
COBRA Subsidy Update: Notice Requirements and Other Recent Guidance

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This Alert highlights:

- Recent IRS guidance liberally interpreting "involuntary termination" for purposes of determining eligibility for the COBRA subsidy
- Notice requirements, including the April 18 deadline for employers to distribute updated COBRA notices to former employees

Background. In February, President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) into law. One of ARRA's many provisions gives Assistance Eligible Individuals (AEIs), defined below, a 65 percent government subsidy for up to nine months of the premiums paid for "COBRA continuation coverage." Under ARRA, this includes both COBRA continuation coverage under federal law and, generally, State programs that provide for healthcare continuation coverage comparable to COBRA coverage.

To be an AEI and receive the 65 percent subsidy, an individual must be an employee (or the qualified beneficiary of an employee) whose employment is involuntarily terminated between September 1, 2008, and December 31, 2009; be eligible for COBRA continuation coverage; and elect COBRA coverage under the normal or special ARRA election rules (detailed in our February 20, 2009 Email Alert). Recent guidance has clarified that both the termination and the eligibility for COBRA coverage must occur between (and including) September 1, 2008, and December 31, 2009, in order for an AEI to qualify for the subsidy. While all AEIs are eligible to receive the subsidy, the amount of the subsidy is recaptured by the government from those people whose income is over a certain threshold amount.

Scope of "Involuntary Termination". Since ARRA was passed, the Internal Revenue Service (IRS) and the Department of Labor (DOL) have issued guidance on many of the issues left open by the legislation. In Notice 2009-27, the IRS clarified that for purposes of the subsidy, "an involuntary termination" is a "severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or

explicit request, where the employee was willing and able to continue performing services." Thus each of the following may qualify as an involuntary termination:

- the expiration of a employment contract;
- the resignation of an employee as a result of a material change in the geographic location of the employee's employment; and
- a lay-off or furlough that results in an involuntary reduction of hours to zero which causes a loss of health coverage.

A simple reduction in hours, such as a switch from full-time to part-time employment that results in the loss of healthcare coverage which entitles the employee to COBRA does not result in eligibility for the subsidy. However, an employee's voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee.

In the same notice, the IRS also discusses severance planning opportunities around the subsidy. For instance, employers have some flexibility in determining when the ARRA subsidy begins if they choose to delay the date of "loss of coverage" for a terminated employee, rather than running the COBRA continuation period concurrently with some part or all of an employee's severance period. In addition, if an employer previously charged less than the maximum premium allowed under the COBRA continuation provisions, the employer may increase the premium (in compliance with §54.4980B-8 Q&A-2(b)(1) and applicable notice requirements) and the subsidy will apply to the new increased premium amount.

Under ARRA, the entity to which premiums are due (either the employer, group health plan, or insurer) must treat a payment of 35% of a COBRA continuation premium by an AEI as full payment for the COBRA continuation coverage. The entity may then claim a reimbursement of the remaining 65% of the premium from the federal government through a credit against its payroll taxes. To facilitate this reimbursement process, the IRS has amended Form 941 (the Employer's Quarterly Federal Tax Return). Aside from completing the new Form 941, no additional information needs to be submitted to the government in order for the employer to claim the reimbursement.

Notice Requirement. Even though the subsidy is available only to involuntarily terminated workers, some revised COBRA notice requirements apply more broadly to all qualified beneficiaries. On March 19, 2009, the DOL released model notices that employers may use to notify COBRA qualified beneficiaries of the new COBRA subsidy. As we outlined in our February 20, 2009 Email Alert, ARRA requires that employers notify certain current and former plan participants about the COBRA premium subsidy. To that end, the DOL has made available four different notification forms, along with application forms for COBRA qualified beneficiaries to complete and return to obtain a subsidized COBRA premium. The four forms available are as follows:

1. A revised model COBRA election notice form to be sent to all COBRA qualified beneficiaries

who had or have any COBRA qualifying event on or after September 1, 2008 through December 31, 2009, who either have not yet been provided an election notice or who were provided an election notice on or after February 17, 2009, that did not include the additional information required by ARRA.

2. An abbreviated, supplemental COBRA subsidy notification form that may be sent, in lieu of the full version described above, to individuals who experienced a COBRA qualifying event on or after September 1, 2008, who already elected COBRA coverage, and are still covered.

Note that under ARRA the COBRA notification requirements will not be considered satisfied until this information regarding the subsidy is provided. Employers should aim to provide this notice as soon as possible.

3. A notification about the special election period for individuals who had an involuntary termination on or after September 1, 2008 through February 16, 2009, and who are not enrolled in COBRA coverage (either because they did not elect COBRA or because they let their COBRA coverage lapse) on February 17, 2009. **Note that under ARRA, this notice must be provided to such individuals by April 18, 2009.**

4. An alternative notification that insurance issuers must send to individuals who became eligible for continuation coverage under a state mini-COBRA law. (Issuers will need to modify this model notice as necessary to conform it to the applicable State law.)

All the model notices provide a space for the employee to attest to the fact that he or she was involuntarily terminated. There is also a space for the employer to indicate, upon receipt of the election form, whether the employee's application for treatment as an AEI has been approved or denied. If an application is denied, the employee may appeal the decision to either the DOL or the Department of Health and Human Services. The Departments are required to make a determination regarding the appeal within 15 business days.

For guidance from the IRS, visit www.irs.gov/newsroom/article/0,,id=204505,00.html, and for guidance from the Department of Labor (including access to the model notices), visit www.dol.gov/ebsa/cobra.html.

Click [here](#) to read the full text of WilmerHale's February 20, 2009 Email Alert.

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