



SPECIAL Alert

In This Issue

In this fourth Special Alert for 2009, we discuss the new COBRA notice requirements created by the American Recovery and Reinvestment Act of 2009 (ARRA).

The Department of Labor (DOL) has released model notice language and employers now need to take action. This Alert will discuss the model notices and provide action steps to help employers handle the additional notice requirements.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGrawWentworth web site at www.mcgrawwentworth.com.

“New Notices for COBRA”

On March 19, 2009, the Department of Labor (DOL) released model notice language addressing the COBRA premium assistance provided by the federal government under the American Recovery and Reinvestment Act of 2009 (ARRA). Along with the model notice language, the DOL has also published additional Frequently Asked Questions (FAQs) to further clarify the new COBRA requirements. Just this week the Department of Labor conducted a teleweb to help answer employer questions.

All employers will need to take action to make sure the correct notices are sent. This *Special Alert* will:

- Provide a brief overview of ARRA’s COBRA provisions.
- Discuss the four model notices available and when each notice should be used.
- Discuss various situations and timing in terms of notices, elections and payments.
- Provide general thoughts on “involuntary termination of employment.”
- Provide action steps for employers to handle notice requirements.

It is critical that your organization begin working on getting the notices out as soon as possible.

Overview of ARRA Provisions

ARRA provides a government subsidy for medical, prescription, dental, vision and, in some cases, EAP coverage, in order to make coverage more affordable for qualified beneficiaries who lost coverage due to an involuntary termination of employment between September 1, 2008 and December 31, 2009. The subsidy is equal to 65% of the COBRA premium and is available only to Assistance Eligible Individuals (AEIs) defined as qualified beneficiaries who:

- Become eligible for COBRA continuation coverage or state law continuation coverage between September 1, 2008 and December 31, 2009.
- Are eligible for COBRA due to an involuntary termination of employment.
- Are not eligible for any other group health coverage or eligible for coverage through Medicare.



- Actually elect COBRA. If any qualified beneficiary lost coverage due to an involuntary termination of employment during the timeframe noted above and failed to elect COBRA when initially eligible or is in their initial COBRA election period, the employer must now give the qualified beneficiary a second opportunity to elect COBRA. If qualified beneficiaries elected COBRA but subsequently lost coverage due to non-payment of premium and the above requirements apply, these beneficiaries also need to be offered a second election period. In general, if coverage is elected during the second election period, it only needs to be reinstated as of March 1, 2009.



The ARRA legislation also allows employers to offer AEIs the opportunity to elect a lower-cost plan option to serve as continuation coverage, if such an option is available. However, this is left to the employer's discretion; it is not mandatory to offer AEIs a lower-cost plan option. If your organization decides to offer the lower cost option, you need to verify that your health plan vendor can accommodate this alternative.

The government has a website dedicated to helping employers become compliant with these regulations. More information can be found at www.dol.gov/ebsa/cobra.html.

Model Notices

The DOL just released four different model notices that employers can use to comply with these rules. The following is a summary of the notices available and a description of the circumstances under which the employer should use that specific model notice language:

- **Abbreviated Notice:** The abbreviated notice should be sent to qualified beneficiaries (with a qualifying event on or after September 1, 2008) who have elected COBRA and are currently paying the premiums. This model notice language focuses on the premium

assistance that may be available, and also contains two sample forms. One form is to determine if a qualified beneficiary meets the

requirements of an AEI. The other form will allow the qualified beneficiary to elect a lower-cost plan option, if the employer chooses to allow this.

- **Extended Election Period Notice:** This notice is designed to be sent to AEIs (with a qualifying event on or after September 1, 2008) who failed to elect COBRA when it was first offered, elected COBRA but subsequently experienced a loss of COBRA coverage due to failure to pay the premium in a timely manner, or are currently in their COBRA election period. This notice is more detailed than the abbreviated notice because it includes all the information normally found in a COBRA election notice, as well

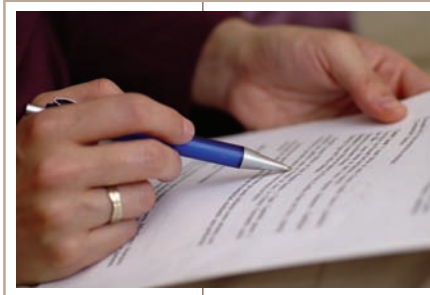
as the details addressing the new enrollment period for AEIs. This notice contains several sample forms as well, including a COBRA election form, a verification of AEI eligibility form, and the form to elect a lower-cost option (if applicable).

