

CLIENT ALERT

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Important information regarding PENNSYLVANIA Mini-COBRA For PA companies with less than 20 employees

On June 10, 2009 Governor Edward G. Rendell signed [Act 2 of 2009](#) to help address the growing need to extend health care options for those newly unemployed. Employees who lose coverage under a small employer's health plan are now eligible for state Mini-COBRA benefits. These benefits extend health coverage under the employer's insurance plan.

Prior to this, only those who worked for companies employing more than 20 people were eligible for federal COBRA benefits.

This also means that the 65 percent reduction in COBRA premiums authorized under the new federal stimulus law will now apply to Mini-COBRA benefits for workers, for up to nine months.

Mini-COBRA Defined

What is "Mini-COBRA"?

Mini-COBRA, or Act 2 of 2009, gives employees of small Pennsylvania businesses (2-19 employees) who receive health insurance from their employers the right to purchase continuation health insurance after they leave employment. It allows eligible employees and dependents to purchase health insurance for nine months after their employment ends.

Why is it called "Mini-COBRA"? Is it different from federal COBRA?

Mini-COBRA is modeled after the federal COBRA law, but with some important differences. The federal COBRA law allows employees at larger businesses (20 or more employees) to purchase continuation health coverage after they leave employment for 18 months (or, in some cases, 36 months) after their employment ends. Pennsylvania's Mini-COBRA applies to employees of smaller businesses (2-19 employees) and it is for a shorter

length of time (nine months).

What is the effective date of the Mini-COBRA act?

The act goes into effect July 10, 2009.

Eligibility

Who is eligible for Mini-COBRA continuation coverage?

Covered employees and their eligible dependents who lose group health insurance coverage through a small employer as a result of a "qualifying event" are eligible for Mini-COBRA continuation coverage. The covered employees and eligible dependents must have been continuously insured under the group policy or for similar benefits under any group policy which it replaced, for three consecutive months ending with the employee's termination.

Also, continuation coverage is not available for:

- anyone who is covered or is eligible for coverage under Medicare; or
- who fails to verify that he is ineligible for employer-based group health insurance as an eligible dependent; or is or could be covered by any other insured or uninsured group health coverage arrangement and under which the person was not covered immediately prior to such termination (this last condition excludes Medical Assistance, CHIP and adultBasic).

What is a "qualifying event"?

A qualifying event is an event that would result in the loss of coverage for the covered employee or eligible dependent, including:

- death of the covered employee,
- termination of employment (either voluntary or involuntary, but not for the employee's gross misconduct),
- reduction in hours,
- divorce or legal separation,
- eligibility for Medicare,
- dependent child ceasing to be dependent,
- bankruptcy of the employer.

When will an employee be eligible for Mini-COBRA?

An employees whose group coverage terminates on or after July 10, 2009 will be eligible for Mini-COBRA.

Does Mini-COBRA apply to someone whose employment ended (i.e., the qualifying event occurs) before the effective date of the act, July 10, but whose employer is providing group coverage (keeping him on the employer's policy) until after the effective date of the Act?

The trigger for Mini-COBRA benefits is the date the employee's insurance coverage terminates. If that date is after the effective date of the act, the employee and eligible dependents will be entitled to Mini-COBRA benefits. This is the case even if the qualifying event is before the effective date of the act.

Can Mini-COBRA coverage be denied to an participant with a serious illness?

No, an employee or dependent who is eligible for Mini-COBRA coverage may not be discriminated against on the basis of any evidence of lack of insurability.

If a participant is on Mini-COBRA and then become eligible for Medicare or a new employer's health insurance coverage, must (s)he give up the Mini-COBRA coverage?

Yes. A person is no longer eligible for Mini-COBRA once they are eligible for Medicare or another group plan.

Does a Mini-COBRA participant have open enrollment rights if the nine months of continuation health insurance overlaps an open enrollment period?

A Mini-COBRA recipient is only entitled to receive continuation coverage for nine months, parallel to the coverage received under the group policy.

Are churches, government entities and/or non-profits exempt from offering Mini-COBRA benefits?

Not necessarily. The Mini-COBRA law looks to the nature of the insurance policy, rather than the nature of the employer and the employer's benefit plan. So, an employer's insurance policy is subject to Mini-COBRA if: (1)

the employer has an insurance policy that insures employees and eligible dependents for hospital, surgical or major medical benefits; (2) the persons eligible for Mini-COBRA benefits are not subject to COBRA; and (3) the employees are employed by an employer that normally employed between 2 and 19 employees on a typical business day.

What does the Act mean where it says that "Continuation shall only be available to a covered employee or eligible dependent who has been continuously insured under a group policy or for similar benefits under any group policy which it replaced, during the entire three-month period ending with such termination." Does this mean continuous coverage with the same employer or can coverage be from one employer to the next as long as there isn't a break in coverage?

