

## Part III - Administrative, Procedural, and Miscellaneous

### Premium assistance for COBRA benefits

Notice 2009-27

This notice provides guidance relating to section 3001 of the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111-5, enacted February 17, 2009, relating to premium assistance for COBRA continuation coverage.

### **BACKGROUND**

Section 3001 of ARRA provides for a 65 percent reduction in the premium otherwise payable by certain involuntarily terminated individuals and their families who elect COBRA continuation health coverage under the provisions of the Internal Revenue Code (Code), the Employee Retirement Income Security Act of 1974 (ERISA), and the Public Health Service Act (PHS Act). (COBRA continuation coverage under the Code, ERISA, and the PHS Act is also referred to in this notice as “Federal COBRA.”) The premium reduction also applies to temporary continuation coverage elected under the Federal Employees Health Benefits Program (FEHBP) and to continuation health coverage under State programs that provide for coverage comparable to COBRA continuation coverage. For purposes of ARRA, continuation health coverage under all of these provisions is referred to as “COBRA continuation coverage.”

Under the new provision, an assistance eligible individual is generally an individual (1) who is a qualified beneficiary as the result of an involuntary termination during the period from September 1, 2008, through December 31, 2009, (2) who is eligible for COBRA continuation coverage at any time during that period, and (3) who elects the coverage. Group health plans must generally treat assistance eligible individuals who pay 35 percent of the premium otherwise payable for COBRA continuation coverage as having paid the full amount of the premium. The employer (or, in certain circumstances, the multiemployer health plan or the insurer) is reimbursed for the other 65 percent of the premium that is not paid by the assistance eligible individual through a credit against its payroll taxes.

The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009 (the date of enactment of ARRA). An assistance eligible individual is eligible for the premium reduction for up to nine months from the first month the premium reduction provisions of section 3001 of ARRA apply to the individual. The premium reduction period ends if the individual becomes eligible for coverage under any other group health plan<sup>1</sup> or for Medicare benefits.

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<sup>1</sup> Eligibility for coverage under any other group health plan does not terminate eligibility for the premium reduction if the other group health plan provides only dental, vision, counseling, or referral services (or a combination of these), is a health flexible spending arrangement or health reimbursement arrangement, or is coverage for treatment that is furnished in an on-site medical facility maintained by the employer and

The premium reduction does not extend beyond the period of COBRA continuation coverage. An individual receiving the premium reduction who becomes eligible for coverage under any other group health plan or Medicare is required to notify the group health plan of eligibility for that other coverage. If the individual fails to notify the group health plan, the individual is subject to a tax penalty of 110 percent of the premium reduction improperly received after eligibility for the other coverage.

Under ARRA, an employer may allow an assistance eligible individual to elect coverage different from the coverage under the plan in which such individual was enrolled prior to the involuntary termination, and the premium reduction will apply with respect to such different coverage. (This does not change the basic requirement under Federal COBRA that a group health plan must allow a qualified beneficiary to elect to continue the coverage in which the individual is enrolled as of the qualifying event.) If offered, the assistance eligible individual has 90 days after receiving notice of the option to elect the other coverage. The premium for coverage offered under this option cannot exceed the premium for the coverage the individual had prior to the involuntary termination. In addition, the coverage offered under this option must be coverage offered to active employees and cannot be coverage that provides only dental, vision, counseling (or some combination), a flexible spending arrangement under section 106(c) of the Code, or coverage that provides coverage through an on-site medical facility maintained by the employer that consists primarily of first-aid, prevention and wellness care, or similar care, or a combination of such care.

ARRA provides an extended election period for certain individuals who did not have an election of COBRA continuation coverage in effect on February 17, 2009 (the date of enactment). The election is available for individuals who would be assistance eligible individuals if they had a COBRA continuation coverage election in effect (that is, as the result of an involuntary termination on or after September 1, 2008). This extended election period is for 60 days after the qualified beneficiaries are provided notice of the extended election period. The resulting COBRA continuation coverage extends no longer than the original maximum period required (as measured with respect to the qualifying event) and begins with the first period of coverage beginning on or after February 17, 2009. The extended election period applies to a group health plan subject to the Federal COBRA requirements and to temporary continuation coverage under the FEHBP, but not to State continuation coverage requirements.

For purposes of section 3001 of ARRA, comparable continuation coverage under State law does not include every State law right to continue health coverage, such as a right to continue coverage with no rules that limit the maximum premium that can be charged with respect to such coverage. To be comparable, the right generally must be to continue substantially similar coverage as was provided under the group health plan (or substantially similar coverage as is provided to similarly situated beneficiaries) at a

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that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of such care). This exception is implicit throughout this notice whenever reference is made to the end of eligibility for the premium reduction due to eligibility for coverage under any other group health plan.

monthly cost that is based on a specified percentage of the group health plan's cost of providing such coverage. H.R. Rep. No. 111-16, at 716 (2009) (Conf. Rep.).

For individuals electing Federal COBRA or temporary continuation coverage under the FEHBP during the extended election period, the period between the loss of coverage and beginning of coverage under the election is disregarded for purposes of the rules that would otherwise permit a group health plan to impose a preexisting condition limitation with respect to the individual's coverage. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally limits to 12 months the period that a group health plan can exclude health benefits relating to a preexisting condition of a new enrollee. The period is generally reduced by an individual's creditable coverage (health coverage under a group health plan or certain other types of health coverage, including individual health insurance) prior to enrollment. Generally, a plan is not required to take into account creditable coverage prior to a significant break in coverage (i.e., 63 days without creditable coverage). For an individual who becomes covered pursuant to an election under the ARRA extended election period, the individual is treated as not having a significant break in coverage because ARRA provides that the period between the loss of coverage and the beginning of coverage is disregarded. Thus, the individual's creditable coverage accumulated prior to the involuntary termination remains available to reduce any future preexisting condition exclusion. The period between the loss of coverage and the beginning of coverage, however, would not be treated as creditable coverage. For example, an individual with seven months of creditable coverage before being involuntarily terminated as of November 1, 2008, who, pursuant to the extended election period, elects COBRA continuation coverage that begins on March 1, 2009, is treated as having seven months of creditable coverage on March 1, 2009, notwithstanding the period of more than 63 days between November 1, 2008, and March 1, 2009, without creditable coverage.

The amount of any premium reduction is excluded from an individual's gross income under new section 139C. For purposes of determining the gross income of the employer and any welfare benefit plan of which the group health plan is a part, the amount of the premium reduction is intended to be treated as an employee contribution to the group health plan. H.R. Rep. No. 111-16, at 716 (2009) (Conf. Rep.).

If the premium reduction is provided with respect to COBRA continuation coverage for an individual, the individual's spouse, or the individual's dependent, and the individual's modified adjusted gross income (adjusted gross income plus amounts excluded under section 911, 931, or 933) exceeds \$145,000 (\$290,000 for married filing jointly), the amount of the premium reduction is recaptured as an increase in the individual's Federal income tax liability. The recapture is phased in for individuals with modified adjusted gross income in excess of \$125,000 (\$250,000 for married filing jointly). An individual may elect to permanently waive the right to the premium reduction (for example, to avoid receiving and then repaying the premium reduction). In addition, an individual who receives the premium reduction under ARRA for a month is disqualified from receiving the Health Coverage Tax Credit under section 35 for that month.

