

## IRS AND DOL ISSUE ADDITIONAL COBRA SUBSIDY GUIDANCE AND MODEL NOTICES

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Recently, the Internal Revenue Service issued additional guidance related to the COBRA subsidy provided under the American Recovery and Reinvestment Act of 2009 (the "ARRA"). The Department of Labor has also recently released four model notices describing the COBRA subsidy. Employers with responsibility for sending COBRA notices need to act quickly, as some notices must be sent by April 18, 2009.

### IRS Guidance

On March 31, 2009, the IRS issued an advance copy of Notice 2009-27 (the "Notice"). The Notice contains additional guidance on involuntary terminations, assistance eligible individuals, calculation of the subsidy amount, waiving premium assistance and extended election periods with respect to the ARRA COBRA subsidy.

### *Involuntary Terminations*

The Notice provides some useful guidance on whether some of the murkier termination situations constitute involuntary terminations for purposes of the COBRA subsidy. For example, involuntary terminations can include an employer's failure to renew a contract or an employer's termination of an employee who is absent from work due to illness or disability. Involuntary terminations also include an employee's voluntary termination in response to a material negative change in employment. A material negative change in employment may include transferring a job to another state or reducing an employee's hours. However, an employee's reduction in hours, by itself, would not be considered an involuntary termination unless the employee quits in response to the reduction in hours.

An employee's voluntary resignation or retirement, in response to an employer solicitation for volunteers prior to making layoffs, is also an involuntary termination under the ARRA if the employer indicates that, after a period in which an incentive to resign or retire is provided, a certain number of remaining employees in the employee's group will be terminated.

Finally, a termination that is classified as voluntary or as a resignation can be an involuntary termination under the ARRA if the facts and circumstances indicate that, without the resignation, the employer would have terminated the employee, and the employee knew that he or she would be terminated unless he or she resigned.

### ***When the Loss of Coverage Occurs***

Under the ARRA, an assistance eligible individual (“AEI”) is someone who is eligible for and elects COBRA continuation coverage as a result of an involuntary termination between September 1, 2008 and December 31, 2009. In the Notice, the IRS emphasizes that both the involuntary termination and the loss of coverage must occur between September 1, 2008 and December 31, 2009. For example, if an employee is involuntarily terminated on December 31, 2009 but gains eligibility for COBRA continuation coverage after December 31, 2009, that employee is not an AEI because COBRA eligibility did not occur during the required timeframe. Likewise, an employee who was involuntarily terminated on August 31, 2008 and gains eligibility for COBRA on October 1, 2008 is not an AEI because the termination did not occur during the required timeframe.

The Notice also clarifies when the loss of coverage occurs in situations where employers allow terminated employees to remain on their group health plans. If the employer considers the terminated employees not to have had a loss of coverage and allows them to continue on the health plan on the same terms as active employees, the loss of coverage occurs when the employer’s provision of health coverage on the same terms as active employees ends. If the employer allows the terminated employee to remain on the employer’s health plan but treats this as COBRA continuation coverage, then the loss of coverage occurs when the employer treats the employee’s coverage as COBRA coverage.

### ***Calculation of the COBRA Subsidy***

The Notice also addresses how the subsidy is calculated. The COBRA subsidy and premium reduction are calculated based on the amount that the AEI is charged for COBRA continuation coverage. If the AEI is required to pay 102% of the premium for COBRA continuation coverage, the AEI is required to pay only 35% of the 102% amount. If the employer provides a subsidy for COBRA coverage, then the AEI is required to pay only 35% of the premium amount he or she would otherwise have to pay.

For example, an employer may provide severance benefits that include six months of COBRA continuation coverage at a cost of \$200 per month for the terminated employee. The full cost of COBRA continuation coverage is \$1,000 per month. For the first six months, the AEI is entitled to COBRA continuation coverage upon the timely payment of \$70 (35% of \$200). The employer’s payroll tax credit is \$130 (65% of \$200) for the first six months. Following the initial six-month period, the AEI must pay \$350 (35% of \$1,000) for

COBRA continuation coverage for the next three months. The employer's resulting payroll tax credit is \$650 (65% of \$1,000).

If the employer covers 100% of the cost of COBRA coverage for six months, then no premium reduction or COBRA subsidy is available for those six months. If the employer charges 102% of the premium after the expiration of the six-month period, then the AEI would be entitled to the premium reduction, and the employer could claim the subsidy, for three months.

