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DOL and IRS Provide More Insight Into New COBRA Requirements

Last week, the DOL issued model notices to be used in connection with apprising qualified beneficiaries of their new rights to COBRA subsidies. In a national webcast held on March 24, 2009, DOL representatives further clarified who gets which notice. In addition, IRS representatives provided useful information on determining the amount that assistance eligible individuals can be charged for COBRA coverage and on determining what constitutes involuntary termination.

Background

The American Recovery and Reinvestment Act of 2009 (ARRA) provides for a subsidy of 65% of the cost of COBRA coverage for certain qualified beneficiaries who lose health coverage due to involuntary termination of employment. (See our February 24, 2009 *For Your Information*.) ARRA requires plan sponsors to notify current and former qualified beneficiaries of the premium subsidy. On March 19, the DOL posted model notices and election forms relating to the subsidy to its website. (See our March 23, 2009 *For Your Information*.) Now DOL and IRS representatives have provided clarifications that will help employers determine who to send which notice to and will help in determining the amount of premium eligible for the subsidy.

Notices

As clarified by the DOL representatives, the new COBRA notices should be provided as follows.

The *Full General Notice* should be provided to all qualified beneficiaries with qualifying events on or after September 1, 2008 through December 31, 2009 who either were not provided an election notice or who were provided a notice on or after February 17, 2009 that did not include required ARRA information. Thus, this notice should be furnished to –

- qualified beneficiaries who have qualifying events on or after February 17, 2009
- qualified beneficiaries with qualifying events prior to February 17, 2009 who received COBRA election notices on or after February 17, 2009 that do not contain subsidy information.

The notice should generally be provided within 44 days of the qualifying event.

The *Abbreviated General Notice* should be provided to individuals with qualifying events on or after September 1, 2008 and who are currently enrolled in COBRA coverage. This notice does not include COBRA election information, and should be provided as soon as possible.

The *Notice of Extended COBRA Election Period* is to be provided to Assistance Eligible Individuals (AEIs) or those who would be AEIs if a COBRA election had been in effect (i.e., those who are involuntarily terminated) and who had a qualifying event on or after September 1, 2008 through February 16, 2009. This notice is to be provided by April 18, 2009.

The DOL representatives indicated that when it is not clear whether a termination was involuntary, it may be advisable to send the notice to a broader group to ensure that all potential AEIs receive the appropriate information. Further, they stated that this notice is not required to be provided to individuals who could not be AEIs (e.g., because the qualifying event is divorce).

Information on Premium Subsidy Amount When a Non-AEI is Covered

The IRS representatives participating in the webcast confirmed that the subsidy is not available for individuals who are not qualified beneficiaries, such as domestic partners, same-sex spouses, or dependents added to COBRA coverage after the qualifying event (other than a child added after birth, adoption or placement for adoption). They provided some important information on how to determine the amount of premium that is eligible for the subsidy when a non-AEI is also covered. They stated that in these situations, the incremental cost of providing coverage to the non-AEI would not be eligible for the subsidy. This is the same approach that the IRS set out in Notice 2005-50, which described how the amount eligible for the Health Care Tax Credit under the Trade Act of 2002 was determined when nonqualified individuals were also covered by the plan.

For example, assume the COBRA premium is $800 for employee plus one coverage and $1,000 for family coverage. If the employee elects family coverage to cover a dependent child qualified beneficiary and a domestic partner, the subsidy would apply to the $800 (employee plus one coverage) but not the remaining $200. If the employee covered two dependent children qualified beneficiaries and the domestic partner, the entire $1,000 would be eligible for the subsidy.

Involuntary Terminations

One of the more difficult issues facing employers is the determination of which terminations are involuntary. The IRS representatives clarified that involuntary terminations include –

- employer-initiated resignations
- constructive involuntary terminations (e.g., where there is a plant closing and the employee declines the opportunity to take a job in a location in another state)
- quitting in response to a "material negative change in employment" (e.g., an employee's hours are substantially cut so the employee leaves for another job with more hours)
- layoffs when the employee is told not to report to work for a period of time.

The IRS is expected to issue more formal guidance next week. We will keep you informed of any important information it provides.

Conclusion

The guidance on the new subsidy is being released in small increments, but at least this recent information will help employers meet some of their looming obligations under the new law. We will update you on developments as they occur.

Buck's consultants would be happy to discuss this latest guidance and other issues in connection with the new law with you.