

### IRS Defines “Involuntary Termination” for Purposes of the ARRA and COBRA

The Internal Revenue Service has released Notice 2009-27, which provides comprehensive guidance with regard to the provisions of the American Recovery and Reinvestment Act of 2009 that affect COBRA continuation coverage (“the ARRA-COBRA provisions”).

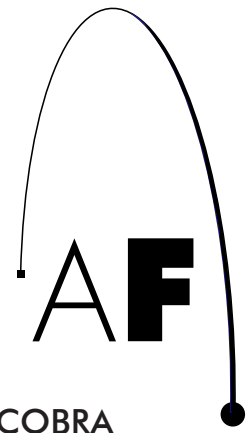
This notice has been much anticipated among employers and members of the employee benefits community, largely because it would provide the IRS definition of an “involuntary termination.” During a nationwide conference call in late March, IRS officials informally indicated that “involuntary termination” would be interpreted broadly, and Notice 2009-27 does indeed offer an expansive interpretation of this phrase for ARRA purposes.

The Notice declares that 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.”

In plain English, an involuntary termination occurs when an employer, acting on its own, terminates an otherwise “willing and able” employee who did not request the termination. One example of an employee’s “request” for termination might be a letter of resignation. However, the IRS advises caution even in these circumstances: “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 he/she would be terminated, the termination is involuntary.”

The Notice provides other examples of involuntary terminations:

- An 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.
- An employee-initiated termination from employment 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 (i.e., a “constructive termination”). Note that a “material negative change” in this case could even include a reduction of hours resulting in an eventual termination.
- An involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment.
- An employer’s action to end an individual’s employment while the individual is absent from work due to illness or disability.
- An employee’s retirement, if the facts and circumstances indicate that the employer would have terminated the employee’s services absent the retirement and the employee had knowledge that the he/she would be terminated.
- A termination for cause (except in the case of “gross misconduct,” since in this case the employee would not be eligible for COBRA in the first place).
- An employee’s resignation due to a material change in the geographic location of employment for the employee.
- An employer-initiated “lockout” (note that employee- or union-initiated work stoppages or strikes would not constitute involuntary terminations).



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- A “buy-out” situation, wherein a termination is elected by the employee in return for a severance package in which 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.

**IMPORTANT NOTE:** This list is not meant to be exhaustive. Many “real-world” fact patterns may be “involuntary terminations” regardless of their presence on the above list.

Given the purpose of the ARRA-COBRA provisions (to offer subsidized health insurance coverage to unemployed workers) as well as the general governing philosophies of the provision’s supporters, AmeriFlex predicted from the outset that federal government officials would define “involuntary termination” very liberally.

AmeriFlex cannot determine for employers (or participants) whether an “involuntary termination” has taken place in any given set of circumstances. However, using this Notice as a guide to the federal government’s general “state of mind” on this issue, we feel secure in saying that except in “crystal-clear” cases of voluntary terminations, employers should be extremely cautious about refusing the subsidy to otherwise eligible individuals. In all situations, employers are strongly urged to consult with their own legal counsel.

The rest of the Notice is mainly a review of the many points already made by the IRS (<http://www.irs.gov/newsroom/article/0,,id=204708,00.html>), but a few other issues have been clarified in response to public questions and comments, including:

- IRS has confirmed that a person could be an AEI more than once.
- IRS has confirmed that the subsidy is available for dental-only and vision-only group health plans, even those paid completely by the employee during employment.
- IRS has confirmed that employers must accept the 35% payment of the COBRA premium for an AEI regardless of whether the employer believes that the AEI may not qualify due to income limitations, unless the AEI has affirmatively waived his or her right to the subsidy.

For more information, consult IRS notice 2009-27 at <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>