

Automation Alley Newsletter

April 2009

DOL Issues New COBRA Subsidy and Election Rights Model Notices - Revised Explanation

On March 19, 2009, the Department of Labor ("DOL") issued four new model notices related to the COBRA premium subsidy program established under the American Recovery and Reinvestment Act of 2009 (Act). The DOL made changes to its website announcement of the model notices and has provided additional information. We have updated our explanation of these new notices and their implications to reflect these changes and to provide additional information.

BACKGROUND

COBRA Subsidy - As we previously reported in our February 16, 2009 Employee Benefits E-News (<http://www.butzel.com/pdf/090216enBEN.pdf>), under the program, a group health plan (other than a health care flexible spending account plan) can only require an assistance eligible individual ("AEI") to pay 35% of the COBRA premium that the AEI would otherwise be required to pay. The federal government is subsidizing the remaining 65% of the premium by allowing the employer to take a credit against the payroll taxes and federal income taxes withheld from employees' compensation. The subsidy applies beginning March 1, 2009. An AEI is entitled to the subsidy for up to nine months.

Under the Act, an AEI is a COBRA qualified beneficiary (covered employee, spouse or dependent child) who:

- is eligible for COBRA coverage at any time between September 1, 2008 and o December 31, 2009; **and**
- elects COBRA coverage either during the original COBRA election period or during the special second election period provided by the Act; **and**
- is a COBRA qualified beneficiary because of an **involuntary** termination of a covered employee's employment (other than for gross misconduct) that occurs on or after September 1, 2008 and on or before December 31, 2009.

At a DOL webcast on March 24, 2009 the DOL provided some insight into what could constitute an involuntary termination. The DOL stated that the following are, or can be, involuntary termination of employment:

- Layoff

- Furlough
- Voluntary retirement and resignation due to solicitation by the employer in anticipation of layoff by employer
- Constructive involuntary termination (i.e., employer tells employee the only way to keep his/her job is to move to a different location in a different state and instead employee quits)
- Employer reduces employee hours from 40 hours to 25 hours per week and as a result employee loses health coverage - employee quits because he needs health benefits
- Employee terminated for cause

The DOL also stated that the following are not involuntary termination:

- Reduction in hours (but hours are not reduced to zero)
- Divorce
- Death of employee
- Dependent reaching age of majority for dependent coverage purposes under plan
- Employee being called to active military duty

Special Second Election Period - The Act also provides that an individual who would be an AEI except that the individual is not receiving COBRA coverage on the date of enactment of the Act must be given a special second chance to elect COBRA coverage. This special election period begins on the date of enactment of the Act and ends 60 days after the plan administrator provides the individual a required notice regarding these rights.

Change in Coverage - The Act permits (but does not require) an employer to allow AEIs (including AEIs that have COBRA coverage without the special election) to elect a health care coverage option different from the health care coverage originally offered to the AEI under COBRA. Under this rule:

- The COBRA premium cost for the different coverage cannot exceed the COBRA premium for the coverage in which the AEI was enrolled when the COBRA qualifying event occurred.
- The different coverage must be coverage the employer is offering to its active employees at the time the AEI elects the different coverage.
- The different coverage cannot provide only dental, vision, counseling or referral services (singly or in any combination) and cannot be a health care flexible spending account or an on-site facility primarily providing first aid, prevention, or wellness care.

MODEL NOTICES

Under the Act, a group health plan is required to provide written notices to certain current and former participants and beneficiaries about the premium subsidy and potential rights to the

second election. On March 19, 2009, the DOL issued four model notices (<http://www.dol.gov/ebsa/COBRAmodeInotice.html>). Each model notice is designed for a particular group of qualified beneficiaries and contains information to help satisfy the Act's notice provisions. A group health plan may revise the notices to fit its particular circumstances. Unfortunately, the DOL explanations of the qualified beneficiaries intended to receive each form of notice that the notices do not cover all possible groups of qualified beneficiaries who have had qualifying events on or after September 1, 2009. This explanation will attempt to fill in the gaps.

Full Election Notice - The first model notice is a full election notice. This notice contains the detailed COBRA information contained in DOL's standard model notice plus specific information related to the COBRA subsidy and changing coverage under the plan. It also contains a summary of the premium subsidy rules under the Act and a model form on which a qualified beneficiary can request AEI status and an employer can indicate its decision on the request.

According to the DOL, the full election notice should be provided to **all qualified beneficiaries** who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, **regardless of the type of qualifying event**, who have not yet received an election notice or who received an election notice on or after February 17, 2009 that did not contain the additional information required by the Act. Neither the model notices or the DOL website indicate what notice must be provided to a qualified beneficiary who received an election notice prior to February 17, 2009 who has not made a COBRA election but whose 60-day COBRA election period has not expired). Because the qualified beneficiary would need the information regarding the subsidy and the right to elect a different coverage option (if available), it appears that the full election notice should also be provided to these qualified beneficiaries. In a webcast on March 24, 2009, the DOL gave an example which suggests that no notice must be provided to a qualified beneficiary who had a qualifying event prior to February 17, 2009 that could not be considered an involuntary termination of employment if the qualified beneficiary received an election notice, did not elect COBRA and the 60-day COBRA election period has expired.

Under the Act and the DOL regulations the required COBRA notices are not considered complete until a notice with information required by the Act is provided, group health plans should provide this notice as soon as possible to relevant existing qualified beneficiaries.

