Constance Gilchrest is the research and compliance specialist for Infinisource, Inc., which provides COBRA, flexible benefits and other administrative services to more than 15,000 employers nationwide. She has more than 14 years of experience with COBRA and is certified for Flexible Compensation Instruction (CFCI) through the Employers Council of Flexible Compensation and is CDHC Certified through the National Association of Health Underwriters (NAHU).

Answers to a Difficult COBRA Question

By Constance Gilchrest

"To be or not to be," that is the question when it comes to whether a termination is involuntary. It is an important question because involuntary termination of employment is the sole qualifying event that allows a qualified beneficiary to become an assistance-eligible individual (AEI) for the COBRA subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA).

The definition of "involuntary termination" is not an easy question to answer. The official definition is provided by IRS Notice 2009-27, Q/A-1:

> 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.

This definition does not make it very simple or clear in determining whether the termination is "involuntary." The answer can be based on facts and circumstances. For example, if the qualifying event is designated as voluntary or as a resignation but the fact and circumstances indicate, that in absence of such termination, the employer would have ended the employee's services and that the employee knew this, the qualifying event would then be considered as involuntary.

Under ARRA, it is the employer's responsibility to determine what is considered an involuntary termination of employment. To better understand what constitutes this type of qualifying event, let's review some examples of involuntary termination:

- If the employee's work hours are reduced "involuntarily" to zero due to a lay-off, furlough or other suspension of employment, resulting in a loss of health coverage, it would be an involuntary termination.
- Generally, a reduction in hours would not allow an individual to be subsidy-eligible, except for one narrow exception. If, in anticipation of an involuntary termination, the employer initially reduces an employee's hours, causing a loss of coverage, the later involuntary termination is regarded as being the actual cause of the loss of coverage. Therefore, this makes the qualified beneficiary an AEI and eligible for the subsidy. The IRS informally commented that an eight-month gap between reduction in hours and involuntary termination would not be in anticipation and therefore would not qualify. It is unclear, however, where one draws the line. Is it at eight months or some shorter period?
- An employee is laid off, even with a right of recall or a temporary furlough period.
- An employee resigns as the result of a material change in the geographic location of employment.
- An employee retires if the employer would have terminated the employee's position and the employee knew this. Otherwise, this would be voluntary.
- An employee agrees to an early retirement or volunteers to accept a severance agreement in connection with a reduction in work force.
- An employer offers a severance package "buy-out" and indicates that after the offered period for the severance package, a certain number of remaining employees will be terminated.
- An employer fails to renew a contract and the employee is willing to renew the contract under similar terms.

See *COBRA Question*, p. 11

We've done some remodeling! Check out the new look and features of thompson.com today!

COBRA Question (continued from p. 10)

- An employee is called to active military leave. Even though the leave is not employer initiated, the rationale is that it is government initiated and ultimately it is the government paying for the subsidy.
- Seasonal and temporary employees work out their agreed term of employment.
- An employee is fired because of a failure to meet company standards or fulfill job responsibilities. This is often referred to as termination of employment for cause.
- An employer initiates a lock-out.
- An elected official is voted out of office or no longer serves as a result of statutory term limits. However, a decision not to run for re-election would be viewed as voluntary.
- An employer terminates employment while an employee is absent due to illness or disability. Review the discussion below on the Family and Medical Leave Act (FMLA).

The following situations would *not* be viewed as involuntary:

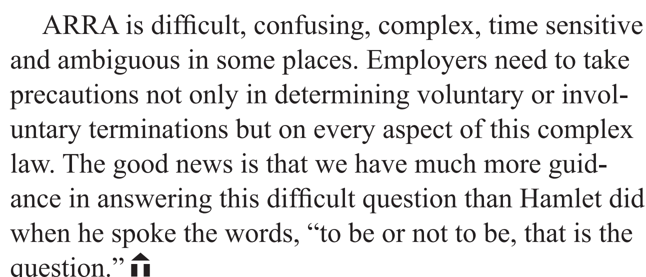
- An employee is absent from work due to an illness or disability. It is not just the mere absence from work due to the illness or disability prior to the employer taking action to end the employee's employment.
- Employee stops working as a result of a strike.
- Other qualifying events (for example, death, divorce) can be involuntary by nature, but do not qualify for the subsidy because they are not involuntary termination of *employment.*

The FMLA can be a confusing issue. The IRS has indicated that exhaustion of FMLA may be either voluntary or involuntary. The key issue is who took action first. If the employee called and said he or she could not come back when FMLA was exhausted, then the termination is voluntary. If the employer determined that FMLA leave was exhausted and determined the employee could not return and took action (for example, creating termination paperwork, issuing a final paycheck or sending a COBRA election notice), then it would be involuntary.

In order to be an AEI, both the involuntary termination and loss of coverage must occur during the 16-month period starting on Sept. 1, 2008. However, an election may occur after Dec. 31, 2009.

Qualified beneficiaries who feel they have been improperly denied the subsidy can file a complaint and seek expedited review of the denial. The U.S. Department of Labor handles appeals related to a private-sector employer subject to ERISA's COBRA provisions. The U.S. Department of Health and Human Services handles appeals for federal, state and local governmental employees as well as appeals related to group health insurance coverage provided under state continuation coverage laws. The agencies are required to make a determination within 15 business days after receiving a completed application. Their decision is the final outcome on determining if the qualifying event is voluntary or involuntary.

The IRS has indicated that if an employer's decision that a termination was involuntary is consistent with a reasonable interpretation of the law and IRS guidance, the IRS will not challenge that assessment. The catch is that the employer must have good documentation for making that conclusion.



ARRA is difficult, confusing, complex, time sensitive and ambiguous in some places. Employers need to take precautions not only in determining voluntary or involuntary terminations but on every aspect of this complex law. The good news is that we have much more guidance in answering this difficult question than Hamlet did when he spoke the words, "to be or not to be, that is the question."

Employee Benefits Series

This publication is part of our comprehensive program for professionals and their advisors, which includes a full array of news, analysis, training and planning tools. To find out more, please call Customer Service at **800 677-3789** or visit **www.thompson.com**.

- Coordination of Benefits Handbook
- Employer's Guide to Fringe Benefit Rules
- Employer's Guide to HIPAA Privacy Requirements
- Employer's Guide to the Health Insurance Portability and Accountability Act
- Employer's Guide to Self-Insuring Health Benefits
- Employer's Handbook: Complying with IRS Employee Benefits Rules
- Flex Plan Handbook
- Guide to Assigning & Loaning Benefit Plan Money
- Mandated Health Benefits – The COBRA Guide
- Pension Plan Fix-It Handbook
- The 401(k) Handbook

New! Try *HR 2009: Answers to Your Top 25 Questions* for 30 days. www.thompson.com/answ