

Client Alert

COBRA Premium Assistance Subsidy Extended; New Model Notices Issued

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The American Recovery and Reinvestment Act of 2009 ("ARRA") provided a nine-month subsidy of COBRA premiums for individuals whose employment was terminated involuntarily (and their qualified beneficiaries) between September 1, 2008, and December 31, 2009. ARRA also required employers to provide certain notifications relating to the COBRA subsidy. On December 19, 2009, President Obama signed the Department of Defense Appropriations Act of 2010 ("DODAA"), which extended the availability of COBRA premium subsidies from nine to 15 months, and to terminations occurring through February 28, 2010. In January 2010, new model notices were released by the Department of Labor, pursuant to DODAA.

Both ERISA and the tax code impose penalties for failures to timely provide the required notices or to make COBRA coverage available. Penalties may be assessed of up to \$110 per day under ERISA, and an excise tax penalty of up to \$200 per day under the tax code. Also, participants (or the Department of Labor) may sue to secure COBRA coverage (or the benefits it would have offered) and recover the related attorneys' fees. In addition, ERISA permits the recovery of "other relief" that may entail substantial damages depending on the circumstances.

Premium Subsidy Extension

DODAA amends ARRA to provide a subsidy for COBRA premiums for any "assistance eligible individuals" and each qualified beneficiary^[1] who has had a COBRA "qualifying event"^[2] between September 1, 2008, and February 28, 2010. Assistance eligible individuals are individuals who are eligible for COBRA due to an involuntary termination occurring during the subsidy period, including some individuals who have previously waived COBRA coverage or let their coverage lapse. The subsidy covers 65% of the COBRA premium costs. Assistance eligible individuals are obligated to cover the remaining 35%.

With the extension provided by DODAA, the subsidy is available until the earlier of (i) the date that is 15 months after the first day of the month that the subsidy becomes available to the individual or (ii) the end of the assistance eligible individual's maximum period of COBRA entitlement (which could be 18, 29, or 36 months, depending on the circumstances).^[3]

ARRA and DODAA also apply to state COBRA-like continuation coverage and other government-sponsored continuation programs.

Election Notices

DODAA supplements existing COBRA notice requirements, as amended by ARRA, and requires employers to send modified election notices to certain individuals reflecting the extended subsidy rights. Also, some employers must send revised or supplemental COBRA notices detailing the extended COBRA subsidy program.

The Department of Labor released three revised model COBRA notices:

- General Notice. The amended general notice must be sent to all qualified beneficiaries subject to the general federal COBRA provisions who have not yet received a COBRA notice and who experienced a COBRA-qualifying event at any time from September 1, 2008, through February 28, 2010, regardless of the type of qualifying event (i.e., even if the beneficiary is not qualified for subsidized benefits under the Act). This version of the model general notice includes information on the premium reduction as well as information required in a COBRA election notice. This notice must be provided before the later of: (i) February 17, 2010, or (2) the end of

the usual COBRA election notification timeline. If the employer has reverted to the pre-ARRA COBRA notice form—for example, for employees terminated during December 2009 who did not become eligible for COBRA coverage until January 2010—such employees may need to be provided with the updated general notice and a new 60-day election period.

- **Alternative Notice.** The revised alternative notice may be used by employers subject to state continuation coverage, but not federal, COBRA requirements, provided that the applicable state agency has approved its use. This notice may require adjustment to conform to applicable state law.
- **Premium Assistance Extension Notice.** This notice is for individuals who have already been provided with a COBRA election notice that did not include the COBRA subsidy extension information. This includes:

(1) Individuals who were assistance eligible individuals as of October 31, 2009, not in a transition period (as described below), who elected COBRA continuation coverage following the covered employee's termination of employment, and who remained on COBRA coverage as of October 31, 2009. Notice must be sent to this group by February 17, 2010.

(2) Individuals in a transition period (as described below). Such individuals may make a retroactive election. Notice must be sent to this group within 60 days of the first day of the individual's transition period. For some individuals this notice period may have already expired; in that case, notice should be given as soon as possible to minimize potential penalties for failure to provide such notice.

(3) Individuals who were terminated from employment on or after October 31, 2009, lost health coverage, and who were not provided the revised general or alternative notice. Notice must be sent to this group by February 17, 2010.

An individual may be in a transition period if he or she has already received nine full months of premium assistance coverage, as required under ARRA. The transition period begins once the initial nine-month period of assistance coverage expires, and ends after the end of the extended premium subsidy period (15 months). However, an individual is in a transition period only if the premium subsidy provisions were to continue to apply to that individual due to the extension of subsidized COBRA premiums from nine to 15 months, and such individual continues to remain eligible for the premium subsidy. An individual may experience a transition period regardless of whether he or she paid all or part of, or maintained, COBRA coverage after the nine-month premium assistance coverage period ended, for he or she may make a new, retroactive election pursuant to DODAA.

The DOL and the IRS have issued expanded fact sheets on the subsidy requirements.

As you consider the administrative issues associated with the COBRA subsidy, bear in mind that the model notices may not address key aspects of your existing COBRA policies and procedures. Before distributing these notices to your "assistance eligible individuals" and other qualified beneficiaries, you should ensure that they are cross-checked against your existing COBRA notices, policies, and procedures and that any ambiguities or inconsistencies are resolved. Even if your COBRA administration process has suffered from a little benign neglect in recent years, now would be an excellent time to reconsider it and make appropriate updates. If you have questions or concerns about the COBRA subsidy extension or COBRA compliance more generally, or if you would like some assistance in customizing the model notices to fit your particular needs, please contact a member of Morrison & Foerster LLP's Employee Benefits Department.

[1] Qualified beneficiaries generally include the terminated employee, his or her spouse, and his or her dependent child.

[2] Qualifying events generally include losses of group health plan coverage as a result of (i) a termination or reduction of hours of a covered employee, (ii) the death of a covered employee, (iii) the divorce or legal separation of a covered employee from the employee's spouse, (iv) a covered employee's becoming entitled to Medicare benefits, (v) a dependent child's ceasing to be a dependent child of the covered employee under the generally applicable requirements of the plan, and (vi) certain bankruptcy proceedings.

[3] Note that where an individual's employment is terminated on or prior to February 28, 2010, but does not become eligible for continuation coverage until after that date, the subsidy will remain available if the individual is otherwise assistance eligible. In contrast, under the original ARRA provisions, the subsidy would not have been available to an individual whose termination and commencement of continuation coverage did not both occur prior to December 31, 2009.