

COBRA SUBSIDY GUIDANCE - MORE CLARITY, MORE COMPLEXITY

The proper guidance can get you on the right path. It doesn't guarantee the path will be without twists and turns. So employers have found in following the official and unofficial (non-binding) guidance (issued by the IRS and DOL) since the February 17, 2009 enactment of COBRA subsidy provisions.

Because the law includes an April 18, 2009 deadline for distributing notices and requirements to provide the subsidy virtually immediately, employers have been scrambling to implement its provisions. The subsequent guidance has answered a number of questions and suggested compliance strategies – but not necessarily simplified matters.

BACKGROUND

The stimulus package signed into law on February 17, 2009 included a temporary COBRA subsidy provision that was effective almost immediately. Very generally, the COBRA subsidy requirements include:

- For certain involuntarily terminated employees and their dependents, group health plans must accept 35% of the required COBRA premium as full payment for the coverage.
- After receiving the 35% payment, the employer maintaining the group health plan may recover the remainder of the COBRA premium through offsets to payroll tax deposits or direct payment from the government.
- In the case of certain employees involuntarily terminated on or after September 1, 2008 and their dependents, group health plans must allow a “second-chance” COBRA election.
- Employers must provide notice of the availability of the subsidy and the second-chance election.

For an overview of the COBRA subsidy requirements, please refer to Willis HRH's *Employee Benefits Alert*, Vol. 2, No. 4 (February 2009), “COBRA Subsidy Provisions Require Immediate Attention.”

EXECUTIVE SUMMARY

The regulatory agencies charged with implementing the COBRA subsidy have answered employers' calls for guidance on the subsidy.

- The IRS has issued a notice that addresses, among other things, the definition of involuntary termination. An involuntary termination of employment generally is one brought about by an employer-initiated event. There will be many situations that are not clear cut, and employers addressing those may wish to deny the subsidy and refer the applicant to the Department of Labor (DOL) for its expedited review process.
- The DOL has issued model notices, and has stated that some form of notice must be sent to most qualified beneficiaries who became eligible for COBRA on or after September 1, 2008, regardless of the reason for eligibility. The exceptions are individuals who were sent an election notice on or before February 17, 2009, provided that they

still must receive a notice if they elected COBRA coverage and still have it in effect or if they are entitled to the second-chance COBRA election. Because the exceptions are so small, the easier approach for many employers will be to send information regarding the subsidy to all qualified beneficiaries who had a qualifying event on or after September 1, 2008.

- Some of the guidance proves the adage that the devil is in the details. Complicated answers have been provided to questions about the effect of family members who do not qualify for the subsidy, the effect of new election notices on election periods, and plans that provide several types of coverage (e.g., medical, dental, and vision).

GUIDANCE ISSUED SINCE ENACTMENT

The most pressing question for employers in connection with the COBRA subsidy has been what qualifies as involuntary termination of employment. On March 31, 2009, the IRS issued a [notice](#) that makes some progress toward answering the question. While some situations remain ambiguous, the IRS' answer is helpful.

Administratively, employers have struggled to prepare notices that adequately describe the COBRA subsidy and to identify the required recipients. On March 19, 2009, the DOL issued some model notices that give some indication of what information the notices must include. The [model notices](#) raise a number of concerns, however, including questions about who must be provided which notice.

Official IRS and DOL guidance has been amplified by a lot of unofficial, non-binding guidance, including a variety of internet postings. Links to the postings are organized on the [DOL's COBRA subsidy webpage](#), a [similar IRS webpage](#) and a [Health and Human Services \(HHS\) webpage for state and local governmental employers](#). (The HHS site also includes [helpful information on state law continuation rights](#).)

DEFINING INVOLUNTARY TERMINATION OF EMPLOYMENT

The most interesting – and eagerly awaited – part of the IRS' [March 31 notice](#) is its discussion of involuntary termination. Defining “involuntary termination” is crucial to administration of the COBRA subsidy because the subsidy generally applies to qualified beneficiaries who elect COBRA coverage offered due to an involuntary termination of employment occurring on or after September 1, 2008 and before January 1, 2010. The IRS' general definition of involuntary termination is not illuminating.

[S]everance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services.

The examples that the IRS provides and its responses to questions are more helpful.

