

DOL Issues new Model COBRA Notices to Explain COBRA Premium Subsidy

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It was down to the wire, but the U.S. Department of Labor (DOL) on March 19 finally issued model notices to comply with the premium subsidy provisions under the American Recovery and Reinvestment Act of 2009 (ARRA). Following is a discussion of the pros and cons of the notices and action steps that employers and plan administrators should begin to take.

Background

ARRA enacted a new 65-percent subsidy for COBRA premiums paid by qualified beneficiaries who lose coverage due to a covered employee's involuntary termination from employment at any time from Sept. 1, 2008 through Dec. 31, 2009. A key aspect of enforcing these provisions, as is true of all COBRA provisions, is a notice mechanism — qualified beneficiaries need to be notified of their rights and, in turn, qualified beneficiaries need to notify the plan administrator of any facts that cause them to lose their entitlement to the credit.

ARRA required DOL to issue new notices that could be used for purposes of communicating the new COBRA premium assistance rules to qualified beneficiaries. On March 19, 2009, DOL published those notices and on March 20, 2009, published a short summary in the *Federal Register* (74 Fed. Reg. 11971) explaining the notices.

Technically, ARRA mandates three specific notices — a “General Notice,” an “Alternative Notice,” and a

“Notice in Connection with Extended Election Periods.” Each of these notices is supposed to include specific information, including:

- a prominent description of the availability of the premium reduction (the 65-percent subsidy) including any conditions on the entitlement;
- a model form to request treatment as an “Assistance Eligible Individual” (AEI);
- the name, address and telephone number of the plan administrator (and any other person with information about the premium reduction);
- a description of the obligation of individuals paying reduced premiums who become eligible for other coverage to notify the plan; and
- if applicable, a description of the opportunity to switch coverage options.

In addition to this information, the Notice in Connection with Extended Election Periods must also include a description of the extended election period during which qualified beneficiaries who were not on federal COBRA coverage as of Feb. 17, 2009, could elect to become covered if they otherwise would be AEIs.

By way of reference, an AEI is an individual who is eligible for COBRA coverage as a result of an involuntary termination of employment at any time from Sept. 1, 2008 through Dec. 31, 2009; and who elects COBRA coverage (when first offered or during the extended additional election period).

Notices Are Packaged

The DOL created its model notices to cover various situations with a number of variables to address the complexity of various different scenarios facing dislocated workers and their families. The DOL did this by creating

See *Model COBRA Notices*, p. 2

Model COBRA Notices (continued from p. 1)

four different packages of notices. Basically, the packages include:

- 1) two types of “General Notice” packages;
- 2) an “Alternative Notice” package; and
- 3) a package for the “Notice in Connection with Extended Election Periods.”

Each package is specifically designed for a particular group of qualified beneficiaries and contains all the information needed to satisfy the content requirements for ARRA’s notice provisions. Each of the packages includes the following disclosures:

- a summary of ARRA’s premium reduction provisions;
- a form for AEIs to request the premium reduction;
- a form for plans (or insurers) that permit AEIs to switch coverage options to use to satisfy ARRA’s requirement to give notice of this option;
- a form for an AEI to use to satisfy ARRA’s requirement to notify the plan (or issuer) that he or she is eligible for other group health plan coverage or Medicare; and
- COBRA election forms and information, as appropriate.

Following is a short discussion of each of the four groups of notices along with comments on issues that need further consideration by plan administrators.

General Notice (Full Version) — All QBs Get it

Plans subject to the federal COBRA provisions must send the General Notice to *all* qualified beneficiaries, not just covered employees, who experienced a qualifying event at any time from Sept. 1, 2008, through Dec. 31, 2009, *regardless of the type of qualifying event*. This means that a general notice with the ARRA information needs to go to:

- 1) qualified beneficiaries affected by any termination of employment; and
- 2) qualified beneficiaries affected by qualifying events such as a divorce or legal separation, employee’s death or cessation of dependent child’s status as a dependent under the plan.

This often seems like an unusual requirement when one considers that only those affected by a covered employee’s involuntary termination of employment could benefit from the COBRA premium reduction; nevertheless, DOL has confirmed that ARRA requires that *all* qualified beneficiaries receive an updated notice.

The General Notice (full version) includes the required ARRA information as well as an optional section for plans that allow qualified beneficiaries to change their coverage options during the optional special ARRA election period. In addition, the notice includes the information for individuals to make an actual COBRA election.

Minor Ambiguity Created by General Notice

Each of the model notices has an introductory parenthetical explaining who the notice is intended for. In the General Notice (full version) instructions it is stated that the notice is for use by group health plans for qualified beneficiaries who *have not yet received* an election notice. The implication of that instruction is that the notice does not have to be provided to individuals who *did receive* an election notice. Yet that instruction directly contradicts the notice’s purpose as stated in the other DOL guidance and is not likely what DOL meant to say in the instruction. It would appear that the form instructions are just misstated.

