

UPDATE: COBRA SUBSIDY – MODEL NOTICES ISSUED

The Department of Labor (DOL) issued model notices associated with the new COBRA subsidy requirement that was effective for periods of coverage beginning on or after February 17, 2009 (March 1, 2009 for most plans).

OVERVIEW

The DOL issued four different notice packages as well as initial guidance describing the notification requirements and respective forms. Each package contains the following information:

- A summary of the availability of a reduced COBRA premium,
- Forms to request the premium reduction;
- An explanation of the availability to switch coverage options (if permitted) and forms to elect the change in coverage;
- Forms for the individual to notify the plan of eligibility for other group health plan coverage or Medicare; and
- As appropriate, a COBRA election form.

The DOL did not provide a model notice of the Waiver Form for certain high income individuals electing to forgo the reduced COBRA premium in order to avoid the recapture tax on their annual tax return.

There is some confusion between the language contained in the model notices and informal DOL guidance about who gets which notice. We will attempt to clarify this in the following information, but further guidance is needed.

In particular, according to the DOL, individuals with a COBRA qualified event from September 1, 2008 through February 16, 2009 who received an election notice prior to February 17, 2009 but did not elect COBRA will not need to receive a new notification if their qualifying event does not make them eligible for the subsidy (e.g. voluntary termination, reduction in hours, death, divorce, child ceasing to be a dependent.)¹ While the DOL allows for this exception from the notice requirement for this small group of individuals, employers should be cautious as a definition of involuntary termination has not been provided and there may be instances of voluntary termination and potentially

¹ See DOL Guidance <http://www.dol.gov/ebsa/COBRAmodeInotice.html>. This information is based on informal, nonbinding comments made by DOL representatives during the *New COBRA Provisions in the American Recovery and Reinvestment Act of 2009 – Compliance Assistance Webcast* - March 24, 2009 - archived Webcast available on DOL Web site.

certain reductions in hours that may make a person eligible for the notice. As detailed in the information below, we recommend sending the ***Notice in Connection with Extended Election Periods*** to all qualified beneficiaries with qualifying events between September 1, 2008 and February 16, 2009 who did not elect COBRA, regardless of qualifying event.

GENERAL NOTICE²

The DOL created two versions of the General Notice, the ***Full General Notice*** and the ***Abbreviated Version***.

Full General Notice

The ***Full General Notice*** will satisfy the DOL's existing content requirement for the COBRA Election Notice as well as the new subsidy requirement. It must be sent to *all* qualified beneficiaries (employee, spouse, dependent children) who:

- experience a COBRA qualifying event at any time from September 1, 2008 through December 31, 2009, **regardless of the type of qualifying event**, and
- 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 on the premium reduction.

For qualified events occurring on or after February 17, 2009 (or for election notices issued on or after this date), this ***Full General Notice*** serves as the Election Notice and the Subsidy Notice for all COBRA qualified beneficiaries. The ***Full General Notice*** should be provided on a timeline consistent with traditional COBRA rules.

Abbreviated Version

An ***Abbreviated Version*** of the General Notice includes the same information as the ***Full General Notice*** regarding the availability of the premium reduction and other rights and obligations, but does not include the COBRA election information. The ***Abbreviated Version*** should be sent to:

- individuals who experienced a COBRA qualifying event on or after September 1, 2008,
- have already elected COBRA continuation of coverage, and
- still have COBRA continuation of coverage.

This ***Abbreviated Version*** must be sent to all individuals currently on COBRA based on any qualifying event that occurred on or after September 1, 2008. This notice will not satisfy the notice obligations for individuals who are not currently receiving COBRA coverage and those who become eligible for COBRA. While the DOL did not provide

² This general notice should not be confused with the "Initial General Notice" that describes COBRA rights and is provided when the covered individual (and spouse if applicable) first enrolls in group health plan coverage.

timing for delivery of this **Abbreviated Version**, informal DOL guidance recommends sending it on or before **April 18, 2009**.