- **Involuntary termination of employment – not just health coverage – is required** in order to receive the subsidy. If an individual has COBRA coverage due to a qualifying event other than involuntary termination of employment (e.g., death of a covered employee), the subsidy will not be available.
- **Termination for cause** is involuntary termination and does not prevent the subsidy from applying.
- **Termination for gross misconduct** is involuntary termination, but it does prevent the subsidy from applying. Employees terminated for gross misconduct and their dependents are not entitled to elect COBRA coverage. An IRS representative has indicated informally, however, that the IRS is unlikely to take issue with an employer who, as a means of reducing its risk of COBRA liability, treats gross misconduct terminations the same as any other termination when offering COBRA and therefore allows the subsidy to apply in gross misconduct situations.

- **Failure to renew a contract** when it expires is an involuntary termination, if the employee is willing and able to execute a new contract on terms similar to those in the expiring contract and to continue providing the services.
- **Resignation or retirement as an alternative to termination** is involuntary termination if “the facts and circumstances indicate that...the employer would have terminated the employee’s services” and the employee knew it.
- **Volunteering to take a “buy out” severance package and resign** is an involuntary termination of employment if the employer has indicated that after the voluntary severance period “a certain number of remaining employees in the employee’s group will be terminated.”
- **Resignation in response to material negative changes** in the employment relationship – such as an employer-imposed reduction in hours or change in geographic location of employment – is an involuntary termination. If an employee who experiences a material negative change continues to work for the employer, however, the subsidy will not apply to any COBRA coverage that might be available.
- **Reduction in hours of employment, by itself**, generally is not termination of employment, and the subsidy will not apply even if the reduction is involuntary.
- **Reduction in hours of employment to zero hours** is termination of employment and the subsidy will apply if the reduction is involuntary. For example, an involuntary lay-off, furlough or other suspension of employment will qualify as involuntary termination.
- **Reduction in hours to zero because of illness or disability** is not termination of employment unless the employer takes action to end the absentee’s employment status. An individual taking a leave will be involuntarily terminated if the employer ends the individual’s employment status due to failure to return to work.
- **A work stoppage due to a strike** is not involuntary termination of employment, but a lockout initiated by the employer is.

GUIDANCE LEAVES EMPLOYERS CAUGHT IN THE MIDDLE

Of course, many situations that were not addressed in the guidance are not clearly voluntary or involuntary (e.g., termination due to job abandonment), and we are convinced that no amount of guidance can cover everything. This puts employers in a difficult spot. If an employer denies COBRA and the subsidy because an employee voluntarily resigned, a court might later second-guess the employer’s conclusion, subjecting the employer to liability for the COBRA violation. In most COBRA situations, an employer is well advised to offer COBRA whenever there is any doubt about whether it is required. On balance, that probably remains true in cases where the subsidy may apply, but the subsidy means that there is additional financial and legal risk for the employer that did not apply before the subsidy was available.

The statute stipulates that an employer is entitled to deduct from its payroll tax deposits the 65% of COBRA premiums that are not paid by individuals who are entitled to the COBRA subsidy (i.e., those who, among other things, have COBRA due to an involuntary termination of employment). An employer is not entitled to recover any COBRA subsidy that is not required by the statute (e.g., if the employer provides the COBRA subsidy to qualified beneficiaries whose qualifying event was voluntary termination). Moreover, an employer’s overstatement of the reimbursement due to it for the COBRA subsidy is an underpayment of payroll taxes that the IRS may collect in the same manner as any other unpaid payroll taxes. Given the difficulty in determining whether a termination is involuntary, the employer must balance potential liability for COBRA violations against the penalties that apply to failure to deposit payroll taxes. This puts employers in an untenable position.

WILLIS HRH ASKS REGULATORS TO SOLVE THE PROBLEM

To address this problem, Willis HRH's National Legal & Research Group, as a member of the board of the American Benefits Council, has requested that regulators assist employers with this issue. NLRG attorneys, along with other industry leaders, met with IRS and Treasury officials to request a "reasonable interpretation" standard of compliance. That is, if an employer errs in favor of providing the subsidy whenever it is not clear that a termination is voluntary, the IRS will accede to the employer's determination when deciding whether the employer has underpaid its payroll taxes. The IRS and Treasury representatives at the meeting listened and understood the concern.

