

Benefit Announcement

The Administrators, Inc. now offers COBRA administration services through Emerson, Reid & Co.

For information about how your company can take advantage of these services, please contact The Administrators, Inc.'s Mary June McCann at (800)634-4428 extension 132.



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ADDITIONAL GUIDANCE ON THE COBRA SUBSIDY AND THE MODEL NOTICES

The Department of Labor ("DOL") and the Internal Revenue Service ("IRS") hosted a conference call and webcast recently on the COBRA Subsidy and the recently released Model Notices. Although many questions still remain, there was some clarification on several key points, including:

- The ability of employers to use a single notice for each of the affected groups, as opposed to multiple notices for certain affected individuals. It now appears clear that just the **Notice in Connection with Extended Election Periods** can be sent to those entitled to the so-called "second chance" election, as opposed to sending it as a supplement to the **General Notice**. Note, though, that the informal guidance did not fully address how to provide information to certain former employees who might believe that they are eligible for the "second chance" election but are not identified as involuntarily terminations by the employer. See the discussion below for a practical solution.
- Additional information on what might constitute an "involuntary termination", including:
 - termination at the direction of the employer;
 - voluntary retirements where the employer is soliciting resignations prior to a reduction in force;
 - reductions in hours to zero (e.g. layoff or furlough);
 - certain constructive discharge scenarios, such as closing a plant in one State and offering employment at a location in another State; and
 - termination in response to a change in working conditions, such as a resignation in response to a reduction in hours.
- Clarification of what will not constitute an "involuntary termination", including:
 - divorce;
 - loss of coverage by a dependent;
 - death of the employee;
 - a reduction in hours that does not reach zero; and
 - military call up.
- The unavailability of the subsidy to the portion of the COBRA premium applicable to a domestic partner.
- The unavailability of the subsidy for certain premiums paid by an employer under severance agreements. The subsidy will not apply to employer paid premiums

where the coverage provided under the severance agreement is not treated as COBRA coverage by the employer; and will only apply to the employee portion of the premium where the coverage is structured as COBRA coverage. See the discussion below for more details.

Single Notice

Based on the information presented in the conference call, an employer need only send one of the notices to any particular person who had a qualifying event on or after September 1, 2008 and before February 17, 2009. Although formal guidance has not been issued, the agencies appear to be encouraging the avoidance of duplicate notices. Nevertheless, some confusion still remains and we hope and expect that additional clarification will be issued quickly. Those employers that have already acted and have used multiple notices should not have to be concerned, as long as each affected individual received at least one notice that applied to him or her.

We do know that anyone who has a qualifying event on or after September 1, 2008 needs a notice of some sort, regardless of whether that person was involuntarily terminated and is, therefore, an Assistance Eligible Individual ("AEI"). We also know that those in that group who elected and remained on COBRA can get either the **full or abbreviated General Notice**, which will explain the availability of the subsidy.

Those who did not elect or keep COBRA are either AEIs, and therefore eligible for both the "second chance" election and the subsidy; or not AEIs, and therefore not entitled to either. AEIs can get the **Notice in Connection with Extended Election Periods**. This leaves those with qualifying events on or after September 1, 2008 through February 16, 2009 who didn't elect COBRA or dropped it and who are not considered AEIs. We believe that these individuals are entitled to either the **full version of the General Notice** or the **Notice in Connection with Extended Election Periods**. Sending one of these notices to individuals in this group will, we believe, be fully compliant with the intent of the new rules.

A logical and straightforward approach would, therefore, be to:

- Send the **Notice in Connection with Extended Election Periods** to everyone with qualifying events on or after September 1, 2008 through February 16, 2009 who is not on COBRA, regardless of whether they are AEIs; and
- Send the **abbreviated version of the General Notice** to everyone with qualifying events on or after September 1, 2008 through February 16, 2009 who has elected and remained on COBRA.
- Use the **full version of the General Notice** for all those with qualifying events, for whatever reason, on or after February 17, 2009.

Those who get the **Notice in Connection with Extended Election Periods** can assert AEI status and the employer can process those claims for the "second chance" election, based on its determination of each individual's status. Those that are rejected would then be able to appeal to the DOL through the expedited appeal process.

Involuntary Termination

While the informal guidance on involuntary terminations is helpful, it leaves open the issue of constructive discharge and terminations in response to changes in working conditions. We expect that these will be subject to factual determinations that will vary from case to case (e.g. a severe reductions in hours). In the absence of more definitive guidance, it is likely that the DOL's expedited appeals process will be used frequently.

Domestic Partner Issues

Unlike spouses, domestic partners are not eligible for COBRA on their own under Federal guidelines. So, for example, if a domestic partner loses coverage due to the death of the employee, he or she cannot elect COBRA coverage. But, if a plan provides domestic partner coverage, a terminating employee who has covered a domestic partner can elect to continue coverage for himself and his domestic partner under COBRA. If a domestic partner is receiving COBRA coverage under these circumstances and the employee is eligible for the subsidy, the IRS informally commented that the domestic partner's portion of the premium would not be eligible for the subsidy (as the domestic partner is not an AEI). This will require an apportionment of the premium between the domestic partner and the others covered by the COBRA coverage similar to that done to determine the taxable portion of domestic partner coverage.

Severance Agreements

Severance agreements may be designed to either continue health care coverage as if it were active coverage, or treat the coverage as COBRA. In either case, the employer may pay all or part of the premium. Where severance is treated as active coverage, the former employee gets the COBRA election for the full COBRA period, beginning at the end of the severance. Where it is treated as COBRA, the employee gets the remainder of the COBRA period after the severance ends (measured from the date of termination) at full cost.

The IRS informally commented that where continued coverage under the severance agreement is structured as active coverage, the subsidy will apply to the 9 months after the end of the severance (assuming, of course that the involuntary termination giving rise to the severance was on or after September 1, 2008 and before December 31, 2009). This means that employer paid premium under this type of severance agreement is not reimbursable from the government, since it is not for COBRA.

If the severance agreement structures the continuation of coverage as COBRA, the subsidy will apply beginning March 1, 2009 (or the later date of termination) and will only apply to the amount that the former employee actually pays under the severance agreement. In these cases, the employer will have to "front" 65% of the employee's portion of the premium for the subsidy period and seek reimbursement for that amount from the government. Any remaining amount that the employer pays for COBRA premiums under the terms of the agreement is not eligible for reimbursement.

Heed the Caution

The guidance described above is all informal and nonbinding. We expect either the DOL or the IRS to release additional guidance in official form in the coming week and will report to you on these developments. In the meantime, employers that act on a reasonable basis to provide appropriate notices to all affected individuals should not be concerned about being second guessed. However, since we are still at least three weeks from the deadline for providing notices, it might be helpful to receive some additional guidance before acting.

You can view and listen to the DOL/IRS webcast on the DOL's website at:

<http://www.dol.gov/ebsa/>

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