



**This Employer Webinar Series  
program is presented by  
Spencer Fane Britt & Browne LLP  
in conjunction with  
United Benefit Advisors**

# SPEAKER BIOGRAPHY



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Ken is a Past-Chair of both the Employee Benefits Committee of the Kansas City Metropolitan Bar Association and the Employee Benefits Institute of Kansas City. He has been on the faculty of the American Bankers Association National Retirement Trust School and is listed in *The Best Lawyers in America*®.

# OVERVIEW

- ▶ American Recovery and Reinvestment Act of 2009 (“ARRA”) provides a federal subsidy equal to 65% of COBRA premiums for involuntarily terminated employees and their dependents.
- ▶ Subsidy available for up to 9 months.
- ▶ ARRA enacted on 2-17-09, with subsidy generally available as of 3-1-09.
- ▶ But aspects of ARRA will apply as of 9-1-08.

# ELIGIBILITY FOR SUBSIDY

- ▶ Applies to involuntary terminations occurring between 9-1-08 and 12-31-09.
- ▶ But only if **regular** coverage ends between those two dates, as well.
- ▶ Must be eligible for -- and elect -- COBRA coverage (or similar state-law continuation coverage).
- ▶ Subsidy also available to terminated employees' dependents, but only if
  - Covered on date of involuntary termination, or
  - Subsequently born to or adopted by former employee.

# COVERED PLANS

- ▶ Subsidy applies to *all* employer-sponsored plans to which COBRA applies (e.g., medical, dental, vision, prescription drug, HRAs).
- ▶ Only health flexible spending accounts are excluded.
- ▶ No exemption for governmental employers or voluntary (non-ERISA) plans.

# SUBSIDY PERIOD

- ▶ Subsidy available for up to 9 months.
- ▶ Measured from later of termination of employment or 3-1-09.
- ▶ But if employer measures both 18-month coverage period and 44-day notification deadline from **loss of coverage**, 9-month subsidy period also starts on that date.

# EARLY LOSS OF SUBSIDY

- ▶ Eligibility for subsidy **lost** if individual eligible for other employer group health coverage or Medicare -- even if not **enrolled** in plan or **entitled** to Medicare.
- ▶ Eligibility for subsidy **not** lost if offered only dental or vision coverage, flexible spending account, employee assistance plan, or on-site medical clinic.
- ▶ Eligibility for subsidy **not** lost if eligibility for other coverage ends before 2-17-09.

# ALLOCATION OF PREMIUM

- ▶ Only COBRA qualified beneficiaries are eligible for premium subsidy.
- ▶ Thus, must be covered under plan at time of involuntary termination (unless newborn or adopted child acquired during period of COBRA coverage).
- ▶ Premium subsidy not available to other covered individuals (such as domestic partners), even if coverage mandated under state law.
- ▶ Incremental cost of covering non-qualified beneficiaries does not qualify for premium subsidy.

# ALLOCATION EXAMPLE

- ▶ Facts: Terminated employee elects single COBRA coverage, but adds spouse during annual enrollment. Single premium is \$500/month; family premium is \$750/month.
- ▶ Only \$500 of family premium is eligible for federal subsidy, because spouse is not a “qualified beneficiary.”

# HIGH INCOME INDIVIDUALS

- ▶ Individuals with modified AGI of \$125,000 or more (\$250,000 if filing joint return) may have to repay some or all of premium subsidy via higher income taxes.
- ▶ Must repay **entire** subsidy if modified AGI exceeds \$145,000 (\$290,000 if filing joint return).
- ▶ Unless waived by such individual, employer must still offer premium subsidy.
- ▶ Any waiver must be signed, dated, and refer to “permanent waiver.”

# SUBSIDY CALCULATION

- ▶ Subsidy equals 65% of COBRA premium (including 2% administrative fee).
- ▶ Example: COBRA premium = \$1,000.
  - COBRA beneficiary must pay \$350.
  - Remaining \$650 is paid by federal government.
- ▶ **But** federal subsidy applies only to portion of COBRA premium **not** subsidized by employer.