Coverage must be provided by the same employer. The term "replaced" refers to the type of policy the employer offers. For example, if an employer changes the group policy within that three-month period, and the employee was covered under the old policy and the new policy over the course of the three-month period, the employee or eligible dependent would still be eligible for Mini-COBRA coverage.

Notice Requirements

How will employers find out about this new law?

The law requires insurance companies to notify policyholders (employers) of the new law within 45 days of the effective date, or by August 24, 2009. After that, the Mini-COBRA requirement will be included in new policies and renewals. To assist insurance companies, a model notice has been developed. (Model Notice Provided as an attachment)

Is there any requirement that the insurance company or employer notify the employees of this change in their health insurance coverage?

Prior to the "qualifying event" notice (see the eligibility section), there is no requirement that employers notify employees of their rights under this new law. However, the terms of the employer's contract with the insurance company may contain specifics dealing with notice of policy changes.

If an employee is terminated, how will he find out about his rights under the Mini-COBRA law?

When health coverage ends due to a "qualifying event", the employer must provide notice to the covered employee.

What is the timeframe for an employer to send this notice of a qualifying event to an employee?

Under the Mini-COBRA law, an employer must give notice of a "qualifying event" – to the plan administrator (different than the employer), the covered employee, and the insurance company – within 30 days of the "qualifying event".

Is a "Model Language Notice" going to be released for employers and insurance companies to use in communicating options to employees?

Yes. The departments of Insurance and Labor & Industry have developed a model notice available for your use in your communicating options to employees.

Will Pennsylvania's Mini-COBRA law require a special "proof of mailing" like the federal COBRA program?

The Mini-COBRA law does not specify how notices must be provided, but it is prudent to maintain proof of mailing in the event of any dispute about the timing or receipt of the notice.

We have 2-19 employees and therefore are covered by Pennsylvania Mini-COBRA. We are not terminating employee health coverage, but are changing our coverage so that it will no longer cover spouses or dependents. Is a plan change a qualifying event for Mini-COBRA coverage for the spouses and dependents?

No, a change in the employer's benefit plan does not constitute a qualifying event for Mini-COBRA coverage.

If an employer does not comply with the Mini-COBRA law, what are the penalties?

There are no specific penalties laid out in the Mini-COBRA law. However, to the extent any person or entity is performing activities in the business of insurance, it is subject to the penalties set forth in the Pennsylvania insurance laws. Employers may be subject to additional penalties by the Department of Labor & Industry or by the federal Department of Labor.

Premium Assistance

Details about the premium assistance program are available from the Internal Revenue Service (IRS) and the Centers for Medicare & Medicaid Services (CMS). See, for example, Notice 2009-27 [<http://www.irs.gov/pub/irs-drop/n-09-27.pdf>] and "Helpful Information About State Continuation Coverage ("Mini-COBRA" Programs) and the American Recovery and Reinvestment Act of 2009 (ARRA)" [http://www.cms.hhs.gov/COBRAContinuationofCov/Downloads/Helpful_Information_State_COBRA_ARRA.pdf]

Will employees eligible for Mini-COBRA continuation benefits be eligible for premium assistance under the federal stimulus law, known as ARRA (the American Recovery and Reinvestment Act of 2009)?

Yes. The federal stimulus law provides that employees eligible for continuation coverage under comparable state Mini-COBRA laws may be eligible for premium assistance under the federal stimulus law. Act 2 of 2009 was written to be a comparable law so that Pennsylvanians working for small employers will be eligible for this premium assistance, as long as eligibility requirements are met. To be eligible, you must have been involuntarily terminated on or after the effective date of the act (July 10, 2009) and before January 1, 2010.

How can an employee apply for premium assistance?

The notice an employer provides to an employee alerting him to the qualifying event and his right to Mini-COBRA continuation benefits will have a section on applying for premium assistance.

Will employees of small businesses terminated before July 10, but whose group coverage extends beyond July 10, be eligible for premium assistance under the federal stimulus law?

No. The trigger for premium assistance is the date of the employee's involuntary termination, even if group coverage is terminated at a later point. Note that because the premium assistance involves federal money, the final determination of eligibility for premium assistance rests with the federal Centers for Medicare and Medicaid Services.

How does the premium assistance work for an employee or dependent?

If an employee or eligible dependent qualifies for premium assistance, he will be required to pay 35% of the premium amount for Mini-COBRA continuation coverage. He will not have to pay the remaining 65% portion; that portion is covered by the federal stimulus program.

Under the premium assistance program, will a small employer have to front any of the premium?