Obligation to Affirmatively Elect Premium Reduction

Importantly, the DOL’s model notice reflects the view that AEIs must affirmatively request the premium reduction (by using a form like DOL’s form). This view is contrary to that of many third-party administrators (TPAs). That is, many TPAs have taken the view that an acceptable practice would be for the employer to identify those involuntarily terminated employees and inform them that they are eligible for the premium reduction unless they affirmatively state that they are *not* eligible. The DOL view appears to be that this common practice is not consistent with the statutory requirements.

Request for Treatment as AEI Form

The General Notice includes a form on which individual may claim their status as AEIs and, therefore, eligible for premium reduction. The form asks individuals to attest to the fact that they: (1) were involuntarily terminated during the relevant period; (2) are electing COBRA coverage; and (3) are not eligible for other group health coverage or Medicare. Also included on that form is a section where the employer or plan may specifically indicate whether the electing individual’s application is approved or denied.

The DOL did not comment on the purpose of this section. However, it is likely that this type of record will need to be kept in cases where an individual is denied treatment as an AEI and the DOL is evaluating that decision on an appeal. In other words, DOL might, on an appeal, ask to see the employer’s form where it denied

See *Model COBRA Notices*, p. 3

Model COBRA Notices (continued from p. 2)

the individual's treatment as an AEI. Therefore, even if an employer or plan decides not to use the specific form provided by DOL for this purpose, it is advisable to maintain records for the reason why anyone is denied treatment as an AEI.

Confusion in the DOL Model Form

The DOL model form for requesting treatment as an AEI can be confusing for qualified beneficiaries. Several boxes need to be checked off and there are several concepts that individuals need to interpret and understand (for example, what it means to be "involuntarily" terminated). It should not be surprising, therefore, for plan administrators to see forms submitted without all the appropriate boxes being checked or with boxes being checked off incorrectly. For example, one box requires an individual to indicate "yes" or "no" to the statement "I am NOT eligible for other group health plan coverage." It is possible that a qualified beneficiary who is really not covered by another group health plan will be confused and wonder whether the correct answer should be "no" because he or she = does not have other coverage available or "yes" because he or she is NOT in fact eligible for the other coverage. It might have been better for the form to ask the individuals to answer "yes" or "no" questions (for example, "Are you eligible for other group health plan coverage?") instead of using statements.

Separately, one part of the form's instructions states, "To qualify, you must be able to check 'Yes' for all statements." Yet it goes on to state: "If you checked NO for statement 3, you may still be eligible. See below for more information." Statements like this will likely create confusion for qualified beneficiaries.

The bottom line is that employers and plan administrators need to be prepared for this confusion and the many questions that will be raised by qualified beneficiaries having a hard time parsing through these concepts.

General Notice (Abbreviated Version)

The DOL's abbreviated version of the General Notice includes the same information as the full version regarding the availability of the premium reduction and other ARRA rights, but does not include the COBRA coverage election information. The idea for this notice package is that it could be sent in lieu of the "full version" to those individuals who experienced a qualifying event on or after Sept. 1, 2008, have already elected COBRA coverage, and still have it in effect. This notice's overall purpose is to advise AEIs that they could be eligible for a

premium reduction via a refund or a credit against future COBRA premium payments.

Alternative Notice

Insurance issuers that provide group health coverage must send the Alternative Notice to persons who became eligible for state-law continuation coverage. Such requirements vary among states, and insurers should modify this model notice as necessary to conform it to the applicable state law. Insurers may also find the model Alternative Notice or the abbreviated model General Notice appropriate for use in certain situations. In particular, if a state decides to mandate a special extended election period for AEIs to elect COBRA coverage due to a pre-ARRA involuntary termination of employment, the Alternative Notice would need to be modified to address that election period.

Notice in Connection With Extended Election Periods

Plans subject to the federal COBRA provisions must send the Notice in Connection with Extended Election Periods to any AEI (or any individual who would be an AEI if a COBRA election were in effect) who:

- 1) had a qualifying event at any time from Sept. 1, 2008, through Feb. 16, 2009; and
- 2) either did not elect COBRA coverage, or elected it but subsequently discontinued COBRA.

This notice includes information on ARRA's additional election opportunity, as well as premium reduction information. The DOL has emphasized that this notice must be provided by April 18, 2009, 60 days after ARRA's enactment.

This model notice anticipates that it would be provided to individuals who were not on COBRA coverage as of Feb. 17, 2009, and who could elect COBRA coverage due to the special ARRA election period.

One point of possible confusion that DOL did not address in its notice involves the situation of a qualified beneficiary who incurred a qualifying event in late January or February 2009 and who is still within a regular COBRA election period. These individuals would be eligible for a regular 60-day COBRA election period measured from the qualifying event date, as well as a special ARRA election period measured as 60 days from the date notice of ARRA rights is provided. If these two election periods overlap, a notice should probably clarify how the two 60-day periods relate.

