



ATTORNEYS AT LAW

ADVISORY BULLETIN – APRIL 2, 2009

Employer action is required as early as April 18, 2009 to comply with the recent COBRA legislation that impacts federal and state-equivalent COBRA rules. As we explained in our previous [Advisory Bulletin](#), the American Recovery and Reinvestment Act (“ARRA”), effective February 17, 2009, created a temporary 65% federal COBRA subsidy for certain involuntarily terminated employees and their dependents. Since our last bulletin, the U.S. Department of Labor (“DOL”) has issued subsidy guidance and model notices. On March 31, 2009, the Internal Revenue Service (“IRS”) also issued extensive subsidy guidance, including a definition of what constitutes an involuntary termination of employment. The purpose of this follow-up bulletin is to summarize the additional guidance and model notices.

Model Notices

The DOL published [Q&A’s](#) (which it updates periodically) and four model notices on its [website](#) on March 19, 2009: (1) [General Notice \(Full Version\)](#), (2) [General Notice \(Abbreviated Version\)](#), (3) [Extended Election Period Notice](#), and (4) [Alternative Notice \(for State COBRA\)](#).

Each of these “notice kits” includes various forms and disclosures, such as: (1) a summary of the ARRA provisions, (2) a premium reduction request form, (3) a form for individuals to report their eligibility for other coverage to their employers, and (4) COBRA election forms. The level of necessary revisions to these notices will depend on each plan.

If you use a COBRA administrator to handle your COBRA needs (e.g. such as Ceridian and Infinisource), then they should be assisting you with the notice requirements. However, you should contact them to confirm the duties that they will be performing. Also, they will still need information such as identifying employees who were involuntarily terminated and are entitled to the Extended Election Period Notice.

If you handle your own COBRA administration in-house, then you will need to pay particular attention to these model notices.

Finally, if you are not subject to federal COBRA (generally less than 20 employees) but are still subject to a state “mini-COBRA” law, then the notification issues are not fully settled.

General Notice – Full and Abbreviated Versions

Plans subject to the federal COBRA provisions must send something similar to the general notice. The full version is for *all* qualified COBRA beneficiaries (including spouses and dependents) who (a) experience *any* qualifying COBRA event from September 1, 2008 through December 31, 2009 and (b) either have not received a COBRA election notice or received a COBRA election notice after February 17, 2009 that did not contain the required ARRA information. **The deadline for the full version is 44 days after any qualifying event.** The abbreviated version can be used in lieu of the full version if the beneficiary (a) experienced *any* qualifying COBRA event on or after September 1, 2008 and (b) elected, and still has, COBRA coverage. **The abbreviated version is due by April 18, 2009.**

Note: Under these rules, some, but not all, individuals who had qualifying events that were unrelated to an involuntary termination must also receive an ARRA subsidy notice but will not be entitled to the subsidy.

Extended Election Period Notice

Plans subject to the federal COBRA provisions must send something similar to the Extended Election Period Notice to individuals who (a) were involuntarily terminated from September 1, 2008 through February 16, 2009 and (b) either did not elect COBRA coverage or elected coverage but later discontinued it.¹ This notice, **due by April 18, 2009**, advises the recipients about the subsidy and their “second chance” right (described in our previous bulletin) to elect coverage retroactive to March 1, 2009.

Alternative Notice (for “mini- COBRA” provisions under State Law)

North Carolina and many other states have “mini-COBRA” laws for employers who are not subject to federal COBRA (e.g. employers with less than 20 employees). For fully insured plans that fall under these mini-COBRA laws, recent guidance has made it clear that the *insurer, rather than the employer*, must pay for the subsidy and is entitled to the credit. The DOL [guidance](#) indicates that it is also the *insurer’s* obligation to send something like the Alternative Notice to those who elect continuation coverage under a state’s mini-COBRA statute. Similarly, in its April 1, 2009 [press release](#), the North Carolina Department of Insurance indicated that employees will receive ARRA notices from their former “group health insurance provider.”