Examples of when to use the *Full General Notice & Abbreviated Notice*³

- Joe has an involuntary termination with a COBRA qualifying event on April 1, 2009. Joe will need to receive the **Full General Notice** within traditional COBRA timeframes.
- Mike was involuntarily terminated on September 1, 2008. He received his COBRA election notice on October 1, 2008, elected and still had COBRA coverage on February 17, 2009. Mike will need to receive the **Abbreviated Version**.
- Sue was divorced with a qualifying event of October 1, 2008. She received her COBRA election notice on November 1, 2008, elected and still had COBRA coverage on February 17, 2009. Sue will need to receive the **Abbreviated Version**.
- Mary ceased to be a dependent on September 15, 2008 under the terms of the plan. She received her COBRA election notice on October 30, 2008 and did not elect to continue COBRA coverage. She does not need to receive the General Notice (full or abbreviated).⁴

Copies of the General Notice may be found at:

- Full General Notice
www.dol.gov/ebsa/COBRAGeneralNoticeFullVersion.doc
- Abbreviated Version
www.dol.gov/ebsa/COBRAGeneralNoticeAbbreviatedVersion.doc

NOTICE IN CONNECTION WITH EXTENDED ELECTION PERIODS

Certain individuals are eligible for a special COBRA election and enrollment opportunity for coverage provided prospectively from March 1, 2009. These individuals are assistance eligible individuals⁵ who:

- were COBRA eligible based on the involuntary termination of the employee from employment from September 1, 2008 through February 16, 2009; and
- either did not elect COBRA when initially offered or elected COBRA and subsequently discontinued the coverage.

³ All examples assume all individuals are eligible for COBRA and, for past-dated qualified events, assume receipt of a COBRA Election Notice.

⁴ Informal, nonbinding guidance from the DOL. Employers should consider providing individuals in this scenario with the *Notice in Connection with Extended Election Periods*.

⁵ In general, an *Assistance Eligible Individual* is an individual who is eligible for COBRA continuation coverage as a result of an involuntary termination of employment at any time from September 1, 2008 through December 31, 2009, and who elects COBRA coverage (when first offered or during the additional election period).

These individuals will need to receive the ***Notice in Connection with Extended Election Periods***. This notice includes information on the new COBRA election opportunity as well as the premium reduction information. It must be provided by **April 18, 2009**.

Many employers are still confused by the term “involuntary termination” as no definition has been provided from the IRS or DOL. This lack of clarity makes it challenging for employers to determine whether an individual is an assistance eligible individual entitled to the reduced COBRA premiums.

In light of this, employers may consider providing this ***Notice in Connection with Extended Election Periods*** to all qualified beneficiaries, regardless of qualified event who did not elect COBRA (or elected coverage and later dropped it) with a qualified event date of September 1, 2008 through February 16, 2009. This way, if there is confusion as to whether or not an individual is eligible for the subsidy, you at least notified them of the availability, and any discrepancy can be resolved via the DOL appeals process. The DOL indicated informally that it would not be problematic to send the ***Notice in Connection with Extended Election Periods*** to individuals where there is a question of whether or not they would qualify.

The IRS indicated that they plan to issue guidance addressing the definition of an involuntary termination. Based on informal nonbinding comments of IRS representatives, this definition may encompass all of the following scenarios:

- When an individual's hours are reduced to zero (e.g. layoff or furlough).
- An individual voluntarily retires when the employer is soliciting resignations prior to a layoff.
- Certain constructive discharge scenarios, such as closing a plan in one state and offering continuing employment to the individual in another state – if the employee does not move for the job, this may be an involuntary termination.⁶

We should see formal guidance from the IRS in the coming week. As notices are not required to be sent until April 18, 2009, employers may consider reviewing this guidance prior to sending notices for questionable situations.

Examples of when to use the ***Notice in Connection with Extended Election Periods***

- Mike was involuntarily terminated on September 1, 2008. He received his COBRA election notice on October 1, 2008 but did not elect COBRA continuation of coverage. Mike will need to receive the ***Notice in Connection with Extended Election Periods***.
- Joe was involuntarily terminated on September 1, 2008. He received his COBRA election notice on October 1, 2008 and made a COBRA election. However, he stopped paying COBRA premiums in December because coverage was too expensive (resulting in a termination of his COBRA coverage). Joe will need to receive the ***Notice in Connection with Extended Election Periods***.

⁶ Informal, nonbinding comments of Russell Weinheimer Office of Chief Counsel IRS made during the *New COBRA Provisions in the American Recovery and Reinvestment Act of 2009 – Compliance Assistance Webcast* March 24, 2009 - archived Webcast available on the DOL Web site.

- Barb voluntarily terminated employment on September 1, 2008. She received her COBRA election notice on October 1, 2008 but did not elect COBRA continuation of coverage. If there is a question whether Barb may qualify as assistance eligible individual, it is recommended that the employer send the ***Notice in Connection with Extended Election Periods***.

