



ERISA ALERT

APRIL 2009

Immediate Action Required to Comply With New COBRA Subsidy

As we previously reported in our [March 2009 ERISA Alert](#), the American Recovery and Reinvestment Act of 2009 created a new COBRA subsidy for employees who are involuntarily terminated between September 1, 2008, and December 31, 2009. The Federal government has now issued guidance to help you comply with your COBRA subsidy obligations and requirements.

The Rules

Effective for COBRA coverage periods beginning on or after February 17, 2009, covered employees (called “Assistance Eligible Individuals”) are entitled to a subsidy of 65% of the COBRA premium for a period of nine months. Employers must notify all individuals who became eligible for COBRA coverage on or after September 1, 2008. Also, any Assistance Eligible Individuals who had not elected COBRA coverage as of February 17, 2009 have a second chance to elect COBRA coverage. All COBRA notices issued on or after February 17, 2009, must include information about the COBRA subsidy under the new law (the “Stimulus Act”).

New DOL and IRS Guidance

The Department of Labor has created model notices that employers can use to fulfill their notice requirements under the new law. Also, the Internal Revenue Service has issued IRS Notice 2009-27, which contains a series of questions and answers that address COBRA subsidy issues, such as what constitutes an involuntary termination.

The DOL Model Notices

The DOL has created four model notices to help employers comply:

1. **The General Notice** includes the information required to comply with COBRA, as well as the COBRA subsidy requirements. This notice can be used for all COBRA notice requirements for the remainder of 2009.
2. **The Second Chance Notice** can be sent to all individuals who qualified for COBRA coverage from September 1, 2008, through February 16, 2009, but do not have a valid COBRA election in effect as of February 17, 2009.
3. **The Subsidy Only Notice** is an abbreviated version of the General Notice and can be sent to those individuals who have already elected and are receiving COBRA coverage.
4. **The Alternative Notice** is for employers not subject to COBRA (*i.e.*, they have fewer than 20 employees) but are subject to state law imposing health care continuation coverage comparable to COBRA. These employers must comply with the COBRA subsidy requirements.

HERRICK

New York Office

2 Park Avenue
New York, New York 10016
Phone: (212) 592-1400
Fax: (212) 592-1500


Princeton Office

210 Carnegie Center
Princeton, New Jersey 08540
Phone: (609) 452-3800
Fax: (609) 520-9095

Newark Office

One Gateway Center
Newark, New Jersey 07102
Phone: (973) 274-2000
Fax: (973) 274-2500

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IRS Notice 2009-27

In this notice, the IRS provides guidance on COBRA subsidy issues, such as:

- An involuntary termination is defined as a severance from employment due to the independent exercise of the employer's authority to terminate an employee (other than due to the employee's implicit or explicit request).
- If an employee is willing to renew an employment contract on similar terms and conditions, the failure of an employer to renew the contract at the time the contract expires may be an involuntary termination.
- A constructive termination or termination for good reason may constitute an involuntary termination if it causes a material negative change in the employment relationship with the employee.
- To qualify as an Assistance Eligible Individual, the involuntary termination and the eligibility for COBRA coverage must occur between September 1, 2008, and December 31, 2009. For example, an employee who was involuntarily terminated in August 2008 and became eligible for COBRA coverage on September 1, 2008, does not qualify as an Assistance Eligible Individual.
- An Assistance Eligible Individual is entitled to a premium reduction of 65% of the amount that the individual would have to pay for COBRA coverage if he or she were not an Assistance Eligible Individual.
- An employer is not entitled to any payroll tax credit for COBRA benefits that it voluntarily agrees to subsidize as part of a severance program or arrangement.

The COBRA subsidy ends on the earliest of (i) the date the Assistance Eligible Individual becomes eligible for other group health coverage or Medicare (whether or not the individual actually enrolls); (ii) the date that is nine months after the first day of the month for which the COBRA subsidy applied; or (iii) the date the individual ceases to be eligible for COBRA coverage. It does not matter whether the individual enrolls in the other group health plan in order for the COBRA subsidy to end.

What to do now?

Employers must act immediately to comply with the COBRA subsidy. You must decide whether to use the DOL Model Notices and forms or to modify your existing COBRA notices. You must also properly identify the Assistance Eligible Individuals who are entitled to the COBRA subsidy.

This ERISA Alert is one in a series of ERISA and employee benefit-related alerts. To read past alerts, please click [here](#). For more information on the this alert or other ERISA matters, please contact:

NY [Fred R. Green](#) at **212.592.5910** or fgreen@herrick.com
NY [Irwin A. Kishner](#) at **212.592.1435** or ikishner@herrick.com
NJ [Gary S. Young](#) at **973.274.2035** or gyoung@herrick.com

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