

## Eligibility for COBRA Subsidy is Expanded for Involuntary Terminations Occurring Through May 31, 2010; Notices Should Be Updated

Congress recently expanded eligibility for the Federal subsidy for continuation health coverage available under the American Recovery and Reinvestment Act of 2009 ("ARRA"). Following are links to our March 2009 and December 2009 Client Alerts on the availability of the subsidy under ARRA: <http://www.pbwt.com/new-federal-cobra-subsidy-law-requires-prompt-employer-action/> and <http://www.pbwt.com/cobra-premium-subsidy-program-extended-immediate-notification-required/>.

Eligibility for the subsidy now applies to assistance eligible individuals who lost health coverage in connection with an involuntary termination which occurred (or will occur) between March 1, 2010 and May 31, 2010.<sup>1</sup>

Significantly, eligibility for the subsidy was also extended to qualified beneficiaries who lost health coverage due to a reduction in the number of hours an employee was working (regardless of whether such reduction was voluntary or involuntary), provided (a) the reduction in hours occurred between September 1, 2008 and the end of the ARRA continuation coverage subsidy period (i.e., currently May 31, 2010), (b) the employee was involuntarily terminated between March 2, 2010 and the end of the ARRA continuation coverage subsidy period and (c) the individual is not eligible for other group health coverage or Medicare. With respect to qualified beneficiaries who are receiving continuation coverage in connection with their loss of coverage due to a reduction in hours, employers must provide these individuals with a supplementary information notice regarding the availability of the subsidy within 60 days of the involuntary termination. In addition, the law now provides a special election opportunity for qualified beneficiaries who did not elect continuation coverage in connection with the qualifying event, or who elected continuation coverage and then stopped paying the applicable premium. Employers must send these individuals a notice of their special election opportunity within 60 days of the employee's involuntary termination.

The period during which an individual is eligible for continued health coverage continues to be measured from the individual's qualifying event where that event was a reduction in hours. For example, if an individual experienced a reduction in hours on August 7, 2009 that caused a loss of coverage on August 31, 2009 and the individual was involuntarily terminated on March 3, 2010, the individual's 18 months of COBRA coverage would be measured from the reduction in hours event, and would therefore end on February 28, 2011. The individual would then only be entitled to 11 months of the subsidy. In addition, the recent law changes did not expand eligibility for continuation coverage if an individual's continuation coverage period under applicable law has already expired. For example, if an individual lost coverage on September 30, 2008 in connection with a reduction in hours which occurred on September 15, 2008, his or her COBRA expired on March 31, 2010.

<sup>1</sup> The changes in law were made through two legislative enactments, the Temporary Extension Act of 2010 ("TEA") and the Continuing Extension Act of 2010 ("CEA"). TEA expanded eligibility for the subsidy for individuals involuntarily terminated on or before March 31, 2010, and CEA expanded eligibility to those involuntarily terminated between April 1, 2010 and May 31, 2010. However, CEA was not enacted until April 15, 2010. Until CEA's enactment, then, it was unclear whether individuals involuntarily terminated in April would be eligible for the subsidy. To the extent an individual involuntarily terminated in April received a continuation coverage notice which did not include the extended subsidy information, the individual should be given an updated continuation coverage notice and a period of 60 days, from the date of the updated notice, to elect continuation coverage. Moreover, individuals involuntarily terminated in April who rejected continuation coverage prior to being notified of their expanded eligibility for the subsidy should be given another election opportunity for continuation coverage.

The U.S. Department of Labor previously released model continuation coverage notices, reflecting TEA's expansion of eligibility for the ARRA subsidy for continued health coverage. The updated model notices can be found at <http://www.dol.gov/ebsa/COBRAmodelnotice.html>. As these model notices only reflect availability for the subsidy for those involuntarily terminated on or before March 31, 2010, it is anticipated that the DOL will issue updated model continuation coverage notices, reflecting expanded eligibility of the subsidy for those involuntarily terminated through May 31, 2010.

## Employer Safe Harbor for Concluding a Termination as "Involuntary"

The new law also provides that a termination will be deemed "involuntary" for purposes of the subsidy if, based on its reasonable interpretation of ARRA and the guidance issued thereunder, an employer determines that a termination was involuntary and it maintains supporting documentation of the determination, *including an attestation by the employer of the involuntary nature of the termination*.

### Action Items for Employers:

1. Update continuation health coverage notices to reflect expanded eligibility for the subsidy.
2. Send a supplemental information notice to individuals who are receiving continuation health coverage in connection with a reduction in hours in the event the employee is (or was) involuntarily terminated between March 2, 2010 and May 31, 2010.
3. Send a notice of extended election to individuals who either chose not to elect continuation health coverage at the time they lost health coverage in connection with a reduction in hours, or who subsequently discontinued continuation health coverage, in the event the employee is (or was) subsequently involuntarily terminated between March 2, 2010 and May 31, 2010.
4. To the extent an individual who terminated employment in March or April 2010 was already sent a continuation coverage election notice without reference to expanded eligibility for the subsidy, send an updated notice which includes a discussion of expanded eligibility for the subsidy for individuals involuntarily terminated on or before May 31, 2010. (However, if an individual involuntarily terminated during March 2010 was sent a notice which included information regarding availability for the subsidy to those involuntarily terminated during March 2010, no additional notice need be provided.)
5. Adopt administrative policies to maintain supporting documentation for the determination that an individual's termination is involuntary (in accordance with the ARRA guidance of which types of termination may be considered "involuntary"), including an attestation of the involuntary nature of the termination. ♦

---

If you would like more information about this alert, please contact one of the following attorneys:

David M. Glaser	212.336.2624	<a href="mailto:dmglasser@pbwt.com">dmglasser@pbwt.com</a>
Bernard F. O'Hare	212.336.2613	<a href="mailto:bfohare@pbwt.com">bfohare@pbwt.com</a>
Bruce L. Wolff	212.336.2959	<a href="mailto:blwolff@pbwt.com">blwolff@pbwt.com</a>
Jessica S. Carter	212.336.2885	<a href="mailto:jcarter@pbwt.com">jcarter@pbwt.com</a>
Meridith Bogart Krell	212.336.2361	<a href="mailto:mkrell@pbwt.com">mkrell@pbwt.com</a>
Carrie L. Mitnick	212.336.2415	<a href="mailto:cmitnick@pbwt.com">cmitnick@pbwt.com</a>

**IRS Circular 230 disclosure:** Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)

This alert is for general informational purposes only and should not be construed as specific legal advice.

To subscribe to any of our publications, call us at 212.336.2329, email [info@pbwt.com](mailto:info@pbwt.com), or sign up on our website, [www.pbwt.com/resources/publications](http://www.pbwt.com/resources/publications). To unsubscribe, please send an email to [info@pbwt.com](mailto:info@pbwt.com) with the subject: unsubscribe.