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## Deadline Approaching to Provide Notice of Extended COBRA Election Period

Under the "American Recovery and Reinvestment Act of 2009" (the "ARRA"), COBRA beneficiaries who qualify for continuation coverage by reason of involuntary termination of a covered employee's employment between September 1, 2008 and December 31, 2009 ("assistance eligible individuals"), are eligible to continue their health coverage at reduced premiums, subsidized by the Federal government. For assistance eligible individuals who qualify by reason of termination of a covered employee's employment between September 1, 2008 and February 16, 2009, the ARRA provides an extended election period which runs for 60-days from the date the plan administrator provides a notice of the extended election period to the beneficiary. The deadline to provide this notice is April 18. This Alert provides some practical guidance regarding the notice of extended election rights.

*What is the extended election period and why are plan administrators required to give notice of the extended period?* The extended election period is a 60-day election period in addition to the COBRA election period provided under pre-ARRA law. Plan administrators are required to provide the notice to assistance eligible individuals who meet certain criteria (described below) because they may have already elected, prior to enactment of ARRA, not to take COBRA coverage or because they elected COBRA coverage prior to ARRA and terminated coverage because they could not afford the premiums.

*What must the Notice of Extended Election Period contain?* The Notice must include the forms that the assistance eligible individual must complete to elect (or re-elect) continuation coverage and apply for reduced premiums. The notice must explain that the beneficiary is entitled to a second COBRA election period which runs for 60 days from the date of the notice. It must also advise the beneficiary of his or her obligation to notify the plan if he or she becomes eligible for coverage under another group health plan or Medicare (which terminates the beneficiary's right to the reduced premium) and the penalties for failure to provide that notice. If the employer allows the beneficiary the right to enroll in a different coverage under the employer's health plan, a description of that right must also be included. The notice should also include both the subsidized and unsubsidized cost of the available coverage.

*Has the Department of Labor published a model notice?* The Department of Labor issued four sets of updated model COBRA notices on March 19, including a "Model Notice in Connection with Extended Benefit Elections."

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Employers may rely on that model. The model is available at <http://www.dol.gov/ebsa/COBRAModelNotice.html>. The model notice contains multiple blanks, options and instructions to employers. Therefore, users of the model should review it carefully and tailor the model to the group health plan before sending the notice to beneficiaries.

*To whom must a notice of extended election rights be sent?* Plan administrators must send the notice to all assistance eligible individuals who lost health coverage between September 1, 2008 and February 16, 2009 who meet the following criteria. The beneficiary must have either previously elected not to extend health coverage under COBRA, or must have elected to extend health coverage under COBRA but subsequently discontinued coverage for reasons other than becoming eligible for coverage under another group health plan or Medicare.

*We know that the covered employee voluntarily quit. Must we still send a Notice of Special Election Right to the employee and the employee's beneficiaries?* There is an ambiguity in the Department of Labor guidance regarding whether the plan administrator must send a notice to a beneficiary that it believes is not an assistance eligible individual. On the one hand, the Department's guidance states that plan administrators need send notices only to assistance eligible individuals whose loss of coverage meet the criteria described above. Taken literally, the Department's guidance provides that the employer may decide which health plan beneficiaries are assistance eligible individuals and send notices only to those beneficiaries.

On the other hand, the Department's model notice makes clear that beneficiaries "apply" to the plan administrator for status as an assistance eligible individual. The Department's guidance further provides that plan administrators who deny those applications must provide a written notice of denial to the beneficiary and offer the beneficiary an expedited administrative review of that decision. Further, recent IRS guidance suggests that a beneficiary and an employer might reasonably disagree on whether a covered employee's termination of employment is involuntary (for example, if the employee quits "for good reason due to employer action that causes a material negative change in the employment relationship for the employee").

In order to minimize the risk of claims by beneficiaries that they were denied an opportunity to apply for status as an assistance eligible individual, we recommend that employers provide notice of the extended election period to beneficiaries who lost coverage due to the termination employment between September 1, 2008 and February 16, 2009, regardless of whether termination of employment was involuntary. However, plan administrators need not send notices to any beneficiary unless he or she has either previously elected not to extend health coverage under COBRA, or elected to extend health coverage under COBRA but subsequently discontinued coverage. ■

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