ARRA amends the Code to add new section 6432, which provides that the “person to whom premiums are payable” is entitled to reimbursement for the amount of premiums not paid by assistance eligible individuals by reason of ARRA<sup>2</sup> in the form of a credit against payroll tax liabilities. For this purpose, payroll taxes are defined as Federal income tax withholding under section 3402, the employee share of Federal Insurance Contributions Act (FICA) tax under section 3102, and the employer share of FICA tax under section 3111. The credit is claimed on the person’s payroll tax return, in most cases Form 941, filed quarterly.<sup>3</sup> If the amount of the credit to which the person is entitled exceeds the person’s payroll tax liabilities on the return, the person is entitled to a refund of such excess as if it were a payment of payroll taxes.

Under ARRA, the “person to whom premiums are payable” is based on the nature of the plan and which COBRA continuation coverage provisions apply. In the case of a group health plan that is a multiemployer plan, the multiemployer plan is allowed the credit. In the case of a group health plan subject to the Federal COBRA requirements or the temporary continuation coverage requirements under the FEHBP, or a group health plan under which some or all of the coverage is not provided by insurance, the employer maintaining the plan is allowed the credit. For any other group health plan subject to ARRA (generally, fully insured coverage subject to State continuation coverage requirements), the insurer providing coverage under the group health plan is allowed the credit. These are the exclusive rules for who may take the credit unless the Secretary provides otherwise pursuant to the authority in section 6432(b).

ARRA provides an individual who requests and is denied treatment as an assistance eligible individual with the right to a review of the denial, within 15 business days after the receipt of the application for review, by the Department of Labor (or the Department of Health and Human Services in connection with COBRA continuation coverage that is provided other than pursuant to ERISA). ARRA also includes new notification requirements, administered by the Department of Labor, regarding the premium assistance and new elections provided under ARRA. For further information on the notice requirements, see <http://www.dol.gov/COBRA>.

An assistance eligible individual who pays the reduced premium pursuant to ARRA must be treated by the plan as having paid the full premium. If the plan does not treat the assistance eligible individual as having paid the full premium, it is a failure to meet the requirements of the underlying statute. Thus, in the case of a plan subject to the COBRA continuation coverage requirements under section 4980B, the failure to treat the assistance eligible individual making the reduced payment as having made the

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<sup>2</sup> As enacted, the statute refers to section 3002(a) of the Health Insurance Assistance for the Unemployed Act of 2009, whereas the provision permitting an assistance eligible individual to pay reduced premiums is section 3001(a) of ARRA. A technical correction is expected to correct this cross reference.

<sup>3</sup> More information about the payroll tax credit is available on the IRS website at [www.irs.gov/newsroom/article/0,,id=204505,00.html](http://www.irs.gov/newsroom/article/0,,id=204505,00.html).

full payment would be a failure to satisfy the requirements of section 4980B and may result in the imposition of the excise tax under section 4980B(b).

## **QUESTIONS AND ANSWERS**

The following questions and answers address a number of issues that have arisen with respect to the premium reduction for COBRA continuation coverage under ARRA. In general, the questions and answers apply for purposes of all COBRA continuation coverage requirements under ARRA, i.e., Federal COBRA, the temporary continuation coverage requirements of the FEHBP, and comparable State health care continuation coverage requirements. However, certain questions and answers or certain portions of certain questions and answers may apply only for purposes of Federal COBRA and not for purposes of the temporary continuation coverage requirements of the FEHBP and comparable State health care continuation coverage requirements; those provisions are introduced with the phrase “for purposes of Federal COBRA.”

## **INVOLUNTARY TERMINATION**

Q&A-1 through Q&A-9 apply solely for purposes of determining whether there is an involuntary termination under section 3001 of ARRA (including new Code sections added by section 3001 of ARRA), but not for any other purposes under the Code or any other law.

Q-1. What circumstances constitute an involuntary termination for purposes of the definition of an assistance eligible individual?

A-1. An involuntary termination means 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. An involuntary termination may include the employer’s failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services. In addition, an employee-initiated termination from employment constitutes an involuntary termination from employment for purposes of the premium reduction if the termination from employment constitutes a termination for good reason due to employer action that causes a material negative change in the employment relationship for the employee.

Involuntary termination is the involuntary termination of employment, not the involuntary termination of health coverage. Thus, qualifying events other than an involuntary termination, such as divorce or a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan (such as loss of dependent status due to aging out of eligibility), are not involuntary terminations qualifying an individual for the premium reduction. In addition, involuntary termination does not

include the death of an employee or absence from work due to illness or disability.

The determination of whether a termination is involuntary is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.

Q-2. Does an involuntary termination include a lay-off period with a right of recall or a temporary furlough period?

A-2. Yes. An involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment, resulting in a loss of health coverage is an involuntary termination for purposes of the premium reduction.

Q-3. Does an involuntary termination include a reduction in hours?

A-3. Generally no. If the reduction in hours is not a reduction to zero, the mere reduction in hours is not an involuntary termination. However, an employee's voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee.

Q-4. Does involuntary termination include an employer's action to end an individual's employment while the individual is absent from work due to illness or disability?

A-4. Yes. Involuntary termination occurs when the employer takes action to end the individual's employment status (but mere absence from work due to illness or disability before the employer has taken action to end the individual's employment status is not an involuntary termination).

Q-5. Does an involuntary termination include retirement?

A-5. If the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's services, and the employee had knowledge that the employee would be terminated, the retirement is an involuntary termination.

Q-6. Does involuntary termination include involuntary termination for cause?

A-6. Yes. However, for purposes of Federal COBRA, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event and the employee and other family members losing health coverage by reason of the employee's termination of employment are not eligible for COBRA

continuation coverage.

Q-7. Does an involuntary termination include a resignation as the result of a material change in the geographic location of employment for the employee?

A-7. Yes.

Q-8. Does an involuntary termination include a work stoppage as the result of a strike initiated by employees or their representatives?

A-8. No. However, a lockout initiated by the employer is an involuntary termination.

Q-9. Does an involuntary termination include a termination elected by the employee in return for a severance package (a "buy-out") where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee's group will be terminated?

A-9. Yes.

## **ASSISTANCE ELIGIBLE INDIVIDUAL**

Q-10. Who qualifies as an assistance eligible individual?

A-10. An individual must be an assistance eligible individual to be eligible for the premium reduction. Under ARRA, an assistance eligible individual is a qualified beneficiary as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, is eligible for COBRA continuation coverage at any time during that period, and elects the COBRA continuation coverage. In order to be a qualified beneficiary, the individual must be covered under the group health plan on the day before the involuntary termination (except in the case of a child born to or adopted by a covered employee during a period of COBRA continuation coverage or in certain circumstances where coverage was wrongfully denied the individual (see section 54.4980B-3, Q&A-1)). For purposes of Federal COBRA, an individual who loses group health coverage in connection with the termination of a covered employee's employment by reason of the employee's gross misconduct is not a qualified beneficiary and thus cannot be an assistance eligible individual.

