

COBRA SUBSIDY UPDATE: *SECOND WEBCAST, DOL FAQs AND SPANISH NOTICES*

Second Compliance Assistance Webcast

On April 6, 2009, the Department of Labor (DOL) and the Internal Revenue Service (IRS) hosted a second Webcast addressing the COBRA subsidy requirements contained in the American Recovery and Reinvestment Act of 2009 (ARRA). While much of this information is based on the informal comments of agency representatives, it provides some clarification on a number of issues and highlights areas where further guidance is needed. Key points from this presentation are summarized below, and an archived recording is available at www.dol.gov/ebsa/cobra.html.

- A leave related to military duty **should qualify as an involuntary termination eligible for the reduced COBRA premium**. This is a change from prior informal guidance where the IRS representative stated military leave would not qualify as an involuntary termination.¹ Formal written guidance on this issue would be welcome.
- The IRS acknowledged that their guidance on disability and involuntary termination is not clear. They reiterated that the employer must take some action to terminate the employment of the individual and the individual must be willing and able to return to work to satisfy the involuntary termination definition. This determination will be made based on the facts and circumstances of each decision. More guidance on this issue is needed.
- If an individual is eligible for the reduced premium, he or she must be allowed to pay the 35% effective March 1, 2009 and forward. The reduced premium payment of an assistance eligible individual should not be denied because the plan's systems are not "ready" to accept this type of payment.
- If the assistance eligible individual pays his or her COBRA premium on a pre-tax basis (through a cafeteria plan), the COBRA premium **is not eligible** for the 65% reduction. This is because premium payments made through the cafeteria plan are treated as employer contributions and any employer contribution is ineligible for the reduced premium.

¹ Informal comments of Russell Weinheimer (IRS). *New COBRA Provisions of the American Recovery and Reinvestment Act of 2009 Compliance Assistance Webcast*, (March 24, 2009).

- The DOL commented they are finalizing the appeals process for those individuals denied assistance eligible individual status. The DOL will require completion of an official application that will be available on their Web site. While the appeals process is initiated by the denied individual, the DOL commented that employers will have an opportunity to present their perspective as to why the reduced premium was denied. It is important that employers keep track of any subsidy denials and maintain sufficient records documenting ineligibility for the reduced premium.

DOL FAQs Updated to Clarify Model Notices

There has been much confusion regarding the recently issued Model Notices tied to the COBRA subsidy requirement under ARRA. In an effort to further clarify the requirements, the DOL posted to its Web site frequently asked questions including additional information on the Model Notices. As part of the guidance, the DOL provides examples of different fact patterns and tells us what model notice (if any) should be used in a specific situation.

We summarized the Model Notice requirements in a recent Technical Bulletin. See [Model Notices Technical Bulletin](#).

As a reminder, the DOL issued four notices:

Full General Notice

- Plans subject to the Federal COBRA provisions must send the **Full General Notice** to all qualified beneficiaries (not just covered employees) who:
 - Experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, and
 - Either have not yet been provided an election notice or were provided an election notice on or after February 17, 2009 that did not include the additional information required by ARRA.
- This notice should be sent in the same manner and timeframe as a traditional COBRA election notice would require.

Abbreviated Version

- The **Abbreviated Version of the General Notice** includes the same information as the full version regarding the availability of the premium reduction and other rights under ARRA, but does not include the COBRA coverage election information.
- It may be sent in lieu of the full version to individuals who:
 - Experienced a qualifying event on or after September 1, 2008 (regardless of the type of qualifying event),
 - Have already elected COBRA coverage, and
 - Still have it.

- **While no specific date was provided in the guidance, the DOL informally indicated this notice should be sent by April 18, 2009**

Notice in Connection with Extended Election Period

- Send the **Notice in Connection with Extended Election Period** to any assistance eligible individual (or any individual who would be an assistance eligible individual if a COBRA continuation election were in effect) who:
 - Had a qualifying event at any time from September 1, 2008 through February 16, 2009, and
 - Either did not elect COBRA continuation coverage, or elected it but subsequently discontinued COBRA.
- **Must be sent by April 18, 2009**

Alternative Notice (for use with state required continuation of coverage)

- Insurance issuers that provide group health insurance coverage must send the **Alternative Notice** to persons who became eligible for continuation coverage under state law. As continuation coverage requirements vary among states, issuers should modify this model notice as necessary to conform it to the applicable state law.

