

June 12, 2009

IRS Issues New Q&As Related to COBRA Premium Subsidy

The American Recovery and Reinvestment Act of 2009 ("ARRA"), enacted on February 17, 2009, provides a federal subsidy for COBRA premiums for certain employees and covered family members who lost or will lose coverage due to involuntary termination of employment from September 1, 2008 through December 31, 2009. Recently, the IRS issued nineteen new Questions and Answers ("Q&As") that provide additional guidance on the COBRA subsidy. In these Q&As, the IRS addresses some of the more difficult COBRA subsidy issues that employers and plan administrators may encounter, including the following:

- **Involuntary Termination.** If an employer's determination that an employee's termination of employment was involuntary for purposes of the COBRA subsidy is consistent with a reasonable interpretation of the applicable statutory provisions and IRS guidance, the IRS will not challenge that determination for purposes of whether the employer is entitled to claim a payroll tax credit for the COBRA subsidy.
- **Church Plans.** The COBRA subsidy does not apply to premiums for continuation coverage under a church plan that is exempt from COBRA requirements under the Code and ERISA and also is not subject to any comparable State law requirements.
- **Out of Business Employer.** If continuation coverage is required under state law and is otherwise comparable to federal COBRA coverage, then it qualifies as COBRA continuation coverage that is eligible for the COBRA subsidy even after the employer has gone out of business and the group health plan has been terminated.
- **Elected Official.** If an elected official ran for reelection and was not reelected, he or she is considered involuntarily terminated for purposes of the COBRA subsidy at the completion of his or her term of office. Likewise, an elected official who is prohibited from running for reelection because of term limits is considered involuntarily terminated at the completion of his or her term of office. However, an elected official who is eligible to run for reelection, but chooses not to, is not considered involuntarily terminated at the completion of his or her term of office.
- **Call to Active Military Duty.** If a member of a military Reserve unit or the National Guard is employed by a civilian employer and is called to active duty, he or she will be considered involuntarily terminated for purposes of the COBRA subsidy regardless of whether the civilian employer treats the employee's absence as a termination of employment or a leave of absence.
- **Effective Date of COBRA Coverage.** An individual who is eligible for the extended federal (or FEHBP) COBRA election period must be offered COBRA coverage that is effective with the first period of coverage beginning on or after Feb. 17, 2009. The employer or health plan may allow the individual to elect COBRA coverage to be effective as of a later date, but for purposes of the nine-month limit on eligibility for

the premium subsidy, the nine-month period would begin with the first period of coverage beginning on or after Feb. 17, 2009. However, a delay in the beginning of COBRA coverage could affect the application of preexisting condition limitations. Similar rules apply if state COBRA law is amended to provide a special election period similar to the extended federal (or FEHBP) COBRA election period.

- Attestation of Involuntary Termination. If an insurer or a multiemployer plan is entitled to a payroll tax credit as reimbursement for the COBRA subsidy, supporting documentation for the reimbursement must include a statement from the employee or the employee's former employer that the employee was involuntarily terminated and that the termination occurred during the period of September 1, 2008, through December 31, 2009. The statement must include a certification that, to the best of the employee's or the employer's, as applicable, knowledge and belief, all of the information provided is true and correct and must be signed by the employee or the employer, as applicable. The DOL's model COBRA notice can be used as the required statement from the employee. If an insurer or multiemployer plan complies with this procedure, the IRS will not challenge the insurer's or multiemployer plan's treatment of the termination of employment as involuntary, provided the insurer or multiemployer plan has not engaged in fraud, malfeasance, or misrepresentation of a material fact and does not know or have reason to know of fraud, malfeasance, or misrepresentation of a material fact on the part of the employee or employer.
- Information Reporting. An employer, multiemployer plan, or insurer is not required to report the COBRA premium subsidy provided to an assistance eligible individual during the year on Form W-2 or Form 1099.
- Plan Covering Employees of Multiple Employers. If a plan (other than a multiemployer plan) that is subject to federal COBRA requirements covers employees of two or more unrelated employers, the person entitled to take the payroll tax credit attributable to the COBRA subsidy provided to an assistance-eligible individual is the former employer of the employee on whose involuntary termination of employment the individual's eligibility for the subsidy is based.
- Reimbursement for Controlled Group Members. Although all the members of a controlled group are treated as a single employer for employee benefit purposes, each member is treated as a separate employer for payroll tax purposes. Therefore, if a plan (other than a multiemployer plan) that is subject to federal COBRA requirements covers employees of different employers that are members of a single controlled group, the person entitled to take the payroll tax credit attributable to the COBRA subsidy provided to an assistance-eligible individual is generally the former employer of the employee on whose involuntary termination of employment the individual's eligibility for the subsidy is based.

The Q&As are available at: <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>

In addition, HHS, through the Centers for Medicare and Medicaid Services (CMS), recently issued the form for its COBRA subsidy appeal process at: <http://www.cms.hhs.gov/COBRAContinuationofCov/>. CMS's appeal process is similar to DOL's (available at <http://www.dol.gov/ebsa/COBRA/main.html>), but appeals filed through CMS must be submitted by mail or fax.

We will provide updates on further developments. In the meantime, if you have any questions, please contact your regular Groom attorney or any of the Health and Welfare Practice Group attorneys listed below:

Jon W. Breyfogle	jwb@groom.com	(202) 861-6641
Jenifer A. Cromwell	jac@groom.com	(202) 861-6329
Thomas F. Fitzgerald	tff@groom.com	(202) 861-6621
Cheryl Risley Hughes	chughes@groom.com	(202) 861-0167
Christine L. Keller	clk@groom.com	(202) 861-9371
Tammy Killion	tkillion@groom.com	(202) 861-6328
Debbie G. Leung	dgl@groom.com	(202) 861-2601
Heather E. Meade	hem@groom.com	(202) 861-0179
William F. Sweetnam	wfs@groom.com	(202) 861-5427
Christy A. Tinnes	cat@groom.com	(202) 861-6603
Donald G. Willis	dgw@groom.com	(202) 861-6332
Brigen L. Winters	blw@groom.com	(202) 861- 6618