Another ambiguity related to this notice was addressed by DOL in its *Federal Register* notice

See Model COBRA Notices, p. 4

Model COBRA Notices (continued from p. 3)

accompanying the new forms. In a footnote, DOL explained that ARRA could be read to require AEIs with qualifying events from Sept. 1, 2008, through Feb. 16, 2009, who are already enrolled in COBRA coverage to receive both a General Notice and a Notice in Connection with Extended Election Periods with duplicate content. Because the COBRA election information would be of no practical importance to individuals already enrolled, however, DOL indicated that plans may send just the abbreviated General Notice to these individuals. If they do so and provide it by April 18, 2009, they could satisfy both ARRA notice requirements.

Notices That DOL Did Not Provide

At least two notice obligations apparent in ARRA's statutory language have not yet been addressed by DOL.

Notice to DOL Challenging Entitlement to Subsidy

The new DOL material did not yet include information on how an AEI could appeal an employer's decision to deny his or her entitlement to AEI status. The fact that the appeal right is available is explained in the notices that were provided and, presumably, a form for this purpose will be published by DOL in the near future.

Waiver of Entitlement to COBRA Premium Subsidy

The new law limits the availability of the COBRA premium subsidy for high-income individuals. If a

See *Model COBRA Notices*, p. 5

Action Steps to Produce Proper COBRA Notices

- Contact your COBRA administrator to see if it is providing sample notices and, if so, what special information it needs to obtain from you
- If your COBRA administrator already sent sample notices for your use, will the administrator be updating those notices?
- Identify the individuals responsible in your organization for communicating with AEIs or potential AEIs on COBRA subsidy questions
- Identify groups of qualified beneficiaries back to Sept. 1, 2008
- Break out the groups into those who are on COBRA coverage as of Feb. 17 vs. not on COBRA coverage
 - ✓ Those on COBRA coverage could receive an abbreviated General Notice; others receive the full version
 - ✓ Those not on COBRA coverage as of Feb. 17 need to receive the Notice in Connection With Extended Election Periods
- Modify notices as appropriate for:
 - ✓ Optional special election to switch coverage from that in effect before the qualifying event; if you aren't using it, delete the sections in the model notices
 - ✓ Special dates for when COBRA coverage would start and stop
 - ✓ Any special premium subsidies otherwise made available by the employer
 - ✓ Other information concerning the date of the qualifying event and relevant election periods
 - ✓ Any other stylistic or clarifying changes that are appropriate and do not change the legal requirements
- Consider using a separate form for approvals/denials of AEI status
- Check your plan language, SPD language, and existing COBRA notices for updates due to the new ARRA rules and election periods
- Check the DOL and IRS Web sites regularly for updated information; the rules are in a state of flux and new information is provided on a regular basis

Model COBRA Notices (continued from p. 4)

COBRA premium subsidy is provided to a taxpayer, the taxpayer's spouse, or any dependent of the taxpayer during a year and the individual's modified adjusted gross income exceeds \$125,000 (or \$250,000 for joint filers), then some or all of the premium subsidy for all months during the year must be repaid to the IRS. The mechanism for repayment is an increase in the individual's income tax liability for the year equal to the amount to be repaid. For individuals with modified adjusted gross income between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium subsidy for the taxable year that must be repaid is reduced proportionately.

To avoid this recapture, the law allows an individual to make a permanent election to waive the right to the premium subsidy for all periods of coverage. This waiver is to be made separately by each qualified beneficiary (who could be an assistance eligible individual) regarding a covered employee. For the election to take effect, the individual must notify the person to who premiums are to be paid and who otherwise would be entitled to a payroll tax credit. The DOL did not provide a specific form for this purpose.

What to Do Now

Now that the model notices are out, what should an employer or plan administrator do? Here are some tips:

- *Optional use of DOL models* — The first thing to consider is that use of the DOL models is not

required. Administrators can amend them in ways that make sense for their unique circumstances and clean up ambiguities, typos and inconsistencies among the various forms.

- *If ARRA notices already provided, a resend is not likely necessary* — Separately, consideration should be given to any notices that were already provided by the plan administrator or its TPA. If ARRA/COBRA notices have already been provided before DOL models were issued, the plan administrator does not necessarily have to re-send revised notices. The DOL models are just that — models. If the basic statutory notice requirements were met with non-model notices, the administrator could determine that it has complied with applicable law. So before deciding to re-send notices at this point the administrator should balance legal compliance with possible confusion among the qualified beneficiaries receiving two sets of notices on the same topic. This is one area where legal expertise should be consulted to help the administrator determine whether the plan is in compliance.
- *Expect more guidance* — Finally, a word of caution. The ARRA guidance is moving fast. The IRS and DOL are pushing guidance out the door as fast as they can. Administrators and employers must, therefore, keep apprised of the latest rules as the new ARRA rules are implemented.

Future updates to *The Guide* will provide updates on the legal rules and model notices, and alerts will be sent to subscribers as late-breaking developments occur. 🏠



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