



Benefits Legal Update

The IRS Issues Notice on Administering the COBRA Premium Assistance Subsidy

On March 31, 2009, the Internal Revenue Service ("IRS") released Notice 2009-27 providing guidance in a question-and-answer format on the premium assistance subsidy for health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

The American Recovery and Reinvestment Act of 2009 ("ARRA") featured substantial changes to COBRA, including the creation of a temporary subsidy of COBRA premiums for individuals who are involuntarily terminated between September 1, 2008, and December 31, 2009. To be eligible for assistance, both the involuntary termination and eligibility for COBRA continuation coverage must occur between September 1, 2008, and December 31, 2009. ARRA provides for a government subsidy of 65 percent of the COBRA premiums that the terminated employees, and their qualified dependents, are required to pay, for a period up to nine months. Qualified beneficiaries may also elect to independently continue coverage and to receive the premium reduction. The COBRA premium subsidy was described in detail in our March 6, 2009 [Legal Update](#).

Involuntary Termination

One key issue not addressed in ARRA is what constitutes an involuntary termination of employment. In Notice 2009-27, the IRS defines involuntary termination as "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." Ultimately, the determination of whether an employee is involuntarily terminated is a facts and circumstances analysis.

To be eligible for the subsidy, there must be an involuntary termination of employment, not simply the involuntary termination of health coverage. Therefore, a qualified beneficiary who loses coverage due to COBRA-qualifying events other than an involuntary termination of employment—such as divorce, age-out of a dependent child, death of an employee, or the employee's absence from work due to illness or disability—is not eligible for the premium subsidy, even though they would be entitled to elect COBRA continuation coverage.

However, the IRS explained that a mere reduction in hours, unless reduced to zero, is not an involuntary termination. The IRS clarified that retirement could amount to an involuntary termination if the facts and circumstances indicated that, absent retirement, the employer would have terminated the employee and the employee had knowledge of the likelihood of termination. Severance or incentive packages used to encourage voluntary termination by an employee may be considered involuntary for ARRA purposes if it is clear insufficient participation in the voluntary program will result in terminations.

Calculation of the Premium Reduction

The Notice also sheds light on how the amount of the subsidy is determined if an employer pays all or a portion of an involuntarily terminated employee's COBRA premiums. To determine

the 35 percent share that must be paid by an assistance-eligible individual, the cost of the employee's coverage is the amount that is actually charged to such individual for COBRA continuation coverage. The Notice clarifies that if a plan that previously charged less than the maximum 102 percent premium for COBRA increases the premium to the maximum, the premium reduction will apply to the increased premium amount. Additionally, the Notice clarifies that the premium reduction is available for continuation coverage under vision-only and dental-only plans.

The premium subsidy is limited to premiums attributable to continuation coverage for assistance-eligible individuals and their qualified beneficiaries. A qualified beneficiary is the spouse of the employee or a dependent child as determined under federal law. Thus, for example, a same-sex spouse does not meet the definition of a qualified beneficiary under federal COBRA and will not be eligible for the premium reduction even though the same-sex spouse may be covered under a plan by its terms or as required by state law. To the extent that an identifiable portion of the COBRA premium is attributable to an ineligible individual, that portion of the premium is not eligible for the subsidy; however, if the cost of covering a nonassistance-eligible individual does not add to the cost of covering the assistance-eligible individual, then the cost of covering the nonassistance eligible individual is zero, and the premium subsidy applies to the full amount paid for the COBRA continuation coverage. Conversely, if the cost of covering a nonassistance-eligible individual adds to the cost of covering the assistance-eligible individual, it is the incremental cost that is ineligible for the premium reduction.

Timing of the Premium Reduction

The Notice contains a number of important insights into the timing and duration of premium reductions, including the following:

- The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009.
- While the premium reduction terminates upon the individual's eligibility for other group health plan coverage, the subsidy continues to apply during any exclusionary or waiting period for such coverage.
- The death of an involuntarily terminated employee will not end the eligibility of any qualified beneficiaries for the premium reduction.
- An assistance-eligible individual may be eligible for multiple premium reductions if the individual has multiple losses of coverage because of involuntary termination.
- An employer may not refuse to provide the premium reduction to an individual it believes to be ineligible based upon income. Thus, even where an employee's income subjects the employee to future recapture of the premium reduction, COBRA continuation coverage must be provided upon payment of the 35 percent premium unless the individual has elected the permanent waiver of the premium reduction.
- An employee's premium reduction period can begin after December 31, 2009, provided the involuntary termination and loss of coverage occurred between September 1, 2008 and December 31, 2009.
- The extended election period for electing COBRA continuation coverage is available for all individuals who are qualified beneficiaries as the result of an involuntary termination during the period from September 1, 2008, through February 17, 2009, even if they still have an open COBRA election period as of February 17, 2009. For example, if an individual is involuntarily terminated in December of 2008 and as of February 17, 2009 has not elected COBRA continuation coverage, the individual may elect and pay for COBRA continuation coverage only for coverage periods on or after February 17, 2009.

Impact of the Subsidy on State COBRA Laws

Although ARRA provides a subsidy for COBRA coverage provided under state COBRA law, the extended election period provided under ARRA only applies to a group health plan subject to federal COBRA. The Notice further explains that a state program remains eligible for the subsidy even if it requires a different period of continuation or different qualifying events.

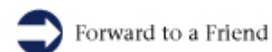
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