Which Notice to Use and When to Use It? (DOL Examples)

- Alice has a qualifying event on September 15, 2008. The plan provides a COBRA election notice on October 15, 2008, prior to ARRA's enactment. Alice subsequently enrolls in COBRA coverage and remains enrolled. What notice should the plan send to Alice after ARRA's enactment?
 - Alice should get an **Abbreviated Version of the General Notice** because Alice had a qualifying event during the ARRA required period (from September 1, 2008 through December 31, 2009), enrolled in COBRA coverage, and still has it. (Note: The type of qualifying event that made Alice COBRA eligible is irrelevant for purposes of this notice).

Q/A-20
- Bob had an involuntary termination of employment on October 2, 2008. The plan provides a COBRA election notice on October 31, 2008. Bob could not afford, and did not enroll in, COBRA coverage. What notice should the plan send to Bob after ARRA's enactment?
 - Bob should get a **Notice in Connection with Extended Election Period** because Bob's qualifying event was an involuntary termination of employment that occurred during the period between September 1, 2008 and February 16, 2009 (before ARRA's enactment) and Bob did not elect COBRA coverage.

Q/A-21

- Charlie has a qualifying event that is a divorce on January 6, 2009. The plan provides a COBRA election notice on January 19, 2009 that meets the requirements of an election notice under 29 CFR 2590.606-4. Charlie does not elect COBRA. Is the plan required to send a notice to Charlie after ARRA's enactment?
 - No. Charlie is not entitled to the **Full General Notice** because Charlie's election notice met the requirements of 29 CFR 2590.606-4 and was provided before ARRA's enactment. Charlie is not entitled to the **Notice in Connection with Extended Election Periods** because Charlie's qualifying event was not an involuntary termination of employment.

Q/A-22

- Diane's qualifying event was an involuntary termination of employment that occurred on January 11, 2009. The plan provides a COBRA election notice on February 22, but it does not include information regarding the premium subsidy (or other information required under ARRA). What notice should the plan send to Diane?
 - If Diane does not have a COBRA election in effect on February 17, 2009 (the date of ARRA's enactment), Diane is entitled to a **Notice in Connection With Extended Election Period.**
 - In addition, Diane is entitled to a **Full General Notice** because she had a qualifying event during the ARRA-required period (September 1, 2008 through December 31, 2009); Diane's election notice was provided on or after ARRA's enactment (that is, on or after February 17, 2009); and it did not contain the additional information required by ARRA.
 - Even though Diane's qualifying event occurred before ARRA's enactment, the election notice was provided after ARRA's enactment and did not contain the additional information required by ARRA. Diane's plan may combine information to avoid duplication, but the information should make clear that Diane has two separate election periods, each election period has a different coverage start date, and that Diane is eligible for the premium reduction for periods of coverage beginning on or after February 17, 2009, regardless of which election period Diane exercises.

Q/A-23

- Eve had an involuntary termination of employment on January 24, 2009. Prior to the qualifying event, Eve was covered by the medical and dental group health plans. The plan provided a COBRA election notice on February 26, 2009. Eve subsequently enrolls in COBRA coverage for the medical plan and still has it. Eve did not elect COBRA for the dental plan. What notice should the plan send to Eve after ARRA's enactment?
 - Eve should get an **Abbreviated Version of the General Notice** for the medical plan because Eve had a qualifying event during the ARRA-

required period (from September 1, 2008 through December 31, 2009), enrolled in COBRA coverage, and still has it. (Note: it does not matter what type of qualifying event made Eve eligible for COBRA.)

- Eve should also get a **Notice in Connection with Extended Election Period** for the dental plan because Eve's qualifying event was an involuntary termination of employment that occurred during the period between September 1, 2008 and ARRA's enactment (February 16, 2009) and Eve did not elect COBRA coverage for the dental plan. Eve's plan may combine information to avoid duplication, but the information should make clear that Eve has the opportunity to elect COBRA for the dental plan and that both the medical and dental plan are eligible for the premium reduction for periods of coverage beginning on or after February 17, 2009.

Q/A-24

Model Notices in Spanish

The DOL released versions of the new Model Notices in Spanish. While there generally is no requirement that notices be provided in Spanish, employers may provide these notices when administering COBRA to a Spanish speaking population.

RESOURCES:

- Second Compliance Assistance Webcast Archive
www.dol.gov/ebsa/cobra.html
- FAQs for Employers About COBRA Premium Reduction Under ARRA
www.dol.gov/ebsa/faqs/faq-cobra-premiumreductionER.html
- Spanish Model Notices
www.dol.gov/ebsa/COBRAmodelnotice.html

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