Q-11. If the involuntary termination and loss of coverage resulting in eligibility for COBRA continuation coverage occur before September 1, 2008, can the individual become an assistance eligible individual?

A-11. No. The involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009, even if the individual is still on COBRA continuation coverage after February 17,

2009.

Q-12. If the involuntary termination occurs before September 1, 2008, but the loss of coverage resulting in eligibility for COBRA continuation coverage occurs after September 1, 2008 (but no later than December 31, 2009), can the individual become an assistance eligible individual?

A-12. No. The involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009. Although section 4980B(f)(8) allows a plan to provide that the COBRA continuation coverage does not begin until the loss of coverage, that does not change the date of the involuntary termination.

Q-13. If an individual's involuntary termination occurs no later than December 31, 2009, but the loss of coverage resulting in eligibility for COBRA continuation coverage occurs after December 31, 2009, is the individual an assistance eligible individual?

A-13. No. Both the involuntary termination and eligibility for COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009. If the loss of coverage is after December 31, 2009, the individual cannot become an assistance eligible individual.

Q-14. For purposes of Federal COBRA, if an employer provides health coverage for an involuntarily terminated employee after the involuntary termination on the same terms as for similarly situated active employees, when is a loss of coverage under the group health plan considered to occur (and, consequently, when does COBRA continuation coverage begin)?

A-14. For purposes of Federal COBRA, the effect on when a loss of coverage under a group health plan is considered to occur if an employer provides health coverage for an involuntarily terminated employee after the involuntary termination on the same terms as for similarly situated active employees depends on how the employer treats the provision of health coverage for the involuntarily terminated employee. If the employer treats the provision of health coverage as deferring the loss of coverage, then for purposes of the ARRA premium reduction the loss of coverage (and eligibility for Federal COBRA) will be considered to occur when the employer's provision of health coverage on the same terms as for similarly situated active employees ends. However, if the employer treats the provision of health coverage after the involuntary termination as part of its obligation to provide COBRA continuation coverage for the involuntarily terminated employee, then the loss of coverage will be considered to have occurred as of the date for which the employer begins making the provision of such COBRA continuation coverage.

Example. An individual is involuntarily terminated from employment on November 15, 2009. Health coverage in connection with the November 15, 2009,



termination of employment would normally end on November 30, 2009. However, the individual is provided with severance benefits that include six months of health coverage for which no premium is required, running from December 1, 2009, through May 31, 2010. The employer considers no loss of coverage to have occurred until the six months of severance benefits have been exhausted. Under these facts, for purposes of Federal COBRA, the loss of coverage does not occur until May 31, 2010, which is after December 31, 2009. Although the individual's involuntary termination occurs during the required time period, the beginning of eligibility for COBRA continuation coverage does not. Consequently, the individual cannot become an assistance eligible individual. However, if the employer considered the payment of health coverage during the severance benefits period to be the provision of COBRA continuation coverage on behalf of the involuntarily terminated individual, for purposes of Federal COBRA the loss of coverage would be considered to have occurred on November 30, 2009, and thus the individual could become an assistance eligible individual.

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination, November 15, 2009. If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage, May 31, 2009.

Q-15. Does an involuntary termination of an employee following another qualifying event, such as a divorce, satisfy the requirements for the qualified beneficiary from the first qualifying event to be an assistance eligible individual?

A-15. No. Generally, if COBRA continuation coverage is based on a qualifying event before the involuntary termination, the later involuntary termination does not cause the qualified beneficiary to become an assistance eligible individual. However, if, in anticipation of an involuntary termination that would otherwise qualify an individual as an assistance eligible individual, the employer takes action other than the involuntary termination of the individual that results in a loss of coverage for the individual (for example, a reduction in hours for the employee in anticipation of involuntarily terminating the employee), the action causing the loss of coverage prior to the involuntary termination is disregarded in determining whether involuntary termination is the qualifying event that results in the COBRA continuation coverage for the individual.

Example 1. An employee is divorced after September 1, 2008, and before December 31, 2009. The divorce results in a loss of health coverage for the spouse of the employee. The spouse is eligible for and timely elects COBRA continuation coverage. After the divorce, and before December 31, 2009, the employee is involuntarily terminated and loses health coverage. The employee elects COBRA continuation coverage that begins before December 31, 2009. The spouse is not an assistance eligible individual because the qualifying event with respect to the spouse's

COBRA continuation coverage is not an involuntary termination. The employee is an assistance eligible individual.

Example 2. An employee experiences a reduction in hours in March 2009 that does not constitute (and is not in anticipation of) an involuntary termination. The reduction in hours results in a loss of coverage for the employee. The employee is eligible for and timely elects COBRA continuation coverage that begins as of April 1, 2009. In November 2009, the employee is involuntarily terminated from employment. The employee cannot become an assistance eligible individual in connection with the November 2009 involuntary termination because the qualifying event with respect to the COBRA continuation coverage is not involuntary termination.

Q-16. If, as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, an individual loses coverage under a health plan that is not subject to the COBRA continuation coverage requirements (as defined under ARRA) and the individual is offered and elects continuation coverage provided voluntarily by an employer, is the premium reduction applicable and the related payroll tax credit for the employer (or other entity) available with respect to the continuation health coverage?

A-16. No. In order for the COBRA continuation coverage premium reduction and the related payroll tax credit to apply, the plan must be subject to the COBRA continuation coverage requirements as defined in ARRA.

Example. A group health plan maintained by an employer that is not subject to COBRA continuation coverage requirements under Federal COBRA, under the FEHBP, or under State law nevertheless provides continuation health coverage to involuntarily terminated employees. Because the terminated employees are not eligible for COBRA continuation coverage (as defined under ARRA), they are not assistance eligible individuals and the premium reduction does not apply.

Q-17. Can an individual become an assistance eligible individual more than once?

A-17. Yes. An individual who becomes a qualified beneficiary as the result of an involuntary termination and who otherwise meets the requirements to be an assistance eligible individual is treated as an assistance eligible individual even if previously treated as an assistance eligible individual. See Q&A-43 regarding the period of premium reduction in such situations.

Q-18. If an individual has a loss of coverage and becomes a qualified beneficiary eligible for COBRA continuation coverage as the result of an involuntary termination no later than December 31, 2009, and timely elects COBRA continuation coverage after December 31, 2009 (with the COBRA continuation coverage beginning retroactively back to the loss of coverage), is the individual an assistance eligible individual eligible for the premium reduction?

A-18. Yes. The election of COBRA continuation coverage is not required to occur during the period from September 1, 2008, through December 31, 2009, as long as the resulting COBRA continuation coverage begins during that period.

Q-19. Is the death of an employee an involuntary termination of employment that would make qualified beneficiaries such as the spouse and dependent children of the employee assistance eligible individuals?

A-19. No. The death of an employee is not an involuntary termination of employment.