No. A small business subject to the Mini-COBRA law that has a former employee eligible for premium assistance will not have to fund any of the premium assistance amount. The insurance company that provides health insurance for the employer will handle the financial arrangements, and will get a tax credit from the federal government for the 65% portion of the premium amount that the employee who is receiving premium assistance does not have to pay.

Who is responsible for notifying the employees of the opportunity to elect the premium assistance under ARRA?

The federal entities administering the premium assistance program have directed that the insurer is responsible for assuring that eligible employees and dependents have information on how to request treatment as an assistance eligible individual for purposes of ARRA. Note that the premium assistance provisions are included in the model notice of Mini-COBRA rights in a manner consistent with the models provided by the federal entities administering the program. (The Mini-COBRA law obligates the employer to provide notice of Mini-COBRA rights.)

Are medical spending accounts such as health savings accounts (HSAs) and health reimbursement accounts (HRAs), medical expense reimbursement accounts (MERPs), and flexible spending accounts (FSAs) eligible for premium assistance?

This depends on federal law. For example, IRS Notice 2009-27 at Q29 states that "while an HRA may qualify as an FSA under section 106(c), the exclusion of FSAs from the premium reduction is limited to FSAs provided through a section 125 cafeteria plan, which would not include an HRA."

Is the employer responsible for collecting the 35% of the employee's share of the premium or the

insurance carrier if the employee is entitled to premium assistance under the ARRA?

Yes, if the employer is the administrator of the group policy. As defined in the Mini-COBRA law, the administrator is the employer unless the employer designates someone else, by written agreement, to manage the administration of the group policy. The law specifies that the employee or eligible dependent must pay "to the administrator or its designee" the monthly contribution to continue the coverage. If the employee or eligible dependent is entitled to premium assistance under the ARRA, the employee or eligible dependent will be responsible for paying to "the administrator or its designee" 35% of the amount of contribution otherwise required to be paid to continue the coverage.

The FAQs explain that the health insurers are responsible for the 65% of premium that an employee or eligible dependent does not have to pay. But under federal COBRA, the employer has to front the 65%. Why the difference?

The federal agencies responsible for administering the premium assistance program have issued guidance making it clear that under state mini-COBRA programs, the insurer is responsible for the 65%. This is different than federal COBRA. Tax laws do not allow an employer or group health plan to receive a tax credit for a Mini-Cobra program, rather, the insurer must front the monies and therefore gets the credit. The written guidance from the federal agencies administering the program is instructive. See especially the CMS "Helpful Information" document at Q6; IRS Notice 2009-27 at page 4, ¶12; and IRS Notice 2009-27, at Q-58.

If an employee becomes eligible for Mini-COBRA coverage before December 31, 2009 and gets premium assistance, and if the premium assistance program is not extended past December 31, 2009, will the employee have to pay the entire premium for coverage after December 31, 2009?

No, as long as the Mini-COBRA continuation coverage begins before December 31, 2009, an assistance eligible individual will continue to be eligible for assistance for the full nine months of Mini-COBRA coverage, and only be responsible for 35% of his premium contribution for the duration of the nine months, subject to all the general eligibility requirements. See IRS Notice 2009-27 at Q-18. The insurer will continue to be responsible for the remaining 65%.

Timing for Electing Mini-COBRA Continuation Coverage

Once the employer gives an employee notice of his right to Mini-COBRA continuation coverage, how soon must the employee respond?

The employee or employee's dependent must give notice to the administrator (who may be the employer) of his or her election within 30 days of receiving notice of the qualifying event.

What is the timeframe for the administrator to give notice to the insurance company of the employee's or eligible dependent's election of continuation coverage under Mini-COBRA?

Once the administrator receives notice from the employee that he is electing Mini-COBRA, the administrator must in turn give notice to the insurance company of the employee's or dependent's election within 14 days of the election.

When does the continuation coverage begin? Is there a break in coverage between the end of the group coverage and the start of Mini-COBRA coverage?

The continuation coverage will begin as of the date the prior group coverage ended. There will be no break in coverage.

Benefits and Payment for Mini-COBRA Continuation Coverage

Will the Mini-COBRA continuation coverage provide the same benefits as the group policy the employee had before coverage terminated?

Yes, the continuation coverage must include any benefits provided under the group policy.

If the employee has a health savings account or other medical spending account, does the employer have to contribute to the deductible after employment is terminated?

No, so long as scheduled payments have been made, there is no ongoing requirement to contribute to the deductible while the employee or eligible dependents are receiving Mini-COBRA continuation coverage.

What is the timeframe for employees to pay for this Mini-COBRA coverage?

Employees must pay for the coverage on a monthly basis.

What is the grace period for ongoing premium payments?

