

Auditee Response

U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210



September 25, 2009

Elliot P. Lewis
Assistant Inspector General for Audit
Office of the Inspector General
U.S. Department of Labor
200 Constitution Ave.
Washington, DC 20210

Re: Draft Audit Report No. 18-09-003-12-001

Dear Mr. Lewis:

Thank you for the opportunity to comment on your Audit Report on the Employee Benefits Security Administration's (EBSA's or the Agency's) implementation of the COBRA premium assistance provisions in the American Recovery and Reinvestment Act of 2009 (Recovery Act). While we believe EBSA's program has been highly successful, we recognize that process improvements can be made to enhance customer service delivery.

In January 2009, the Employee Benefits Security Administration of the U.S. Department of Labor began preparing for what was to become one of the most important provisions of the Recovery Act. While there were many elements of the Recovery Act that provided institutional relief and support for organizations, the health premium subsidy provision was a crucial component that provided direct support to individuals and their families by helping them keep their health care benefits that might otherwise been unaffordable because of job loss.

The Act required the Secretary of Labor to:

- create model notices within 30 days after the enactment of the Recovery Act for plans and other entities to use to notify participants about the new COBRA subsidy provisions;
- provide for the expedited review of denials of premium assistance and complete the determinations within 15 business days;
- conduct public outreach and enrollment assistance targeted to eligible participants, employers, group health plan administrators, states, insurers, and other entities, including providing information about premium reduction and enrollment on the agency's website; and,
- issue any regulations that are necessary or appropriate to carry out the provisions.

The Secretary delegated these responsibilities to EBSA.

EBSA recognized the importance of this legislation for individuals as well as business organizations, and worked vigorously to ensure that a nationwide functional program would be in effect immediately following the passage of the law. EBSA designed the program from the ground up, including the issuance of model notices in conjunction with the Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS) and the development of a dedicated website to provide updated information to workers, employers and health plan administrators. EBSA created a fully functional system that proved its design objectives by accommodating, to date, over 1.7 million web visits, 130,000 COBRA inquiries and over 9,300 appeals, delivering responses to appeals within the 15 day target period over 99.996 percent of the time.

The data and the continuing responses to our customers, including individuals and plan sponsors, suggest that, by any measure, the program we developed has been overwhelmingly successful.

We believe the draft audit report conducted by your office on EBSA's implementation of this new program did not fully describe the tremendous challenges that the Agency faced and the amount of planning and hard work that resulted in a smooth execution of the new program and the successful result. For example, the report understates the outreach that was conducted and the effort required to develop a new paperless operating system for processing and tracking the appeals, and the new requirements and operating procedures for our staff.

I have summarized the work required by EBSA and the results which should, in our opinion, be more clearly highlighted as part of the OIG report as it documents the Department's determination to support American workers during this period of economic crisis.

EBSA developed four model notices in conjunction with the IRS and HHS for use by plan sponsors to notify their employees of the new COBRA subsidy provisions. These notices were cleared by the agencies and OMB, published in the Federal Register and posted on EBSA's website within the 30 day statutory requirement.

To implement the statute, EBSA was required to develop an entirely new program to process the appeals in a very short timeframe. While EBSA's Benefits Advisors located in offices across the country were accustomed to handling approximately 170,000 inquiries for assistance from participants each year and resolving complaints through informal benefit dispute resolution, no formal adjudication process or deadlines for formal determinations existed within EBSA prior to the enactment of the Recovery Act and the implementation of this new program. Further, the Recovery Act provided the Agency only fifteen days to issue these determinations that provided both the complainant and the plan sponsor due process, and which were legally binding decisions that could be appealed only through the Courts.

Because this was an extremely important program for the thousands of workers who experienced job loss, the Agency had to deal with record breaking inquiry volume beginning in February 2009. By the end of March 2009, the number of calls received

regarding the new COBRA subsidy had reached over 2,000 per day – on top of the already heavy call volume. (For example, total per day inquiry volume on April 28, 2009 was 3,005, compared to 834 on April 28, 2008.)

Given the lack of any historical data, there was significant uncertainty about the volume of COBRA denials and appeals that would be submitted to EBSA for review and determination. Adding to the challenges, while EBSA was charged with conducting outreach, developing and issuing model notices, and designing and implementing the appeal process, the IRS was responsible for issuing guidance and interpretation of the eligibility provisions as well as establishing the process by which employers would be reimbursed for payment of the subsidies through their payroll tax submissions. HHS was charged with development of a similar appeals process for individuals denied the subsidy by plans sponsored by the government and non-profit organizations. Close coordination among the agencies was absolutely essential.

EBSA succeeded, however, because of early planning, close collaboration among our program offices and with other agencies, and an efficient program design utilizing our trained Benefits Advisors and information technology (IT) system to track and monitor the handling of the appeals.