## **CALCULATION OF PREMIUM REDUCTION**

Q-20. What premium amount is used to determine the 35 percent share that must be paid by (or on behalf of) an assistance eligible individual?

A-20. The premium used to determine the 35 percent share that must be paid by (or on behalf of) an assistance eligible individual is the cost that would be charged to the assistance eligible individual for COBRA continuation coverage if the individual were not an assistance eligible individual. If, without regard to the subsidy, the assistance eligible individual is required to pay 102 percent of the “applicable premium” for continuation coverage, i.e., generally the maximum permitted under the Federal COBRA rules, the assistance eligible individual is required to pay only 35 percent of the 102 percent of the applicable premium. However, if the premium that would be charged the assistance eligible individual is less than the maximum COBRA premium, for example if the employer subsidizes the coverage by paying all or part of the cost, the amount actually charged the assistance eligible individual is used to determine the assistance eligible individual’s 35 percent share.

In determining whether an assistance eligible individual has paid 35 percent of the premium, payments on behalf of the individual by another person (other than the employer with respect to which the involuntary termination occurred) are taken into account. For example, some or all of the 35 percent share of the premium could be paid on behalf of the individual by a parent, guardian, State agency, or charity.

The following examples illustrate this Q&A-20. For all examples, 102 percent of the applicable premium for the COBRA continuation coverage is \$1,000 per month, and the person to whom premiums are payable is the employer maintaining the plan.

Example 1. The employer requires individuals electing COBRA continuation coverage to pay \$500 per month. An assistance eligible individual is entitled to COBRA continuation coverage upon the timely payment of \$175 (35 percent of \$500). The employer’s resulting payroll tax credit is \$325 (65 percent of \$500).

Example 2. The employer requires active employees to pay \$200 per month for

health coverage. For involuntarily terminated employees, the severance benefits include continued health coverage at the cost of \$200 per month for six months after termination. After the six-month severance period, the terminated employee must pay \$1,000 per month for the remainder of the COBRA continuation coverage. The employer considers the loss of coverage to occur on the last day coverage is in effect before the severance benefits begin to take effect; that is, the employer considers the six-month severance period to be part of the terminated employee's COBRA continuation coverage period, during which the employer pays \$800 toward the cost of the terminated employee's COBRA continuation coverage.

For the first six months, an assistance eligible individual is entitled to COBRA continuation coverage upon the timely payment of \$70 (35 percent of \$200); for the next three months, the individual is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000). The employer's resulting payroll tax credit is \$130 (65 percent of \$200) for the first six months and \$650 (65 percent of \$1,000) for the next three months.

Example 3. Same facts as Example 2, except that the employer considers the loss of health coverage and the beginning of the terminated employee's COBRA continuation coverage period to occur at the end of the six-month severance period. For the first six months after termination of employment, the terminated employee is not eligible for COBRA continuation coverage and is not an assistance eligible individual. The employee therefore pays \$200 for coverage, and no subsidy applies. The employee elects COBRA continuation coverage at the end of the six-month period and is an assistance eligible individual. For the next nine months, the individual is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000). The employer's resulting payroll tax credit is \$650 (65 percent of \$1,000).

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination (that is, 12 months after the end of the six-month severance period). If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage (i.e., 24 months after the involuntary termination).

Example 4. The employer requires active employees to pay \$200 per month for health coverage. For involuntarily terminated employees, the severance benefits include continued health coverage for six months after termination at no cost. The employer considers that COBRA continuation coverage begins on the date of the involuntary termination. After the six-month severance period, the terminated employee would be required to pay \$1,000 per month (but for the ARRA premium reduction) for the remainder of the COBRA continuation coverage. Because the premium during the first six months is zero, the premium reduction is not available and no payroll tax credit is available to the employer. For the next three months after the severance period, the

terminated employee is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000) for coverage. The employer's resulting payroll tax credit is \$650 (65 percent of \$1,000). After the first nine months, no subsidy applies, so the terminated employee can be required to pay \$1,000 per month for any later month of COBRA continuation coverage.

Example 5. Same facts as Example 4, except the employer considers no loss of coverage to have occurred until the end of the severance period, i.e., six months after termination of employment. For the first six months, the terminated employee is not eligible for COBRA continuation coverage and is not an assistance eligible individual. The employee pays nothing for the coverage, and no payroll tax credit is available to the employer. The employee elects COBRA continuation coverage at the end of the six-month period and is an assistance eligible individual. For the next nine months, the individual is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000). The employer's resulting payroll tax credit is \$650 (65 percent of \$1,000).

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination (that is, 12 months after the end of the six-month severance period). If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage (i.e., 24 months after the involuntary termination).

Q-21. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium pursuant to section 54.4980B-8, Q&A-2(b)(1) (or similar authority under comparable State law or other Federal law), does the ARRA premium reduction apply to the increased premium amount?

A-21. Yes.

Example. Under the plan, 102 percent of the applicable premium for COBRA continuation coverage is \$1,000 per month. Prior to February 17, 2009, the plan charged \$500 per month for COBRA continuation coverage. Pursuant to section 54.4980B-8, Q&A-2(b)(1) and the applicable notice requirements, beginning March 1, 2009, the plan charges \$1,000 per month for COBRA continuation coverage. The premium reduction and the payroll tax credit are based on \$1,000 for the coverage beginning March 1, 2009.

Q-22. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium pursuant to section 54.4980B-8, Q&A-2(b)(1), and the employer provides a separate taxable payment to the assistance eligible individual, does the premium reduction apply to the increased

premium amount?

A-22. Yes.

Example 1. Under a group health plan, 102 percent of the applicable premium for COBRA continuation coverage is \$1,000 per month. Prior to February 17, 2009, the plan charged \$400 per month for COBRA continuation coverage. Pursuant to section 54.4980B-8, Q&A-2(b)(1) and the applicable notice requirements, the plan charges \$1,000 per month for COBRA continuation coverage for periods of coverage beginning March 1, 2009. In addition, beginning March 1, 2009, the employer provides a taxable severance benefit of \$600 per month to employees who are assistance eligible individuals. The premium reduction is based on \$1,000 for the coverage beginning March 1, 2009, and thus the individual is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000).

Example 2. Same facts as Example 1, except that, beginning March 1, 2009, instead of providing a taxable severance benefit, the employer reimburses employees who are assistance eligible individuals for the \$350 the employees pay for the coverage, and the employer excludes that amount from the employees' gross income under section 106. Consequently, the \$350 is treated as paid by the employer, and, because there is no non-employer payment, the premium reduction is not available, and no payroll tax credit is available to the employer.

Q-23. Does the premium reduction apply to portions of the premium attributable to COBRA continuation coverage for individuals who are not qualified beneficiaries?

