

Employee Benefits Alert: New COBRA Subsidy Model Notices

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The Department of Labor has just released several model notices (including election forms) to reflect the new COBRA subsidy requirements of ARRA, the American Recovery and Reinvestment Act of 2009. (These new COBRA subsidy provisions were discussed in our Employee Benefits Alert published on February 18, 2009).

ARRA provides COBRA premium assistance for lower- and middle-income employees who are involuntarily terminated between September 1, 2008 and December 31, 2009, as well as their spouses and dependent children (“assistance eligible individuals.”) The new model notices are intended to help employers comply with the notice provision requirements of ARRA.

The model forms intended for employer, rather than insurer, use are described below. Upon reading the notices, it does appear that they may have been prepared in haste, as there is some ambiguity as to who should receive the general notice.

(1) COBRA Continuation Coverage Election Notice (Full Version)

This is the general notice that employers and the group health plans they sponsor are directed to provide to qualified beneficiaries (employees as well as spouses and dependents) who experience any kind of COBRA qualifying event from September 1, 2008 through December 31, 2009. This notice takes the place of the former general notice provided by the Department of Labor, while incorporating information about ARRA’s COBRA subsidy.

It appears from the Department of Labor heading on this notice that it is to be provided to all qualified beneficiaries who have any kind of qualifying event (involuntary termination as well as other events), so long as that event took place between September 1, 2008 and December 31, 2009. However, provision of this notice should, from a common sense point of view, be subject to the carve-out of certain groups of qualified beneficiaries, who should receive the notices described in (2) and (3) below.

(2) COBRA Continuation Coverage Election Notice (Abbreviated Version)

This notice is similar to the general notice described in (1) above, except that it does not include the general COBRA coverage election information. According to the Department of Labor, it can be sent instead of the full general notice described in (1) above, to a key subset of individuals who (i) experienced a qualifying event on or after September 1, 2008, and (ii) already elected COBRA coverage. It notifies such individuals of their new rights under ARRA, advises them whether they are assistance eligible individuals, and gives them forms to elect less expensive coverage and to elect subsidy coverage as assistance eligible individuals -- but does not require them to fill out basic COBRA election forms all over again.

(3) COBRA Continuation Coverage Additional Election Notice for Extended Election Periods

Employers and the group health plans they sponsor should use this notice in special cases, for another key subset of COBRA qualified beneficiaries -- those who are (or would have been) “assistance eligible individuals,” but for their failure to enroll in COBRA coverage. The notice should be provided both to (i) qualified beneficiaries with qualifying events from September 1, 2008 through December 31, 2009 who never elected COBRA coverage, and (ii) qualified beneficiaries with qualifying events from September 1, 2008 through December 31, 2009 who did elect COBRA coverage, but subsequently discontinued it. This is the notice that informs such qualified beneficiaries, if they are assistance eligible individuals, of their second chance to elect COBRA coverage, a key feature of the subsidy provisions of ARRA.

Customization of Model Notices

Although these forms are Department of Labor “models,” none of them can be described as “plug ‘n’ play.” Each notice requires substantial customization to conform to the terms of a company’s group health plan, and its wishes regarding certain optional provisions, such as the ability for assistance eligible individuals to switch from

a more expensive COBRA coverage alternative to a less expensive one. By close of business Monday, March 23, Fenwick & West LLP will have the model forms available for customization and distribution to interested clients.

While the forms are long and complex, clients should use them as provided, in case important information might be inadvertently omitted if the forms were altered or shortened. So long as the complete Department of Labor model notices are used, it is more likely that clients would be able to withstand a DOL audit.

The full version of the notice described in (1) should be provided on a prospective basis to all new qualified beneficiaries who have any qualifying event (not just an involuntary termination) through December 31, 2009. Any recent qualified beneficiaries who have not yet received any COBRA notice and election form, or who were provided an election notice and form that did not meet the requirements of the ARRA, should also receive this notice. The abbreviated version described in (2) should be provided no later than April 18, 2009 to qualified beneficiaries who experienced a qualifying event on or after September 1, 2008 and then elected (and did not discontinue) COBRA coverage. The Additional Election Notice for Extended Periods described in (3) should be provided no later than April 18, 2009 to qualified beneficiaries who experienced a qualifying event on or after September 1, 2009 and who either did not elect COBRA coverage, or elected such coverage but subsequently discontinued it.

A link to the model notices can be found here on the Department of Labor's website: <http://www.dol.gov/ebsa/COBRAmode notice.html>

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