



New Updates on the Federal COBRA Premium Reductions

As we announced last month in our NewsFlash No. 09-23, under the federal American Recovery and Reinvestment Act of 2009 (“ARRA”), individuals who were involuntarily terminated from employment from September 1, 2008 to December 31, 2009, will be provided a premium reduction in their COBRA payments for up to nine months, the difference being made up by an employer subsidy that can later be claimed as a payroll tax credit. The federal government recently released regulations to help guide employers and terminated employees through the premium reduction process. In response to the number of client questions we have received on the topic, the following information highlights key areas which have been clarified by the federal government:

Notices

Model notices have been provided by the Department of Labor, and can be found at: <http://www.efast.dol.gov/ebsa/COBRA.html>.

Please be advised that notices must be sent out to all qualified COBRA beneficiaries who experience a qualifying event from September 1, 2008 through December 31, 2009, whether or not they qualify for the premium reduction.

Second Enrollment Period

If an employee was terminated between September 1, 2008 to February 16, 2009, and decided not to elect COBRA during that period, the terminated employee gets a second window of opportunity in which to elect COBRA. These notices must be provided to the terminated employee by April 18, 2009.

Involuntary Termination

Determining whether an employee has been “involuntarily terminated” depends on the facts of each situation. The federal government has alluded that “involuntary” will be interpreted in a broad manner. Any termination of employment that is *employer-driven* or *employer-initiated* will be considered involuntary. Examples:

- *Resignation v. Dismissal or Non-Reelection.* If a K-12 certificated employee has been notified that he will be non-re-elected, but elects to resign in lieu of the non-re-election, this will be considered involuntary because the decision was driven by the employer. Had the employee not known that his employment was to be terminated, he would not have resigned.
- *Temporary Contract.* If an employer decides to not renew an employee's temporary contract, this will also be seen as an involuntary termination because the decision was initiated by the employer. The nuance lies in situations where the employee informs the employer that he or she will not be accepting a new contract, even if one was offered by the employer. The employee will be seen as the one initiating the termination.

- *Reduction in Hours.* If an employer offers reduced hours in lieu of termination, and the employee decides that he or she cannot accept a reduction in hours and resigns, this situation will also be seen as an involuntary termination.
- *Gross Misconduct.* Employees who are terminated due to gross misconduct do not qualify for COBRA, and thus will not qualify for the subsidy.

Amount of Subsidy

The 65% subsidy only applies to the amount of the premium that the employee has to pay, and not the total amount of the premium itself. For example, if an employer offers to pay half of a terminated employee's \$1000 COBRA premium (such as in a severance package), the subsidy only covers 65% of the remaining premium that the employee pays, i.e., the payroll tax credit ultimately received by the employer will be for 65% of the remaining premium.

Terminated Employee's Responsibility

The terminated employee has the responsibility for informing the former employer of his or her eligibility in another health plan. The penalty for failing to inform is a 110% tax on the amount of subsidy received by the individual.

The employee can waive the COBRA subsidy if the employee knows that he or she won't qualify for the subsidy, and thus will avoid the obligation of reporting the subsidy on their income taxes. Employees should be cautioned that the waiver is permanent, however, so once the individual elects the waiver, the individual cannot "reclaim" the subsidy in a later year.

This subject has obvious implications for your operations, particularly in a year where many public entities are forced to layoff employees. If you have any questions regarding implementation of the ARRA, please contact one of our four offices.

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This F3 NewsFlash is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this matter may apply to your specific facts and circumstances.

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