A-23. No. The premium reduction is limited to premiums attributable to COBRA continuation coverage for assistance eligible individuals, defined as qualified beneficiaries who elect COBRA continuation coverage and whose qualifying event with respect to the coverage is the involuntary termination of employment of a covered employee during the period from September 1, 2008, through December 31, 2009. A qualified beneficiary with respect to a covered employee under a group health plan is the spouse of the employee under Federal law or a dependent child of the employee under Federal law if, generally, the spouse or dependent child was a beneficiary under the plan on the day before the qualifying event. Qualified beneficiary also includes a child who is born to or adopted by the covered employee during the period of COBRA continuation coverage. Subject to the preceding sentence, qualified beneficiary does not include a spouse or dependent child not covered before the qualifying event and added to the coverage during a later enrollment period. In addition, if an individual does not meet the definition of a qualified beneficiary under Federal COBRA, the individual's coverage is not eligible for the premium reduction under ARRA, even though such an individual may be covered under a plan by its terms, or as required by State law.

Q-24. If COBRA continuation coverage is provided under a State program that provides comparable continuation coverage does the premium reduction apply to portions of the premium attributable to COBRA continuation coverage for individuals

who would not be qualified beneficiaries under Federal COBRA if the coverage were provided under Federal COBRA?

A-24. No. While section 3001(a)(10)(B) of ARRA defines COBRA continuation coverage eligible for the premium reduction to include comparable State continuation coverage, qualified beneficiary is defined under section 3001(a)(10)(E) by cross-reference to ERISA. Thus, the premium reduction is limited to the premium attributable to the coverage of the involuntarily terminated employee and the employee's spouse or dependent children who are qualified beneficiaries under Federal COBRA, even if the State law requires a group health plan to provide continuation coverage to a broader group.

Q-25. If the COBRA continuation coverage of one or more assistance eligible individuals also covers one or more individuals who are not assistance eligible individuals, how is the premium paid by the assistance eligible individual for COBRA continuation coverage allocated between the assistance eligible individuals and the other individuals?

A-25. Amounts paid by an assistance eligible individual for COBRA continuation coverage covering one or more individuals who are assistance eligible individuals and one or more individuals who are not assistance eligible individuals are allocated first to the cost of covering assistance eligible individuals and then to the cost of covering non-assistance eligible individuals. Thus, if the cost of covering a non-assistance eligible individual does not add to the cost of covering the assistance eligible individuals, then the cost of covering the non-assistance eligible individual is zero, and the premium reduction applies to the full amount paid for the COBRA continuation coverage. If the cost of covering a non-assistance eligible individual adds to the cost of covering the assistance eligible individuals, it is the incremental cost that is ineligible for the premium reduction.

Example 1. An individual and the individual's two dependent children are assistance eligible individuals and have COBRA continuation coverage. The COBRA continuation coverage also covers an individual who is not an assistance eligible individual. The amount the plan requires to be paid for COBRA continuation coverage for self-plus-two-or-more-dependents for non-assistance eligible individuals is \$1,000 per month.

The amount the individual would pay (but for the ARRA premium reduction) for covering the individual and the two children (the assistance eligible individuals) under the COBRA continuation coverage is \$1,000 per month. The additional premium amount for coverage of the individual who is not an assistance eligible individual is \$0 per month. The individual is entitled to apply the premium reduction to the \$1,000, and is entitled to COBRA continuation coverage upon the timely payment of \$350 (35 percent of \$1,000) for the coverage. The employer's resulting payroll tax credit is \$650 (65 percent of \$1,000).

Example 2. Same facts as Example 1, except the individual has only one dependent child, and the plan charges \$800 per month for self-plus-one-dependent COBRA continuation coverage. Although the individual's premium (but for the ARRA premium reduction) would be \$1,000 per month for self-plus-two-or-more-dependents COBRA continuation coverage, the portion of the premium attributable to coverage for the individual and the individual's dependent child (both assistance eligible individuals) is \$800.

The individual is entitled to apply the premium reduction to the \$800 and is entitled to COBRA continuation coverage upon the timely payment of \$280 (35 percent of \$800) for that portion of the coverage. The amount the individual pays for the non-assistance eligible individual is \$200. The individual's total premium payment is \$480 (\$280 plus \$200). The employer's resulting payroll tax credit is \$520 (65 percent of \$800).

Example 3. An individual is an assistance eligible individual and has COBRA continuation coverage. The individual has self-only coverage and pays \$157.50 (35 percent of the \$450 per month charged non-assistance eligible individuals for self-only COBRA continuation coverage). During the premium reduction period, the plan has an open enrollment period during which it allows active employees and qualified beneficiaries to add spouses and dependents to the health coverage. The individual adds the individual's spouse and dependent child, who were not covered prior to the involuntary termination, to the COBRA continuation coverage. Without regard to the ARRA premium reduction, COBRA continuation coverage for self-plus-two-or-more-dependents is \$1,000 per month.

The spouse and the dependent child are not assistance eligible individuals because they were not covered by the plan on the day before the involuntary termination. The amount the individual pays for the spouse and the dependent child is \$550 per month (\$1,000 less \$450). The individual is entitled to the premium reduction with respect to \$450 per month. Thus, the individual is entitled to COBRA continuation coverage upon the timely payment of \$707.50 (\$550 + \$157.50 [35 percent of \$450 = \$157.50]). The employer's resulting payroll tax credit is \$292.50 (65 percent of \$450).

Q-26. Does the premium reduction apply to the increased premium if the plan, in compliance with section 54.4980B-8, Q&A-2(c), allows the assistance eligible individual to change coverage from the benefit package that covered the individual prior to termination to a different benefit package with a higher applicable premium that allows an increase in the amount charged the assistance eligible individual?

A-26. Yes.

## **COVERAGE ELIGIBLE FOR PREMIUM REDUCTION**

Q-27. Is the premium reduction available for COBRA continuation coverage under a vision-only or dental-only plan?



A-27. Yes. The premium reduction is available for COBRA continuation coverage of any group health plan, except a flexible spending arrangement (FSA) under section 106(c) offered under a section 125 cafeteria plan. This includes vision-only or dental-only plans and “mini-med plans,” whether or not the employer pays for a portion of the costs for active employees. The premium reduction is not available for continuation coverage offered by employers for non-health benefits that are not subject to COBRA continuation coverage, such as group life insurance.

Q-28. Can retiree health coverage be treated as COBRA continuation coverage for which the premium reduction is available?

A-28. Yes, but only if the retiree coverage does not differ from the coverage made available to similarly situated active employees (though the amount charged for the coverage may be higher than that charged to active employees and the retiree coverage may still be eligible for the ARRA premium reduction as long as the charge to retirees does not exceed the maximum amount allowed under Federal COBRA).

Q-29. Is the premium reduction available for COBRA continuation coverage under a health reimbursement arrangement (HRA)?

A-29. Yes. While an HRA may qualify as an FSA under section 106(c), the exclusion of FSAs from the premium reduction is limited to FSAs provided through a section 125 cafeteria plan, which would not include an HRA.

## **BEGINNING OF PREMIUM REDUCTION PERIOD**

Q-30. When does the premium reduction first apply to an assistance eligible individual?

A-30. The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009 (the date of enactment of ARRA), for which the assistance eligible individual is eligible to pay only 35 percent of the premium (as determined without regard to the premium reduction) and be treated as having made full payment. For this purpose, a period of coverage is a monthly or shorter period with respect to which premiums are charged by the plan with respect to such coverage. Therefore, the exact date when the first period of coverage beginning on or after February 17, 2009, begins depends on the period with respect to which premiums are charged by the plan.

