

IRS Releases Guidance on COBRA Premium Assistance

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The Internal Revenue Service (IRS) recently released additional guidance on COBRA premium assistance under the American Recovery and Reinvestment Act (ARRA), including what qualifies as an involuntary termination of employment, who is an assistance eligible individual, and how to calculate the premium reduction.

Involuntary Termination. For purposes of COBRA premium assistance under ARRA, an involuntary termination is generally “a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment...where the employee was willing and able to continue performing services.” All the facts and circumstances must be considered upon determining whether a termination of employment is involuntary. It is not an involuntary termination of employment for purposes of COBRA premium assistance under ARRA if an employee loses health coverage but does not experience a termination of employment.

The following actions may constitute an involuntary termination of employment for purposes of COBRA premium assistance under ARRA:

- Failure to renew a contract if the employee was willing and able to execute a new contract on similar terms to continue providing services;
- A resignation by an employee for good reason due to employer action that caused a material negative change in the employment relationship or as a result of a material change in the geographic location of employment;

- A termination designated as voluntary or as a retirement where the facts and circumstances indicate that, absent such voluntary termination or retirement, the employer would have terminated the employee and the employee had knowledge of such likelihood;
- A lay-off period or a temporary furlough if hours were reduced to zero and health coverage was lost, even if the employee has recall rights;
- Termination for cause if the termination was not for “gross misconduct” within the meaning of COBRA;
- A lockout initiated by the employer; and
- A voluntary termination in exchange for a severance package if the employer indicated that after the severance offer period, a certain number of remaining employees would be terminated.

The following actions may not constitute an involuntary termination of employment for purposes of COBRA premium assistance under ARRA:

- Termination of employment by the employer at the employee’s implicit or explicit request;
- Death;
- Reduction in hours but not to zero;
- Absence from work due to illness or disability before the employer has taken action to end the individual’s employment; and

- A strike initiated by employees or their representatives.

Assistance Eligible Individuals. An assistance eligible individual (AEI) is a “qualified beneficiary” within the meaning of COBRA as the result of an involuntary termination that occurred between September 1, 2008 and December 31, 2009 and is eligible for COBRA continuation coverage during that period. The IRS guidance confirms that an individual is not an AEI if the individual was involuntarily terminated before September 1, 2008 even if the loss of health coverage occurs after that date or if the individual was involuntarily terminated before December 31, 2009 but does not lose health coverage until after that date.

Calculation of Premium Reduction.

Under the IRS guidance, if an employer subsidizes the cost of coverage by paying all or part of the cost, the amount the AEI must pay after such employer subsidy is used to determine the amount of premium assistance. For example, if COBRA continuation coverage costs \$1000 each month and an employer only requires individuals electing COBRA continuation coverage to pay \$500 each month, an AEI only needs to pay \$175 each month (35% of \$500). If an employer pays the entire cost of coverage, the AEI is not eligible for COBRA premium assistance. However, if an employer provides a taxable cash severance payment to the employee in lieu of COBRA continuation coverage, an AEI would be eligible to receive COBRA premium assistance. Employers that have in the past subsidized the COBRA premiums of former employees receiving severance may want to consider alternatives for any future reductions in force.

If an AEI elects COBRA coverage for a family unit that includes a domestic partner or other non-dependent, the premium reduction does not apply to the incremental cost of covering the domestic partner or non-dependent.

Failure to Provide Notice of Coverage.

An individual receiving COBRA premium assistance must notify the health plan if the individual becomes eligible for other health coverage. The individual may be subject to a tax penalty for failure to give notice. However, the IRS guidance provides that an employer is not required to refund to the IRS the excess premium assistance if an individual fails to provide this notice and the employer claimed a payroll tax credit for the premium assistance.

Recapture of Premium Assistance.

The COBRA premium assistance received by high income individuals as defined under ARRA may be recaptured on their federal income tax returns. Under the IRS guidance, employers may not refuse to provide the premium assistance even if the AEI would qualify as a high income individual under ARRA.

An AEI may elect to permanently waive the right to premium assistance. The IRS guidance provides that such election must be executed and dated by the AEI and include a reference to “permanent waiver” of COBRA premium assistance.

Additional Guidance. The IRS is aware that not all questions have been answered. There may be additional guidance.

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