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New Guidance on the COBRA Premium Subsidy

This bulletin provides a summary of recent guidance from the Internal Revenue Service and the Department of Labor regarding the application and interpretation of the COBRA premium subsidy provisions enacted as part of the American Recovery and Reinvestment Act of 2009.

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

Under federal and state COBRA laws that provide for continuation of health coverage, most employers who sponsor group health plans are required to provide continuation coverage upon certain “qualifying events.” As discussed in our February 2009 bulletin (www.ThompsonHine.com/publications/publication1712.html), the American Recovery and Reinvestment Act of 2009 (the “Act”) creates new COBRA rights for certain individuals. Generally, any employee or dependent who loses group health plan coverage due to an involuntary termination of employment during the period beginning September 1, 2008 and ending December 31, 2009 is eligible for a premium subsidy for COBRA coverage. Individuals who are eligible for and elect COBRA coverage will be required to pay only 35 percent of the otherwise applicable COBRA premium for up to nine months. The remaining 65 percent of the COBRA premium is covered by the employer (or, in certain cases, the insurer or plan) and reimbursed through a payroll tax credit.

The Act established this general framework for the COBRA premium subsidy and tasked the Department of Labor (DOL) and the Internal Revenue Service (IRS) with issuing specific guidance regarding the application and administration of the new COBRA subsidy provisions of the Act. This bulletin summarizes the IRS guidance issued to date (including the recently issued Notice 2009-27 and payroll FAQs), summarizes the DOL guidance regarding the new model notices and provides calculation examples to illustrate issues addressed in Notice 2009-27.

IRS GUIDANCE

Involuntary Termination of Employment. An individual is eligible for the COBRA premium subsidy only if the loss of group health plan coverage is due to an involuntary termination of employment. The new IRS notice provides that a termination will generally be considered involuntary if the employer takes action to terminate employment when an employee is willing and able to continue providing services. In addition to providing this general definition, the notice specifically addresses a number of situations.

The following circumstances **do** constitute an involuntary termination:

- A lay-off period or a temporary furlough period that results in a loss of health coverage.



Note: Even though there is no actual termination of employment, a loss of coverage due to a reduction in hours is considered an involuntary termination of employment if the hours are reduced to zero. However, a reduction in hours that is not a reduction to zero (such as a change from full-time to part-time employment) is not an involuntary termination of employment unless it constitutes a material negative change (discussed below).

- A voluntary resignation in response to a *material negative change* in the employment relationship. Examples of a material negative change include a change in geographic location or a reduction in hours that results in loss of health coverage.
- An employer's action to end an individual's employment while the individual is absent from work due to illness or disability.
- Voluntary severance (a "buy-out") or early retirement where the employer indicates that after the offer period a certain number of remaining employees will be terminated.
- Termination for cause (other than for gross misconduct).
- A lockout initiated by the employer.

The following circumstances **do not** constitute an involuntary termination:

- A work stoppage as the result of a strike initiated by employees or employee representatives.
- Termination due to gross misconduct.
- Absence from work due to illness or disability.
- Death of an employee.

The following circumstances **may** constitute an involuntary termination, based on the facts and circumstances:

- A voluntary resignation where the employer would have otherwise terminated the employee's employment and the employee is aware of that fact.
- The employer's failure to renew an employment contract where the employee was willing and able to continue providing services.



Note: The IRS notice indicates that the determination as to whether a termination of employment is an involuntary termination of employment will depend upon all of the facts and circumstances involved. If there is any question about whether a participant is eligible for the premium subsidy, an employer should consider taking a conservative approach and treating the participant as ineligible. An employer who erroneously grants the subsidy to an ineligible individual may be liable for penalties resulting from the underpayment of payroll taxes. By contrast, there are no penalties for an employer who in good faith erroneously denies the subsidy to an eligible individual. The individual who is denied eligibility can request that the DOL review the determination, and the DOL's determination will be binding on the IRS. A cautious employer may therefore want to rely on the DOL's determination in uncertain cases.

Assistance Eligible Individuals. Only an "assistance eligible individual" may receive the premium subsidy. An individual is an assistance eligible individual if he is a qualified beneficiary (as determined under federal COBRA law) and he becomes entitled to COBRA continuation coverage during the period from September 1, 2008 through December 31, 2009; the qualifying event is an involuntary termination of employment that occurs during the same period; and the individual elects COBRA continuation coverage.