However, North Carolina employers who are subject to North Carolina's mini-COBRA statute should coordinate with their insurers to confirm how they will be implementing the ARRA requirements. For example, prior to the issuance of the model notices, BlueCross BlueShield of North Carolina put out the following statement in a list of [Q&A's](#):

7. I am a small group not subject to Federal COBRA, only state continuation. Who will send out these notices to my employees?

BCBSNC will be providing model notices to you once the model notices are issued. It will remain the employer's responsibility to provide notices to your employees. BCBSNC will be making any necessary changes to enrollment forms and benefit booklets.

The Alternative Notice does not refer to "second chance" rights because there is only an extended election period under the *federal* COBRA laws. However, on March 26, 2009, legislation ([Senate Bill 957](#)) was proposed in North Carolina that, if passed, would provide second chance rights under North Carolina law and require the "administrator of the group policy" to provide a second chance notice within 60 days of the passage of the bill.

Involuntary Terminations

There has been much debate about what constitutes an "involuntary" termination. On March 31, 2009, the IRS published [Notice 2009-27](#) which includes a definition of the term and detailed Q&A's. We now know the following:

- The determination is a "facts and circumstances" determination.
- An involuntary termination is the only qualifying event that qualifies for the subsidy (e.g. death, divorce, etc. do not count). Generally, an involuntary termination following another qualifying event (e.g. divorce, partial hours reduction, etc.) does not qualify.
- A "good reason" resignation due to an employer action that causes a "material negative change" in the employer-employee relationship qualifies as an involuntary termination.
- A resignation in the face of termination will be considered an involuntary termination. Specifically, "if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary."

- Absence due to injury, sickness, or disability is generally not considered an involuntary termination *unless* the employer has actually ended the employment relationship.
- A temporary furlough and a temporary lay-off with a right of recall will qualify as an involuntary termination.
- A reduction in hours is not an involuntary termination but if an employee resigns after a reduction in hours and that reduction represents a “material negative change” in the employer-employee relationship, then that termination would be considered involuntary.
- A termination for cause qualifies unless it is related to “gross misconduct.” (Employees are not entitled to COBRA at all if a termination is for gross misconduct).
- An employee who voluntarily accepts a “buy out”/severance package will be considered involuntarily terminated if the employer indicates that certain remaining employees will be terminated when the package offer period expires.

Recovering the 65% COBRA Subsidy

Employers or, as applicable, plans and insurers, are initially responsible for paying the 65% subsidy but will be reimbursed via a federal payroll tax credit. In addition to [Notice 2009-27](#), the IRS recently published ARRA guidance on its [website](#) and issued a revised [Form 941](#) (Employer’s Quarterly Tax Return). The IRS guidance indicates or reiterates that:

- The beneficiary’s full share of the premium must be collected before a credit may be claimed.
- Regardless of an individual’s income, the premium reduction must be provided unless such individual permanently waived the subsidy.
- Claiming the 65% subsidy on Form 941 is the exclusive reimbursement mechanism. If the claimed credit exceeds payroll taxes, then the IRS will refund the excess directly.²
- Although the credit is always reported on Form 941, employers can either reduce payroll tax deposits during the quarter or claim the subsidy as an overpayment at quarter-end.
- The IRS will not extend the due date for Form 941 for the first quarter of 2009.
- Credits must be claimed in the year, but not the quarter, that the subsidies are provided.
- Credits will be applied to unpaid federal employer/income taxes *before* being refunded.

- Credits have no impact on federal unemployment tax (FUTA).

The party to whom the premium is payable is the only party entitled to claim and recover the credit. As mentioned above, in the case of plan that is subject to a state's mini-COBRA statute (i.e. a fully insured employer of less than 20 employees), the premium is payable to the insurer and, thus the insurer is entitled to the credit (even if the employer collects the premiums on the insurer's behalf). In all other single employer cases, the premium is payable to the employer and, thus, the employer is entitled to the credit.