The government specifies this notice need only be sent to AEIs, but McGraw Wentworth recommends sending the notice to any qualified beneficiary who lost coverage due to a termination of employment during the specified timeframe. During the DOL teleweb, the representatives indicated involuntary terminations of employment can be construed quite broadly. Based upon the discussion, it will be difficult for employers to determine who is considered an AEI due to involuntary termination of employment. If your notice covers all employee terminations, your organization can deny treatment as an AEI to individuals you believe were voluntarily terminated and those individuals can appeal to the DOL. It is best to allow the DOL to make these calls because of how broadly they seem to define "involuntary".

- **Full Notice:** The full model notice should be used for all qualifying events from now until December 31, 2009. In addition, if there is any reason an individual who experienced a qualifying event on or after September 1, 2008 failed to receive an election notice, employers should send this full model notice to them as well.

This notice will replace the qualifying event notice your organization would normally send when an individual experiences a loss of coverage and a qualifying event. This notice includes all the required information on the COBRA election notice along with information about qualifying as an AEI. The full notice also contains several additional forms. The sample forms include a COBRA election form, a verification of AEI eligibility form, and the form to elect a lower-cost option (if applicable).

- **Alternative Model Notice:** This notice is to be used in the limited circumstances when a qualified beneficiary is receiving benefits through a state continuation plan. In general, insurance carriers hold the responsibility for notifying qualifying beneficiaries under mini-COBRA statutes.



These model notices are not ready to send as-is. Employers need to look carefully at each notice and personalize it with information related to your plan and your organization. You can retrieve Word files of all four model notices at <http://www.dol.gov/ebsa/COBRAmode notice.html>.

These re-notices must be sent out by April 18, 2009. Once your organization has sent notices to any impacted qualified beneficiaries, then you should use the full notice language going forward.

Timing of Notices, Elections and Payments

Once your organization has sent out all the required notices, what comes next? Again, the organization's response will depend on the particular situation of each qualified beneficiary. Let's review how each situation should be handled, depending on the type of notice that was sent:

- **Abbreviated Notice:** For these individuals, you will be receiving one or two forms:
 1. **Form to Request Treatment as an AEI:** If the individual answers yes to all statements and your records indicate an involuntary termination of employment, approve the assistance. You need to return a copy of the approved form to the qualified beneficiary.

Accept 35% of premium going forward and create a tracking system to collect the tax credit. Ask your payroll vendor and your COBRA vendor if they will be able to provide assistance with this tracking. If a full COBRA premium was received for March and/or April, decide how you will refund or provide a credit for the 65% of premium already paid in these two months. Note on the form how these credits will be handled and confirm how long assistance will last, unless the individual fails

to remain an AEI. In addition, put a follow-up system in place so you are reminded when the nine months of assistance ends.

If an individual does not qualify for assistance, deny the request for treatment as an AEI. The denial can be completed on this form. The denial should specify the reason the individual fails to qualify, and a copy of the form should be returned to the qualified beneficiary.

2. **Form to Switch COBRA Coverage Option:** This form will be provided only by organizations that decide to allow AEIs to elect a lower-cost plan option. If an individual qualifies as an AEI and requests a lower-cost plan option, you need to process the change request and confirm the coverage change in writing. The individual has 90 days from the date of the notice to elect a lower-cost plan option.

- **Extended Election Period Notice:** For individuals receiving this notice, you will have certain forms that need to be completed in a specific window of time:

1. **COBRA Election Form:** Qualified beneficiaries will have time to decide if they want to elect COBRA when offered a second opportunity to elect coverage. The qualified beneficiary must be given 60 days from the date of this notice to elect COBRA. Once the election is made,

the qualified beneficiary has 45 days to make the initial payment. The initial payment is equal to 35% of the total coverage premium. Employers only need to retroactively reinstate COBRA to March 1, 2009. Make sure they qualify as AEIs (see next point) before allowing the COBRA election.