IF THERE'S NO IRS SOLUTION, THERE'S ALWAYS THE DOL

Unless the IRS provides some assurance that employers' decisions regarding involuntary termination will not be challenged as failures to deposit payroll taxes, employers may be best served by sending doubtful cases for a determination by the DOL under an expedited review process. The statute provides that individuals who are refused the subsidy (i.e., a plan refuses to provide COBRA coverage if they pay only 35% of the premium) may appeal the denial to the DOL, which must decide the appeal within 15 business days. If the DOL determines that an individual is subsidy-eligible, then that should protect the employer against failure-to-deposit issues that result from treating someone who quit as involuntarily terminated.

Under this approach, employers would initially deny a subsidy request from anyone whose qualifying event was not a clearly involuntary termination of employment. (See the discussion below regarding the advantages to an employer of requiring that all individuals seeking the subsidy complete a written request to that effect.) When explaining the denial, the employer would encourage an appeal of the decision to the DOL. The employer would also explain that the individual may want to pay the full COBRA premium while awaiting the DOL's decision in order to prevent termination of COBRA coverage for failure to pay in the event that the DOL concludes that the subsidy is not required. The individual may, however, pay the reduced premium while the appeal is pending and that will keep COBRA coverage in effect if the DOL ultimately rules in the individual's favor.

There is a provision in the statute under which an employer who receives payment of the full COBRA premium from a subsidy-eligible individual with respect to the first two payment cycles at the beginning of COBRA coverage must treat those amounts as an overpayment. If the individual overpays while an appeal is pending, for example, and later establishes eligibility for the subsidy (e.g., as a result of a DOL determination), then the employer refunds the excess or provides a credit against future COBRA premiums (provided the credit will be used up within 180 days).

DOL'S MODEL NOTICES RAISE ISSUES

The only guidance more eagerly awaited than the definition of involuntary termination was the DOL's model language for notices explaining the COBRA subsidy as required by the COBRA subsidy law. Unfortunately, many employers are finding the model notices difficult to use.

The statute specifically allows employers to provide the required information by adding it to the text of the COBRA election notice or by putting it in a separate document that is delivered along with the COBRA election notice. Because different plans need different COBRA election notices to accommodate varying plan provisions and practices, it was expected that the DOL would issue model notices that employers could use alongside their existing election notices or incorporate into those notices. The **model notices** that the DOL issued on March 19 take a different approach.

There are three model notices that are intended for use by employers. (A fourth notice, entitled the "**Alternative Notice**," is for use by health insurance issuers that provide continuation coverage pursuant to state law.) Each of these three notices raises issues for employers and, for most, it is not possible to use the model notices without significant modifications.

- **General Notice (full version).** This notice is intended to replace an employer's normal COBRA election notice. Prospectively, an employer would send this notice to all qualified beneficiaries rather than using its normal COBRA election notice. (See the chart below for a description of the DOL-recommended recipients of this model notice.) To create this model notice, the DOL engrafted information regarding the subsidy into the model election notice that it issued in 2004. Several COBRA compliance issues result.

As was the case with the 2004 model election notice, this model notice cannot be used without significant customization, and it has some omissions that arguably put employers at risk for COBRA liability (e.g., procedures for qualified beneficiaries to provide certain notices and consequences of failure to give those notices). Because of these issues with the DOL's 2004 model election notice, many employers use election notices that differ significantly from it. The new General Notice (full version) has the same issues as the 2004 model election notice and will not work well for many employers. They will need to either extract the COBRA subsidy information from the General Notice (full version) or revise the General Notice (full version) so that it incorporates the employer's modifications to the DOL's 2004 model election notice. The General Notice (full version) also shares some of the issues noted below for the abbreviated version.

- **General Notice (abbreviated version).** This notice is intended for qualified beneficiaries who currently have COBRA coverage in effect, so it does not replace an election notice like the full version does. (See the chart below for a description of the DOL-recommended recipients of this model notice.) The notice does not clearly state, however, that the terms of the election notice previously provided to the recipient (including those regarding early termination of COBRA coverage) continue to apply to the individual's COBRA coverage whether or not the subsidy is available. While the model notice includes a form "Request for Treatment as an Assistance Eligible Individual Under ARRA," it does not indicate what effect completing the form has or whether the recipient must complete and return the form in order to receive the COBRA subsidy. These issues also apply to the General Notice (full version).

