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## IRS Issues Guidance on Involuntary Terminations under the New COBRA Premium Subsidy

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The Internal Revenue Service (IRS) has issued Notice 2009-27 providing additional guidance in question-and-answer (Q&A) format on the new COBRA premium subsidy provided for under the American Recovery and Reinvestment Act of 2009 (ARRA). The Notice addresses several issues regarding the subsidy. In particular, it provides answers regarding what constitutes an “involuntary termination,” which is a key requirement for an individual to be eligible for the subsidy. The guidance is timely for employers that need to determine eligibility, particularly with the current downsizing in the economy. However, there are some questions left unanswered, and employers need to be careful in how they proceed.

### Background

ARRA provides for a 65% reduction in the premium otherwise payable by assistance eligible individuals who elect COBRA continuation coverage. An assistance eligible individual is generally an individual who (i) is a qualified beneficiary as the result of an involuntary termination during the period from September 1, 2008, through December 31, 2009, (2) is eligible for COBRA continuation coverage at any time during that period, and (3) elects the coverage. Group health plans must generally treat assistance eligible individuals who pay 35% of the premium otherwise payable for COBRA continuation coverage as having paid the full amount of the premium. For a general description of the ARRA provisions, see our article [Stimulus Legislation Provides COBRA Premium Assistance for Employees and More Obligations for Employers](#).

The employer (or, in certain cases, the multiemployer health plan or insurer) is reimbursed for the other 65% of the premium that is not paid by the assistance eligible individual through a credit against its payroll taxes. For further information about claiming the subsidy, see our articles [IRS Revises Form 941 for COBRA Subsidy](#) and [IRS Issues Additional Guidance on COBRA Premium Subsidy](#).

The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009 (the date of enactment of ARRA). An assistance eligible individual is eligible for the premium reduction for up to nine months from the first month that the premium reduction provisions apply to the individual. The premium reduction period ends if the individual becomes eligible for coverage under any other group health plan or for Medicare benefits. As a related matter, employers are required to provide notices to qualified beneficiaries regarding the subsidy. These are discussed in our article [DOL Issues Model Notices Regarding COBRA Premium Reduction](#).

### Notice 2009-27

Notice 2009-27 provides an overview of the new COBRA premium subsidy along with 58 Q&As on the following topics: involuntary termination, assistance eligible individuals, calculation of premium reduction, coverage eligible for premium reduction, beginning of premium reduction period, end of premium reduction period, recapture of premium assistance, extended election period, payments to insurers under COBRA, and comparable state continuation coverage. One of the more vexing questions about the new subsidy is what constitutes an involuntary termination, and the Notice provides 9 Q&As on this topic.

## **Involuntary Termination**

The Notice provides that an involuntary termination means “a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.” The determination of whether a termination is involuntary will be based on all the “facts and circumstances.” For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent the voluntary termination, the employer would have terminated the employee’s services, and that the employee had knowledge that he would be terminated, the termination is involuntary. This will often be an issue when an employee is given the “option” of resigning, but the termination is in fact involuntary.

The Notice clarifies that a number of specific events result in an involuntary termination:

- A lay-off period, furlough, or other suspension of employment that results in a loss of health coverage, provided the reduction is to zero hours. However, the notice does not specify how long the lay-off, furlough, or suspension must be.
- Termination by the employer while the individual is absent from work due to illness or disability, although mere absence from work due to illness or disability before the employer has taken action to end the individual’s employment status is not an involuntary termination. Under various employment laws, employers may be reluctant to terminate an individual who is off work due to illness or disability even if doing so would make the individual eligible for the subsidy.
- Retirement, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee’s services, and the employee had knowledge that the employee would be terminated.
- Termination for cause. However, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event, and the employee and other family members losing health coverage by reason of the employee’s termination of employment are not eligible for COBRA continuation coverage. It is important to note, however, that “gross misconduct” is a fairly high standard, and employers should be careful in taking the position that a termination is for gross misconduct.
- A resignation that results from a material change in the geographic location of employment for the employee. The Notice does not indicate what changes are “material.”
- A termination elected by the employee in return for a severance package where the employer indicates that, after the offer period for the severance package, a certain number of remaining employees in the employee’s group will be terminated.
- An employer’s failure to renew an employment contract if the employee was willing and able to renew such contract or enter into a similar employment contract upon expiration.
- An employee-initiated termination if such termination constitutes a termination for good reason due to a material negative change in the employment relationship by the employer. Neither good reason nor material are defined in the Notice.

The Notice indicates that the following events do not constitute an involuntary termination:

- Qualifying events other than an involuntary termination such as divorce or a dependent child ceasing to be a dependent child.
- Death of an employee or absence from work due to illness or disability.
- A reduction in hours unless the reduction in hours is to zero. However, an employee’s voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee. Again, the Notice does not indicate what changes would be “material.”
- A work stoppage as the result of a strike initiated by employees or their representatives, although a lockout initiated by the employer is an involuntary termination.

Employers and others eligible for the premium subsidy will need to make determinations regarding whether an involuntary termination has occurred. However, there will be cases in which this is not clear. The employer must be cautious in not claiming the subsidy credit because of the potential underpayment penalty. If the employee is not treated as an assistance eligible individual, he or she will have a right to appeal the determination to the Department

of Labor (DOL). Therefore, where the circumstances are not clear, the employer may be best served by taking the position that the termination was not involuntary and letting the employee appeal the decision for a determination by the DOL.

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

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