2. Form to Request Treatment as an AEI:

If the individual answers yes to all statements and your records indicate an involuntary termination of employment, approve the assistance. In this case, the qualified beneficiary is also permitted to elect COBRA during the second election. You need to return a copy of the approved form to the qualified beneficiary. Accept 35% of the premium as of March 1st going forward and create a tracking system to collect the tax credit. Ask your payroll vendor and your COBRA vendor if they will be able to provide assistance with this tracking. In addition, put a follow-up system in place so you are reminded when the nine months of assistance ends.

If an individual does not qualify for assistance,

deny the request for treatment as an AEI and the COBRA election. The denial can be completed on this form. The denial should specify the reason the individual fails to qualify, and a copy of the form must be returned to the qualified beneficiary. In addition, it may be wise to use the COBRA unavailability notice as a cover letter, with the denial of treatment as an AEI given as the reason for COBRA unavailability. The

letter should state the qualified beneficiaries are not eligible for a second COBRA election,

and at no point is COBRA coverage in effect.

3. Form to Switch COBRA Coverage Option:

This form will be provided only by organizations that decide to allow AEIs to elect a lower-cost plan option. If an individual qualifies as an AEI and requests a lower-cost plan option, you need to process the change request and confirm the coverage change in writing. The individual has 90 days from the date of the notice to elect a lower-cost plan option.

- **Full Notice:** The good news is that once you send out these new required notices, the

notice requirements are not as difficult going forward:

1. COBRA Election Form:

The full model notice includes everything that needs to be included in the COBRA election notice, as well as information describing the COBRA subsidy. The election notice requirements have not changed. Qualified beneficiaries still have 60 days from the date of notice to elect coverage. Once the election is made, the qualified beneficiary has 45 days to make the initial payment.

2. Form to Request Treatment as an AEI:

If the individual answers yes to all statements and your records indicate an involuntary termination of employment, approve the assistance. You need to return a copy of the approved form to the qualified beneficiary. Once qualified beneficiaries are approved as AEIs, accept 35% of premium going forward and create a tracking system to collect the tax credit. Ask your payroll vendor and your COBRA vendor if they will be able to provide assistance with this tracking. In addition, put a follow-up system in place so you are reminded when the nine months of assistance ends.

Some individuals will not qualify for assistance. This does not mean they



are not eligible for COBRA; it simply means they must pay the full premium to continue coverage. The plan needs to deny officially the request for treatment as an AEI. The denial can be completed on this form, and should specify the reason the individual fails to qualify. A copy must be sent to the qualified beneficiaries.

3. **Form to Switch COBRA**

Coverage Option: This form will only be completed in organizations that decide to allow AEIs to elect a lower-cost plan option. If an individual qualifies as an AEI and requests a lower-cost plan option, you need to process the change request and confirm the coverage change in writing. The individual has 90 days from the date of the notice to elect a lower-cost plan option.

- **Alternative Model Notice:** The specifics will follow the state continuation law and in most cases will be the carriers' responsibility.

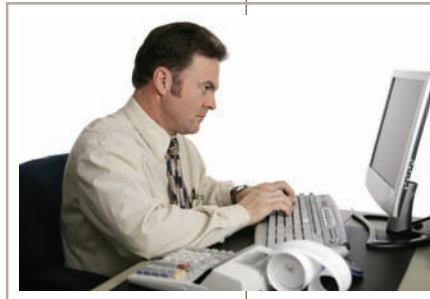
This may seem daunting, but the process is manageable. Once your organization sends the notices required above, set system reminders for when election forms are due. Once elections are made, set reminders for when payments are due.

Keep copies of all notices sent and proof of mailing. The ARRA provisions overlay basic COBRA law, so you should follow the same process in sending these notices as you do when sending COBRA election notices.

Involuntary Termination of Employment

"Involuntary termination of employment" was not defined in ARRA, and the guidance in the notices did not provide a definition, either. However, the newly published FAQs provide some clarification that may be helpful.

- "Involuntary termination of employment" is a termination at the direction of the employer. In analyzing questionable situations, you need to think which party is directing the termination. The teleweb discussions have indicated the DOL intends to interpret involuntary termination very broadly, and the following situations would be considered involuntary terminations:
 - Terminations for cause
 - Employees on furlough
 - If an employer reduces work hours and an employee subsequently quits as a result
- The FAQs verify that the premium assistance and secondary election period do not have to be offered in situations where the termination was due to gross misconduct. COBRA does not need to be offered in terminations involving gross misconduct.
- A reduction of work hours that results in a loss of eligibility for health plan coverage is not considered an involuntary



termination of employment if employees are still working.