IRS and DOL officials have indicated informally that an employer may condition availability of the subsidy on completion of such a form. This requirement will be helpful to employers by forcing those who believe they are eligible for the subsidy to identify themselves to the employer, minimizing the chances of a claim that the employer should have identified all subsidy-eligible individuals and notified them of their reduced premiums. Employers implementing this requirement will want to add a provision explaining that it might be advantageous to pay full COBRA premiums until the employer responds to the request with confirmation of eligibility for the subsidy. The provision should note that any overpayment made during this period will be credited against future premiums or refunded. Similarly, the notice should encourage anyone who is not confirmed as subsidy-eligible to file an appeal with the DOL under its expedited review process (discussed above in connection with the definition of involuntary termination).

- **Notice in Connection with Extended Election Periods.** This model notice is intended to extend the second-chance COBRA election opportunity to individuals who qualify for it. (See the chart below for a description of the DOL-recommended recipients of this model notice.) As such, it is based on the DOL's 2004 model election notice and raises all of the issues noted above with respect to both versions of the General Notice. In addition, the DOL drafted this model notice as if the plan sending it had made an advance determination that the recipient was eligible for the second-chance election. One of the conditions for the second-chance election being available is having a qualifying event that is involuntary termination of employment. Because it is not always clear which terminations are involuntary, it is desirable to provide a timely notice as required by the statute, yet leave open the possibility that the recipient may not qualify for the second-chance election. Revisions to this model notice are needed in order for it to make clear that, if the recipient returns the election form as required, the plan will make a determination about the recipient's eligibility for the second-chance election and an ineligible recipient will not be provided COBRA coverage.

THE DOL'S INSTRUCTIONS ON RECIPIENTS COMPLICATE MATTERS

Informal DOL guidance on the model notices exposes additional problems with them. The following chart lists the three DOL model notices that employers are to use, and the required recipients and deadlines for each, as specified by the DOL.

DOL Model Notice	DOL-Identified Required Recipients	Deadline for Providing Notice
General Notice (Full version)	All individuals (other than those currently having COBRA in effect) who experienced a qualifying event of any type at any time from September 1, 2008 through December 31, 2009 and either: <ul style="list-style-type: none"> ■ Have not been provided any election notice ■ OR were provided an election notice on or after February 17, 2009 that did not include the required information about the COBRA subsidy 	Same as deadline for providing election notice. ¹ If election notice deadline has passed, provide as soon as possible and in no event later than April 18, 2009
General Notice (Abbreviated version)	All individuals who experienced a qualifying event on or after September 1, 2008, elected COBRA coverage, and still have COBRA coverage in effect	Same as deadline for providing election notice. [†] If election notice deadline has passed, provide as soon as possible and in no event later than April 18, 2009
Notice in Connection with Extended Election Periods	All individuals who experienced an involuntary termination of employment qualifying event at any time from September 1, 2008 through February 16, 2009 and either: <ul style="list-style-type: none"> ■ Did not elect COBRA continuation coverage ■ OR elected COBRA coverage but subsequently discontinued it 	April 18, 2009

Aside from the overlaps of these groups and the difficulties in identifying involuntary terminations, it is not immediately clear why the DOL's identified recipients satisfy the notice requirements that Congress wrote into the law. Specifically, the statute states that every election notice provided to individuals who become entitled to elect COBRA coverage during the period from September 1, 2008 through December 31, 2009 must include information about the subsidy and the second-election period. The recipients identified by the DOL do not include all of those individuals. The DOL concluded that qualified beneficiaries whose election notices were sent before February 17, 2009 are not entitled to any notice of the COBRA subsidy unless they elected COBRA coverage and still have it in effect or they are entitled to the second-chance COBRA election.

¹ If the employer is also the plan administrator, the deadline for providing an election notice to qualified beneficiaries whose qualifying event is termination of employment, reduction in hours, or death of the covered employee is 44 days from the date of the event. In the case of qualified beneficiaries whose qualifying event is divorce of the covered employee or a dependent child's ineligibility, the election notice deadline is 14 days from the plan's receipt of notice that the event occurred (notice that such an event has occurred generally can be provided by the covered employee, a qualified beneficiary, or a representative).

The DOL probably will consider a plan to have complied with the statute's notice requirement if properly completed model notices are provided to the individuals identified by the DOL as required recipients. Several other authorities enforce COBRA obligations, however, and they probably are not obligated to follow the DOL's internet postings. In particular, courts that decide individual COBRA lawsuits have authority under ERISA to award penalties to individual claimants (up to \$110 per day) for failure to provide required COBRA notices, including the subsidy notice. In order to prevent possible claims based on failure to provide COBRA notices when required, employers may wish to ensure that all individuals who become entitled to elect COBRA coverage during the period from September 1, 2008 through December 31, 2009 receive notice regarding the COBRA subsidy requirements.

