

# Client Alert



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March 2009

## U.S. Department of Labor Issues Model COBRA Subsidy Notices And Other Guidance

As we reported in our February 17, 2009 Client Alert regarding the *American Recovery and Reinvestment Act* (the “ARRA” or “Act”), the government is providing a temporary COBRA premium subsidy to certain eligible employees who were involuntarily terminated from employment during the period from September 1, 2008 through December 31, 2009 and their eligible family members. See [The American Recovery and Reinvestment Act – COBRA Revisions](#) Client Alert.

As a reminder, notice of the subsidy must be provided to all COBRA qualified beneficiaries who experience a qualifying event within the above period. In addition, as described in detail below, the Act requires plans to provide notice (by no later than April 18, 2009) of the extended COBRA election rights available to certain qualified beneficiaries who experienced an involuntary termination of employment prior to the ARRA’s enactment (*i.e.*, during the period from September 1, 2008 through February 16, 2009).

### Model Documents

As promised at the time of enactment, the U.S. Department of Labor (“DOL”) issued today various model notices and forms to assist employers and other plan sponsors in complying with the Act’s notice requirements and in implementing the subsidy program. [<http://www.dol.gov/ebsa/COBRA.html>]. Specifically, the following model documents have been issued:

1. **General COBRA Election Notice and Election Form** to be provided to all qualified beneficiaries who experience a COBRA qualifying event, *regardless of the type of qualifying event*, between September 1, 2008 and December 31, 2009.<sup>1</sup>

The General Notice is essentially the same as the DOL’s existing model COBRA Election Notice, except that it now includes information regarding the ARRA. In addition, the DOL has added boxes to the form where the plan administrator will check whether a qualifying event of “end of employment” is “involuntary” or “voluntary.”

Included with the General Election Notice and Form are the following additional model documents:

(i) a “Summary of the COBRA Premium Reduction Provisions under ARRA,” (ii) a “Request for Treatment as an Assistance Eligible Individual,” (iii) a “Participant Notification” of eligibility for other group health coverage or Medicare (and, thus, ineligibility for the subsidy), and (iv) a “Form for Switching COBRA Continuation Coverage Benefit Options,” as permitted by the Act (if applicable).

<sup>1</sup> For individuals who fall within this category but are already enrolled in COBRA, the abbreviated Notice described in paragraph 2 below should be provided and, for “assistance eligible individuals” who were terminated from employment prior to the Act’s enactment and were previously offered COBRA but declined it or let it lapse, the Notice described in paragraph 3 below should be provided.

The “Request for Treatment as an Assistance Eligible Individual” specifically requires employees to confirm that their loss of employment was (i) involuntary, and (ii) occurred within the relevant time period.

**2. Abbreviated General COBRA Election Notice** to be provided to all qualified beneficiaries *who are currently enrolled in COBRA* and experienced a qualifying event, *regardless of the type of qualifying event*, between September 1, 2008 and December 31, 2009. This Notice is the same as the Notice described in paragraph 1 above, except that the information regarding the premium subsidy is geared toward individuals who are already receiving COBRA coverage.

The other forms (as described in (i) through (iv) in paragraph 1 above) are essentially the same as those included with the full version of the General Notice.

**3. COBRA Notice and Election Form in Connection with the Extended Election Periods** to be provided to all “assistance eligible individuals” (or individuals who would qualify as “assistance eligible individuals” if a COBRA election was in effect)<sup>2</sup> who: (i) experienced an involuntary termination of employment during the period from September 1, 2008 through February 16, 2009 (*i.e.*, prior to the ARRA’s enactment), and (ii) were previously offered COBRA coverage *but either did not elect such coverage or elected it and then subsequently discontinued it.*<sup>3</sup> This notice must be provided no later than April 18, 2009, and the second election period must last for a period of 60 days from the date the notice is provided.

This model Notice/Election Form is similar to the General Notice and Election Form but is tailored to apply to individuals who already have been offered COBRA coverage and either did not elect such coverage or allowed such coverage to lapse. It also includes all of the supplementary documents included with the General Notice.

