

"It appears that the DOL may be taking a more reasonable approach in its construction of the Act's language that will cut down on the need to provide notices to many of those qualified beneficiaries."

## Update: COBRA Notice Requirements Under the ARRA of 2009

by

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In light of the time-sensitivity of the COBRA notice requirements applicable in connection with the COBRA premium subsidy available under the American Recovery and Reinvestment Act of 2009 (the "Act"), we wanted to follow up yesterday's firm seminar discussion with a brief description of additional informal guidance posted on the DOL's COBRA website. While the seminar was ongoing, in fact, the DOL posted that guidance in the form of an archived version of a DOL webcast held on the prior day (March 24, 2009). The webcast included a helpful discussion of various topics, but we will focus solely on the notice issues below. We have provided a link to that webcast at the end of this communication.

*Webcast.* Officials from the DOL, Department of the Treasury, and IRS participated in the webcast. We learned from the webcast that the IRS expects to issue additional guidance sometime in the next week. We also learned more about the DOL's plans for further guidance. The DOL representative, Ms. Amy Turner, Senior Advisor and Special Projects Manager, said specifically that it is possible – even likely – that the DOL would issue additional FAQs regarding "which notice goes to whom." She also expanded on the DOL's views with respect to the notice requirements and responded to a series of hypothetical situations. Although the DOL official was speaking in her *unofficial* capacity, and employers certainly want to be on the lookout for forthcoming written guidance from the IRS and DOL, we wanted to pass along some of Ms. Turner's comments regarding the notice requirements and her responses to the hypothetical situations. In particular, we find her responses helpful with respect to qualified beneficiaries who experienced their qualifying event prior to February 17, 2009, which is the date the Act was enacted. It appears that the DOL may be taking a more reasonable approach in its construction of the Act's language that will cut down on the need to provide notices to *many* of those qualified beneficiaries.

*DOL Model Notices.* Ms. Turner referenced the situations in which the DOL's four model notices are appropriate. First, she explained the DOL's position that plans that are subject to the federal COBRA provision must provide the "Full Version" of the new "General Notice" (including the COBRA subsidy information) to an individual satisfying each of the three following criteria: (1) a qualified beneficiary; (2) who experiences a qualifying event during the period beginning on September 1, 2008, and ending December 31, 2009; and (3) who has not yet been provided a COBRA election notice or was provided an election notice on or after February 17, 2009, that did not include the information required by the Act. Those rules apply without regard to what kind of qualifying event occurred.

"[The DOL representative] was then asked to respond to five hypothetical situations. We'll outline those situations and share her responses . . . ."

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Second, she referred to the "Abbreviated Version" of the new "General Notice," which includes the same information as the Full Version regarding the COBRA subsidy and the Act but does not include the COBRA coverage election information. This version is appropriate, in lieu of the Full Version, for an individual satisfying the four following criteria: (1) a qualified beneficiary; (2) who experienced a qualifying event on or after September 1, 2008; (3) who elected COBRA coverage; and (4) still has COBRA coverage.

Third, she described the "Alternative General Notice," which is appropriate for state "mini-COBRA" elections. She did not apply these requirements to any of the hypothetical situations described below.

Fourth, she referred to the "Notice in Connection with the Extended Election Period." Plans that are subject to the federal COBRA provisions must provide this Notice to an individual satisfying each of the following criteria: (1) an Assistance Eligible Individual ("AEI") or any individual who would be an AEI if a COBRA continuation election were in effect; (2) who experienced a qualifying event during the period beginning on September 1, 2008, and ending on February 16, 2009; and (3) either did not elect COBRA continuation coverage, or elected it and subsequently discontinued it (perhaps because of the inability to pay premiums).

*Hypothetical Situations.* Ms. Turner was then asked to respond to five hypothetical situations. We'll outline those situations and share her responses below. When considering Ms. Turner's responses, please consider that she provided the appropriate model DOL notice (if any) to be distributed for the particular situation, but that her responses should not be construed as necessarily requiring the use of the DOL's model notices. That is, the qualifying beneficiaries described below should either receive the model notice listed or an individually designed notice that includes the same information as the appropriate model.

**Hypothetical #1:** Qualifying event on September 15, 2008; receives COBRA notice on October 15, 2008; enrolls in COBRA coverage and still has it. Qualified beneficiary must receive the Abbreviated Version of the General Notice, regardless of the type of qualifying event.

**Hypothetical #2:** Qualifying event – involuntary termination of employment – on October 2, 2008; receives COBRA notice on October 31, 2008; could not afford COBRA so did not enroll. Qualified beneficiary must receive Notice in Connection with the Extended Election Period.

**Hypothetical #3:** Qualifying event – a divorce – on January 6, 2009; receives COBRA notice on January 19, 2009; does not elect COBRA. No notice is required to be given. For all relevant purposes, this is the same fact pattern as Hypothetical #2 above, but for the different qualifying event and that's the key. And the Notice in Connection with the Extended Election Period is required only for a qualified beneficiary who is an AEI or one who would be one with a COBRA coverage election in effect.

**Hypothetical #4:** Qualifying event on April 11, 2009; COBRA notice to be distributed on May 1, 2009; what is appropriate notice? Full Version of General Notice.

**Hypothetical #5:** Qualifying event on February 10, 2009; receives COBRA notice on March 17, 2009, but it does not include any information required by the Act. Qualified beneficiary must receive the Full Version of the General Notice, regardless of the type of qualifying event.

*"[I]n terms of providing notice, 'it does not hurt to throw the net wide.'"*

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*Closing.* Ms. Turner acknowledged that there will difficult questions related to whether an employee had been involuntarily terminated and suggested that some employers may wait until the next IRS guidance before distributing notices. She also acknowledged, however, that the April 18, 2009 notice deadline might dissuade some employers from waiting much longer. She blessed a more conservative approach by noting that, in terms of providing notice, "it does not hurt to throw the net wide."

As we noted above, Ms. Turner's comments are not binding upon the DOL, but we understand her comments to be fairly representative of the DOL's current views and likely consistent with any guidance we might receive soon. If you have questions about the rules and situations described above, please do not hesitate to let us know.

The webcast may be accessed at:

<https://event.on24.com/eventRegistration/EventLobbyServlet?target=registration.jsp&eventid=139337&sessionid=1&key=3A818D91BC18D31F024968D47757389D&sourcepage=register>.