Note: An employer is not required to refund a credit to the IRS after determining that an employee was ineligible for the subsidy creating such credit because of his or her eligibility for other coverage. Instead, the employee pays the subsidy back to the IRS via the 110% subsidy tax described in our previous bulletin.

Other Matters and Issues

- Qualifying for the Subsidy. The involuntary termination *and* eligibility for COBRA coverage (i.e. loss of coverage), but not the COBRA election, must both occur between September 1, 2008 and December 31, 2009. For example, an individual will not qualify if he or she is terminated on December 30, 2009 but loses coverage on January 5, 2010.
- Multiple Subsidy Periods. An individual can receive up to 9 months of subsidies *per* involuntary termination (e.g. loss of eligibility due to a spouse's plan followed by spouse's involuntary termination, which results in another subsidy period).
- Continuation of Coverage after Termination of Employment. In order to be eligible for the subsidy there must be both an involuntary termination of employment and a corresponding loss of coverage. In some instances, without regard to COBRA, some employers voluntarily continue coverage for a certain period of time after termination of employment. COBRA is then only offered when the extended coverage terminates. In those instances, the subsidy will only be available for COBRA periods after both the involuntary termination and the end of the extended coverage. This is distinct, however, from the situation where a loss of coverage occurs at a termination of employment but, as part of a severance agreement, the employer agrees to subsidize all or part of the COBRA premium. As indicated in our previous bulletin, the rules for calculating the 65% subsidy when an employer already subsidizes a portion of the COBRA premium are complex.
- Eligibility Issue: Eligibility for Medicare or other health insurance terminates an individual's eligibility for the subsidy. However, subsidies are available until an individual can *enroll* in the other coverage (i.e. they are available during wait periods).

- **15 Day Appeal:** Those who are denied eligibility for the subsidy may request an expedited review by the DOL.³ The DOL has 15 business days from its receipt of a review request to issue a decision. An appeal form is expected on the DOL website soon. Note: The 15 day requirement is arguably unrealistic. Additionally, there is not currently a deadline for filing appeals. Therefore, reviews could actually take months to complete.
- **Penalties: Per diem penalties will be assessed for ARRA violations, including notice violations.** An employer could also be liable, retroactively, for an employee's unpaid claims and premiums if such violation prevents the employee from receiving the subsidy.

Please contact either Ken Johnson [(336) 271-5264] or David Bury [(336) 271-5266] if you have any questions concerning these new COBRA obligations.

This publication is not intended to be a source of legal advice, and should not be relied upon as legal advice on any specific matter. Moreover, information contained in this publication may have changed subsequent to its publication. If you have a questions related to this topic, please seek legal counsel regarding your particular situation.

INTERNAL REVENUE SERVICE - CIRCULAR 230 DISCLOSURE:

As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this communication (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any plan or arrangement addressed herein.

¹ Technically, a beneficiary who was involuntarily terminated sometime from September 1, 2008 through February 16, 2009 but received a non-ARRA COBRA notice on or after February 17, 2009 is entitled to two notices: (1) the full General Notice because he or she had a qualifying event sometime from September 1, 2008 through December 31, 2009 but received a non-ARRA notice on or after February 17, 2009 and (2) the Extended Election Period Notice because, but for his or her lack of a COBRA election as of February 17, 2009, he or she is eligible for the subsidy. The employer can combine information to avoid duplicate notices as long as it makes it clear that (a) the employee has two election periods, (b) each period has a different coverage start date, and (c) regardless of which election he or she exercises, the subsidy will be available for the first coverage period after February 17, 2009.

² Insurers and plans must also claim the credits using Form 941. However, their claimed credits will most likely exceed their payroll tax liabilities on a routine basis. Therefore, they will likely rely heavily on the refund process.

³ The U.S. Department of Health and Human Services will handle appeals for plans subject to state COBRA laws.