.</p> <p><u>Subsidy-Eligible Individuals Cannot elect Health FSAs as Lower-Cost Alternative Coverage Option.</u> As discussed in Box 14, a subsidy-eligible individual may generally elect COBRA coverage under a lower-cost group health plan sponsored by the employer (if the employer so allows), but cannot elect FSA-only coverage.</p>	<p>The fact that Health FSAs are excepted from the subsidy is good news for employers. This is because a contrary rule would have created additional incentives (beyond those existing under current law rules) for terminated employees to COBRA their Health FSA coverage at potential cost and detriment to employers.</p>
<p>OTHER FEDERAL AND STATE PROGRAMS</p> <p><i>Box 16</i></p>	<p>N/A</p>	<p>The Act provides that premium subsidies received by Subsidy-Eligible Individuals shall not be considered income or resources in determining an individual's eligibility for, or the amount of assistance or benefits provided under, any other public benefit provided under Federal law or the law of any State or political subdivision thereof.</p>	

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HEALTH COVERAGE TAX CREDIT (“HCTC”)			
<p style="text-align: center;">HCTC</p> <p style="text-align: right;"><i>Box 17</i></p>	<p>The Health Coverage Tax Credit (“HCTC”) provides a federal subsidy to certain trade-affected workers, retirees, and their families for the purchase of qualified health insurance. The HCTC is generally equal to 65% of the monthly premium cost of such qualified health insurance.</p> <p>To be eligible for the HCTC, an individual generally must be covered by certain qualified health insurance coverage (which can include COBRA coverage) and be eligible for (i) assistance under the Trade Adjustment Act of 2002 (“TAA”), (ii) certain nonforfeitable benefits from the Pension Benefit Guarantee Corporation (“PBGC”) benefits, or (iii) assistance as an “Alternative Trade Adjustment Act” (“ATAA”) recipient, as defined for purposes of the HCTC.</p>	<p><u>Increased HCTC and Expanded Coverage.</u> The Act makes numerous changes to the HCTC. Most notably, the Act increases the current HCTC from 65% to 80% for the purchase of qualified health insurance. The Act also provides for certain retroactive payments with respect to the increased credit and provides for continued eligibility for family members after certain events, such as death and divorce.</p> <p><u>Expanded Definitions of Eligible Individual and Qualified Health Insurance.</u> The Act broadens the class of persons who may be eligible for the HCTC by eliminating certain training requirements for TAA-eligible individuals. The Act also expands the definition of qualified health insurance by including coverage funded by a voluntary employees’ beneficiary association or “VEBA”, where established by a bankruptcy court, or authorized representative.</p> <p><u>Extended COBRA Coverage For Certain HCTC-Eligible Individuals Through 2010.</u> The Act provides for extended COBRA coverage (beyond general current law maximums) for certain HCTC-eligible individuals who have a qualifying event by reason of involuntary termination or reduction of hours of employment (hereinafter referred to as a “COBRA Alignment Event”). Specifically, the Act provides that, in the event of a COBRA Alignment Event, COBRA coverage must continue until (i) the death of a PBGC-eligible individual (and in the case of the surviving spouse or dependent child, 24 months after the death of such individual), and (ii) for the entire period an individual is otherwise TAA-eligible.</p> <p><u>Special Creditable Coverage and Notice Rules.</u> The Act also includes a special rule for TAA-eligible individuals regarding the rules for creditable coverage. New notice requirements were also added by the Act for responsible parties.</p> <p><u>Effective Date.</u> Some of the HCTC-related provisions are effective beginning as early as the date of enactment and generally remain in effect through December 31, 2010.</p>	<p>Given the numerous changes made to the HCTC, including with respect to extended COBRA coverage for certain HCTC-eligible individuals, employers will need understand these rules to ensure proper administration of required continuation coverage.</p> <p>An individual cannot avail himself of both the HCTC and the subsidy. Given the relatively more generous HCTC and the expanded continuation coverage periods that may be available to HCTC-eligible individuals, it would seem that individuals who are eligible for both would be wise to elect the HCTC over a premium subsidy.</p> <p>It is not entirely clear whether the extended COBRA coverage rules apply to continuation coverage required at the state level or as required by federal laws other than ERISA, although it appears that they do not. Thus, small employer group health plans, church plans, and plans sponsored by federal, state and local governments may be excepted from these enhanced COBRA requirements.</p>

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PROVISIONS <u>NOT</u> INCLUDED IN THE ACT			
<p>EXTENDED COBRA COVERAGE – FOR INDIVIDUALS AT LEAST AGE 55 OR WITH 10 YEARS OF SERVICE</p> <p><i>Box 18</i></p>	<p>As noted above, an individual generally may elect up to 18 months of COBRA coverage (although there are certain enumerated exceptions that allow coverage for up to 36 months, such as a qualifying event caused by disability).</p>	<p>The House bill included a provision that would have allowed individuals who are at least age 55 or with at least 10 years of service to continue COBRA coverage until Medicare-eligible age.</p> <p>The Senate bill did not include a similar provision.</p>	<p>This provision, commonly referred to as the “55 or 10” provision would have been problematic for employers for several reasons, including the fact that it could skew their health plan population to older individuals and result in adverse selection and/or negative experience ratings. Additionally, it was unclear how this provision would apply to spouses and dependents of eligible individuals, who could be much younger and thus, possibly, could have remained COBRA covered until they reached Medicare-eligible age.</p>
<p>EXTENDED COBRA COVERAGE – TO 36 MONTHS</p> <p><i>Box 19</i></p>		<p>Although not included in the initial bills that passed the House and Senate, there was much discussion about whether to include a provision that would have extended the default COBRA period from 18 months to 36 months for eligible individuals.</p>	<p>Although this provision could have magnified the effects of adverse selection that are already associated with COBRA coverage (because COBRA coverage is more commonly elected by persons with knowledge or expectation of future medical claims), it was seen as much more palatable by employers than the 55 or 10 provision.</p>

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