The IRS notice further clarifies who is an assistance eligible individual:

- Both the involuntary termination *and* the loss of group health plan coverage must occur during the period from September 1, 2008 through December 31, 2009.
- An individual can be an assistance eligible individual multiple times.
- If an individual experiences a qualifying event (such as divorce), a subsequent involuntary termination does not trigger eligibility for the COBRA premium subsidy. However, if an employer takes action in anticipation of an involuntary termination of employment that results in a loss of coverage for the individual (*e.g.*, a reduction in hours), the action causing the loss of coverage prior to the involuntary termination of employment is disregarded.
- As long as the involuntary termination of employment and the loss of coverage occur no later than December 31, 2009, a timely election for COBRA continuation coverage may be made after December 31, 2009 (with the coverage beginning retroactively to the date of the loss of coverage).

Date of Loss of Coverage. As noted above, both the involuntary termination of employment and the loss of coverage must occur during the period from September 1, 2008 through December 31, 2009. The IRS notice clarifies how the date of the loss of coverage is determined when an employer provides continuation coverage following an involuntary termination of employment.

Specifically, if an employer provides health coverage for an involuntarily terminated employee on the same terms as for similarly situated active employees, the date of the loss of coverage depends on the employer's characterization of the provided coverage.



- If the employer treats the provided coverage as an extension of the active plan, the provided coverage defers the loss of coverage until the date that the active plan coverage ends.
- If the employer treats the provided coverage as part of its obligation to provide COBRA coverage, then the loss of coverage occurs as of the date the employer begins providing the coverage.

Note: This determination is important for understanding whether and how the COBRA subsidy applies. For example, the subsidy does not apply if the continuation coverage postpones COBRA eligibility until 2010.

Employers should review both their continuation provisions and their health plans to determine when the COBRA subsidy will begin to apply. For example, a severance agreement could provide for a continuation of coverage under the active plan or for payment of COBRA coverage. If the severance agreement provides for a continuation of coverage, and if the health plan provides that COBRA coverage begins after the loss of coverage, the COBRA premium subsidy would not apply until the end of the continuation period. However, if the severance agreement instead provides for payment of COBRA coverage, or if the health plan provides that COBRA coverage begins on the date of the qualifying event, then the COBRA premium subsidy would apply to the first period of coverage beginning on or after the date of the involuntary termination of employment.

“Second Chance” Election Period. The Act created a special election period for any person who was involuntarily terminated from employment during the period from September 1, 2008 through February 17, 2009. An individual who did not elect COBRA continuation coverage but otherwise would have been eligible for the COBRA subsidy is allowed a second opportunity to elect COBRA coverage. The resulting coverage begins with the first period of COBRA continuation coverage beginning on or after February 17, 2009. The IRS notice provides additional clarification regarding this “second chance” election period:

- The second chance election period is **not** available to involuntarily terminated employees whose continuation coverage is provided only under state “mini-COBRA” law.

Note: If a state has or creates a similar second chance election requirement for fully-insured plans, the premium subsidy applies to coverage elected during that second chance election period.

- If an individual elects COBRA coverage during the second chance election period, payment of the first premium is due 45 days after the date that the individual makes the election.
- An individual who still has an open COBRA election period may decline to elect coverage under the original COBRA election period and instead elect COBRA under the second chance election period.



Note: An individual ordinarily receives and must pay for COBRA coverage that is retroactive to the date of the qualifying event. However, an individual who chooses to enroll in COBRA coverage during the second chance election period generally does not receive or pay for coverage prior to March 1, 2009. An individual with overlapping election periods therefore has a unique opportunity to make an election choice based on his known claims history. The COBRA notice provided to this individual will need to clearly explain the two different election periods.

Covered Group Health Plans. The premium subsidy applies to coverage under both the federal COBRA law and any comparable state “mini-COBRA” laws (*i.e.*, state continuation laws applicable to employers with fewer than 20 employees), and both insured and self-insured plans. The IRS notice specifies that the premium subsidy is available for COBRA continuation coverage under the following plans:

- Any group health plan, including medical, dental-only, vision-only and “mini-med” plans.
- A group health plan where active employees pay 100 percent of the premium. In this case, COBRA beneficiaries receiving the subsidy pay less than active employees.
- Retiree health coverage that is the same as the coverage made available to similarly situated active employees. The amount charged may be higher than that charged to active employees, but cannot exceed the maximum amount allowed under federal COBRA law.
- A health reimbursement arrangement (HRA).

