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is a challenge. Meeting the  
government’s is critical.”

## ▶ DOL ISSUES MODEL COBRA PREMIUM SUBSIDY NOTICES

The American Recovery and Reinvestment Act ("ARRA") gave the Department of Labor ("DOL") 30 days to draft and issue model notices for use by employers and insurers in complying with the COBRA-related provisions of that economic stimulus package. This 30-day period ended on March 19, 2009, with the DOL just barely meeting that deadline – by posting on its website four different [model notices](#), along with an additional set of [FAQs](#).

### BACKGROUND OF ARRA'S COBRA PROVISIONS

As explained in our earlier Alert, ARRA created a temporary federal subsidy of COBRA premiums for employees (and their dependents) who elect COBRA coverage in connection with an involuntary termination of employment occurring between September 1, 2008, and December 31, 2009. For a period of up to nine months, such "Assistance Eligible Individuals" need only pay 35% of the usual COBRA premium. The plan's sponsoring employer or insurer must advance the other 65% of the premium, obtaining reimbursement of this amount through a credit against its federal payroll tax liability.

ARRA also provided that any individual who *would* have been an Assistance Eligible Individual had he or she elected COBRA coverage (or not let such coverage lapse before ARRA's enactment date of February 17, 2009) must be offered a second opportunity to elect COBRA coverage. By electing COBRA during this second election period, they may take advantage of the 65% premium subsidy. Employers have until April 18, 2009, to notify these individuals of their right to this second election.

### THE NEW MODEL NOTICES

The DOL's four model notices are captioned as follows:

- Model General Notice (full version)
- Model General Notice (abbreviated version)
- Model Alternative Notice
- Model Notice in Connection with Extended Election Period

The captions assigned to the first two notices are particularly unfortunate, in that the DOL's 2004 COBRA regulations assigned the phrase "model general notice" to the notice that must be provided when an individual first becomes covered under a plan. These new model notices are actually variations on the model *election* notice that was issued in connection with those 2004 regulations. The DOL has not issued any revised version of the COBRA notice to be provided when coverage commences (nor does ARRA even suggest that such a notice must refer to these ARRA provisions).

Although these model notices should help employers and insurers comply with their notification obligations under ARRA, they will require some tailoring to fit specific situations. Moreover, careful thought will have to be given to determining which notice should be sent to a particular individual. Based on the recent FAQs, it *appears* that these model notices should be used as follows.

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## [Model General Notice \(full version\)](#)

This model notice should be sent to all individuals who experience a qualifying event under the federal COBRA provisions between September 1, 2008, and December 31, 2009, *and* have not yet received a COBRA election notice. This notice says nothing about the second election period. Nor does it apply to state-law continuation rights (under the so-called "mini-COBRA" statutes).

## [Model General Notice \(abbreviated version\)](#)

This model notice would be appropriate for all individuals who experienced a qualifying event under the federal COBRA provisions between September 1, 2008, and February 16, 2009; who have already elected COBRA coverage; and who were still maintaining that coverage as of ARRA's enactment date. It describes the premium subsidy, but not the second election period.

## [Model Alternative Notice](#)

Insurers providing health coverage to employers with fewer than 20 employees (and therefore not subject to the *federal* COBRA provisions) may use this model notice to describe the premium subsidy available to Assistance Eligible Individuals who elect continuation coverage under a state's mini-COBRA statute. This notice will definitely need to be tailored to fit the specific requirements of each state's laws. However, the language describing the federal premium subsidy should be equally applicable to all states.

This model notice contains no reference to the second election period. This is because nothing in ARRA requires insurers to offer a second opportunity to elect mini-COBRA coverage. In some cases, however, *state* laws will require them to do so. In that event, insurers will want to include the appropriate language – in either this or the following notice.

## [Model Notice in Connection with Extended Election Period](#)

This model notice is designed specifically for Assistance Eligible Individuals who lost regular coverage due to an involuntary termination of employment (either their own or a family member's) occurring on or after September 1, 2008, and before February 17, 2009, and who either failed to elect COBRA coverage or allowed that coverage to lapse before February 17, 2009. It describes both the premium subsidy and the second election period. The deadline for providing this notice is April 18, 2009.

## **ADDITIONAL MODEL DOCUMENTS**

All four of these model notices are designed to enclose a number of related documents, which are also included in the recent postings. These are captioned as follows:

- Continuation Coverage Election Form
- Form for Switching Continuation Coverage Benefit Options
- Important Information About Your Continuation Coverage Rights
- Summary of the Continuation Coverage Premium Reduction Provisions Under ARRA
- Request for Treatment as an Assistance Eligible Individual
- Participant Notification

Of all these documents, the "**Continuation Coverage Election Form**" may need the most tailoring. In fact, if a plan already has an election form in place, there should be no need to revise it because of ARRA. Because the *abbreviated* version of the Model General Notice is designed to be sent only to individuals who have already elected COBRA coverage (as a way of informing them of the premium subsidy), this election form is not included as a part of that notice.

