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COBRA Subsidy - Updated IRS and DOL Guidance

The IRS on March 31 issued Notice 2009-27 providing for detailed questions and answers regarding the premium reduction (COBRA subsidy) provided by the American Recovery and Reinvestment Act of 2009 (“ARRA”).¹ The DOL also revised its frequently asked questions on April 2 regarding the COBRA subsidy and its notice requirements. The above guidance is available at www.dol.gov/cobra . See earlier memos at www.ebeclaw.com/cobra .

The following are the more significant points in the IRS and DOL guidance.

Involuntary Termination. Involuntary termination means termination due to independent action of the employer, where the employee is willing to continue services. The employee quitting for good reason, i.e., due to material negative change in employment relationship, is also an involuntary termination.² A layoff or furlough resulting in loss of coverage is an involuntary termination, provided it is a reduction to zero hours.³ Termination for cause is technically also an involuntary termination, but if it is due to gross misconduct it is not a COBRA qualifying event.⁴ A buyout taken by an employee in anticipation of layoffs of a certain number of remaining employees is considered an involuntary termination.⁵

Effective Dates of Premium Reduction. To be an assistance eligible individual eligible for the COBRA subsidy, both the involuntary termination and eligibility for COBRA must occur between September 1, 2008 through December 31, 2009.⁶ The

¹ ARRA, enacted February 17, 2009, includes a temporary nine-month government subsidy of 65% of the COBRA continuation health coverage premiums for employees who are involuntarily terminated prior to 2010. This subsidy takes effect by the first premium period after February 17, 2009, which would generally be March 1, 2009. ARRA Part B Title III § 3001.

² IRS Notice 2009-27 Q&A 1.

³ Notice 2009-27 Q&As 2&3; DOL FAQ 4

⁴ Notice 2009-27 Q&As 6 &10; DOL FAQ 3.

⁵ Notice 2009-27 Q&A 9.

⁶ Notice 2009-27 Q&As 11-13.

election of coverage, however, can occur after December 31, 2009.⁷ Likewise, the premium reduction will be available after December 31, 2009 for those who qualify for the subsidy on or before Dec. 31, 2009.⁸

The COBRA subsidy applies to the first period of coverage beginning on or after February 17, 2009. Therefore, if the COBRA premiums are paid for on a calendar month basis, the COBRA subsidy will apply as of March 1, 2009. If, however, if the premiums are paid based on a non-calendar month or based on a period short than one month, the COBRA subsidy will begin from the beginning of such period.⁹ The Notice provides that an individual may become eligible for two sets of COBRA subsidies if involuntarily terminated twice between September 1, 2008 and December 31, 2009.¹⁰

Employer-Paid COBRA as Severance. Where the employer continues to pay the full COBRA premiums for a period of time, e.g., as part of a severance package, then if the employee elects, per Code § 4980B(f)(8), to delay the commencement of 18 month COBRA period to the end of the employer-provided coverage, the loss of coverage for purposes of the COBRA subsidy will occur only upon cessation of the employer-paid severance benefits. However, if the employer treats the COBRA 18-month period as commencing on date of termination of employment, the loss of coverage for the COBRA subsidy will be considered to occur on the involuntary termination of employment.¹¹

Calculation of Premium Reduction. The premium used to determine the 35% participant share is whatever the COBRA premium would be absent the COBRA subsidy (which can be up to 102% of employer cost). If the employer subsidizes the COBRA so that the terminated employee pays less than 100% of employer cost, the 35% share will be of the nonsubsidized amount.¹² If the COBRA premiums may be increased per the COBRA regulations the 35% share will be of such increased amount.¹³

Eligible Coverage. The COBRA premium reduction is available for health, vision or dental plans but not for flexible spending arrangements.¹⁴

Qualified Beneficiaries. Only qualified beneficiaries are eligible for the COBRA subsidy.¹⁵ Qualified beneficiary is limited to the definition under Federal law, and domestic partners covered under the group health plan only under state law would not be eligible for the premium reduction.¹⁶

⁷ Notice 2009-27 Q&A 18.

⁸ Notice 2009-27 Q&A 38.

⁹ Notice 2009-27 Q&As 30-32.

¹⁰ Notice 2009-27 Q&As 17 & 43.

¹¹ Notice 2009-27 Q&A 24.

¹² Notice 2009-27 Q&A 20.

¹³ Notice 2009-27 Q&A 26.

¹⁴ Notice 2009-27 Q&A 27.

¹⁵ See definition of qualified beneficiary in Notice 2009-27 Q&A 23.

¹⁶ Notice 2009-27 Q&A 24.

Retiree Coverage. Retiree health coverage offered at the same time COBRA continuation coverage is offered will have no effect on eligibility for ARRA premium reduction if the retiree coverage is under the same group health plan as the COBRA coverage. If it is offered under a different group health plan, such coverage may cause the individual to be ineligible for the COBRA premium reduction.¹⁷

Miscellaneous. If the employer has claimed a payroll tax credit, the employer is not required to refund it if the employee fails to provide notice of subsequent plan eligibility. Instead 110% of the subsidy is taxed to the employee as a penalty.¹⁸ An employer cannot refuse the premium reduction due to the individual's income unless the employee makes a permanent election to waive.¹⁹

COBRA Notices. DOL revised FAQs provide general guidance regarding the COBRA subsidy and regarding required COBRA notices.²⁰ The full version of the general notice should be sent to all qualified beneficiaries who experience any COBRA qualifying event from Sept. 1, 2008 to Dec. 31, 2009 and not merely to those who had involuntary terminations.²¹ The abbreviated notice should be sent to those who have had a qualifying event on or after Sept. 1, 2008 and have elected and currently have COBRA coverage.²² An extended election notice must be provided to those who had an involuntary termination between Sept. 1, 2008 and Dec. 31, 2009 and did not elect COBRA (or elected COBRA but subsequently discontinued it).²³

¹⁷ Notice 2009-27 Q&A 36.

¹⁸ Notice 2009-27 Q&A 42.

¹⁹ Notice 2009-27 Q&As 45 & 46.

²⁰ Model notices were issued by the DOL on March 19, 2009, and some of the revised FAQs repeat guidance issued at that time.

²¹ DOL FAQs for Employers about COBRA Premium Reductions under ARRA – FAQs 14 & 15 (April 2, 2009).

²² DOL FAQs 16 & 20.

²³ DOL FAQs 18 & 21.