

MORE ON COBRA CHANGES UNDER ARRA

By: *Patricia McGrath*
Email: pmcgrath@devinemillimet.com
Phone: 603.695.8537

APRIL 17, 2009

We have written twice before on the changes to COBRA effected under the American Recovery and Reinvestment Act of 2009 ("ARRA"), which became law on February 17, 2009. Even since our last update in our March 27, 2009 E-mail Alert, the Federal Department of Labor and the Internal Revenue Service has continued to produce information at an impressive rate. Two efforts are, in this writer's opinion, particularly helpful.

First, the Department of Labor hosted two "Compliance Assistance" webcasts. The first took place on March 24, 2009. The second, which covered some of the same material but also amplified certain issues further, took place on April 6, 2009. Both of these webcasts have been archived on the Department of Labor's website, located at www.dol.gov/ebsa/cobra.html. You can find the access to both of these webcasts under "Compliance Webcasts" on that site. Both webcasts contain helpful and informative PowerPoint presentations.

Second, the IRS timely issued its Notice 2009-27, as promised. This Notice can also be accessed through the same DOL website, by clicking on "IRS Notice 2009-27". Much of the new material covered in the DOL's second Compliance Assistance webcast focuses on the information contained in Notice 2009-27.

The information contained in the Notice is, thankfully, easy to follow as it focuses on several nuts-and-bolts issues in the interpretation and implementation of the ARRA changes to COBRA. The Notice follows a question-and-answer format. Much of the value of the Notice is found in multiple examples that illustrate the government's position on the ARRA provisions.

One section of questions deals directly with the exact meaning and limits of the term "involuntary termination". As we know, a person who is eligible for COBRA continuation coverage on account of an involuntary termination that occurs within the stated statutory timeframe is treated as having paid the full premium amount if

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Aaron Gilman
978.475.9100
agilman@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Karen Levchuk
603.695.8618
klevchuk@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

Anne Trevethick
603.695.8725
atrevethick@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

that individual pays thirty-five percent (35%) of the amount of the premium otherwise required. When the law first became effective, human resource professionals and their advisors worked to accurately apply the law to the myriad situations with which they were confronted. Now, finally, we can all feel secure that the following interpretations are accurate:

- An involuntary termination is 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, or the employee was willing and able to continue performing services”.
- An involuntary termination does not include the death of an employee. However, if an employee who is an “assistance eligible individual” on account of an involuntary termination dies after that eligibility is established, then that employee’s surviving spouse and dependents who were eligible for the subsidy on account of the employee’s involuntary termination will continue to be eligible, since they had become, in their own right, “assistance eligible individuals”.
- An involuntary termination does not generally include absence from work due to illness or disability.
- Involuntary termination does not generally include a reduction in hours. If, however, an employee voluntarily terminates employment in response to an employer-imposed reduction in hours, this would be an involuntary termination if the reduction in hours is a “material negative change in the employment relationship for the employee”.
- Always, the determination of whether a termination is involuntary is based on all the facts and circumstances. For example, even if a termination is designated as “voluntary”, it could be that the facts and circumstances show that but for that voluntary termination, the employer would have terminated the employee’s services, and the employee had knowledge that he or she would be terminated. In that case, the termination would, indeed, be involuntary.

Another group of questions addresses that an “assistance eligible individual” must be, first, a qualified beneficiary under COBRA. Second, that individual’s eligibility for COBRA must be as a result of an involuntary termination that occurred during a specified period. The time period begins on September 1, 2008 and runs through December 31, 2009. Finally, that individual must be eligible for COBRA continuation coverage “at any time during that period”, and also must elect COBRA continuation coverage. This section of Notice 2009-27 clarifies the following:

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001



- In order to be a qualified beneficiary, the individual must have been covered under the employer's group health plan on the day before the involuntary termination (except for certain specified circumstances) in order to be eligible to "continue" that coverage.
- The individual's involuntary termination must occur on or after September 1, 2008.
- The individual's loss of coverage resulting in eligibility for COBRA continuation coverage must also occur on or after September 1, 2008 and no later than December 31, 2009. This means, for example, that an individual who was involuntarily terminated before September 1, 2008, regardless of when loss of coverage actually occurred, is not eligible for the subsidy under ARRA.
- It is possible for the same individual to be eligible for the subsidy under ARRA more than once. For example, an individual may be involuntarily terminated and meet the requirements for the COBRA subsidy. Thereafter, the individual becomes eligible for coverage under another group health plan. After that, the individual again loses coverage due to involuntary termination, still within the ARRA timeframe. That individual's subsidy eligibility would start again, with a fresh nine (9) month timeframe.
- A plan cannot refuse to provide the premium reduction to an individual because of that individual's income. ARRA provides that if an assistance eligible individual's income is high enough so that the premium reduction is recaptured via an additional income tax liability, COBRA coverage must still be provided upon the payment of thirty-five percent (35%) of the premium amount by that person. Certainly, the individual could notify the plan that he or she has waived the premium reduction. This is done by affirmatively electing the waiver on a DOL-provided form. Otherwise, however, an individual need only pay thirty-five percent (35%) of the applicable premium amount.

Implementation of the ARRA changes to COBRA permit an employer (or other designated entity) to receive reimbursement for the remaining sixty-five percent (65%) of COBRA premium through a credit against payroll tax. If an employer elects to voluntarily accept only thirty-five percent (35%) of the premium amount from an individual who is not an assistance eligible individual under the law, then the employer cannot seek reimbursement for the remaining sixty-five percent (65%). Likewise, if a plan is not subject to ARRA, then a decision to accept a reduced premium under that



employer's health plan would not entitle that employer to a sixty-five percent (65%) premium reimbursement. There is nothing in the law that would prevent the voluntary election by an employer to do this. However, the employer would need to make up the sixty-five percent (65%) premium payment on its own.

This weekend is the deadline for providing the "second chance" notice to designated individuals who are eligible under ARRA. For more information on this, please refer to our March 27, 2009 E-mail Alert. Going forward, Notice 2009-27 should be an excellent resource for handling the day to day questions that will certainly arise as employers respond to these difficult economic times.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at employment@devinemillimet.com.

"This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Devine, Millimet & Branch, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that any reader should rely on it as such."

