

## Additional Guidance on the COBRA Subsidy

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Both the Internal Revenue Service (IRS) and the Department of Labor (DOL) recently issued additional guidance on the federal government's 65% subsidy of COBRA premiums.

### *More on involuntary termination*

Only an individual who is entitled to COBRA due to an involuntary termination of employment between September 1, 2008 and December 31, 2009 can be eligible for the subsidy as an Assistance Eligible Individual (AEI). On June 4, 2009, the IRS added a few nuggets to its March 31, 2009 guidance on the circumstances that constitute involuntary termination of employment for purposes of the subsidy.

- The activation of an employee who is in the military reserve or National Guard should be treated as an involuntary termination for purposes of the subsidy even though it is a leave of absence for other purposes. The employee and his or her family members do not lose eligibility for the subsidy due to eligibility for TRICARE.
- The end of a seasonal worker's term of employment is an involuntary termination for purposes of the subsidy if the employee is willing and able to continue employment. Of course, this is relevant only if seasonal employees are eligible for your health benefits.

The DOL opened its appeal process on May 21, 2009. If a former employee believes his or her termination was involuntary but you deny the former employee's

Request for Treatment as an Assistance Eligible Individual because you believe the termination was voluntary or if there is any other disagreement as to an individual's eligibility for the subsidy, the individual may appeal to the DOL. Instructions are at <http://www.dol.gov/ebsa/COBRA/main.html>.

### *An AEI needs to pay 35% of the COBRA premium on an after-tax basis in order to get the 65% subsidy*

A company could permit a former employee to apply credits in a health reimbursement arrangement (HRA) to the payment of his or her COBRA premiums. However, in this situation, the former employee would not be entitled to the COBRA subsidy. Application of HRA credits to COBRA premiums is treated as the employer's (not the employee's) payment of COBRA premiums and no subsidy is available when the employer pays (or waives) COBRA premiums.

### *Claiming the credit*

All corporations in a controlled group of corporations are generally treated as a single employer for purposes of COBRA and other employee benefits laws. However, each corporation in a controlled group is treated as a separate employer for purposes of claiming the credit against payroll taxes for the subsidy of its former employees' COBRA premiums. Each corporation may only claim the credit for its own former employees and cannot claim the credit for the former employees of its sister corporations. There is an exception: If a corporation (Corp. A) has filed IRS Form 2678 to appoint another

corporation (Corp. B) as its agent for purposes of making payroll deposits and filing returns, then Corp B should claim the COBRA subsidy against payroll taxes deposited by Corp. B for Corp. A and/or Corp. B.

### ***Recordkeeping***

The IRS confirmed some good news that has been circulating informally for a few weeks: The COBRA subsidy will not have to be reported on either Form W-2 or Form 1099. The IRS reiterated the employer's responsibility to keep records. The IRS will not challenge an employer's determination that a termination of employment was involuntary as long as the determination is consistent with a reasonable interpretation of applicable law and IRS guidance and the employer maintains the following supporting documentation.

- Information on the receipt, including dates and amounts, of the AEI's' 35% share of the premium.
- In the case of an insured plan, a copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA.
- In the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the assistance eligible individual.
- Attestation of involuntary termination, including the date of the involuntary termination.

- Proof of each AEI's eligibility for COBRA coverage at any time during the period from Sept. 1, 2008, to Dec. 31, 2009, and election of COBRA coverage.
- A record of the SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee and whether the subsidy was for one individual or two or more individuals.

The IRS clarified that, for single-employer plans, the attestation needs to be made by the employer. The form of attestation is different for plans subject to state mini-COBRA laws and multiemployer plans.

### ***Resources***

Prior Vorys Client Alerts on the COBRA subsidy:

[IRS Releases Guidance on COBRA Premium Assistance \(4/7/09\)](#)

[DOL Updates Instructions To Model COBRA Notices \(3/26/09\)](#)

[DOL Publishes New Model COBRA Notices \(3/20/09\)](#)

[Federal Government to Subsidize COBRA Premiums \(2/23/09\)](#)

IRS guidance on the COBRA subsidy:  
<http://www.irs.gov/newsroom/article/0,,id=204708,00.html>

DOL guidance on the COBRA subsidy:  
<http://www.dol.gov/ebsa/COBRA.html>

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