

EMPLOYEE BENEFITS

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LABOR & EMPLOYMENT

LAW ALERT

This Alert is written by George J. Kasper, member of the Employee Benefits Law Section, and Margaret M. Sheahan, member of the Labor & Employment Law Section, at Pullman and Comley, LLC. Please feel free to contact any of the attorneys listed below for more information.

Employee Benefits Law Section

George J. Kasper	203-330-2119	gkasper@pullcom.com
Nancy D. Lopera	203-330-2107	nlopera@pullcom.com
Herbert H. Moorin	203-330-2124	hmoorin@pullcom.com
Daniel A. Schwartz	860-424-4359	dschwartz@pullcom.com
Lori L. Underberger	203-330-2202	lunderberger@pullcom.com
Barrie K. Wetstone	860-541-3342	bwetstone@pullcom.com

Labor & Employment Law Section

Christine Collyer	860-424-4329	ccollyer@pullcom.com
Andrew C. Glassman	860-541-3316	aglassman@pullcom.com
Joshua A. Hawks-Ladds	860-541-3306	jhawks-ladds@pullcom.com
Sabrina N. Kiluk	203-330-2279	skiluk@pullcom.com
Michael N. LaVelle	203-330-2112	mlavelle@pullcom.com
Robert B. Mitchell	203-330-2147	rbmitchell@pullcom.com
Adam S. Moccio	203-330-2128	amoccio@pullcom.com
Jonathan B. Orleans	203-330-2129	jborleans@pullcom.com
Richard C. Robinson	860-541-3333	rrobinson@pullcom.com
Daniel A. Schwartz	860-424-4359	dschwartz@pullcom.com
Margaret M. Sheahan	203-330-2138	msheahan@pullcom.com

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Update published March 23, 2009

UPDATE- COBRA Subsidy Model Notices Issued by DOL

The U.S. Department of Labor (DOL) has released model notices to help employers and plan administrators comply with the requirements of the new subsidy program for COBRA continuation coverage. The four model notices, each designed for a particular group of qualified beneficiaries, contain information to help satisfy COBRA provisions under the American Recovery and Reinvestment Act of 2009 (ARRA). You can find the notices at: <http://www.dol.gov/ebsa/COBRAmode notice.html>.

By April 18, 2009, a general notice must be provided to all individuals who became eligible for COBRA since September 1, 2008, advising them of the subsidy, regardless of whether they meet the eligibility requirements for the subsidy or if they are currently on COBRA. In addition, plans subject to the Federal COBRA provisions must send the new Notice in Connection with Extended Election Periods to any assistance eligible individual (AEI) who (i) had a qualifying event at any time from September 1, 2008, through February 16, 2009; and (ii) either did not elect COBRA continuation coverage, or who elected it but subsequently discontinued COBRA. This notice includes information on ARRA's additional election opportunity, as well as premium reduction information that must also be provided by April 18, 2009.

Care should be taken in adopting these notices to assure that the appropriate notices are provided for a particular group of AEIs. Further guidance is expected from the IRS and DOL concerning the COBRA subsidy which may impact the information employers and plan administrators may wish to include in the notices.

The COBRA subsidy applies to periods of health coverage beginning on or after February 17, 2009, and lasts for up to nine months for those eligible for COBRA during the period beginning September 1, 2008, and ending December 31, 2009, due to an involuntary termination of employment that occurred during that period. More information about the COBRA subsidy rules is provided below.

Update published March 17, 2009

IRS Updates Form 941 (Employer's Quarterly Federal Tax Return) for COBRA Premium Payments

IRS Form 941 has been updated to reflect employer subsidy payments under the new temporary COBRA premium assistance program as provided for under ARRA. The Form 941 now includes lines 12a and 12b for reporting employer COBRA subsidy information. Line 12a is included to report the COBRA premium assistance payments made by an employer - 65 percent of the total COBRA premium for assistance eligible individuals (AEI). This amount is added to the employer's total deposits for the quarter. The amounts deposited, including the COBRA premium payment, will be compared to the total taxes payable. If the total amount of the COBRA premium subsidy payments and the deposits is greater than the taxes

payable, the excess is treated as an overpayment and the employer can choose to have the IRS either refund the overpayment or apply it to the next quarterly return. Line 12b requires entry of the total number of individuals provided with COBRA premium subsidy payments reported on line 12a. The revised Form 941 can be accessed at <http://www.irs.gov/pub/irs-pdf/f941.pdf>, and instructions are at <http://www.irs.gov/pub/irs-pdf/i941.pdf>.

Additional guidance concerning the COBRA subsidy is expected from the Treasury Department, the Department of Labor and the Department of Health and Human Services in the near future.

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Employers Must Act Now to Comply with New COBRA Continuation Rules Applicable to Certain Terminated Employees

The economic stimulus package President Obama signed on February 17 includes relief for workers who have lost their jobs in the current economic crisis. One component requires employers or insurers, depending on the type of plan, to pay 65 percent of COBRA continuation coverage premiums of certain workers and their dependents for up to nine months. The new rule applies to plans subject to federal COBRA and to insurers of small plans if they are subject to a state insurance law mandate to provide similar continuation coverage.

Generally, employers will pay the subsidy and can recoup this cost by claiming a payroll tax credit for these payments on an updated IRS Form 941. For multiemployer group health plans, it is the plan itself that pays the subsidy and has reimbursement rights. In the case of fully-insured health plans not subject to COBRA (under 20 employees), the insurer funds the subsidy and is the entity entitled to reimbursement.

Assistance eligible individuals (AEI) are certain employees involuntarily terminated (for other than gross misconduct) on or after September 1, 2008, and before January 1, 2010, as well as the employees' spouses and covered dependent children. AEIs must pay their portion (35 percent) of the COBRA premium. Individuals and families whose adjusted gross income exceeds statutory maximums will be required to repay premium subsidies.

New Notice Requirement

A new COBRA notice or addendum must be generated for individuals who became or become COBRA qualified beneficiaries as a result of an involuntary termination of employment on or after September 1, 2008, and before January 1, 2010. AEIs terminated prior to March 1, 2009, will have 60 days from the date of the notice or March 1, 2009, (whichever falls later) to elect COBRA coverage effective March 1 (whether or not they initially elected continuation coverage). However, there is no premium reduction for premiums paid for periods of coverage prior to February 17, 2009, and a new election does not extend coverage beyond the original maximum period (generally 18 months from the employee's involuntary termination).

Actions Employers Should Take Now

- Identify former employees who were involuntarily terminated
- Update COBRA materials to comply with the new requirements
- Notify the eligible qualified beneficiaries of their new rights and responsibilities under COBRA
- Develop policies and procedures for administration of the COBRA subsidy and coordinate with any third party COBRA administrator
- Consider impact on severance policies
- Review recently released government guidance and watch for future releases, including a model notice from the Department of Labor within the next few weeks and
- Determine how to refund or credit premiums to participants who may have already paid premiums for March, and possibly later

Employers should also exercise caution in applying the long-standing COBRA provision that an employee involuntarily terminated for gross misconduct is ineligible for continuation coverage. While employers often overlooked this provision in the past, now the tax credit application for the 65 percent payment makes this question more critical.

The U.S. Department of Labor has launched a web page with posters, FAQs and Fact Sheets at <http://www.dol.gov/ebsa/COBRA.html>.

Guidance on the tax credit application and the data gathering that will be necessary to support it is available on the IRS website (COBRA: Answers for Employers) at <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>.