

## Alert

### IRS Issues Additional Guidance on COBRA Premium Subsidy

April 10, 2009

As we previously reported in [“New Stimulus Package Creates Subsidy for Health Care Continuation Coverage”](#) (SRZ Alert, March 9, 2009) and [“Department of Labor Issues Model Notices for Subsidized COBRA Premiums”](#) (SRZ Alert, March 20, 2008), the American Recovery and Reinvestment Act of 2009 (the “ARRA”) expands the rights of assistance eligible individuals under the Consolidated Omnibus Budget and Reconciliation Act of 1985, as amended (“COBRA”), by subsidizing 65 percent of their COBRA premiums. On March 31, 2009, the Internal Revenue Service issued [Notice 2009-27](#) (the “Notice”). The Notice, which consists of 58 “Q&As,” provides information on a wide-range of topics related to the ARRA, including what constitutes an “involuntary termination,” who qualifies as an “assistance eligible individual,” how to calculate the premium reduction, what type of coverage is eligible for the premium reduction, and what is considered the beginning and end of the premium reduction period. The Notice also provides additional information on the recapture of the COBRA premium subsidy, the extended election period, payments to insurers, and the application of the subsidy rules to comparable state continuation coverage programs. This Alert sets forth some of the guidance covered in the Notice.

#### Involuntary Termination

As described in a previous Alert on the subsidy, a person is eligible for the subsidy if he or she is (i) involuntarily terminated (for reasons other than gross misconduct) during the period beginning on Sept. 1, 2008, and ending on Dec. 1, 2009, and (ii) eligible for COBRA coverage (or applicable state continuation coverage) during that period. The Notice makes clear that an “involuntary termination” is the involuntary termination of employment rather than the involuntary termination of health coverage. An involuntary termination is a “severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.” An involuntary termination may include (i) the employer’s failure to renew a contract when it expires if the employee was willing to execute a new contract with similar terms to the expiring contract, (ii) an employee-initiated termination if the termination constitutes a termination for good reason due to employer action that causes a material adverse change in the employment relationship for the employee, or (iii) an employee’s resignation as a result of a material change in the employer’s geographic location. The Notice also clarifies the following with respect to involuntary terminations:

- A voluntary resignation or retirement will be deemed an involuntary termination if, absent such voluntary resignation or retirement, the employer would have terminated the employee’s services, and the employee had knowledge that he/she would be terminated.
- Generally, a reduction in hours is *not* an involuntary termination unless the reduction is to zero hours. An employee’s voluntary termination in response to an employer-imposed reduction in hours, however, may be an involuntary termination if the reduction in hours is a material adverse change in the employment relationship for the employee.

- A work stoppage as a result of a strike initiated by employees or their representatives is *not* an involuntary termination, but a lock-out initiated by the employer is an involuntary termination.
- Except in the case where a termination of employment is due to gross misconduct, an involuntary termination includes an involuntary termination for cause.
- The death of an employee does not constitute an involuntary termination of employment.

### **Assistance Eligible Individuals**

The Notice makes the following clarifying points with respect to who qualifies as an “assistance eligible individual”:

- An individual cannot become an assistance eligible individual if the involuntary termination occurred before Sept. 1, 2008.
- Both the involuntary termination and the eligibility for COBRA continuation coverage must occur during the period from Sept. 1, 2008 through Dec. 31, 2009.
- An assistance eligible individual must be a qualified beneficiary for COBRA purposes. This means the individual must be covered under the group health plan on the day before the involuntary termination.
- An individual may become an assistance eligible individual more than once.

### **Other Important Provisions of the Notice**

The Notice includes the following additional guidance:

- The premium reduction is available for dental-only or vision-only plans.
- While the premium reduction does not extend to health flexible spending arrangements, it is available under a health reimbursement arrangement.
- Even if an assistance eligible individual’s modified adjusted gross income during the year in which the individual receives the subsidy exceeds the threshold set forth in ARRA, an employer or plan sponsor cannot refuse to provide the premium reduction to the individual. An assistance eligible individual who wants to make a permanent election to waive the right to the premium reduction can make this election by providing a signed and dated notification to the employer or plan sponsor.
- If the insurer of an insured single employer plan has agreed to collect COBRA premiums directly from the qualified beneficiaries, it must treat a 35 percent payment by an assistance eligible individual as a payment of the full COBRA premium even if this payment comes before the employer pays the insurer the remaining 65 percent.
- A period of employer-paid COBRA premiums counts against the maximum nine-month subsidy period.
- If an employer pays for a portion of a COBRA premium, the subsidy only applies to the remaining portion of the COBRA premium that is being charged to the assistance eligible individual.

Please review the Notice for additional information. The Department of Labor (the “DOL”) also continues to update its website with more information on the COBRA subsidy program. To view the DOL’s website, go to <http://www.dol.gov/ebsa/cobra.html>.

---

If you have any questions concerning this Alert, please contact:

<b>Mark E. Brossman</b>	<b>+1 212.756.2050</b>	<a href="mailto:mark.brossman@srz.com">mark.brossman@srz.com</a>
<b>David M. Cohen</b>	<b>+1 212.756.2141</b>	<a href="mailto:david.cohen@srz.com">david.cohen@srz.com</a>
<b>Laurence M. Moss</b>	<b>+1 212.756.2529</b>	<a href="mailto:laurence.moss@srz.com">laurence.moss@srz.com</a>
<b>Ronald E. Richman</b>	<b>+1 212.756.2048</b>	<a href="mailto:ronald.richman@srz.com">ronald.richman@srz.com</a>
<b>Holly H. Weiss</b>	<b>+1 212.756.2515</b>	<a href="mailto:holly.weiss@srz.com">holly.weiss@srz.com</a>
<b>Susan E. Bernstein</b>	<b>+1 212.756.2056</b>	<a href="mailto:susan.bernstein@srz.com">susan.bernstein@srz.com</a>
<b>Judith Kurzweil</b>	<b>+1 212.756.2113</b>	<a href="mailto:judith.kurzweil@srz.com">judith.kurzweil@srz.com</a>
<b>Shannon L. Cade</b>	<b>+1 212.756.2448</b>	<a href="mailto:shannon.cade@srz.com">shannon.cade@srz.com</a>

---

**New York**

919 Third Avenue  
New York, NY 10022  
+1 212.756.2000  
+1 212.593.5955 fax

**Washington, DC**

1152 Fifteenth Street, NW, Suite 850  
Washington, DC 20005  
+1 202.729.7470  
+1 202.730.4520 fax

**London**

Heathcoat House  
20 Savile Row, London W1S 3PR  
+44 (0) 20 7081 8000  
+44 (0) 20 7081 8010 fax

[www.srz.com](http://www.srz.com)

---

**“U.S. Treasury Circular 230 Notice:** Any U.S. federal tax advice included in this communication was not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal tax penalties.”

*This information has been prepared by Schulte Roth & Zabel LLP (“SRZ”) for general informational purposes only. It does not constitute legal advice, and is presented without any representation or warranty as to its accuracy, completeness or timeliness. Transmission or receipt of this information does not create an attorney-client relationship with SRZ. Electronic mail or other communications with SRZ cannot be guaranteed to be confidential and will not (without SRZ agreement) create an attorney-client relationship with SRZ. Parties seeking advice should consult with legal counsel familiar with their particular circumstances. The contents of these materials may constitute attorney advertising under the regulations of various jurisdictions.*