MULTIPLE PLANS WILL MULTIPLY NOTICE ISSUES

Two things have been clear since enactment:

1. The COBRA subsidy requirements are not limited to medical plans. Like COBRA itself, the subsidy requirements apply to all plans that provide group health benefits, including dental and vision coverage.
2. Even if a qualified beneficiary elects only dental or vision coverage, that coverage will be subject to the subsidy requirements if it is subject to COBRA and the individual is eligible for the subsidy.

However, in discussing the required recipients of its model Notice in Connection with Extended Election Periods, the DOL noted a surprising corollary to this rule. If an employer allows qualified beneficiaries to elect various types of coverage separately at the time of a qualifying event (i.e., as if they were separate plans), the employer will need to offer a second-chance COBRA election with respect to each of those coverages that a qualified beneficiary does not continue (or continues and later drops) in order to comply with the subsidy requirements. That means that for each qualified beneficiary whose qualifying event was an involuntary termination occurring during the period from September 1, 2008 through December 31, 2009, the employer would end up sending a different notice regarding the subsidy with respect to each type of coverage depending on the election that the qualified beneficiary made at the time of the qualifying event.

Example: Alice had medical, dental and vision coverage in effect under her employer's plan when she was involuntarily terminated on September 15, 2008. Her employer treated the three coverages as separate plans for COBRA purposes, so she had a choice of electing one, two or all three coverages at the time of her qualifying event. (If her employer had treated them all as one plan, she would have had only the choice to continue all three or none of them.) She chose to continue only her medical coverage, and it was still in effect on February 17, 2009. With respect to this medical coverage, the employer does not have to offer Alice a second-chance election and is only required to send her the General Notice (abbreviated version). However, with respect to dental and vision coverage, the employer is required to offer her a second-chance COBRA election, because she does not have a COBRA election in effect with respect to those plans on February 17, 2009. The employer must send Alice the Notice in Connection with Extended Election Periods for those coverages.

None of the DOL's model notices is drafted to accommodate situations in which a single recipient has different rights under the subsidy requirements with respect to various types of coverage – significantly complicating administration of the COBRA subsidy and preparation of subsidy notices.

EXTENDED ELECTION PERIOD MAY APPLY UNEXPECTEDLY

The COBRA subsidy statute makes clear that the subsidy notice is a required part of an election notice and that no election notice is complete unless it includes the required information on the COBRA subsidy. Meanwhile, COBRA has always provided that a qualified beneficiary has at least 60 days from the date that an election notice is provided to elect COBRA coverage. The DOL combined these two facts to reach some interesting conclusions in its informal guidance regarding its model notices.

- A qualified beneficiary who was provided an election notice after February 16, 2009 did not receive a complete election notice unless it included the required information on the COBRA subsidy.
- If an election notice that was sent after February 16 did not include the COBRA subsidy information, the election period for the qualified beneficiary will not run out until at least 60 days after the qualified beneficiary is sent information on the COBRA subsidy requirements.
- If a qualified beneficiary who previously received an election notice elects COBRA during the election period set in that notice, the qualified beneficiary's COBRA coverage will become effective retroactive to the date that coverage was lost as a result of the qualifying event. If, however, the qualified beneficiary elects during the extension of the election period resulting from the incomplete election notice, the qualified beneficiary's COBRA coverage will become effective retroactive to the first day of the first coverage period starting on or after February 17, 2009.
- An election notice for an individual in this situation is not complete unless it explains this timing issue.
- This extension of the election period is not limited to those who qualify for the subsidy or the second-chance COBRA election. It could apply to an individual whose qualifying event was divorce or death of a covered employee.

Example: Amy and Bill were covered under Bill's employer's plan when they divorced on December 15, 2008. Amy notified the employer of the divorce within 60 days, on February 10, 2009, and her coverage was terminated retroactive to December 15, 2008 (subject to reinstatement upon election of and payment for COBRA coverage). On February 18, the employer sent Amy an election notice that did not include information on the COBRA subsidy. Her election period as specified in that election notice will run out on April 20 (60 days after the date of the February 18 notice). If she elects COBRA before April 20, her COBRA coverage will be effective retroactive to December 15, and she will be required to pay COBRA premiums for the intervening months to bring her coverage current. On April 15, 2009, the employer sends Amy the General Notice (full version) according to the DOL's instructions. The employer must add to model notice an explanation that she will now have 60 days from the date of the new notice (i.e., until June 14, 2009) to decide whether she wants to elect COBRA coverage. The notice must also explain that if she elects later than April 20, her COBRA coverage will not be effective retroactive to December 15. Instead, it will be effective retroactive to March 1, 2009 (which for this employer is the first period of coverage starting on or after February 17, 2009).