Note: The IRS notice clarifies an issue that has caused confusion among both commentators and Treasury Department officials. The Act’s provisions regarding COBRA continuation coverage are different from the provisions regarding group health plan coverage that terminates eligibility for the subsidy. Continuation coverage under an HRA **is** COBRA continuation coverage, regardless of how the HRA is structured. However, the HRA’s structure will determine whether coverage under the HRA terminates eligibility for the COBRA subsidy. If the HRA is considered a “flexible spending arrangement” under Internal Revenue Code Section 106 (*i.e.*, the balance of the HRA can never be more than 500 percent of the HRA’s COBRA premium), coverage under the HRA **does not** terminate eligibility for the COBRA subsidy.

The premium subsidy does **not** apply to coverage under the following plans:

- A health flexible spending arrangement (FSA) offered through an Internal Revenue Code Section 125 cafeteria plan.
- Non-health benefits that are not subject to COBRA continuation coverage, such as group life insurance.

Applicable COBRA Premium. The 35 percent share of the COBRA premium that must be paid by a subsidy recipient is based on the premium that would be charged for the COBRA coverage if the individual were not a subsidy recipient. So, if an individual would be required to pay 102 percent



of the applicable premium (generally the maximum permitted under federal COBRA law), a subsidy recipient would pay 35 percent of 102 percent of the premium. The IRS notice further clarifies that:

- If an employer subsidizes part or all of the COBRA premium, a subsidy recipient pays only 35 percent of the premium that he or she would otherwise pay.
- Payments made on behalf of a subsidy recipient by another person (other than the employer), such as a parent, guardian, state agency or charity, are considered to have been made by the subsidy recipient.
- If an individual terminated employment in 2008 and enrolls during the second chance election period, the plan can charge the 2009 premium for the COBRA coverage.
- If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium (to the extent permitted by state or federal law), the individual can be required to pay 35 percent of the increased premium amount.
- If the premium paid by a subsidy recipient also covers one or more individuals who are not qualified beneficiaries (such as a domestic partner), the incremental cost (if any) of providing coverage for an ineligible individual is not eligible for the subsidy.

Note: A series of calculation examples are provided at the end of this bulletin.

Payroll Tax Credit. Employers must cover the remaining 65 percent of the COBRA premium amount for subsidy recipients. The employer is reimbursed through a payroll tax credit, as follows:

- The employer claims a payroll tax credit for the subsidy on IRS Form 941, Employer's QUARTERLY Federal Tax Return. The employer must report the number of individuals who received the COBRA subsidy in the applicable quarter and the amount of the subsidy.
- The employer may either offset its payroll tax deposits or claim the subsidy as an overpayment at the end of the quarter. If the subsidy amount exceeds the employer's tax liability for a particular quarter, the employer can elect to have the excess refunded or applied to the next quarter.
- The employer may claim the credit for the subsidy for the quarter during which the subsidy is provided or for a later quarter in the same calendar year.
- The employer must provide the subsidy for an eligible individual, unless the individual makes a permanent waiver of the premium reduction.



Note: Although this summary refers to “employers,” a **plan** claims the tax credit in the case of a multiemployer plan, and an **insurer** claims the tax credit in the case of a fully insured plan that is not subject to the federal COBRA laws. The IRS notice clarifies that the responsibility for claiming the tax credit is non-negotiable. For example, if a plan is subject to the federal COBRA laws, the **employer** must claim the tax credit, even if the insurer receives the premiums from the subsidy recipients. Because the insurer cannot claim the tax credit, the insurer will look to the employer to pay the remaining 65 percent.

Waivers. Assistance eligible individuals must be given the opportunity to waive receipt of the premium subsidy. An individual makes the waiver by providing a signed and dated notification to the entity that is responsible for claiming the payroll tax credit (*i.e.*, the employer, insurer or plan, as applicable). Employers and administrators may provide a model waiver with their COBRA notices, but it does not appear that they can require their model to be used. No additional reporting to any governmental agency is necessary.

