



## Management Alert

# IRS and DOL Issue New COBRA Premium Reduction Guidance

On March 31, the IRS issued Notice-2009-27, a much-anticipated and comprehensive guidance about the COBRA premium reduction under the American Recovery and Reinvestment Act (ARRA). For the first time, the IRS has provided insight into what constitutes an involuntary termination. Notice 2009-27 confirms information provided in our previous Management Alerts, and provides new guidance, which is summarized below. On April 2, the Department of Labor (DOL) also expanded its “FAQs for Employers About COBRA Premium Reduction Under ARRA,” which includes detailed guidance about use of the model notices.

### *Involuntary Termination*

The Notice defines an involuntary termination for purposes of the COBRA premium reduction as a “severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employee, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.” Situations qualifying as involuntary termination may be summarized as follows:

Involuntary Termination	Not Involuntary Termination
Employee-initiated termination if termination is due to the employer’s action that causes a material negative change in the employment relationship	Death of employee
Employer’s failure to renew employee’s contract upon expiration if employee is willing to continue in employment	Absence from work due to illness or disability (unless employer takes action to terminate employment)
Employee’s voluntary resignation or retirement, if facts and circumstances indicate that absent such resignation or retirement the employee knew that he or she would otherwise be terminated by the employer	Reduction in hours (except where hours are reduced to zero)
Layoff with right to recall or furlough or other suspension of employment	Retirement (except when retirement is in lieu of termination/layoff)
Employee’s voluntary termination in response to employer-initiated reduction in hours if it’s a material negative change in the employment relationship	Termination due to gross misconduct

Involuntary Termination	Not Involuntary Termination
Employer's action to end employee's employment while employee is absent due to disability	Work stoppage as a result of strike initiated by employees or union
Termination of employment for cause (except in cases of gross misconduct)	
Employee's resignation due to material change in employment geographic location	
Employer-initiated lockout	
Voluntary acceptance of severance programs (buy-out) if employer has indicated that additional terminations are likely after the buy-out election period ends	

### *Deferred Loss of Coverage*

To be eligible for the COBRA premium reduction, both the involuntary termination and the loss of coverage that results in COBRA eligibility must occur during the period from September 1, 2008 through December 31, 2009. Severance arrangements often permit terminating employees to continue employer-provided coverage for a period following the termination date, and then COBRA continuation coverage is offered. Because the COBRA premium reduction will not apply unless the loss of coverage triggering COBRA occurs before December 31, 2009, employers should review plan provisions to determine whether coverage ends on the employee's termination date or at some later date. Employers interested in optimizing use of the COBRA premium reduction may want to revise their plans so that employees involuntarily terminated on or before December 31, 2009 have the right to elect COBRA continuation coverage on or before December 31, 2009.

### *IRS Approves Increased COBRA Amount*

Employers that have previously charged less than the maximum applicable COBRA premium now have assurance that they may increase the premium under their plan in order to take full advantage of the new premium reduction. According to the Notice, if the employer increases its plan's premium for COBRA coverage, the premium reduction will apply to the increased premium amount. The Notice also confirms that the premium reduction will apply to the premium charged even if the employer applies different COBRA premiums to different groups of assistance eligible individuals.

### *COBRA Premium Reduction and HRAs*

According to the Notice, the premium reduction applies to a health reimbursement arrangement (HRA), even though the HRA may qualify as a flexible spending account (FSA). (FSAs provided under a cafeteria plan are not available for the premium reduction.) In addition, the Notice provides that eligibility for an HRA will not cause an individual's premium reduction to end if the HRA qualifies as an FSA under Code Section 106(c). In general, an HRA will qualify as an FSA if the balance in the HRA is less than 500% of the applicable premium for COBRA continuation of the HRA coverage.