- Death is not considered an involuntary termination of employment.

The DOL has advised that if a situation is unclear, the employer should deny the treatment as an AEI and allow the employee to appeal the decision to the DOL. Let the DOL make the questionable calls. It is

important to understand that your organization's payroll records may be audited if the IRS questions the manner in which you are processing AEIs. If you take a tax credit on a situa-

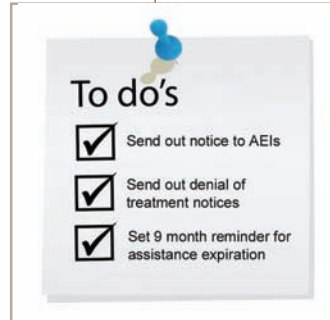
tion that is unclear, the IRS may question why you are taking the credit. If you deny treatment as an AEI, and the DOL later approves the individual's AEI status, your organization will have proof that the individual qualifies as an AEI for any audit situation.

Action Steps

Employers need to begin work right away to prepare these notices as soon as possible. Your organization has until April 18, 2009 to send the notices.

- **Step 1:** Identify all qualified beneficiaries who had a qualifying event on or after September 1, 2008 and divide the individuals as follows:
 - *Group 1:* Those who have elected and are paying for COBRA coverage.

- *Group 2:* Those AEIs who did not elect COBRA, elected COBRA and were subsequently terminated for non-payment or AEIs in their COBRA election period. (McGraw Wentworth recommends notifying all employees that were terminated between September 1, 2008 to current in this group.)
- *Group 3:* Anyone who has had a qualifying event but has not yet been sent a COBRA election notice.
- *Group 4:* Anyone who is continuing coverage under a state-sponsored mini-COBRA plan and these notices are handled by the carrier.
- **Step 2:** Pull down the model notice language from the DOL website and personalize each notice with the information that is specific to your organization. **If you are not offering AEIs the opportunity to elect a lower-cost plan option, you should remove that optional language and the election form for the lower-cost option.**
- **Step 3:** Notices need to be sent:
 - Group 1 qualified beneficiaries receive the abbreviated notice.
- Group 2 qualified beneficiaries who have experienced a termination of employment are given the extended election period notice.
- Group 3 qualified beneficiaries receive the full model notice language.
- **Step 4:** Keep copies of what notice was sent to whom. You should follow your plan's procedure for sending COBRA election notices in terms of proof of mailing.
- **Step 5:** Enter all the follow-ups required:
 - For Group 1, enter a follow-up to receive the Form to Request Treatment as an AEI. For those that return the form and do qualify, determine if your organization needs to apply any credits for premiums already paid. Enter a reminder to discontinue assistance after nine months.
 - For Group 2, set a follow-up date for 60 days following the date the notice is sent. If the election form is returned within the 60 days, you need to set another 45-day reminder from the date of election to receive payment. Once payment is received, set a reminder to discontinue assistance after nine months. If someone who does not qualify as an AEI elects coverage, send out a denial of treatment as an AEI and an unavailability of COBRA notice.
- For Group 3, process as you would any normal COBRA participant. However, if an individual qualifies as an AEI, you need to set the nine-month reminder for when assistance expires.



Remember to save all correspondence related to compliance with COBRA, and make sure you keep confirmation of mailing.

If you have any questions, please contact your McGraw Wentworth Account Manager. **MW**

Copyright McGraw Wentworth, Inc. Our publications are written and produced by McGraw Wentworth staff and are intended to inform our clients and friends on general information relating to employee benefit plans and related topics. They are based on general information at the time they are prepared. They should not be relied upon to provide either legal or tax advice. Before making a decision on whether or not to implement or participate in implementing any welfare, pension benefit, or other program, employers and others must consult with their benefits, tax and/or legal advisor for advice that is appropriate to their specific circumstances. This information cannot be used by any taxpayer to avoid tax penalties.

McGraw Wentworth, Inc.

3331 West Big Beaver Road, Suite 200
Troy, MI 48084
Telephone: 248-822-8000 Fax: 248-822-4131
www.mcgrawwentworth.com

250 Monroe Ave. NW, Suite 400
Grand Rapids, MI 49503
Telephone: 616-717-5647 Fax: 248-822-1278
www.mcgrawwentworth.com