Q-31. If a plan requires that COBRA continuation coverage be paid for based on a calendar month and an assistance eligible individual has COBRA continuation coverage for the entire month of February, can the plan pro-rate the premium for February in order to apply the ARRA premium reduction to the portion of February that begins on February 17, 2009?

A-31. No. If a plan requires that COBRA continuation coverage be paid for based on a calendar month and an assistance eligible individual has COBRA continuation coverage for the entire month of February, the first period of coverage beginning on or after February 17, 2009, is the month beginning March 1, and the premium reduction only applies to the premiums for COBRA continuation coverage for March and the following months.

Q-32. If a plan requires that COBRA continuation coverage be paid for based on a calendar month and requires an individual who loses coverage other than on the last day of the month and who wishes to enroll in COBRA continuation coverage to pay a pro-rata portion of the monthly premium for the first partial month of coverage, what is the first period of coverage to which the premium reduction applies for an assistance eligible individual who loses coverage after February 17, 2009?

A-32. If a plan requires an individual who loses coverage other than on the last day of the month and who wishes to enroll in COBRA continuation coverage to pay a pro-rata portion of the monthly premium, the first period of coverage to which the premium reduction applies for an assistance eligible individual who loses coverage after February 17, 2009, is the individual's first partial month of coverage. But see Q&A-48 for a different rule in the case of an individual electing COBRA continuation coverage under the ARRA extended election period.

## **END OF PREMIUM REDUCTION PERIOD**

Q-33. For how long does the premium reduction apply to an assistance eligible individual?

A-33. The premium reduction applies until the earliest of (1) the first date the assistance eligible individual becomes eligible for other group health plan coverage (with certain exceptions) or Medicare coverage, (2) the date that is nine months after the first day of the first month for which the ARRA premium reduction provisions apply to the individual, or (3) the date the individual ceases to be eligible for COBRA continuation coverage.

Q-34. If an assistance eligible individual is eligible for other group health plan coverage but does not enroll in the other group health plan coverage, is the premium reduction available for the individual's COBRA continuation coverage after the date the individual is first eligible for the other coverage?

A-34. No.

Example 1. An assistance eligible individual begins employment with a new employer and is eligible to enroll in the employer's group health plan, with coverage effective the first day of the next month. The assistance eligible individual declines the coverage and continues COBRA continuation coverage. Although eligibility for other group health coverage does not end the individual's eligibility for Federal COBRA, the

premium reduction is no longer available as of the first day of the next month.

Example 2. Same facts as Example 1, except that the new employer's group health plan imposes a 2-month waiting period. The premium reduction stops being available as of the first day after the end of the waiting period, even though the employee declined coverage under the plan. It is the same result if the employee had enrolled for coverage; the premium reduction would apply until the first day after the end of the waiting period.

Example 3. The spouse of an assistance eligible individual (who is also an assistance eligible individual) begins employment with a new employer and is eligible to enroll in the employer's group health plan with self-only or family coverage, with coverage effective the first day of the next month. The spouse enrolls in self-only coverage, and the assistance eligible individual continues COBRA continuation coverage. Although the individual is allowed to continue Federal COBRA, the premium reduction is no longer available for the COBRA continuation coverage as of the first day of the next month because the assistance eligible individual is eligible for coverage under the group health plan of the spouse's employer.

Q-35. Is an assistance eligible individual who otherwise meets the eligibility requirements for coverage under a group health plan, but who cannot enroll and have coverage take effect immediately, considered eligible for coverage under the group health plan for purposes of ending the period of premium reduction?

A-35. No. An individual who is eligible to enroll for coverage under a group health plan is considered to be eligible for coverage under the group health plan for purposes of ending the period of premium reduction only from the first date that coverage can take effect. For example, if, as of February 17, 2009, an assistance eligible individual meets the eligibility requirements for coverage under a group health plan maintained by the individual's spouse, but cannot enroll and have coverage take effect immediately, the individual may receive the premium reduction for periods of coverage until the first date that coverage can take effect under the plan maintained by the spouse's employer.

Q-36. What is the effect on eligibility for the premium reduction if retiree health coverage that is not COBRA continuation coverage is offered at the same time that COBRA continuation coverage is offered?

A-36. The effect on eligibility for the premium reduction of an offer of retiree coverage that is not COBRA continuation coverage at the same time that COBRA continuation coverage is offered depends on whether the retiree coverage is offered under the same group health plan as the COBRA continuation coverage or under a different group health plan. If offered under the same group health plan, the offer of the retiree coverage has no effect on an individual's eligibility for the ARRA premium reduction.

If offered under a different group health plan, the offer can affect the individual's eligibility for the premium reduction. If offered to an individual whose eligibility for COBRA continuation coverage arises in connection with an involuntary termination on or after February 17, 2009, the offer of retiree coverage that is not COBRA continuation coverage under a different group health plan than the one under which COBRA continuation coverage is being offered will render the individual ineligible for the ARRA premium reduction. If offered to someone whose eligibility for COBRA continuation coverage arose on or after September 1, 2008, but before February 17, 2009, the offer will render the individual ineligible for the premium reduction only if the period the individual is given for enrolling in the retiree coverage extends to at least February 17, 2009.

Q&A-6 of section 54.4980B-2 provides rules for determining whether health benefits provided by an employer or employee organization constitute one or more group health plans for purposes of Federal COBRA. Under those rules, all health benefits provided by an organization constitute a single group health plan unless it is clear from the instruments governing the arrangement or arrangements that the benefits are being provided under separate plans and the arrangement or arrangements are operated pursuant to such instruments as separate plans.

Q-37. Does eligibility for coverage under an HRA end the period of premium reduction under ARRA as eligibility for coverage under any other group health plan?

A-37. Not if the HRA qualifies as an FSA under section 106(c), but otherwise yes. Under section 106(c), an FSA is health coverage under which the maximum amount of reimbursement which is reasonably available to a participant of the coverage is less than 500 percent of the value of the coverage. For this purpose, the maximum amount of reimbursement which is reasonably available is generally the balance of the HRA and the value of the HRA coverage would generally be the applicable premium for COBRA continuation of the HRA coverage.

Q-38. Is the premium reduction available after December 31, 2009?

A-38. Yes, the premium reduction may be available after December 31, 2009, for individuals who qualify as assistance eligible individuals on or before December 31, 2009. For example, an assistance eligible individual with respect to whom the period of COBRA continuation coverage for which the premium reduction first applies begins on December 1, 2009, could receive the premium reduction until August 31, 2010, assuming the individual does not become eligible for other group health plan coverage or Medicare or lose eligibility for COBRA continuation coverage before that date.

Q-39. Does the death of an involuntarily terminated employee end the eligibility of the qualified beneficiary spouse and dependent children for the premium reduction?

A-39. No.

Q-40. Does a failure to timely pay the required premium for COBRA continuation coverage end the premium reduction?