The broad program design included an ambitious outreach initiative, a procurement action for intake of applications, preliminary processing of the applications in the national office, factual development, documentation, and analysis by field office Benefits Advisors, and recommended determinations based on the record by a designated team of technical experts. The design involved developing budget estimates and requests, initiating procurement actions for intake and IT development, designing an application form that could be completed on-line and that would integrate with our existing IT case management system modified to handle the application process, creating determination letters for a range of case outcomes, recruiting, hiring and training temporary staff, and training existing staff on the provisions of the new COBRA program, due process requirements, and the detailed procedures to be followed. EBSA developed and continuously refined step-by-step procedures to ensure transparency, consistency, adherence to the intake contract, and quality.

The IT enhancement allows for totally paperless processing of a fully documented record that moves seamlessly across the nation from intake to the field office, and on toward a final technical review and issuance of determination. The system supports extensive queuing, timeliness and quality monitoring, and reporting features. This system design was critical to the swift development and handling of a complete legal record by individuals with differing responsibilities in many different geographic locations.

EBSA staff recruited and hired 15 summer students in the national office and 25 temporary Benefits Advisors in the field offices to handle the increased inquiry volume and process the appeals. Hiring began as soon as the ARRA budget was approved and funds were made available to us. Training was provided on the new COBRA technical provisions and appeal process for all new hires, field office executive staff, Benefits Advisors across the country, and affected program office staffs (approximately 300 in total). Twenty additional temporary Benefits Advisor positions were added in the field on June 16, 2009 and training was provided.

Once funding decisions were made, the procurement process was completed; a contractor was selected to operate the intake unit and work began on the development of the efile system to electronically accept applications for review, and to modify the TAIS system - the inquiry case tracking system expanded to manage and track appeals. OMB approved the application form on May 20 and EBSA began accepting and processing applications on May 21, 2009.

As noted earlier, EBSA handled a very significant volume of general inquiries on COBRA, roughly tripling typical inquiry volume during March through June. In total, during FY 2009, the Benefits Advisors have handled over 335,000 inquiries (130,000 related to COBRA) to date. Over 9,300 appeals have been processed and determinations issued. Only 36, or less than 1/2 of 1 percent, of those determinations were issued after 15 business days.

The following are EBSA's responses to the five findings & recommendations in the report:

Recommendation # 1: Coordinate with ETA to include ARRA COBRA premium assistance information availability in both its and State Workforce Agency's monitoring to ensure all local One-Stop Centers have COBRA premium assistance information available to workers. The audit report specifically focuses on EBSA's use of the One-Stops to disseminate information about the program. This was only one element of EBSA's comprehensive outreach strategy.

The Agency developed four model notices in conjunction with the IRS and HHS. The notices were cleared by OMB and issued within the 30 day statutory requirement. A dedicated COBRA/ARRA website was launched on February 20, three days after the enactment of ARRA, and has hosted over 1.7 million visitors. The website has a section devoted to participants and one to plan sponsors and their service providers; over 40,000 individuals subscribed to the page to be alerted as new guidance, FAQs, the model notices, the application form and other materials were made available. Two COBRA/ARRA compliance webcasts were held by EBSA in conjunction with the IRS on March 24 and April 6, 2009; over 10,000 individuals participated live or accessed the archive version on our website. In addition, our field offices conducted 40 compliance workshops, made 69 presentations in their regions and conducted 33 webinar briefings for the district staff in 194 Congressional offices across the country who come in contact with thousands of individuals seeking information or help with COBRA. The Office of Congressional and Intergovernmental Affairs sent a blast email to all Congressional offices when the application form was available. Our Health Benefits Compliance Seminars were revamped to include a session on the new COBRA requirements, reaching hundreds of human resource managers and service providers. Benefits Advisors participated in 273 Rapid Response sessions with the states, reaching 9,610 workers facing job loss, by going on-site at significant plant closures or at companies experiencing large lay-offs, to explain COBRA, HIPAA and the new subsidy program to thousands of affected workers. EBSA's English & Spanish Dislocated Worker and COBRA publications were revised to include a section on the new subsidy. A new video on COBRA and the subsidy was developed in both English and Spanish and placed on the Agency's website.

We are very appreciative of the Employment and Training Administration's (ETA's) willingness to work with us to distribute flyers and information on the new COBRA subsidy through the One-Stop Centers. Their issuance of a Training and Employment Notice (TEN) was the first time a formal notification was issued by ETA related to an EBSA program. Following the OIG's visit to the One-Stop sites in July, EBSA staff phoned the contact person in each of the offices to find out if they had received the mailings. We were able to talk to someone in each of the One-Stops at that time and confirm that they had either received the package or that the address that the package was sent to was correct. For one of the One-Stops, given the logistics of the center, they requested we send a second package which we did right away. The One-Stop in Washington had not received the package because they were part of our later mailing (with 3,000 packages, we had to do them in several mailings). We did follow up to make sure that the One-Stop Centers had received the mailings. In late August, the IG followed up to note that the One-Stop in Overland Park, Kansas did not have the materials. We followed up and talked directly to the person identified to receive the mailing, Erich Ulmer, who confirmed that he had received the original mailing and wanted to order additional copies of the fact sheet, application and flyers in English and Spanish. EBSA has been calling the One-Stops from the mailing list to make sure the packages have been received, update addresses/contact people if needed, and ask if additional materials are needed.

