

## SPECIAL BULLETIN

### *IRS Publishes 58 Q&As On COBRA Premium Subsidy*

The Internal Revenue Service (IRS) released *Notice 2009-27* today. The *Notice* provides guidance on the COBRA premium subsidy under Section 3001 of the American Recovery and Reinvestment Act of 2009 (ARRA) and is available by "[clicking here](#)" or at <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>. A specially prepared version with a Table of Contents listing the text of each question and identifying which answer have examples has been prepared by the Research Department and is available by "[clicking here](#)." See [Client Bulletins 2009-15](#), [2009-19](#) and [2009-20](#) and [Special Bulletin 2009-22](#) for more information on the COBRA premium subsidy.

The IRS noted that it is aware of various issues relating to the premium reduction provision that are not addressed in this *Notice*, including issues affecting particular arrangements. Although this *Notice* does not address these issues, the IRS and Treasury continue to consider these and other issues and possible guidance with respect to them.

#### **Excerpts from the *Notice***

The *Notice* consists of guidance in the form of 58 Questions and Answers (Q&As), divided into ten categories as follows:

- *Involuntary Termination*: Q&A 1-9
- *Assistance Eligible Individual*: Q&A 10-19
- *Calculation Of Premium Reduction*: Q&A 20-26
- *Coverage Eligible For Premium Reduction*: Q&A 27-29
- *Beginning Of Premium Reduction Period*: Q&A 30-32
- *End Of Premium Reduction Period*: Q&A 33-44
- *Recapture Of Premium Assistance*: Q&A 45-46
- *Extended Election Period*: Q&A 47-55
- *Payments To Insurers Under Federal COBRA*: Q&A 56
- *Comparable State Continuation Coverage*: Q&A 57-58

Individuals involved in administering or advising on the COBRA premium subsidy will want to read through the *Notice* in its entirety with a special eye for Q&As that relate to issues that have arisen in their health plan. A few Q&As caught our eye as they addressed some common questions that have recently been addressed to the Research Department.

### **What is an “Involuntary Termination?”**

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First, the question asked by many is “what is an involuntary termination” as only individuals who have suffered an “involuntary termination” between September 1, 2008 and December 31, 2009 are eligible for the COBRA premium subsidy. Q&A 1 provides an answer and Q&As 2-9 provide examples of what is and isn’t an involuntary termination. Q&A 1 says in essence that an involuntary termination means a severance 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 determination of whether a termination is involuntary is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee’s services, and that the employee had knowledge that the employee would be terminated, that termination is involuntary. (Q&A 1)

#### **An involuntary termination DOES include:**

- a lay-off period with a right of recall or a temporary furlough period, including an involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment, resulting in a loss of health coverage is an involuntary termination for purposes of the premium reduction. (Q&A 2)
- an employer’s action to end an individual’s employment while the individual is absent from work due to illness or disability. (Q&A 4)
- retirement, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee’s services, and the employee had knowledge that the employee would be terminated, the retirement is an involuntary termination. (Q&A 5)
- termination for cause. (Q&A 6)
- a resignation as the result of a material change in the geographic location of employment for the employee. (Q&A 7)
- a termination elected by the employee in return for a severance package (a “buy-out”) where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee’s group will be terminated. (Q&A 9)

**An involuntary termination DOES NOT include:**

- a reduction in hours, generally. If the reduction in hours is not a reduction to zero, the mere reduction in hours is not an involuntary termination. However, an employee's voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee. (Q&A 3)
- a work stoppage as the result of a strike initiated by employees or their representatives. However, a lockout initiated by the employer is an involuntary termination. (Q&A 8)
- death of an employee. (Q&A 1)
- absence from work due to illness or disability. (Q&A 1)

**Eligibility - Dates of Involuntary Termination and Loss of Coverage**

A number of questions have been asked about the relation between the date of involuntary termination and the date of the loss of coverage and eligibility for the premium subsidy. Q&As 11-13 address some common fact patterns in this regard.

Q&A 11 indicates that if the *involuntary termination* and *loss of coverage* resulting in eligibility for COBRA continuation coverage occur before September 1, 2008, the *individual is not eligible* for the COBRA premium subsidy. For an individual to be eligible, the involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008 through December 31, 2009, even if the individual is still on COBRA continuation coverage after February 17, 2009.

Q&A 12 indicates that if the *involuntary termination* occurs before September 1, 2008, but the *loss of coverage* resulting in eligibility for COBRA continuation coverage occurs after September 1, 2008 (but no later than December 31, 2009) the *individual is not eligible* for the COBRA premium subsidy. The Answer further noted that the involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008 through December 31, 2009. Although Code Section 4980B(f)(8) allows a plan to provide that the COBRA continuation coverage does not begin until the loss of coverage, that does not change the date of the involuntary termination.

Q&A 13 indicates that if an individual's *involuntary termination* occurs no later than December 31, 2009, but the *loss of coverage* resulting in eligibility for COBRA continuation coverage occurs after December 31, 2009 the *individual is not eligible* for the COBRA premium subsidy. The Answer emphasizes that both the involuntary termination and eligibility for COBRA continuation coverage must occur during the period from September 1, 2008 through December 31, 2009. If the loss of coverage is after December 31, 2009, the individual cannot become an assistance eligible individual.

Q&A 18 indicates if an individual has a *loss of coverage* and becomes a qualified beneficiary eligible for COBRA continuation coverage as the result of an *involuntary termination no later than December 31, 2009*, and timely elects COBRA continuation coverage after December 31, 2009 (with the COBRA continuation coverage beginning retroactively back to the loss of coverage) the *individual is eligible* for the COBRA premium subsidy. The Answer notes that the election of COBRA continuation coverage is not required to occur during the period from September 1, 2008 through December 31, 2009, *as long as the resulting COBRA continuation coverage begins during that period*.

### **Conclusion**

While this *Notice* is very helpful, a number of questions remain unanswered and hopefully the IRS will issue additional guidance soon. The Research Department will report on any further guidance as it is issued. In addition to the Q&As addressed in this *Special Bulletin*, the IRS had posted a number of Q&As previously which were reported on in *Client Bulletin 2009-19*. The previous Q&As are available at: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>.

**Again, plan professionals are encouraged to read the entire Notice for more details.**

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### **NEWSFLASH!!!**

The Department of Labor (DOL) is sponsoring a second webcast on the COBRA premium subsidy. Go to <http://www.dol.gov/ebsa/COBRA.html> and look under Compliance Webcasts for a link to register. The webcast is set for April 6, 2009 at 3:00 PM Eastern Daylight Time. Register early!

**LEGAL DISCLAIMER:** Information contained in this publication is not legal advice, and should not be construed as legal advice. If you need legal advice upon which you can rely, you should seek a legal opinion from your attorney.