

April 16, 2009

Proceed with Caution – New COBRA Subsidy Notices Pose Risks to Employers

Employers are working frantically to comply with the new COBRA subsidy requirements of the American Recovery and Reinvestment Act of 2009 (the “Act”). However, the rush to compliance poses significant dangers if employers rely on the guidance issued by the Internal Revenue Service and Department of Labor without careful review and use the Department of Labor sample notices without modification. For example:

- The definition of “involuntary termination” for purposes of the COBRA subsidy is extremely broad, and what constitutes an involuntary termination for purposes of the COBRA subsidy may not be an “involuntary termination” for purposes of an employer’s other plans or release agreements. If any of an employer’s plans (such as severance or retiree medical plans) pay any benefits upon “involuntary termination”, use of the sample notices without clearly providing that the assistance eligible individual’s termination is “involuntary” solely for purposes of the COBRA subsidy (and not for purposes of any other company plans or agreements) may trigger other rights for the individual that were not intended.
- The General Notice must be given to all eligible former employees (and their qualifying beneficiaries) who experienced a COBRA “qualifying event” between September 1, 2008 and December 31, 2009 (including individuals who would not be eligible for the subsidy) and who either did not receive an election notice or received an election notice on or after February 17, 2009 that did not include the additional information required by the Act. However, if the sample notice is used without modification, a recipient may be confused regarding his or her eligibility for the subsidy, particularly if he or she was not “involuntarily terminated”, thus resulting in an increased administrative burden to address recipients’ questions and concerns regarding the subsidy.
- The Notice in Connection with Extended Election Periods should be provided to all assistance eligible individuals who incurred a qualifying event during the September 1, 2008 to February 16, 2009 period and did not elect COBRA coverage or elected it but then discontinued coverage, even if the employer believes the employee’s termination was voluntary or due to “gross misconduct” (as defined under COBRA). The former employee may disagree with the employer’s classification of his or her termination as voluntary, and if the employer’s classification is incorrect, it will have failed to provide the former employee with the required notice.
- An involuntary termination of employment for purposes of the COBRA subsidy includes a termination of employment that occurs when the employee enlists for or returns to active military duty. This is not clear from the notices, and without modification, the language in the notices may lead these employees to believe they are not eligible for the COBRA subsidy.

Even if your company has sent the notices that due are by April 18, 2009 without modification, you should consider modifying your forms prospectively to address the issues that may be caused by deficiencies in the sample notices.

If you have any questions or would like to discuss the requirements of the Act, please contact one of the attorneys listed below.

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