# EMPLOYER SUBSIDY

- ▶ Example: Total COBRA premium is \$1,000, but employer pays 80% of premium under severance policy.
  - Employer will pay \$800.
  - COBRA beneficiary must pay 35% of \$200 (or \$70).
  - Federal subsidy will cover remaining 65% of \$200 (or \$130).

# ALTERNATIVE APPROACH

- ▶ To take advantage of federal subsidy, employer might revise severance policy to pay cash equal to 80% of COBRA premium.
  - COBRA beneficiary would pay 35% of \$1,000 (or \$350)
  - Federal subsidy would be 65% of \$1,000 (or \$650).
  - Note: Could not condition cash payment on election of COBRA coverage.

# SUBSIDY MECHANICS

- ▶ COBRA beneficiary (or someone other than employer) must pay 35% of premium.
- ▶ Employer must then pay other 65%.
- ▶ Employer may recover its 65% through credit against payroll tax liability.
  - Includes income tax withholding and both employer and employee shares of FICA.
  - Does not include FUTA.

# IRS FORM 941

- ▶ Credit claimed on lines 12a and 12b of revised IRS Form 941.
- ▶ No credit may be claimed until 35% portion of premium has been received.
- ▶ Employer may **choose** to take credit at end of each quarter.
- ▶ 941 for first quarter of 2009 still due by 4-30-09.

# DATA RETENTION

- ▶ Employer must retain proof of entitlement to credit, such as:
  - Amount of premiums paid by eligible individuals.
  - Attestation of involuntary termination.
  - SSNs for all assistance eligible individuals.
- ▶ Refer to 941 Instructions for full list.

# SPECIAL SITUATIONS



- ▶ Under multiemployer plan, **plan** must provide (and may recover) subsidy.
- ▶ Under small insured plan (i.e., not subject to federal COBRA), **insurer** must provide (and may recover) subsidy.
- ▶ If subsidy exceeds payroll tax liability, excess may be recovered under rules applicable to overpayment of payroll taxes.

# TRANSITION RELIEF

- ▶ If plan cannot implement subsidy procedures by 3-1-09, may continue to collect full COBRA premium for months of March and April.
- ▶ Must then either (1) credit 65% “overpayment” against future COBRA premiums, or (2) refund overpayment to COBRA beneficiary.
- ▶ Amounts not fully creditable within 180 days must be refunded within 60 days.

# “INVOLUNTARY TERMINATION”

- ▶ Defined by IRS as an employee’s severance from employment due to the independent exercise of an employer’s unilateral authority, where the employee was willing and able to continue performing services.
- ▶ Even **employee**-initiated termination is considered involuntary if employee had “good reason” to resign due to employer action causing a material negative change in the employment relationship.

# EXAMPLES



- ▶ Employer's failure to renew contract following its expiration will be involuntary termination if employee was willing and able to execute new contract under similar terms and conditions.
- ▶ Involuntary reduction in work hours to zero – such as through layoff or furlough, even with recall rights – constitutes involuntary termination.
- ▶ Even lesser reduction in work hours **may** constitute involuntary termination, if that reduction constitutes a material negative change in employment relationship, leading to employee's resignation.

# ILLNESS OR DISABILITY

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- ▶ Employee's absence from employment due to illness or disability is **not** an involuntary termination.
- ▶ If employer terminates employee for such absence, however, it **will** be an involuntary termination.

# ADDITIONAL EXAMPLES

- ▶ **Retirement** may constitute involuntary termination, if employer would have terminated employee and employee had knowledge of that fact.
- ▶ Involuntary termination for **cause** constitutes involuntary termination, although “gross misconduct” exception to COBRA still applies.
- ▶ Material change in **geographic location** of employment may give rise to involuntary termination.
- ▶ Employee’s voluntary termination in return for **severance package** would be involuntary termination, if employer indicated that layoff might follow if package not accepted.

# NOT INVOLUNTARY TERMINATION

- ▶ **Strike** is not an involuntary termination (though employer-initiated **lockout** is).
- ▶ **Death** is not considered involuntary termination.
- ▶ Other COBRA qualifying events are not involuntary termination.