The grace period for premium payments under Mini-COBRA is not specified in the act, but would be the same as under the group coverage being continued.

Is the nine months of continuation health insurance under Mini-COBRA the same for all qualifying events (loss of dependent status, death of employee, etc.)?

Yes, Mini-COBRA continuation health coverage extends for nine months, regardless of the nature of the qualifying event. However, if a recipient of Mini-COBRA benefits becomes eligible for Medicare or other employer-based coverage, or fails to pay premiums on a timely basis, or the group policy is terminated, then Mini-COBRA coverage will end.

Does Mini-COBRA exclude medical spending accounts such as health savings accounts (HSAs) and health reimbursement accounts (HRAs), medical expense reimbursement accounts (MERPs), and flexible spending accounts (FSAs)? What if the medical spending account is funded weekly as the expenses come in, not on a regular basis. Would this mean that the employer does not have to fund through the medical spending account for those on Mini-COBRA?

The Mini-COBRA law does not exclude medical spending accounts. However, so long as scheduled payments have been made, the law does not impose a duty on the employer to contribute to the deductible of the employee holding the medical spending account as a component of the group policy after the employee's termination date. For purposes of determining whether all scheduled payments have been made, employers must satisfy all rules, including comparable contribution and nondiscrimination rules, applicable to the medical spending account. Note: any employer funding its employees' medical spending accounts on an irregular basis should look carefully to assure that it is satisfying all laws applicable to the spending accounts, since funding on an irregular basis may run afoul of comparable contribution and nondiscrimination rules, and possibly other rules as well.

When is the initial payment due after Mini-COBRA election?

While the law does not dictate the timing of the first payment, the payment should coordinate with the timing of the employer's regular payments to the insurer for the group insurance that is being continued. This is because Mini-COBRA requires payment to be made "on a monthly basis" to the administrator or its designee. The law also states that the amount may not be more than 105% "of the group rate of the insurance being continued on the due date of each payment."

We understand that the Mini-COBRA premium may not be more than 105% of the group rate. May the insurer choose not to charge the additional 5% fee for administration of the Mini-COBRA benefit? If so, may the insurer choose not to charge it on those accounts that have a third party administrator, but charge it on those accounts that it administers directly?

The law does not dictate that the premium must be 105% of the group rate; rather, the Mini-COBRA administration portion of the employee's or eligible dependent's contribution may not be more than 5% of the premium, so that the entire "premium contribution" (premium plus administrative expense) is not more than 105% of the group rate. The administrative expense portion, if any, may be charged by whatever entity is performing the administrative services for the Mini-COBRA coverage.

QUESTIONS AND ANSWERS FOR EMPLOYEES

Should I apply for premium assistance if I think I'm going to get another job soon?

If you expect to earn, over the course of the calendar year, more than \$125,000 (\$250,000 for a married couple filing a joint tax return), any premium assistance would be recaptured by an increase in your tax liability. To avoid that tax consequence, you may delay electing, or permanently waive, premium assistance if you think you might earn this amount.

If I am on Mini-COBRA and then become eligible for Medicare or a new employer's health insurance coverage, will I still be able to get premium assistance?

No. You are no longer eligible for Mini-COBRA if you are eligible for Medicare or another group plan, and, if you are getting premium assistance for your Mini-COBRA, you must notify the insurance company to avoid being subject to a penalty of 110 percent (110%) of the amount of any premium assistance.

If I apply for premium assistance and am denied, may I appeal?

Yes, you may appeal a denial of premium assistance to the federal Centers for Medicare and Medicaid Services (CMS). A form for that purpose can be accessed at <http://www.continuationcoverage.net/>

Will premium assistance be available if I am terminated on or after January 1, 2010?

Currently, the federal stimulus law only extends the premium assistance law through December 31, 2009. However, Pennsylvania's Mini-COBRA law was written so that if the federal stimulus law is amended, premium assistance for eligible Pennsylvanians under the Mini-COBRA law will be available as long as the federal government allows.

After the premium assistance program ends, will I still be able to get Mini-COBRA benefits if my employment is terminated?

Yes, the Mini-COBRA law was written so that Mini-COBRA will continue on even after the federal stimulus premium assistance program ends.

After my nine months of Mini-COBRA coverage ends, am I still entitled to get conversion coverage or HIPAA conversion coverage?

Yes, whatever rights you have for conversion coverage or HIPAA conversion coverage will be triggered by the end of Mini-COBRA coverage.

Additional Questions

May be addressed to The Pennsylvania Insurance Department:

Toll-free, Automated Consumer Hotline: 1-877-881-6388

Harrisburg Regional Office: (717) 787-2317

Philadelphia Regional Office: (215) 560-2630

Pittsburgh Regional Office: (412) 565-5020

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