A-40. Yes. Failure to timely pay the required premium for COBRA continuation coverage ends the period of COBRA continuation coverage, at which time the individual no longer qualifies for the premium reduction. For this purpose, payment is considered timely if it is made by the end of any applicable grace period for making the payment.

Q-41. Is an individual currently enrolled in Medicare who is a qualified beneficiary as the result of an involuntary termination of employment that occurred during the period from September 1, 2008, through December 31, 2009, able to elect COBRA continuation coverage and receive the premium reduction?

A-41. No. An individual currently enrolled in Medicare who becomes a qualified beneficiary as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, may be eligible to elect COBRA continuation coverage but is not eligible for the premium reduction.

Q-42. If an assistance eligible individual receiving a premium reduction from an employer fails to provide notice of the individual's eligibility for coverage under any other group health plan or Medicare and continues receiving the premium reduction, is the employer required to refund to the IRS the payroll tax credit relating to the premium reduction provided with respect to the period after the individual's eligibility for the premium reduction ended due to eligibility for coverage under the other group health plan or Medicare?

A-42. No. If the employer has claimed a payroll tax credit for the premium reduction, the employer is not required to refund to the IRS the excess premium reduction received as a credit merely because the assistance eligible individual failed to provide notice that the individual is no longer eligible for the premium reduction due to eligibility for coverage under any other group health plan or Medicare unless the employer otherwise knew of the eligibility for such coverage. The assistance eligible individual who failed to provide notice may be subject to a Federal tax penalty of 110 percent of the premium reduction improperly received. The penalty will not apply if it is shown that individual's failure to provide notice was due to reasonable cause and not to willful neglect. The employer who received the credit against payroll taxes in the amount of the excess premium reduction has no rights to the penalty payment.

Q-43. How long is the period of premium reduction for an individual who becomes an assistance eligible individual a second time?

A-43. An assistance eligible individual is eligible for up to nine months of premium reduction for each involuntary termination.

Example. An individual is involuntarily terminated and loses coverage as of April 1, 2009. The individual otherwise meets the requirements for an assistance eligible

individual and is allowed the premium reduction for COBRA continuation coverage beginning April 1, 2009. On July 1, 2009, the individual ceases to be an assistance eligible individual because of coverage under a group health plan provided by the employer of the individual's spouse. Subsequently, the individual's spouse is involuntarily terminated, the individual loses coverage as of November 1, 2009, and, at that time, otherwise meets the requirements for being an assistance eligible individual. The individual is allowed up to nine months of premium reduction with respect to the involuntary termination of the individual's spouse.

Q-44. Is the period for which premium assistance is available extended by a second qualifying event, such as a divorce, following an involuntary termination based on which a qualified beneficiary is an assistance eligible individual?

A-44. No.

## **RECAPTURE OF PREMIUM ASSISTANCE**

Q-45. Can a plan refuse to provide the premium reduction to an individual because of the individual's income?

A-45. No. Even if an assistance eligible individual's income is high enough that the recapture of the premium reduction would apply, COBRA continuation coverage must be provided upon payment of 35 percent of the premium unless the individual has notified the plan that the individual has elected the permanent waiver of the premium reduction (or the period for the premium reduction has ended).

Q-46. How does an assistance eligible individual make a permanent election to waive the right to the premium reduction?

A-46. An assistance eligible individual who wants to make a permanent election to waive the right to the premium reduction makes the election by providing a signed and dated notification (including a reference to "permanent waiver") to the person who is reimbursed for the premium reduction under section 6432. There is no separate additional notification to any government agency. If an assistance eligible individual makes the permanent election to waive the right to the premium reduction, the individual may not later reverse the election and may not receive the premium reduction for any future period of COBRA continuation coverage in 2009 or 2010, regardless of modified adjusted gross income in those years.

## **EXTENDED ELECTION PERIOD**

Q&A-47 through Q&A-50 and Q&A-52 through Q&A-55 apply only for purposes of Federal COBRA and temporary continuation coverage under FEHBP.

Q-47. If an employee was involuntarily terminated during the period from September 1, 2008, through February 17, 2009, and elected self-only COBRA

continuation coverage, are a spouse and dependent children who are qualified beneficiaries in connection with the involuntary termination allowed to elect COBRA continuation coverage and receive the premium reduction under the extended election period?

A-47. Yes. An individual who does not have an election of COBRA continuation coverage in effect on February 17, 2009, but who would have been an assistance eligible individual if the election were in effect is allowed a second opportunity to elect COBRA continuation coverage under the extension of election period under section 3001(a)(4)(A) of ARRA. The resulting coverage begins with the first period of COBRA continuation coverage beginning on or after February 17, 2009. A spouse or dependent child who is a beneficiary under a group health plan that covers an employee on the day before the involuntary termination of the employee (whose termination was on or after September 1, 2008) would have been an assistance eligible individual if the spouse or dependent child timely elected COBRA continuation coverage and thus qualifies for the second election, notwithstanding the prior election of self-only COBRA continuation coverage by the employee.

Q-48. If a plan requires that COBRA continuation coverage be paid for based on a calendar month, what is the first period of coverage for an assistance eligible individual who becomes eligible for COBRA continuation coverage as a result of the extended election period provided under ARRA?

A-48. If, as a result of the extended election period provided under ARRA, an assistance eligible individual becomes eligible for COBRA continuation coverage under a plan that requires that COBRA continuation coverage be paid for based on a calendar month, the individual's first period of coverage beginning on or after February 17, 2009, is the month beginning March 1, and the premium reduction only applies to the premiums for COBRA continuation coverage for March and the following months. This does not change even if the plan otherwise requires individuals who lose coverage before the last day of the month and who wish to enroll in COBRA continuation coverage to pay a pro-rata portion of the monthly premium for the first partial month of coverage.

Q-49. If a plan requires that COBRA continuation coverage be paid for based on a monthly period computed from the date of the loss of coverage, what is the first period of coverage beginning on or after February 17, 2009, for an assistance eligible individual who becomes eligible for COBRA continuation coverage as a result of the extended election period provided under ARRA?

A-49. The first period of coverage is the monthly period corresponding to the day after the loss of coverage to the day of the following month corresponding to the day of the loss of coverage. For example, if the last day of coverage was October 3, 2008, the period of coverage runs from the fourth of the month to the third of the following month, and thus the first period of coverage on or after February 17, 2009, is the period March 4, 2009, through April 3, 2009.

Q-50. May an individual involuntarily terminated during the period from September 1, 2008, through February 17, 2009, who still has an open COBRA continuation coverage election period independent of ARRA elect coverage under the extended election period and receive and only pay for coverage that starts on the first period of coverage beginning on or after February 17, 2009?

A-50. Yes. The extended election period for electing COBRA continuation coverage is available for all individuals who are qualified beneficiaries as the result of an involuntary termination during the period from September 1, 2008, through February 17, 2009, even if they still have an open COBRA election period as of February 17, 2009. If these individuals elect COBRA under their original COBRA election period, under Federal COBRA the coverage is retroactive to their loss of coverage and the premium reduction does not apply to the periods of coverage prior to the first period of coverage beginning on or after February 17, 2009 (generally, periods of coverage before March 2009 for plans with monthly coverage periods).

