

## IRS Issues Detailed Guidance for Implementation of COBRA Premium Subsidy

The American Recovery and Reinvestment Act of 2009 provides a government subsidy of 65% percent of the COBRA premium actually charged to anyone who becomes eligible for COBRA between September 1, 2008 and December 31, 2009 because of an involuntary termination of employment (other than for gross misconduct) during that period. The subsidy is available for coverage periods beginning on or after February 17, 2009. Employers and plan administrators have raised a number of questions concerning who is eligible for the subsidy, calculation of the subsidy amount, and termination of subsidy eligibility. IRS and DOL representatives have addressed many of these issues in recent webcasts. The IRS has now provided written confirmation of much of this verbal guidance, as well as clarification of a variety of additional issues. Notice 2009-27 includes 58 questions and answers on such topics as what events qualify as involuntary terminations of employment, calculation of the premium subsidy when COBRA covers individuals who are and are not eligible for the subsidy, and when eligibility for retiree health care or another group health plan will terminate eligibility for the subsidy. Here are a few of the highlights:

- An involuntary termination generally is a severance of the employment relationship due to the independent exercise of the unilateral authority of the employer, other than as a result of the employee's implicit or explicit request, where the employee is willing and able to continue performing services.
- Certain employee-initiated terminations may qualify as involuntary terminations if the employee terminates the relationship for good reason due to employer action that causes a material negative change or constitutes a constructive discharge. Whether an employee-initiated termination constitutes an involuntary termination is based on all the facts and circumstances.
- Death or absence due to illness or disability are not involuntary terminations.
- A layoff with recall rights, a temporary furlough, or any other involuntary reduction in services to zero hours is an involuntary termination. If hours are not reduced to zero, however, the reduction is not an involuntary termination, unless the reduction is such a material negative change in the employment relationship that the employee quits for good reason.
- A lockout is an involuntary termination, but a strike is not.
- Voluntary acceptance of a severance package may be an involuntary termination if the employer indicates that a certain number of positions will be eliminated, voluntarily or involuntarily.
- Both the involuntary termination and the loss of health care coverage must occur between September 1, 2008 and December 31, 2009 in order for an individual to be eligible for the subsidy. The timing of the loss of coverage for this purpose may depend on the terms of the employer's health care plan. If the employer extends coverage for a period of time after the qualifying event and treats the COBRA continuation period as beginning after the extended coverage expires, the loss of coverage will occur at the expiration of the extended coverage. If the employer treats the extended coverage as part of its COBRA obligation, on the other hand, the loss of coverage occurs at the time of the qualifying event.
- If an individual is involuntarily terminated more than once between September 1, 2008 and December 31, 2009, the individual may become eligible for the subsidy more than once and may receive up to nine

months of subsidy each time.

- Only individuals who are COBRA qualified beneficiaries may become eligible for the subsidy. Qualified beneficiaries generally are limited to the covered employee, the employee's spouse and the employee's dependent children. A domestic partner, for example, generally cannot be a qualified beneficiary and cannot become eligible for the subsidy.
- Where health care coverage applies both to individuals eligible for the subsidy and to individuals not eligible for the subsidy, the portion of the total premium cost that is attributable to ineligible covered individuals is limited to any additional incremental cost. If the highest coverage classification is self and two or more dependents, for example, and the individual covers himself, two dependent children and a domestic partner, no portion of the premium cost is attributable to the domestic partner's coverage, and the entire premium is eligible for the subsidy.
- A health reimbursement account ("HRA") may be eligible for the subsidy if the employee is required to contribute to the HRA on an after-tax basis.
- A health care plan cannot deny the subsidy to an individual whose income exceeds the statutory limits, unless the individual has furnished a signed and dated notification permanently waiving the subsidy.
- Individuals whose employment has been terminated involuntarily and who have an open COBRA election period as of February 17, 2009, but have not yet elected COBRA, are entitled to an extended COBRA election period and must be provided the notice for extended or second COBRA election periods. In other words, these individuals must be treated the same as someone whose employment was terminated involuntarily in October 2008 and who rejected COBRA continuation coverage at that time.
- Under an insured health care plan, if the insurer has agreed to collect premiums directly from COBRA qualified beneficiaries, the insurer must provide coverage upon receipt of 35% of the applicable premium from the qualified beneficiary, even if the employer has not yet paid the balance of the premium.

If you have questions or would like additional information about this IRS guidance or the COBRA premium subsidy in general, please feel free to contact Brian Dougherty at (215) 587-5919 or [bdougherty@postschell.com](mailto:bdougherty@postschell.com).

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