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IRS Issues Additional Guidance on COBRA Premium Subsidy

by [B. David Joffe](#)

The Internal Revenue Service (IRS) has issued additional guidance regarding the COBRA premium subsidy contained in the American Recovery and Reinvestment Act of 2009 (ARRA). The guidance has been issued in the form of Q&As on the IRS web site. The IRS has a dedicated web page for employers regarding the subsidy, which can found at <http://www.irs.gov/newsroom/article/0,,id=204708,00.html>.

Background

Generally, the ARRA provides nine months of premium assistance for COBRA continuation coverage for individuals who are or were involuntarily terminated from employment during the period from September 1, 2008, through December 31, 2009. It also provides a premium assistance benefit of 65% of the cost of COBRA coverage under the group health plan of the individual's employer. When the individual pays the reduced premium amount, the plan (in the case of a union multiemployer plan), employer (in the case of an insured or self-funded plan), or insurer (in the case of certain insured plans not subject to COBRA) may claim a credit against payroll tax deposits for the remaining 65% of the premium. For more general information regarding the premium subsidy and other COBRA provisions under the ARRA, see our prior alert, "[Stimulus Legislation Provides COBRA Premium Assistance for Employees and More Obligations for Employers.](#)"

Claiming the Credit and IRS Form 941

The ARRA requires that the person claiming the subsidy attest to the involuntary termination for each covered employee for whom a reimbursement credit is taken, report the amount of the withholding taxes offset for the coverage period, and provide the tax identification numbers for the individuals for whom a reimbursement credit is taken. Shortly after the passage of the ARRA, the IRS issued a revised 2009 version of Form 941, Employer's Quarterly Tax Return, to take into account certain COBRA subsidy reporting requirements. (The new Form 941 must be used for the first 2009 quarterly return due on April 30, 2009.) The revised Form 941 requires the employer to report the amount of the premium assistance claimed and number of employees for whom the assistance was provided. According to the IRS, no additional information needs to be submitted with the Form 941 but certain other documentation must be maintained to support the credit. For information on the such requirements and the new Form 941, see our prior alert, "[IRS Revises Form 941 for COBRA Subsidy.](#)"

Additional Guidance

Under the new Q&As, the amount of the COBRA subsidy the employer provides during the quarter is treated as having been deposited on the first day of the quarter and applied against the employer's deposit requirements. If the subsidy provides less than the required deposits for the quarter, the employer must still make timely deposits during the quarter. The IRS provides the following examples:

Example 1: Employer's required payroll deposits for the second quarter of 2009 total \$10,000, determined without regard to the COBRA premium subsidy provided by Employer during the quarter. Employer provides assistance eligible individuals with a total COBRA subsidy of \$12,000 during the quarter, based on the 35 percent premium payments received from the individuals during the quarter, and reports the \$12,000 subsidy on Line 12a of its Form 941 for the quarter. Employer will be treated as having made a \$12,000 payroll tax deposit on the first day of the quarter and thus

will not be subject to a Failure to Deposit penalty for the quarter even if it reduces its deposits during the quarter by the amount of the subsidy. Alternatively, Employer may make some or all of its required deposits during the quarter, determined without regard to the COBRA premium subsidy provided by Employer during the quarter, rather than reducing its total deposits by the subsidy.

Example 2: Employer's required payroll deposits for the second quarter of 2009 total \$10,000, determined without regard to the COBRA premium subsidy provided by Employer during the quarter. Employer provides assistance eligible individuals with a total COBRA subsidy of \$8,000 during the quarter, based on the 35% premium payments received from the individuals during the quarter, and reports the \$8,000 subsidy on Line 12a of its Form 941 for the quarter. Employer will be treated as having made an \$8,000 payroll tax deposit on the first day of the quarter and thus will not be subject to a Failure to Deposit penalty for the quarter, provided that, once the total of its required deposits exceeds \$8,000, it makes its regularly required deposits for the remainder of the quarter.

Although the credit will most often be taken by an employer, in those circumstances where another entity such as the insurer claims the credit, the Q&As indicate that such entity must take the credit on its own Form 941.

Deposit Frequency and Alternative Reporting

The COBRA subsidy credit generally does not affect the employer's current "assigned" deposit frequency or future deposit frequencies, even though taking the credit for the applicable quarter will reduce the amount of the deposit. Although most employers file the quarterly Form 941, for employers who are only required to file an annual return (on Forms 933 or 944), the annual return may be used to claim the credit. Also, it is permissible to report the credit in a subsequent quarter on a Form 941. The guidance permits employers to claim the COBRA subsidy on the Form 941 for the quarter in which it arises *or* on subsequent Forms 941 within the same calendar year. However, if an employer actually reduces its payroll tax deposits during a particular quarter for the COBRA subsidy, it must claim the credit for that subsidy in the same quarter. If an employer fails to timely claim a COBRA subsidy in the quarter in which it arises, the employer may alternatively amend its previously filed Form 941 by filing the newly released Form 941-X.

Refunds

Although an employer may reduce its payroll tax deposits during a quarter by the amount of subsidy provided during the quarter, claiming the credit on Form 941 for the quarter is not dependent on reducing any deposits during the quarter. Therefore, even if no additional deposits are due for the quarter, the employer can claim credit for the full amount of the subsidy provided during the quarter on its Form 941 for the quarter (requesting a refund or credit to the next quarter). If the excess is to be refunded, the IRS will not send a notice before making the refund.

If you have any questions about the COBRA premium subsidy, please contact [B. David Joffe](#) or one of the other Employee Benefits & Executive Compensation attorneys at [Bradley Arant Boult Cummings LLP](#).

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