



Additional Guidance Emerges on COBRA Subsidy

The IRS recently posted some new questions and answers to its website on the federal COBRA premium subsidy included in the stimulus package enacted earlier this year. The IRS provides some leeway for employers in determining involuntary terminations and some other clarifications on the availability of the subsidy and claiming the payroll tax credit. In addition, the DOL and CMS each released guidance on the appeals process, including forms that individuals can use if they are denied COBRA premium assistance.

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 an involuntary termination of employment. (See our [February 24, 2009](#) *For Your Information*.) Under ARRA, the subsidy is available for a period of up to nine months.

Since ARRA's enactment on February 17, 2009, the federal agencies responsible for overseeing compliance with the premium assistance rules have issued formal and informal guidance for employers and employees. (See our [March 23, 2009](#), [March 26, 2009](#) and [April 13, 2009](#) *For Your Information* publications.) Most recently, the IRS posted new Q&As to its [website](#) on the COBRA subsidy, and DOL and CMS each released additional guidance on appealing the denial of COBRA premium assistance.

New IRS Guidance

On June 4, the IRS added to its previously posted FAQs a number of COBRA questions and answers addressing a variety of issues.

Involuntary Termination. In a new Q&A, the IRS states that it will generally not challenge an employer's determination that an employee's termination was involuntary, as long as it is a reasonable interpretation under the law and applicable guidance. The employer must maintain supporting documentation, including its attestation that the termination was involuntary.

BUCK COMMENT. *This guidance is useful for employers who may have been considering a more conservative position on involuntary termination so as to avoid potential penalties due to underwithholding.*

The IRS clarifies that each of the following circumstances would be considered an involuntary termination –

- an employee hired for a limited time period (e.g., a seasonal worker or a teacher hired for the school year) is terminated at the end of the period, despite the employee's willingness and ability to continue working
- an elected official who runs for reelection is not reelected or is forced out of office by term limits
- an employee who is a member of a military Reserve unit or the National Guard is called to active duty, regardless of whether the civilian employer treats the absence as a termination or a leave of absence.

Availability of Premium Subsidy. The IRS provides two new examples of when the COBRA premium subsidy does not apply –

- continuation coverage is voluntarily provided by the employer under a health plan that is not subject to COBRA (e.g., church plan or certain governmental plans)
- COBRA premiums are paid on a pre-tax basis through a health reimbursement account (because they are considered to have been paid by the employer).

Effect of TRICARE Eligibility. The IRS confirms that eligibility for TRICARE health coverage for members of the military or their families does not affect an assistance-eligible individual's eligibility for the COBRA premium subsidy.

Extended or Special Election Period. The IRS confirms that for purposes of the extended COBRA election period or similar state special election period, COBRA coverage could be effective at a date later than the first period of coverage beginning on or after February 17, 2009 if the plan allows. However, the nine-month limit on eligibility would still begin with the first period of coverage beginning on or after February 17 and the delay period would not be disregarded in determining whether a break in coverage has occurred. Thus, the delay could trigger a preexisting condition exclusion.

Payroll Tax Credit. Under the law, the employer maintaining the plan is generally able to take the payroll tax credit. There has been confusion over who is entitled to take the credit when a group health plan covers employees of two or more employers (other than a multiemployer plan). In the new Q&As, the IRS confirms its informal position that when employers are unrelated or are members of a single controlled group, the former employer of the subsidy-eligible employee would be entitled to the payroll tax credit. The total premium subsidy amount provided to all assistance-eligible individuals under the plan would be allocated on this basis.

The IRS also clarifies that an insurer or multiemployer plan that is entitled to claim the payroll tax credit must maintain a signed statement from the employee or from the employee's former employer attesting to an involuntary termination occurring during the period from September 1, 2008 through December 31, 2009. The IRS confirms that the COBRA subsidy rules do not require additional Form W-2 or 1099 reporting.

DOL and CMS Guidance on the Appeals Process

Recently, both DOL and CMS issued guidance outlining the appeals process individuals can use if they are denied a premium subsidy for COBRA coverage. Appeals concerning continuation coverage or reduced premiums through a private sector employer plan generally with at least 20 employees should be directed to the DOL. Appeals relating to continuation coverage provided through a federal, state or local government plan, or pursuant to state insurance law should be directed to CMS.

To appeal a premium subsidy denial, individuals must complete and submit the [DOL form](#) or [CMS form](#) as appropriate. Additional information and downloadable forms are available on the [DOL](#) and [CMS](#) websites.

More recently, the DOL issued a [notice](#) indicating that it will in some circumstances need to contact plan administrators for information to substantiate or deny an individual's claim for the subsidy.

Conclusion

Buck's consultants are available to discuss the latest guidance and will continue to keep you informed of ongoing developments in this area.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.