As a reminder, the second election opportunity does not extend the period of COBRA coverage beyond the original maximum period (*i.e.*, in general, 18 months from the date of the qualifying event), and coverage elected during this election period is prospective only, beginning with the first period of coverage on or after the date of the ARRA’s enactment.

**4. Alternative Continuation Coverage Election Notice and Election Form** to be used where coverage is provided in accordance with State continuation coverage requirements. Also included with these model forms are the supplemental forms described in items (i) through (iv) in paragraph 1 above.

### **Additional Guidance Issued by the DOL**

The DOL also issued today two sets of “Frequently Asked Questions” (FAQs) - one for Employers and one for Employees. Unfortunately, the FAQs do not provide guidance on some of the significant questions and issues that have been raised during the past month since the ARRA was enacted, including the definition of “involuntary termination,” how the subsidy interacts with certain severance arrangements, and how the program is intended to apply to multiemployer benefit plans that determine eligibility for benefits based on hours worked during specific eligibility periods (or similar standards). The DOL has not indicated when it will be issuing guidance with regard to these issues.

Note: One question that plan sponsors have had is whether notice of the subsidy must be sent to all qualified beneficiaries who experience a qualifying event during the period beginning September 1, 2008 and ending December 31, 2009, *regardless of the type of qualifying event*. In the guidance, the DOL has made it clear that notice of the subsidy *must be provided to all qualified beneficiaries who have experienced a qualifying event during the relevant period*, not just those qualified beneficiaries whose qualifying event was a termination of employment. This clarification may significantly increase the burden that the Act imposes over what some administrators had initially contemplated.

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<sup>2</sup> An “assistance eligible individual” is a COBRA “qualified beneficiary” (*i.e.*, generally, an employee, spouse or dependent child who was covered under the plan on the day before the qualifying event): (i) who is eligible for COBRA continuation coverage at any time during the period from September 1, 2008 through December 31, 2009, (ii) who elects COBRA coverage, and (iii) whose COBRA qualifying event is the employee’s involuntary termination of employment that occurred during the period from September 1, 2008 through December 31, 2009. However, individuals who are eligible for other group health coverage or Medicare are not eligible for the subsidy. In addition, the subsidy is phased out for certain high income individuals.

<sup>3</sup> Note, this notice is only required for plans that are subject to federal COBRA continuation coverage requirements.

In the FAQs, the DOL has reiterated that individuals who are denied the premium subsidy may request an expedited review of the denial by the government,<sup>4</sup> and a decision will be made within 15 days of receipt of the appeal. The DOL has not yet issued a form for this purpose, but has stated that it is currently developing the process and that an official application form will be issued (for submission electronically, by mail or by fax). The FAQs also mention that the process will include obtaining information from the employer, plan or insurer, as applicable, on an expedited basis. In addition, the FAQs included a contact number at EBSA for employees who wish to speak with an advisor before filing an appeal.

In the past few weeks, the DOL and the Internal Revenue Service have issued other information to assist plans and employers in implementing the subsidy program. This information may be found on their websites.

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The model notices and forms issued by the DOL today will assist employers and health plan administrators in fulfilling their notice obligations under the Act. Of course, these documents will need to be customized to suit each plan's particular needs. As an alternative to creating new COBRA notices and election forms, plans may wish to simply add the new ARRA language to their existing notices and forms based on the models. Presumably, use of the models (and the language contained therein) is not mandatory, but will be considered good faith compliance with the Act's notification requirements.

If you have any questions regarding the government's model documents or relating in any way to the COBRA subsidy program, please feel free to contact any member of our COBRA Subsidy Team.

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We would also like to acknowledge **Reuven Bauman** for his assistance in the preparation of our alerts on this subject.

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<sup>4</sup> The DOL will handle appeals relating to private sector employers subject to ERISA's COBRA provisions and the Department of Health and Human Services will handle appeals by federal, state and local government employees and appeals related to coverage provided pursuant to state continuation coverage laws.