An employer will need to carefully consider the situation of each qualified beneficiary to whom it sends notice of the COBRA subsidy to determine whether an extended election period will apply.

CALCULATING THE SUBSIDIZED PREMIUM CAN GET COMPLICATED

The IRS' March 31 notice makes clear that only "assistance eligible individuals" (AEIs) qualify for the COBRA subsidy and that all family members must be AEIs in order for the entire COBRA premium for the family's coverage to be eligible for the subsidy. The IRS explained that an AEI whose family COBRA coverage includes one or more non-AEIs will not receive the subsidy for COBRA premium attributable to the non-AEIs. On the plus side, the IRS chose an attribution formula that usually will minimize the portion of the premium that is deemed attributable to non-AEIs.

Example 1: Aaron is an AEI who qualifies for the COBRA subsidy and elects COBRA coverage for himself only. His COBRA premium is \$700, but the COBRA subsidy allows him to pay only \$245. When he still has six months of COBRA subsidy eligibility remaining, Aaron marries Doris and adds her to his COBRA coverage. She is not an AEI and, to the extent that the COBRA premium for their coverage is attributable to Doris, the COBRA subsidy will not apply. The COBRA premium for their coverage normally would be \$1200. Under the IRS guidance, the COBRA premium that would apply to family members that are AEIs is deducted from the total premium to determine the amount attributable to the non-AEIs. In this case, the \$700 COBRA premium that applies to Aaron alone is deducted from the \$1200 total premium, leaving \$500 attributable to Doris. The COBRA subsidy still reduces the premium for Aaron's coverage to \$245, so the total payment required for their coverage is be \$745.

Example 2: Jane has family coverage for herself and her three children under her employer's plan when she is involuntarily terminated. She and her children are all AEIs, qualifying for the COBRA subsidy, and she elects COBRA coverage for all four of them. The COBRA premium for family coverage (the highest tier available under Jane's employer's plan) is \$1,700, but the COBRA subsidy allows her to pay \$595. Three months later, Jane marries Bob and adds him to her COBRA coverage. Bob is not an AEI and, to the extent that the COBRA premium for the family's coverage is attributable to Bob, the COBRA subsidy will not apply. However, adding Bob to the family's COBRA coverage has no effect on the premium, because Jane was already paying premium based on the highest tier available under her employer's plan. Therefore, no part of the COBRA premium would be deemed attributable to the non-AEI spouse's coverage for purposes of the COBRA subsidy. Jane's premium payment would remain \$595 as long as she and her children continued to qualify for the COBRA subsidy.

Similar situations may arise (and the same attribution rules would apply) if individual family members retained COBRA coverage after becoming eligible for Medicare or other group health coverage. Eligibility for Medicare or group health plan coverage results in loss of eligibility for the COBRA subsidy. (When determining whether other group health coverage eliminates eligibility for the subsidy, the following are not taken into account: coverage for dental, vision, counseling, or referral services (or a combination of these); coverage under a health flexible spending arrangement or, in most cases, a health reimbursement arrangement; or treatment that is furnished in an on-site medical facility maintained by an employer and consists primarily of first-aid services, prevention and wellness care, or similar care.)

SEVERANCE AND THE SUBSIDY

Employers often include some payment for COBRA coverage in their severance programs (e.g., payment of the full COBRA premium for the first three months of coverage following termination of employment). When employers pay all or part of the cost of COBRA coverage, the COBRA subsidy applies only to the amount that a subsidy-eligible individual is required to pay for COBRA coverage during the period that the subsidy is available. If a subsidy-eligible individual is not required to pay anything for COBRA coverage, the subsidy applies to \$0. The subsidy is available for up to nine months from the date that COBRA coverage begins.