Recordkeeping Requirements. Employers, plans or insurers claiming a payroll tax credit for the subsidy must maintain the following supporting documentation:

- Information (including dates and amounts) showing the receipt of the subsidy recipients’ 35 percent of the COBRA premium.
- For insured plans, a copy of the invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required by COBRA.
- For self-insured plans, proof of the premium amount and proof of the coverage provided to the subsidy recipients.
- Attestation of involuntary termination of employment, including the date of the involuntary termination of employment, for each covered employee.
- Proof of each subsidy recipient’s eligibility for COBRA coverage and election of COBRA coverage.
- A record of the Social Security numbers for all covered employees, the amount of the subsidy reimbursed with respect to each covered employee and whether the subsidy was for one individual or two or more individuals.
- Any other documents necessary to verify the correct amount of reimbursement.

Note: This information will likely come from a variety of sources. Employers should consider how best to compile and retain this information. The Act contemplates that this information be submitted to the IRS, but the IRS has confirmed that this information need only be provided upon request.



DOL MODEL NOTICES

Plan administrators must provide COBRA notices explaining the premium subsidy and (if applicable) the second chance election period. The DOL has issued four model notices for employers:

- *General Notice (Full Version)*. This notice is for all individuals and qualified beneficiaries who experience **any kind** of qualifying event during the period from September 1, 2008 through December 31, 2009 and either have not yet received a COBRA election notice or received a notice that did not include the subsidy information.

Note: The full version of the model general notice is intended to replace the model election notice that was used prior to the Act. Individuals who receive this new notice generally do not need to receive any other COBRA election notice.

- *General Notice (Abbreviated Version)*. This notice is for all individuals who experienced a qualifying event on or after September 1, 2008, have already elected COBRA coverage and still have it. This abbreviated notice contains the subsidy information but does not include the COBRA coverage election information.
- *Notice in Connection With Extended Election Periods*. This notice for the second chance election period is for all individuals and their qualified beneficiaries who lost coverage **due to an involuntary termination of employment** during the period from September 1, 2008 through February 17, 2009 and either did not elect COBRA coverage or elected COBRA coverage but subsequently discontinued it. **This notice must be provided by April 18, 2009.**
- *Alternative Notice Under State Law*. This notice applies only to continuation coverage under state “mini-COBRA” laws.

In addition to the model notices, the DOL has issued flyers and posters to inform persons about the subsidy. The use of these flyers and posters is not required.

Note: The Act requires that subsidy information be given to all persons who became entitled to COBRA coverage from September 1, 2008 through December 31, 2009. However, the DOL’s instructions and FAQs indicate that a qualified beneficiary does not need to receive a revised COBRA notice if the individual became entitled to COBRA as a result of a qualifying event that is not an involuntary termination; received a COBRA election notice prior to February 17, 2009; and does not have a COBRA election in effect as of February 17, 2009.

Nevertheless, employers should consider sending a notice to all persons who became entitled to COBRA coverage due to a termination of employment. Given that it may be uncertain whether some terminations are involuntary (and the DOL might find differently if requested to review an employer’s determination), employers can avoid a possible penalty for failure to provide a COBRA notice by sending a revised COBRA notice to all terminated employees.



Note: Although the model notices require an individual to complete and return a form requesting treatment as an assistance eligible individual, this formal request does not appear to be a requirement to receive the subsidy. Therefore, an assistance eligible individual who remits a 35 percent payment without returning the form must be treated as a subsidy recipient.

Additional Information. The governmental agencies have issued a significant amount of guidance on the COBRA subsidy. Additional information addressed in the guidance includes:

- How to determine the beginning of the first period of coverage to which the COBRA premium subsidy applies.
- How to determine whether and when other group health coverage (including retiree coverage) terminates eligibility for the COBRA subsidy.
- What constitutes “comparable” state “mini-COBRA” coverage.

PREMIUM CALCULATION EXAMPLES

Calculations Involving Ineligible Individuals

An employer offers three levels of health coverage: Employee-Only, with a COBRA premium of \$500, Employee-Plus-One, with a COBRA premium of \$700, and Family, with a COBRA premium of \$1,000.

Example 1: An employee is involuntarily terminated on June 1, 2009 and timely elects Family COBRA coverage for himself, his two children and his domestic partner. The employee and his children are assistance eligible individuals, but the domestic partner is not. Therefore, the premium subsidy will not apply to the portion of the premium attributable to the domestic partner.

Because the employee would be required to elect Family coverage to cover himself and his two children, there is no additional cost for covering the employee’s domestic partner. Therefore, the value of the domestic partner’s coverage is considered \$0 and the subsidy applies to the full \$1,000 premium. The employee’s required COBRA premium payment is \$350.

