McGraw Wentworth

SPECIAL Alert

Volume Five, Issue Five

April 2009

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In this fifth Special Alert for 2009, we discuss the additional guidance recently issued by the IRS addressing the COBRA subsidy included in the American Recovery and Reinvestment Act (ARRA) of 2009.

Employers are struggling with administering these new COBRA responsibilities. The IRS Notice is organized in a question and answer format and will help employers understand some of the gray areas of these new rules.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGraw Wentworth website at www.mcgrawwentworth.com.

"IRS Guidance on ARRA COBRA Administration"

The IRS recently released Notice 2009-27, which provides employers with more guidance in administering the COBRA subsidy created by the American Recovery and Reinvestment Act of 2009 (ARRA). The notice is written in a question and answer format and can be downloaded at http://www.irs.gov/pub/irs-drop/n-09-27.pdf.

Key areas addressed by this notice include:

- ***Involuntary Termination.*** This notice does provide some clarification on involuntary termination. It defines an involuntary termination as "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."

  Several questions address termination situations and if they would be considered involuntary:

  - An involuntary reduction in hours, causing a loss of health coverage, may or may not be an involuntary termination, depending on the circumstances. For example, an involuntary reduction of hours to zero, such as following a lay-off, furlough, or other suspension of employment that results in a loss of health coverage, **is viewed as** an involuntary termination of employment. However, a reduction of hours that causes a loss of health coverage, but is not a reduction to zero, is generally not an involuntary termination of employment. The notice further explains that if an employee voluntarily terminates employment in response to an employer-imposed reduction of hours, it may be considered an involuntary termination if the reduction of hours is a "material negative change in the employment relationship" for the employee.
  - An employee's retirement may also be considered an involuntary termination if the facts and circumstances indicate that the employer would have otherwise terminated the employee's services, and the employee understood that the choice was between retirement or termination of employment.

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- An employee's resignation as the result of a material change in the geographic location of employment is considered an involuntary termination.
- If an employer terminates an individual's employment while the individual is absent from work due to illness or disability (for example, an employee who does not return from an FMLA leave because of continued illness or disability), this is considered an involuntary termination of employment.

- Employment terminated as part of a "buy out" situation is also addressed. If the employer indicates that after the offer period for the buy out expires, a certain number of remaining employees will be terminated, the terminations associated with the buy out are viewed as involuntary.
- The death of an employee is not an involuntary termination of employment.

- ***Addressing Premium Treatment for Non-AEIs.*** In some situations, certain COBRA participants will not qualify to be treated as AEIs (Assistance Eligible Individuals). The subsidy does not apply to portions of the premium attributable to individuals who are not qualified beneficiaries (since non-qualified beneficiaries can never be AEIs). While uncommon, there are some situations where COBRA is elected and the covered individuals are not considered qualified beneficiaries:
  - A spouse or dependent child not covered before the qualifying event, but added to the coverage later during an open enrollment period.
  - An individual who does not meet the definition of a qualified beneficiary under federal COBRA, even if the individual may be covered under a plan (such as a domestic partner).

  The questions and answers discuss how to allocate premiums when one of more of the qualified beneficiaries is not considered an AEI.
- ***Qualifying More than Once as AEI:*** Individuals can become AEIs more than once if the circumstances supporting their terminations of employment meet the ARRA requirements. For example, if an individual qualifies as an AEI for a period of time and then secures a new job with group health coverage, and later experiences an involuntary termination of that new job and loses coverage as a result, he or she may qualify for an additional nine months of premium assistance.
- ***Premium Payments by Others:*** ARRA clearly excludes from subsidy assistance any premium payments made by employers. The IRS has clarified that if an individual qualifies as an AEI but the premium is paid by another organization, such as a hospital, a state Medicaid plan, or a charity, the premium assistance still applies. The organization will then be eligible to pay 35% of the COBRA premium if the individual qualifies as an AEI.

The IRS and the Department of Labor are committed to helping employers manage the new COBRA requirements added by ARRA. Additional guidance is frequently posted on the Employee Benefit Security Administration website at http://www.dol.gov/ebsa/COBRA.html.

If you have any questions on this additional guidance, please contact your McGraw Wentworth Account Manager. MW

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