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DOL Issues Model Notices for COBRA Subsidy Program

By: Alan M. Levy

On March 19, 2009, the U.S. Department of Labor issued model notices by which employers may inform employees who were or are “involuntarily terminated” between September 1, 2008 and December 31, 2009 that they may be eligible for up to nine months of subsidized COBRA continuation of health insurance benefits. These models can be found at <http://www.dol.gov/ebsa/COBRAmodelnotice.html>.

The subsidy program, which is part of the American Recovery and Reinvestment Act of 2009, requires the same COBRA notices used earlier plus explanations of the 65% premium subsidy, the ability to make a new COBRA election now if the Assistance Eligible Individual (“AEI”) was terminated between 9/1/08 and 2/17/09, and options for changing to a different benefit plan if the employer offers one. The notices for pre-2/17/09 AEIs must be given no later than April 18, 2009. The models include both notices (with explanations of COBRA continuation, subsidies, etc.) and forms for employee elections. An AEI must submit one form for electing to accept COBRA continuation and a different one for invoking the subsidy. The Lindner & Marsack E*Alert issued February 20, 2009 explains these rules in greater detail.

The model notices cover four different scenarios:

1. The “General Notice” is the “full version.” It is to be used for all AEIs whose qualifying event under normal COBRA rules occurs between 2/17/09 and 12/31/09 and who do not qualify for any of the other models.
2. The “Alternative Notice” is for AEIs subject to state law continuation requirements beginning between 9/1/08 and 12/31/09.
3. The “Notice in Connection with Extended Election Periods” is to be used by group health plans for AEIs who are not now enrolled in COBRA coverage and whose qualifying event occurred between 9/1/08

and 12/31/09, including those who never elected COBRA continuation before and those who started COBRA continuation but experienced a lapse before this notice is sent. This notice should be sent to all employees who were terminated prior to the issuance of that notice, regardless of whether they are thought to be eligible for the benefit; the eligibility issue can be adjudicated after they file election forms, while failure to notify risks exposure to other claims.

4. The “COBRA Continuation Coverage Supplemental Notice” is for qualified beneficiaries presently enrolled in COBRA continuation coverage whose qualifying event occurred on or after 9/1/08, and who must be informed about the subsidy now available to them. (The Model General Notice refers to this as the “Abbreviated Version.”)

At the same time, DOL has issued clarifying guidance on several issues:

1. An AEI can make a new COBRA election without electing to use the subsidy. This will affect highly compensated individuals and people who were terminated after 9/1/08 and did not wish any COBRA benefit at that time, but now want continuation coverage with no subsidy.

2. Children born or adopted by an AEI are eligible for the subsidy. However, a spouse first married to the AEI after his/her termination has no independent right to a subsidy.

The big question which remains unanswered is the definition of “involuntary termination.” Despite frequent efforts to elicit clarification as to retirees, voluntary layoffs to allow others to continue working, and the degree of disciplinary violation which constitutes “gross misconduct” (e.g., violations of attendance policies, accumulation of repeated minor offenses as compared to theft or other dishonesty), at present, the only instruction is that the employee seeking the subsidy must mark a box on the election form indicating “the loss of employment was involuntary.”

In a separate publication, the Internal Revenue Service has said the value of the subsidy should be included in the AEI’s W-2 form, but it will not be treated as taxable income.

Lindner & Marsack will continue to monitor developments in this area and provide our analyses and observations to our clients as these events occur.

If you have any questions about the issues raised by this e-alert, please feel free to contact Alan M. Levy at (414) 273-3910 or by e-mail at alevy@lindner-marsack.com.

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