# CHANGES IN COVERAGE

- ▶ Employer may allow qualified beneficiary to elect COBRA coverage under **less** expensive option (and still receive premium subsidy).
- ▶ Premium subsidy also available for **more** expensive COBRA coverage, if elected during annual enrollment period.

# RETIREE COVERAGE

- ▶ Premium subsidy available for retiree coverage if of “COBRA quality” – i.e.:
  - Coverage identical to that provided active employees, and
  - Premium for such coverage does not exceed permissible COBRA premium.
- ▶ **Non-COBRA** quality retiree coverage may render retiree ineligible for COBRA subsidy under active employee plan, but only if offered under different “plan.”

# EFFECTIVE DATE

- ▶ For plans charging COBRA premium on calendar-month basis, premium subsidy is generally effective as of 3-1-09.
- ▶ However, if plan requires prorated premium for calendar month in which regular coverage is lost, premium subsidy may apply for remainder of February 2009 (if coverage is lost on or after 2-17-09).
- ▶ If COBRA coverage is elected during ARRA's extended election period, eligibility for premium subsidy can never precede 3-1-09.

# DUAL ELECTION PERIODS

- ▶ Employees whose involuntary termination preceded ARRA's effective date, but who still have election period open on that date, must be offered two options:
  - Elect COBRA coverage retroactive to loss of regular coverage, or
  - Elect COBRA coverage effective as of March 1, 2009.
- ▶ In either event, premium subsidy would commence as of March 1, 2009.

# NOTICE OBLIGATIONS

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- ▶ DOL issued four model notices on 3-19-09.
- ▶ No need to revise general (initial) COBRA notice.
- ▶ Unless modified by ARRA, standard COBRA notice, election, and premium payment rules apply.

# GENERAL NOTICE (FULL)

- ▶ Full version of DOL model notice should be sent to:
  - **All** qualified beneficiaries experiencing **any** type of qualifying event between September 1, 2008, and December 31, 2009 . . .
  - Who either:
    - Have not yet received an election notice, **or**
    - Were provided an election notice on or after February 17, 2009, that did not comply with AARA's requirements.

# DOL EXAMPLE

- ▶ Facts: Spouse experienced qualifying due to divorce on February 2, 2009, and received **non-ARRA COBRA** election notice on March 10, 2009.
- ▶ Should now receive full general notice, despite being ineligible for premium subsidy.

# DOL EXAMPLE



- ▶ Facts: Child experienced qualifying event on April 11, 2009, by “aging out” of plan’s definition of dependent.
- ▶ Should receive full general notice, despite ineligibility for premium subsidy.

# GENERAL NOTICE (ABBREVIATED)

- ▶ Abbreviated version of general notice may be sent to individuals meeting **all** of the following criteria:
  - Experienced a qualifying on or after September 1, 2008,
  - Have already elected COBRA coverage, and
  - Are continuing to maintain that coverage.
- ▶ This notice omits information concerning COBRA elections.

# DOL EXAMPLE

- ▶ Facts: Individual experienced qualifying event on 9-15-08, and received COBRA election notice on 10-15-08. Elected COBRA and remained covered on ARRA's enactment date.
- ▶ Should receive abbreviated general notice (**regardless** of qualifying event).

# NOTICE OF EXTENDED ELECTION PERIOD

- ▶ Plans subject to federal COBRA provisions must send this notice to any qualified beneficiary who:
  - Experienced a qualifying event that was involuntary termination of employment between 9-1-08 and 12-31-09, and
  - Either did not elect COBRA coverage or allowed such coverage to lapse before 2-17-09.
- ▶ Must be provided by 4-18-09.
- ▶ Need not be provided under small-employer plan, unless state law mandates extended election period.

# DOL EXAMPLE

- ▶ Facts: Individual involuntarily terminated on 10-2-08 and received COBRA election notice on 10-31-08. Did not elect COBRA coverage.
- ▶ Should now receive notice of extended election period – by 4-18-09.