The "**Form for Switching COBRA Continuation Coverage Benefit Options**" will be needed only by those employers who choose to allow Assistance Eligible Individuals to elect COBRA coverage under an option *other*

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than the one they had at the time of a qualifying event. Employers may offer such an election – and still allow their Assistance Eligible Individuals to receive the premium subsidy – only if this does not result in a greater COBRA premium. Few employers are likely to offer such an election.

The **"Important Information About Your Continuation Coverage Rights"** will look familiar to employers who have been using prior DOL model COBRA notices. It has been updated, however, to include references to the ARRA provisions. It has also been slightly tailored to fit the differing circumstances of the individuals receiving these various notices.

The **"Summary of the COBRA Premium Provisions Under ARRA"** is a one-page document describing the conditions attached to claiming the premium subsidy. It also contains links to IRS and DOL websites at which additional information is available. For this reason, employers might consider posting this Summary on their internal websites.

The two-page **"Request for Treatment as an Assistance Eligible Individual"** should serve as an ideal means for obtaining the information and certifications needed to determine an individual's eligibility for the premium subsidy or second election period. A portion of this form would be completed by the employer, either approving or denying an individual's request for treatment as an Assistance Eligible Individual. Should there be a dispute between an employer and an individual as to the individual's eligibility, the DOL is to resolve that dispute within 15 days of the individual's request. This form is likely to be considered by the DOL in resolving such a dispute.

The **"Participant Notification"** form is designed to allow individuals who are receiving the premium subsidy to notify an employer or insurer that they have become eligible for other employer health coverage or Medicare, thereby losing their eligibility for the premium subsidy. This form also advises those individuals of the penalty they may face for failing to provide this notice on a timely basis.

## ADDITIONAL GUIDANCE IN FAQs

Although most of the information contained in the recently posted FAQs was already generally available, these FAQs do clarify a few points.

### Election and Payment Deadlines

For instance, the usual election and premium-payment deadlines apply during the special election period made available to Assistance Eligible Individuals who did not have COBRA coverage in effect on February 17, 2009. They will have 60 days after the date of the notice of this second election period in which to elect COBRA coverage, and then an additional 45 days after that election in which to pay their first premium for such coverage.

For plans that require premiums to be paid on a calendar-month basis, this COBRA coverage will be effective as of March 1, 2009. However, it appears that an individual who is entitled to this second election period may first *wave* his or her right to COBRA coverage and then *revoke* that waiver – if both occur during this 60-day election period. In that case, the COBRA coverage would begin as of the date of the affirmative COBRA election.

### Proper Recipients of Retroactive Notices

The FAQs also shed some light on the difficult question of which individuals should receive a "retroactive" notice of the COBRA rights made available under ARRA. That is, should such a retroactive notice be sent to only (1) COBRA qualified beneficiaries losing regular coverage due to an *involuntary* termination of employment occurring on or after September 1, 2008, (2) all qualified beneficiaries losing coverage due to *any* termination of employment – whether voluntary or involuntary – occurring on or after that date, or (3) all qualified beneficiaries losing coverage due to *any* COBRA *qualifying event* occurring on or after that date? Surprisingly, the answer to this question appears to be different for the second election period than for the premium subsidy.

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Notice of the second election period must be sent to any Assistance Eligible Individual who either did not elect COBRA coverage or elected such coverage and then let it lapse before February 17, 2009. Thus, only individuals in category (2) – and *perhaps* only those in category (1) – need be notified of this second election period. (Of course, these individuals must also be notified of the premium subsidy that would be available to them if they were to take advantage of this second opportunity to elect COBRA coverage.)

By contrast, it appears that notice of the premium subsidy must be sent to all individuals in category (3) who were maintaining COBRA coverage as of February 17, 2009 – regardless of the qualifying event that gave rise to their COBRA coverage. This would include children who "aged out" of eligibility for regular coverage, any divorced spouse, and any surviving spouse or children of a deceased employee. Because none of these individuals would be – or could ever become – eligible for the premium subsidy, it seems odd to require that they be *notified* of the subsidy. Such notification can only cause confusion. Employers may thus consider whether it is truly appropriate to provide this notice to those individuals.

## CONCLUSION

In any event, the 30-day clock has now started for providing retroactive notices to individuals who experienced a COBRA qualifying event on or after September 1, 2008. To the extent that these four model notices reflect the DOL's considered interpretation of ARRA, employers and insurers will want to take advantage of these models when preparing the notices they send to affected individuals.

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