The Notice also clarifies that employers who previously charged less than the full premium amount for COBRA continuation coverage may raise the premium amount, and the ARRA premium reduction will apply to the increased amount (assuming the employer has no prior contractual obligation).

### ***Waiving Premium Assistance***

The ARRA provides for a recapture of premium assistance for individuals whose modified adjusted gross income exceeds \$145,000 (\$290,000 for married filing jointly). The recapture is phased in for individuals with modified adjusted gross incomes in excess of \$125,000 (\$250,000 for married filing jointly).

The Notice provides that employers may not refuse to provide the premium reduction to an AEI, even if the employer knows that the AEI's income is high enough that the recapture of the premium reduction would apply. However, an AEI may permanently waive the right to receive premium assistance. To waive the premium assistance, the AEI must provide a signed and dated notification to the person who is reimbursed for the premium reduction (generally, the employer). No government agency needs to be notified of the waiver, and there is no prescribed form for the waiver. The AEI may not later rescind the waiver and is therefore ineligible to receive the premium reduction for any future period of COBRA continuation coverage in 2009 or 2010, regardless of his or her income in those years.

### ***Extended Election Periods***

The Notice also addresses the extended COBRA election period under the ARRA. Employees who were involuntarily terminated between September 1, 2008 and February 16, 2009, and either declined COBRA or elected but subsequently discontinued COBRA, are entitled to a 60-day extended election period in which they may elect COBRA at the reduced rate. This right applies to all qualified beneficiaries. For example, if an AEI who was terminated on December 1, 2008 elected self-only COBRA continuation coverage, the employee's spouse and dependent children would now be entitled to the 60-day extended election period, in which they will have a second chance to elect COBRA.

Employees who were involuntarily terminated between September 1, 2008 and February 16, 2009, and still have a period of time in which to elect COBRA continuation coverage under their original COBRA notice, should receive a notice about the extended election period. (See a description of the notices below.) If the individual elects under the original COBRA notice, coverage would extend back to the date the coverage was lost. If the individual elects under the extended election period notice, coverage would extend back to only the first period of coverage beginning on or after February 17, 2009. In either event, the COBRA subsidy would apply only for coverage periods beginning on or after February 17, 2009.

### DOL Model Notices

The Department of Labor released four model notices to be used in conjunction with the COBRA subsidy provided under the ARRA. Employers must act quickly to customize these notices, as some notices must be sent by April 18, 2009.

The following four notices were provided:

- **Model General Notice** – This notice should be sent to employees and beneficiaries who have a qualifying event between September 1, 2008 and December 31, 2009 and who either did not yet receive a COBRA notice or who received a COBRA notice on or after February 17, 2009 that did not include the information related to the premium subsidy. This notice is available at: <http://www.dol.gov/ebsa/COBRAgeneralnoticefullversion.doc>.
- **Model General Notice (Abbreviated Version)** – This abbreviated version may be sent, in lieu of the model notice described above, to employees and beneficiaries who had a qualifying event on or after September 1, 2008 and who are currently enrolled in COBRA coverage. The abbreviated notice is available at: <http://www.dol.gov/ebsa/COBRAgeneralnoticeabbreviatedversion.doc>.
- **Model Alternative Notice** – This notice is for use by employers and others who are not subject to federal COBRA law but are subject to state continuation requirements. This notice will have to be customized to reflect applicable state law. The model alternative notice is available at: <http://www.dol.gov/ebsa/COBRAalternativenotice.doc>.
- **Model Notice in Connection with Extended Election Periods** – This notice must be sent to individuals who had a qualifying event between September 1, 2008 and February 16, 2009 and either did not elect COBRA coverage or elected but subsequently discontinued COBRA coverage. *This notice must be sent by April 18, 2009.* This notice is available at: <http://www.dol.gov/ebsa/COBRAextendedelectionperiodnotice.doc>.

Employers will need to review these model notices and customize them as necessary with specific plan information. Employers should also determine all individuals who must receive a notice and the contact information for those individuals. Note that the notices must be sent to qualified beneficiaries (such as employees' spouses or dependents), not just employees, who had a COBRA-qualifying event since September 1, 2008 (including divorce, voluntary terminations, etc.).

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