# DOL EXAMPLE

- ▶ Facts: Individual experienced qualifying under medical and dental plans due to involuntary termination on 1-24-09 and received **non-ARRA** COBRA election notice on 2-26-09. Enrolled in COBRA coverage under medical plan, but did not elect dental COBRA.
- ▶ Should receive abbreviated general notice under medical plan (explaining availability of premium subsidy).
- ▶ Should receive notice of extended election period under dental plan.

# DOL EXAMPLE

- ▶ Facts: Individual experienced qualifying event due to involuntary termination on 1-11-09 and received **non-ARRA** COBRA election notice on 2-22-09.
- ▶ Should receive **both** full general notice and notice of extended election period.
- ▶ Although required information may be combined into single notice, must make clear that individual has two separate election periods, with different dates for commencement of COBRA coverage.

# ALTERNATIVE NOTICE

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- ▶ Insurer providing coverage under small employer plan (i.e., under state “mini-COBRA statute”) must provide this notice.
- ▶ Notice should be tailored to requirements of state law, but must always describe federal premium subsidy.
- ▶ Unless required under state law, need not be sent to individual having no further COBRA rights as of February 17, 2009.

# SO, WHO'S LEFT OUT?

- ▶ No notice must be provided to a qualified beneficiary who
  - Received even a **pre-ARRA** election notice before 2-17-09, and
  - Has no further COBRA rights . . .
- ▶ **Unless**, the qualifying event was an involuntary termination of employment (and must thus receive notice of extended election period).

# DOL EXAMPLE

- ▶ Facts: Individual lost coverage due to divorce on 1-6-09 and received COBRA election notice on 1-19-09. Did not elect COBRA coverage.
- ▶ Plan need not send any notice to this individual, because general notice was sent **before** 2-17-09 and qualifying event was **not** involuntary termination of employment.

# RETROACTIVE ELECTIONS

- ▶ Any eligible individual whose involuntary termination of employment was on or after 9-1-08 but before 2-17-09 may elect COBRA coverage at any time up to 60 days after receiving notice of extended election period.
- ▶ COBRA coverage would then be effective as of 3-1-09 and be available for up to remainder of 18-month period (measured from termination of employment).

# EFFECT OF ELECTION

- ▶ Example: Employee terminated on 10-1-08 would be entitled to COBRA coverage from 3-1-09 through 3-31-10 (i.e., 18 months from 10-1-08).
- ▶ Subsidy would be available for up to 9 months after 3-1-09 (i.e., through 11-30-09).

# EFFECT OF GAP

- ▶ Any gap in coverage must be disregarded when identifying a 63-day gap under HIPAA.
- ▶ Will generally preserve prior creditable coverage, thereby avoiding application of new preexisting condition limitation or exclusion.

# OTHER INELIGIBILITY FACTORS

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- ▶ No subsidy available if individual not entitled to COBRA – e.g., if terminated for gross misconduct.
- ▶ Individual may not claim health coverage tax credit for any month in which this subsidy is received.

# Q.B. NOTICE OBLIGATION

- ▶ COBRA beneficiary receiving subsidy must notify plan upon becoming eligible for other coverage or Medicare.
- ▶ May be assessed penalty of up to 110% of subsidy if notice is not provided.
- ▶ Employer may retain premium reimbursement (unless employer knew of individual's eligibility for other coverage).

# DISPUTE RESOLUTION

- ▶ Government agency will resolve dispute as to individual's eligibility for subsidy, within 15 days after individual's request.
  - For most ERISA plans, DOL decides.
  - For governmental and small employer plans, HHS.
- ▶ This process replaces plan's claims and appeals procedures, and agency's determination entitled to deference by courts.

# EMPLOYER NEXT STEPS

- ▶ Identify qualified beneficiaries having qualifying event between 9-1-08 and 2-17-09.
- ▶ Determine which of these individuals had COBRA election and coverage in effect as of 2-17-09.
- ▶ Identify all employees involuntarily terminated during this period.

# EMPLOYER NEXT STEPS

- ▶ Coordinate with COBRA administrator and payroll service provider as to
  - provision of notices, and
  - premium reimbursement procedures.
- ▶ Review existing severance arrangements for possible revisions.

# THANK YOU!



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**Thank you for your participation.**