A copy of the Notice in Connection with Extended Election Periods may be found at: www.dol.gov/ebsa/COBRAextendedelectionperiodnotice.doc

ALTERNATIVE NOTICE (“MINI-COBRA” OR COBRA-LIKE STATE MANDATED REQUIREMENTS)

Insurance issuers (generally the carriers) that provide group health insurance coverage continuation under State law must send the ***Alternative Notice*** to assistance eligible individuals. Continuation coverage requirements vary among States, and issuers should modify this model notice as necessary to conform to applicable State law. It is anticipated that many states with mandated continuation requirements may issue state-specific notices patterned after this Alternative Notice.

California “Cal-COBRA” and Oregon continuation requirements appear to be subject to this continuation provision. Per informal guidance from the Office of the Insurance Commissioner (OIC), Washington’s continuation provisions are optional for small group plans; therefore, at this point, they are not subject to the requirement.⁷

A copy of the Alternative Notice may be found at: www.dol.gov/ebsa/COBRAalternativenotice.doc

⁷ Informal OIC comments indicated the legislature may introduce legislation this session that would make the subsidy provision under the Act available to Washington State continuation coverage for small employers (fewer than 20 employees). At this point, a bill has not been introduced.

WHO GETS WHAT?

In an effort to clarify these requirements, the following highlights common scenarios and the applicable required notice.

Scenario	Notice
Employee has an involuntary termination of employment September 1, 2008. He receives a COBRA election notice on October 1, 2008 and elects COBRA and remains on COBRA currently.	Abbreviated Version
Spouse has COBRA currently as a result of an employee's involuntary termination on September 1, 2008 (employee did not elect).	<ul style="list-style-type: none"> • Spouse receives Abbreviated Version • Employee receives Notice in Connection with Extended Election Periods
Employee is involuntarily terminated on May 1, 2009.	Full General Notice
Employee has a reduction in hours on December 1, 2008. She receives a COBRA election notice January 10, 2009, elects COBRA and remains on COBRA currently.	Abbreviated Version (even though she is not eligible to receive the subsidy)
Employee voluntarily terminates employment on December 1, 2008. He receives an election notice January 10, 2009 and does not elect COBRA. ⁸	Notice in Connection with Extended Election Periods
Employee is covered by a small group plan (< 20 employees) in a state with mandated continuation of coverage. Employee experiences an involuntary termination on May 1, 2009.	Alternative Notice (provided by insurer)

INDIVIDUAL SUBSIDY ELECTION

Individuals requesting the subsidy will make an election to receive the reduced premium (documenting their eligibility) and return this election form to the designated recipient, generally the employer or the COBRA administrator. This election form is contained in all of the notice packages. The employer or administrator will need to complete a section on the form indicating whether the individual is eligible for the reduced premium.

OFFERING THE ALTERNATIVE COVERAGE

Contained in both the **General Notice** and **Notice in Connection with Extended Election Periods** packages is language regarding the availability for an assistance eligible individual to elect alternative coverage and an election form to make such a

⁸ This is the scenario where the DOL informally indicated that the individual will not need to receive any notice as they are not an AEI and received their election notice prior to February 17, 2009. However, if there is uncertainty about whether this individual "voluntarily" terminated employment this notice should be sent.

change. Employers not offering the option to change coverage will want to remove this information when formatting the letters for use.

Employers providing this alternative coverage opportunity will need to follow the 90-day election rule and implement processes and procedures for facilitating this election change (including a discussion with any insurance carrier to confirm they will allow this change under the terms of the plan).

NOTICE OF ELIGIBILITY FOR OTHER GROUP HEALTH PLAN COVERAGE OR MEDICARE

All four notices include a document that may be used to provide written notification to the plan of the availability of other group health plan coverage or Medicare. An assistance eligible individual has the obligation to provide this notice to the group health plan to avoid a 110% penalty.

CONCLUSION

We are awaiting further guidance from the DOL and IRS on these new requirements. In particular, we are anticipating guidance and additional clarification of the notice requirements and the term “involuntary termination” for purposes of identifying assistance eligible individuals. As the notification deadline is still a few weeks away, employers may wait to see what the IRS says about the definition of an involuntary termination in order to fully understand their compliance obligations

For employers using a COBRA vendor for administration, it is important to discuss their notice process, reporting capabilities, and any new fees in connection with these new requirements.

Employers relying on the DOL notice for compliance will need to adjust the letters and include relevant information in order to create a complete and sufficient notice. This will include (but is not limited to) information on premiums (including both the full COBRA premium and the 35% premium), contact information and information about the availability of another coverage option (if applicable). Please review all the notices and update accordingly prior to sending.

We will continue to keep you posted as additional information and guidance becomes available.

RESOURCES

For more information including the archive of the DOL Webcast, see the DOL Web site: www.dol.gov/ebsa/COBRAmodeInotice.html

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