Example 2: Assume the same facts above, except that the loss of coverage creates a special enrollment right for the children to immediately enroll in their mother’s (the employee’s ex-spouse’s) plan. In this case, neither the children nor the domestic partner are eligible for the premium subsidy. As a result, the subsidy applies only to the portion of the premium attributable to the employee. The employee’s required COBRA premium payment is therefore calculated as follows:



\$1,000	Family premium
<u>- \$500</u>	Employee-Only premium
\$500	Portion ineligible for the subsidy
\$500	Portion eligible for the subsidy
<u>x 35%</u>	
\$175	Subsidy premium
\$500	Portion ineligible for the subsidy
<u>+\$175</u>	Subsidy premium
\$675	Employee's total required premium
\$500	Portion eligible for the subsidy
<u>x 65%</u>	Subsidy
\$325	Eligible to be claimed as a payroll tax credit

When calculating the incremental cost of ineligible individuals, amounts paid are allocated first to the assistance eligible individuals—not necessarily to the employee. Therefore, the cost of Employee-Only coverage will not always be attributable to the employee.

Example 3: An employee is involuntarily terminated on May 1, 2009 and timely elects Employee-Plus-One COBRA coverage for himself and his spouse. The employee is immediately eligible for Medicare (rendering him ineligible for the subsidy). The spouse is not yet eligible for Medicare, so she remains eligible for the subsidy. Because the amounts paid for COBRA coverage are allocated first to the assistance eligible individual (in this case, the spouse), the employee's required COBRA premium payment is therefore calculated as follows:

\$700	Employee-Plus-One premium
<u>- \$500</u>	Employee-Only premium (attributed to spouse)
\$200	Portion ineligible for the subsidy (attributed to employee)
\$500	Portion eligible for the subsidy
<u>x 35%</u>	
\$175	Subsidy premium
\$200	Portion ineligible for the subsidy
<u>+\$175</u>	Subsidy premium
\$375	Employee's total required premium
\$500	Portion eligible for the subsidy
<u>x 65%</u>	Subsidy
\$325	Eligible to be claimed as a payroll tax credit

Calculations Involving Continuation Coverage

As part of a severance package for an employee terminated on August 1, 2009, an employer provides health coverage at active employee rates for three months. The employee elects Family COBRA coverage, which has a monthly active premium of \$200 and a monthly COBRA premium of \$1,000.



Example 1: The severance agreement provides that the employer “will continue group health plan coverage” for three months, and the employer treats the coverage as an extension of the health plan. Therefore, the loss of coverage occurs on October 31, 2009. The health plan provides that the 18-month COBRA period begins on the date of termination, so the continuation coverage will run concurrently with the COBRA period.

Assuming the employee and his family remain eligible for the subsidy for the full nine months, the employee’s required COBRA premium payment is calculated as follows:

August-October Premiums		November-April Premiums	
\$1,000	Family premium	\$1,000	Family premium
<u>- \$800</u>	Voluntary subsidy	<u>- \$0</u>	Voluntary subsidy
\$200	Portion eligible for the subsidy	\$1,000	Portion eligible for the subsidy
\$200	Portion eligible for the subsidy	\$1,000	Portion eligible for the subsidy
<u>x 35%</u>		<u>x 35%</u>	
\$70	COBRA premium	\$350	COBRA premium

Example 2: Assume the same facts as above, except that the health plan provides for the 18-month COBRA period to begin on the date of the loss of coverage. In this case, COBRA does not begin until the provided continuation coverage ends.

Assuming the employee and his family remain eligible for the subsidy for the full nine months, the employee’s required COBRA premium payment is calculated as follows:

August-October Premiums		November-July Premiums	
\$1,000	Family premium	\$1,000	Family premium
<u>- \$800</u>	Voluntary subsidy	<u>x 35%</u>	
\$200	Health plan premium – Not eligible for the subsidy	\$350	COBRA premium

FOR MORE INFORMATION

If you would like more information about the COBRA subsidy guidance that has been issued to date, please contact your primary Thompson Hine Employee Benefits & Executive Compensation lawyer or email us at AskUs@ThompsonHine.com. For a list of our Employee Benefits & Executive Compensation lawyers, please go to www.ThompsonHine.com/practices/Employee_Benefits_Executive_Compensation/lawyers/.

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