If a qualified beneficiary elects to continue HRA coverage under a second chance COBRA election, the qualified beneficiary will have access to the same level of reimbursements that he or she had immediately before the qualifying event, reduced for

any reimbursements made after the qualifying event (for example, reimbursements of expenses incurred before the qualifying event that were submitted and paid after the qualifying event). Under a second chance election, the HRA is not required to reimburse expenses incurred between the date of the qualifying event and the first day of the first period of coverage beginning on or after February 17, 2009.

### *COBRA Premium Reduction and Retiree Coverage*

The Notice provides that premiums paid for retiree health coverage may be eligible for the ARRA premium reduction under some circumstances. If an assistance eligible individual is offered retiree health coverage that is identical to the health coverage offered to similarly situated active employees (even if the coverage costs more), then the retiree coverage will be treated as COBRA coverage under ARRA and the ARRA premium reduction will be available.

Under ARRA, the availability of other group health coverage renders an individual ineligible for the premium reduction. The Notice offers guidance as to whether the availability of retiree health coverage will cause an individual to be ineligible for the premium reduction. If retiree coverage is offered under the “same group health plan” as the COBRA coverage, then the offer of retiree coverage has no effect on the individual’s eligibility for the premium reduction. If the retiree coverage is offered at the same time as COBRA, but under a “different group health plan,” then the availability of the premium reduction depends on when the individual was terminated and if he or she is still eligible to enroll in the retiree health plan. Specifically, individuals involuntarily terminated and entitled to COBRA on or after February 17, 2009 are not entitled to a premium reduction. Individuals terminated and entitled to COBRA on or after September 1, 2008 but before February 17, 2009, are not entitled to a premium reduction if the entitlement to enroll in the retiree plan continued until February 17. If as of February 17 the individual was no longer entitled to elect retiree coverage, an ARRA premium reduction is available.

In determining whether retiree health coverage is offered under the “same plan” as COBRA, COBRA regulations provide that all health care benefits provided by an entity are deemed to be offered under the same plan, unless it is clear from the plan documents that benefits are being offered under separate plans. Therefore, employers offering retiree health coverage will need to review their plan documents and determine whether such coverage is offered under the same plan as COBRA coverage.

### *Eligibility for Other Coverage and Refund of Excess Premium Subsidies*

An employer has no obligation to refund to the IRS any excess payroll tax credit received merely because the assistance eligible individual failed to report eligibility for other coverage, unless the employer had actual knowledge of the eligibility.

An individual is not considered eligible for other coverage until such time as he or she is actually permitted to enroll in the other plan. For example, if the individual is eligible for coverage under a spouse’s plan, but is not permitted to enroll until the next open enrollment period, the subsidy may still apply until enrollment becomes possible under the spouse’s plan.

### *Income Limits and Premium Reduction Waivers*

A plan may not refuse to provide the premium reduction to an assistance eligible individual because of the individual’s income. If the individual’s income is too high to qualify for the premium reduction, COBRA coverage must be provided so long as the assistance eligible individual pays the required 35%.

The Notice provides that an assistance eligible individual may permanently waive the premium reduction by providing a signed and dated notification that includes a reference to “permanent waiver” to the entity eligible to be reimbursed for the premium reduction (generally the employer). Once the waiver is made, the election cannot be reversed.

### *New COBRA Notice Not Required for All Qualified Beneficiaries*

The DOL has clarified that not all individuals who became qualified beneficiaries between September 1, 2008 and February 16, 2009 should receive a new COBRA notice. In accordance with newly released FAQs, a new COBRA notice is not required if the individual became a qualified beneficiary for any reason other than involuntary termination, and the individual was provided with COBRA materials before February 17, 2009. For example, if an individual becomes a qualified beneficiary on January 6, 2009 due to divorce and is given COBRA materials on January 19, 2009, new COBRA materials containing information on the premium reduction should not be provided.

For more information, please contact the Seyfarth attorney with whom you work, or any Employee Benefits attorney on our website ([www.seyfarth.com/EmployeeBenefits](http://www.seyfarth.com/EmployeeBenefits)).



Breadth. Depth. **Results.**

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