Abbreviated Election Notice - According to the DOL, the second model notice is an abbreviated election notice to be provided to qualified beneficiaries who experienced a qualifying event on or after September 1, 2009, already elected COBRA coverage, and still have COBRA coverage in effect. Like the full election notice, the abbreviated notice would also have to be provided to **all qualified beneficiaries, regardless of the type of qualifying event**. Because individuals on COBRA previously received an election notice, the abbreviated notice focuses on the Act's COBRA provisions, including the summary of the premium subsidy rules and a model form on which a qualified beneficiary can request AEI status and an employer can indicate its decision on the request. Neither the model notices or the DOL website indicate what notice should be provided to a qualified beneficiary who has made a COBRA election but has not yet paid for it (qualified beneficiaries have 45 days from the date of their election of COBRA coverage to make their first premium payment). Presumably, these qualified beneficiaries would receive the abbreviated notice. This notice should also be provided as soon as possible to relevant existing beneficiaries.

Extended Election Period Notice - The third model notice only has to be provided to potential AEIs

informing them of the subsidy, the second election period and change in coverage rights (if any) under the plan. This notice must be sent to any AEI (or any individual who would be an AEI if he had a COBRA continuation election in effect) who had a qualifying event at any time from September 1, 2008 through December 31, 2009 and either did not elect COBRA coverage, or who elected it but subsequently discontinued COBRA. This notice would only have to be sent to an individual whose qualifying event was or could be considered an involuntary termination of employment. This notice must be provided no later than April 18, 2009.

State Continuation Coverage Notice – The fourth model notice is for insurance issuers that provide group health insurance coverage and who must notify persons who became eligible for continuation coverage under a State continuation coverage law. Since continuation coverage requirements vary among States, this notice would need to be modified to conform it to the applicable State law. It appears that like the full election notice, the state continuation coverage notice would also have to be provided to **all qualified beneficiaries, regardless of the type of qualifying event.**

NEXT STEPS

Now that the DOL has issued model notices, plan administrators of group health plans subject to COBRA need to act quickly to begin implementing the new COBRA provisions. For purposes of providing timely COBRA notices, plan administrators should:

- Identify all qualified beneficiaries (including covered spouses and dependent children) who had qualifying events between September 1, 2008 and December 31, 2009) but who (a) have not yet received a COBRA election notice, (b) received a COBRA election notice prior to February 17, 2009 which did not contain the COBRA information required by the Act, have not elected COBRA and whose 60-day COBRA election period has not yet expired and (c) received a COBRA election notice on or after February 17, 2009 which did not contain the COBRA information required by the Act. These individuals should be provided a form of the full election notice, tailored to fit the plan's specific information. The full election notice must be provided to these qualified beneficiaries, even if their qualifying events were something other than termination of employment. This notice should be provided as soon as possible.
- Identify all qualified beneficiaries (including covered spouses and dependent children) who had qualifying events since September 1, 2008 (and no later than December 31, 2009) currently receiving COBRA coverage or who received a COBRA election notice prior to February 17, 2009 which did not contain the COBRA information required by the Act, elected COBRA but have not yet paid the initial COBRA premium. These individuals should be provided a form of the abbreviated election notice, tailored to fit the plan's specific information. As with the full election notice, this notice must be provided to these qualified beneficiaries, even if their qualifying events were something other than termination of employment. Note that unlike the full election notice, the abbreviated election notice does not include language that would let a qualified beneficiary know the date by which they must request AEI status. It appears that group health plans should provide qualified beneficiaries 60 days from the date the qualified beneficiary receives the notice to submit the request. This notice should be provided as soon as possible.
- Identify all AEIs (or any individual who would be an AEI if he had a COBRA continuation election in effect) who had a qualifying event at any time from September 1, 2008 through December 31, 2009 and either did not elect COBRA coverage, or who elected it

but subsequently discontinued COBRA. These individuals should be provided a form of the extended election period notice, tailored to fit the plan's specific information, no later than April 18, 2009. Group health plans may want to consider sending the extended election notice to all qualified beneficiaries whose qualifying event during the relevant period was a termination of employment to allow any qualified beneficiary to request AEI status.

- Identify any states in which an insured group health plan has covered employees and coordinate with the insurance issuer to ensure that the appropriate notice of state law COBRA rights, with the Act's COBRA provisions included, will be timely provided to qualified beneficiaries in those states.
- Determine the correct COBRA premium that applies to AEIs who elect COBRA under the subsidy program and any revised COBRA premium for any AEI who is not being required to pay the maximum permissible COBRA premium (e.g., under a severance agreement that provides for payment of COBRA premiums at the active employee rate while receiving salary continuation).
- Qualified beneficiaries who are AEIs have likely paid the full COBRA premium for March 2009 and many will pay the full premium for April 2009. Under the Act, a plan administrator must either credit the subsidized portion of the premium against future COBRA premiums (if the plan administrator reasonably expects the overpayment to be fully applied to future COBRA premiums within 180 days) or refund the subsidized portion within 60 days. For AEIs who already paid their March and/or April 2009 COBRA premiums based on the full COBRA applicable premium, the plan administrator should determine whether the plan will credit the excess of the COBRA premiums above the 35% AEI portion received to future premiums or will refund the excess and implement the premium credit or refund process.
- Determine whether to implement the special coverage option for AEIs.

For more information about the Act's COBRA provisions, or for questions regarding any aspect of your company's employee welfare benefit plans, contact your regular Butzel Long attorney, a member of the Butzel Long Employee Benefits Practice Group, or the author of this e-news bulletin.

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