Example. An individual is involuntarily terminated in December 2008 and received the COBRA election notice in January 2009. As of February 17, 2009, the individual has not elected COBRA continuation coverage. The individual should receive a notice about the extended election period for COBRA continuation coverage and the individual may decline to elect COBRA continuation coverage under the original COBRA election period and instead elect and pay for COBRA continuation coverage only for coverage periods on or after February 17, 2009, under the extended election period.

Q-51. Is the extended election period available to involuntarily terminated employees whose continuation coverage is provided pursuant to State law only?

A-51. Generally, no. The extended election period under section 3001(a)(4)(A) of ARRA applies to a group health plan that is subject to Federal COBRA or the temporary continuation coverage requirements of the FEHBP. It does not apply to plans subject to COBRA continuation coverage requirements under a State program that provides comparable continuation coverage. However, if a State program provides for a similar special election and an individual otherwise satisfies the requirements to be an assistance eligible individual, the premium reduction is available for any resulting continuation coverage.

Q-52. When does COBRA continuation coverage begin for individuals making the election during the extended election period provided under section 3001(a)(4) of ARRA?

A-52. As provided in section 3001(a)(4)(B) of ARRA, COBRA continuation coverage elected during the extended election period begins with the first period of coverage beginning on or after February 17, 2009. Thus, expenses incurred after the loss of coverage and before the first day of the first period of coverage beginning on or



after February 17, 2009, are not covered under the resulting COBRA continuation coverage.

Q-53. How does the COBRA continuation coverage election under the extended election period apply in the case of an HRA?

A-53. Generally, qualified beneficiaries electing COBRA continuation coverage with respect to HRA coverage have access to the same level of reimbursements during COBRA continuation coverage as was available immediately before the qualifying event. Thus, a qualified beneficiary electing COBRA continuation coverage with respect to an HRA under the extended election period would have access to the same level of reimbursements as they had immediately before the qualifying event. The amount available would be reduced for any reimbursements made after the qualifying event; for example, reimbursements for expenses incurred before the event submitted and reimbursed after the event. Upon election of COBRA continuation coverage with respect to the HRA under the extended election period, the HRA would not be required to reimburse expenses incurred after the loss of coverage and before the first day of the first period of coverage beginning on or after February 17, 2009.

Q-54. If an assistance eligible individual was eligible for other group health plan coverage prior to February 17, 2009, but has been unable to enroll in the other group health plan coverage on and after February 17, 2009, is the premium reduction available to the individual's COBRA continuation coverage?

A-54. Yes, the assistance eligible individual is allowed the premium reduction until the individual is eligible to enroll in coverage under any other group health plan.

Example 1. An assistance eligible individual was involuntarily terminated and lost health coverage on or after September 1, 2008, and before February 17, 2009. At the time of, and because of, the loss of coverage, the assistance eligible individual was eligible for a special enrollment period in the group health plan provided by the employer of the individual's spouse. The special enrollment period ended before February 17, 2009. The assistance eligible individual elected COBRA continuation coverage and has not been eligible to enroll in coverage under the spouse's group health plan at any time on or after February 17, 2009. Under these facts, the assistance eligible individual is not considered eligible for coverage under the plan of the spouse's employer until the effective date of coverage for the first enrollment opportunity that occurs on or after February 17, 2009. Therefore, the assistance eligible individual may receive the premium reduction beginning with the first period of coverage beginning on or after February 17, 2009, and until becoming eligible for coverage under the plan of the spouse's employer.

Example 2. Same facts as Example 1, except that the spouse's group health plan has an open enrollment period from June 1, 2009, to June 21, 2009, with coverage elected during the open enrollment period beginning July 1, 2009. The individual's spouse may elect coverage for the individual under the group health plan at that time.

The spouse does not elect coverage for the individual, who continues COBRA continuation coverage. The premium reduction is no longer available for the individual's COBRA continuation coverage for periods beginning on or after July 1, 2009.

Q-55. Under Federal COBRA, what is timely payment of the initial premium for COBRA continuation coverage for an individual electing the coverage under the extended election period of section 3001(a)(4) of ARRA?

A-55. Pursuant to section 54.4980B-8, Q&A-5(b), a plan cannot require payment for any period of Federal COBRA for a qualified beneficiary earlier than 45 days after the date on which the election of COBRA continuation coverage is made for that qualified beneficiary. Thus, for purposes of Federal COBRA in the case of COBRA continuation coverage elected under the extended election period of section 3001(a)(4) of ARRA, the plan cannot require payment of the first premium earlier than 45 days after the date on which the election of Federal COBRA under the extended election period is made for that qualified beneficiary.

## **PAYMENTS TO INSURERS UNDER FEDERAL COBRA**

Q-56. In the case of an insured plan that is not a multiemployer plan and that is subject to the COBRA continuation provisions contained in the Code, if the insurer and the employer have agreed that the insurer will collect the premiums directly from the qualified beneficiaries, is the insurer required to treat an assistance eligible individual paying 35 percent of the premium as having paid the full premium, even before the employer pays the insurer the remaining 65 percent?

A-56. Yes. If the insurer fails to treat a 35 percent payment by an assistance eligible individual as a payment of the full premium, the insurer may be liable for the excise tax under section 4980B(e)(1)(B), which applies to each person responsible (other than in a capacity as an employee) for administering or providing benefits under the plan and whose act or failure to act caused (in whole or in part) the failure, if the person assumed responsibility for the performance of the act to which the failure relates.

## **COMPARABLE STATE CONTINUATION COVERAGE**

Q-57. Does a State continuation coverage program provide comparable coverage qualifying for the premium reduction under ARRA if the maximum period of continuation coverage under the program differs from the maximum period under Federal COBRA?

A-57. Yes. A different period of continuation coverage under State continuation coverage programs does not disqualify the State program from being comparable. Thus, for example, the mere fact that a State continuation coverage program only provides for six months of continuation coverage (instead of 18 months) would not result in the State program failing to be comparable. Similarly, State programs providing for

different qualifying events, different qualified beneficiaries, or different maximum premiums generally do not fail to be comparable solely for those reasons.

Q-58. In the case of an insured plan subject solely to State law requiring the insurer to provide continuation coverage, if the employer collects the reduced premiums from assistance eligible individuals and pays the full premium to the insurer, is the employer eligible to take the payroll credit directly?

A-58. No. Under section 6432(b)(3), in the case of an insured plan subject solely to State law with respect to the requirement to provide continuation coverage, the only person entitled to be reimbursed for the premium reduction through the payroll credit (unless and until provided otherwise in future guidance) is the insurer providing the coverage under the group health plan.

## **ADDITIONAL ISSUES**

The IRS and Treasury are aware of various issues relating to the premium reduction provision that are not addressed in this notice, including issues affecting particular arrangements. Although this notice does not address these issues, the IRS and Treasury continue to consider these and other issues and possible guidance with respect to them.

## **DRAFTING INFORMATION**

The principal author of this notice is Leslie R. Paul of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Ms. Paul at (202) 622-6080 (not a toll-free call).