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## Department of Labor Issues Model COBRA Notices; April 18 Deadline Looms, But Modifications May Be Advisable

As we reported in an earlier *GT Alert* ([Stimulus Legislation Makes Significant Changes to Continued Health Coverage Under COBRA](#), February 19, 2009), the American Recovery and Reinvestment Act of 2009 (ARRA) provides for a federal subsidy of 65 percent of the applicable COBRA premium to individuals who lost health care coverage due to an involuntary termination of employment ("assistance eligible individuals" or AEIs). The subsidy applies to health plans subject to federal health care continuation requirements, as well as to those subject to similar provisions under state law (e.g., plans of small employers). ARRA enhanced the COBRA notice requirements and added a new notice requirement for state continuation requirements.

On March 19, 2009, the Department of Labor (DOL) issued four model COBRA notices, including two "General Notices," an "Alternative Notice" and a "Notice in Connection with Extended Election Period." The model notices are available at <http://www.dol.gov/ebsa/COBRAmode notice.html>. Generally, the deadline for complying with the notice distribution requirements is April 18, 2009.

This *GT Alert* describes the model notices, as well as some issues presented by these model notices in the context of complying with the notice distribution requirements.

### THE MODEL NOTICES

**Full General Notice.** The model General Notice (full version) includes:

- a full description of COBRA continuation rights (including ARRA-related information);
- a COBRA election form (including ARRA-related information);
- a one-page "Summary of COBRA Premium Reduction Provisions under ARRA";
- a Request for Treatment as an AEI; and
- a participant notification form to notify the health plan that the individual is eligible for other group health plan coverage or Medicare.

The header that the DOL put on the Full General Notice indicates that it is to be used "for qualified beneficiaries who have not yet received an election notice and with qualifying events occurring during the period that begins with September 1, 2008 and ends with December 31, 2009."

**Abbreviated General Notice.** The model General Notice (abbreviated version) includes:

- a supplemental COBRA notice;
- the one-page "Summary of COBRA Premium Reduction Provisions under ARRA";
- a Request for Treatment as an AEI; and
- a participant notification form to notify the health plan that the individual is eligible for other group health plan coverage or Medicare.

Essentially, this notice is the same as the Full General Notice but without the full description of COBRA rights or the COBRA election form. The DOL-supplied header to the form indicates that is to be used "for qualified beneficiaries currently enrolled in COBRA coverage with qualifying events that occurred on or after September 1, 2008 to advise them of the availability of the premium reduction."

**Extended Election Notice.** The Notice in Connection with Extended Election Period includes:

- a full description of COBRA continuation rights (including ARRA-related information);
- a special Additional Election Form (for AEIs who did not elect COBRA or elected COBRA and let it lapse);
- a one-page "Summary of COBRA Premium Reduction Provisions under ARRA";
- a Request for Treatment as an AEI; and
- a participant notification form to notify the health plan that the individual is eligible for other group health plan coverage or Medicare.

It is substantially similar to the Full General Notice, but with changes to describe the special 60-day election period and to explain that, notwithstanding a new election, the expiration of COBRA coverage is determined by reference to the date of the qualifying event, not the date of the new election.

**Alternative Notice.** The model Alternative Notice is for use with plans subject only to State continuation requirements.

## COMPLYING WITH THE NOTICE DISTRIBUTION REQUIREMENTS

The DOL has also updated FAQs for employers and employees that are available at <http://www.dol.gov/ebsa/COBRA.html>. Consistent with the literal reading of the statute, the FAQs provide that a general notice must be provided to "all qualified beneficiaries, whether they are currently enrolled in COBRA coverage or not, who have a qualifying event during the period from September 1, 2008 through December 31, 2009." (See FAQs for Employers About COBRA Premium Reduction Under ARRA, Q&A 5, as posted on 3/19/09).

Based on the headers of the Model Forms, we believe that use of the Model Forms without modification will not conform with the requirements set forth in the statute and explained in the Department of Labor FAQs to provide notice to all qualified beneficiaries who had a qualifying event on or after September 1, 2008. Because the Full General Notice header provides that it should be issued to qualified beneficiaries who have "not yet received an election notice," and because the Abbreviated General Notice header provides that it should be issued to those qualified beneficiaries "with COBRA coverage," certain qualified beneficiaries who received an election notice but did not elect COBRA coverage may not receive any notification of the ARRA subsidy.

Similarly, the header to the Extended Election Notice indicates that it is to be provided to certain AEs, that is, *involuntarily terminated* qualified beneficiaries who had a qualifying event on/after September 1, 2008, and who did not elect COBRA coverage or elected coverage and let it lapse. As a result, individuals who became entitled to continuation coverage as a result of a termination of employment that the employer is not deeming an *involuntary* termination would not receive any notice of the ARRA subsidy or 60-day special election period, even though the legislative history to ARRA is clear that they need to be provided with notice of the existence of the subsidy. In addition, other qualified beneficiaries, such as divorced spouses or children who ceased to be dependents, who received a general notice but did not elect coverage would not receive any notice of the ARRA subsidy.

Because only *involuntarily* terminated individuals are entitled to the special 60-day election period, and because the Full General Notice includes a general election form, we would not advise sending the Full General Notice to all qualified beneficiaries who previously received a general election form and who the employer does not believe are entitled to the ARRA subsidy or another election period. For the same reason, we would not advise using the Extended Election Notice for these people. Specifically, we are concerned that these individuals will consider either of these notices to offer them a new election opportunity even though they will not, except in rare cases, be entitled to another election opportunity.

Nevertheless, we believe that the statute and legislative history (as well as the DOL's own FAQs) reflect a requirement that a "supplemental" notice be given to these qualified beneficiaries. In addition, it is particularly important to provide some notice to qualified beneficiaries whose qualifying event was a termination of employment that the employer classified as not being involuntary, in the event that the individual wishes to take advantage of the expedited appeal process provided for under the statute.

Notwithstanding these apparent deficiencies, we do believe that the model notices can, with some modification, be used to satisfy the statutory notice requirements. Specifically, the Abbreviated General Notice can be revised somewhat and provided to qualified beneficiaries who are not given the Full General Notice or the Extended Election Notice. Alternatively, employers can use information contained in the various model notices to modify their existing COBRA notice packages or otherwise create notice packages that will satisfy the ARRA distribution requirements.

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