

Who Should Receive Which Model COBRA Subsidy Notice?

Background

On February 16, 2009, the American Recovery and Reinvestment Act (the “Act”) was enacted. This economic stimulus legislation includes a temporary COBRA continuation coverage subsidy for qualified beneficiaries who lose coverage because of an ***involuntary*** termination of employment during the period from September 1, 2008 to December 31, 2009. This subsidy also applies to the individual’s covered dependents. The Act refers to these persons as “assistance eligible individuals”. An assistance eligible individual will receive a 65% federal subsidy of the individual’s COBRA premiums for up to nine months, if the individual pays 35% of the COBRA premium. The subsidized coverage, generally, begins on March 1, 2009. The employer group health plan that provides the COBRA continuation coverage will be reimbursed for the 65% COBRA premium subsidy by a payroll tax credit or refund. The Act directed the U.S. Department of Labor (“DOL”) to issue model COBRA subsidy notices by March 19, 2009. The COBRA subsidy notices must be distributed by April 18, 2009.

Issues

This e-alert will focus on the following issues raised by the model notices:

- 1) who should receive which of three forms of model notices; and
- 2) will any guidance be provided by the Internal Revenue Service (“IRS”) with respect to the meaning, for this purpose, of “***involuntarily***” terminated employment.

Model COBRA Subsidy Notices

On March 19, 2009, the DOL issued the following three described model COBRA subsidy notices. We believe they answer the who should receive which notice question as follows:

Model COBRA Subsidy Notice	Should be Sent to:
The General Abbreviated Notice	All qualified beneficiaries who experienced a qualifying event for any reason after September 1, 2008 who elected COBRA coverage and currently have such coverage.
The Notice in Connection with Extended Election Periods (or Second Election Notice)	All assistance eligible individuals who experienced a qualifying event at any time from September 1, 2008 to February 16, 2009 and who do not for any reason currently have COBRA coverage.

The General Notice	All other qualified beneficiaries who experience a qualifying event for any reason during the period from September 1, 2008 to December 31, 2009.
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These model notices can be accessed at <http://www.dol.gov/ebsa/COBRAmodelnotice.html>.

Former employee/qualified beneficiaries, including those who *voluntarily* terminate employment during the period from September 1, 2008 to December 31, 2009 and their former covered dependents, must receive the **general notice**. Qualified beneficiaries who are assistance eligible individuals who terminated employment during the period from September 1, 2008 to February 16, 2009 should receive the Second Election Notice. Please also note that the general notice includes a check-the-box indication of whether an employer deems a termination of employment to be voluntary or involuntary.

Therefore, before the type of COBRA subsidy notice which a qualified beneficiary should receive can be determined, the employer (or, if applicable, the plan or health insurer) must determine whether an employee voluntarily or involuntarily terminated employment. This is an easy task most of the time, but there are gray areas, such as:

- constructive terminations;
- when an employee is permitted to resign;
- terminations pursuant to a voluntary open early retirement window program; and
- voluntary terminations for good reason under employment agreements.

IRS Involuntary Termination Guidance

The good news is that we understand the IRS will soon issue guidance with respect to the definition of “involuntary termination of employment” for this purpose, which hopefully will address these gray areas.

Please let us know if we can be of any assistance.

March 23, 2009

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