When employers provide a period of continued coverage on the same terms as apply to active employees or continued coverage at no cost as part of a severance package, it is not always clear when COBRA coverage begins. In short, employer-supported coverage during a severance period following termination of employment raises the question of when the up-to-nine-month subsidy period starts. In the case where the employer-supported coverage during the severance period is a continuation of plan coverage (i.e., a deferred loss of coverage) it is NOT COBRA coverage and no subsidy applies to it. Instead, the COBRA coverage begins when the employer-supported severance period coverage ends and that is also when the subsidy first applies.

If, however, the employer treats the loss of coverage as occurring at the beginning of the employer-supported severance period of coverage, and the employer support provided by the severance package simply includes paying all or part of the COBRA premiums, then COBRA coverage will begin when the severance period of coverage begins and the maximum subsidy period will begin then, too. According to the IRS, the difference between these two situations is the employer's characterization of the employer-supported continuation period.

CONCLUSION

The guidance provided since enactment of the COBRA subsidy has clarified, but perhaps not simplified, this compliance challenge. COBRA compliance stakes are high, so employers are well-advised to work through the many details that must be addressed in order to comply with the COBRA subsidy requirements.

KEY CONTACTS

US BENEFITS OFFICE LOCATIONS

NEW ENGLAND

Bangor, ME
207 942 4671

Boston, MA
617 557 7517

Hartford, CT
860 756 7365

Shelton, CT
203 924 2994

NORTHEAST

Buffalo, NY
716 856 1100

Cranford, NJ
908 931 3005

Florham Park, NJ
973 410 4622

Morristown, NJ
973 829 6374
973 829 6465

New York, NY
212 915 8802

Norwalk, CT
203 523 0501

Philadelphia, PA
610 260 4351

Radnor, PA
610 254 7289

Wilmington, DE
302 397 0171

ATLANTIC

Baltimore, MD
410 584 7528

Bethesda, MD
301 581 4261

Knoxville, TN
865 588 8101

Memphis, TN
901 248 3103

Nashville, TN
615 872 3716

Norfolk, VA
757 628 2303

Reston, VA
703 435 7078

Richmond, VA
804 527 2343

Rockville, MD
301 692 3025

SOUTHEAST

Atlanta, GA
404 224 5000

Birmingham, AL
205 871 3300

Charlotte, NC
704 344 4856

Gainesville, FL
352 378 2511

Greenville, SC
704 344 4856

Jacksonville, FL
904 355 4600

Marietta, GA
770 425 6700

Miami, FL
305 421 6208

Mobile, AL
251 544 0212

Orlando, FL
352 378 2511

Raleigh, NC
704 344 4856

Savannah, GA
912 239 9047

Tallahassee, FL
850 385 3636

Tampa, FL
813 490 6808
813 289 7996

Vero Beach, FL
772 469 2842

MIDWEST

Appleton, WI
414 259 8837

Chicago, IL
312 527 6482
312 621 4843
312 621 4704

Cleveland, OH
216 357 5921

Columbus, OH
614 326 4788

East Lansing, MI
517 349 3226

Grand Rapids, MI
248 735 7249

Green Bay, WI
414 259 8837

Milwaukee, WI
414 203 5248
414 259 8837

Minneapolis, MN
763 302 7131
763 302 7209

Moline, IL
309 764 9666

Pittsburgh, PA
412 645 8537
412 586 3524

Schaumburg, IL
847 517 3469

SOUTH CENTRAL

Amarillo, TX
806 376 4761

Austin, TX
512 651 1660

Dallas, TX
972 715 2194
972 715 6272

Denver, CO
303 765 1564
303 773 1373

Houston, TX
281 584 1672
281 584 1676
713 625 1017

McAllen, TX
956 682 9423

Mills, WY
307 266 6568

New Orleans, LA
504 581 6151

Oklahoma City, OK
405 232 0651

Overland Park, KS
913 498 4423
913 339 0800, ext. 108

San Antonio, TX
210 979 7470

Wichita, KS
316 494 6174

WESTERN

Aliso Viejo, CA
949 461 3996

Fresno, CA
559 256 6212

Las Vegas, NV
602 787 6235
602 787 6078

Los Angeles, CA
213 607 6300

Novato, CA
415 493 5210

Phoenix, AZ
602 787 6235
602 787 6078

Portland, OR
503 274 6224

Rancho/Irvine, CA
562 435 2259

San Diego, CA
858 535 1800
858 678 2130

San Francisco, CA
415 291 1567

San Jose, CA
415 291 1567

Seattle, WA
800 456 1415

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