We have discussed this finding with ETA and they have agreed to issue a change to the TEN to clarify that the One-Stop Centers should display EBSA's COBRA/ARRA flyers and materials to inform dislocated or unemployed workers about the new COBRA provisions. They have also agreed to host a joint webinar with EBSA for the One-Stop staff to enhance outreach and information efforts, and will request that ETA regional office staff, on their regular monitoring visits to local areas, check to determine whether information on the COBRA premium reduction is available. EBSA staff is following up with all the One-Stops to find out if they need additional flyers for distribution.

Recommendation # 2: Use feedback from enforcement investigations to help assess outreach efforts. As the report explains EBSA's Office of Enforcement issued a memorandum in June 2009 to EBSA's field offices instructing them to include a review of the new COBRA notice requirements in their health plan investigations. If COBRA notice violations are found during the investigation, the investigator is instructed to handle the corrective action. Any COBRA violation found by an investigator is entered into the Enforcement Management System (EMS), the enforcement case tracking system. If there are COBRA Notice violations found after April 18, they are considered COBRA/ARRA violations. There are currently no entries in that field for the 170 open health investigations; however these fields in EMS are generally not completed until after the investigation is complete. On September 4, 2009, the Director of Enforcement instructed the Regional Directors by memorandum to notify OPA if they find any violations in connection with the requirement to provide ARRA COBRA notices to eligible participants and beneficiaries. To date there have been no findings. Based on the IG auditors' conclusions, the lack of violations found would indicate that EBSA's outreach has been a success and that non-compliance is not a problem.

Recommendation # 3: Develop a contingency plan with more specific resource plans for meeting the 15-day requirement in case of system failure, overflow applications

and other undesirable events. The report states EBSA needs to develop a written resource contingency plan for meeting ARRA appeals processing requirements. It recommends that EBSA should develop a more specific resource plan to meet the 15-day requirement for a determination if the COBRA appeals processing workload increases or resources decrease and a backlog occurs. EBSA should decide and identify from where it would obtain needed resources and the effect of reassigning those resources to the COBRA appeals process. If this is not done, EBSA may violate ARRA requirements and/or cause unnecessary disruption in its services to participants.

While no formal written contingency plan document was developed by EBSA, we have considered contingencies and provided guidance to deal with them. On April 9, EBSA developed and submitted to the Department a five page risk mitigation plan that anticipated potential problems and provided steps the Agency would take to mitigate the problems should they occur. One of the risks identified in this plan was missing the 15 day statutory deadline if EBSA received an overwhelming number of appeals that exceeded capacity. To mitigate that risk EBSA developed a scalable program to process from 5,000 to 10,000 applications a month. The Department recognized that there was no way to accurately predict the volume of appeals and set aside reserve funds that could be utilized by EBSA to increase staff in the event the volume exceeded our estimates.

In early May 2009, EBSA's Deputy Assistant Secretary for Program Operations convened a meeting with the Executive Staff and Regional Directors to discuss, among other topics, the implementation of COBRA/ARRA. A discussion memo was prepared for that meeting including such topics as the increased inquiry volume, the anticipated volume of subsidy appeals, staff morale and well-being, performance standards issues for Benefits Advisors and Investigators, and work priorities.

In follow-up to the decisions made at that meeting, the Director of the Office of Participant Assistance sent a memorandum to the Regional Directors on May 14, 2009 outlining expectations for handling the ARRA workload. The letter stated that the Regional Directors should adjust their allocation of personnel and other resources as necessary to meet the demand created by the COBRA premium reduction program, giving highest priority attention to resolving the COBRA appeals and responding to inquiries. EBSA allowed the Directors the flexibility to reassign investigators and other staff to handle this workload which was considered a top priority of the Agency.

This flexibility provided the ability to expand staff devoted to the program as the volume increased. We understand the dynamic nature of this ever changing process, and we are managing the process vigorously with our customers in mind. Accordingly, we believe that EBSA has sufficiently well documented contingency plans and has provided managers with the flexibility to deal with unplanned, undesirable events.

Recommendation # 4: Improve controls over TAIS determination dates to ensure that determination dates in the TAIS match with the dates on determination letter received by applicants. The auditors found that the actual determination date was recorded accurately, however the date of the letter informing the appellant of the decision was sometimes missing or dated before the actual determination.

This problem occurred because we designed the system to automatically generate the determination letters. The letters were originally generated with the date the Benefits Advisor submitted them for supervisory review. We have since corrected the problem in TAIS so that the date on the letter updates when the letter has been reviewed and finalized and the status in TAIS is changed to "Letter Mailed/Faxed." Prior to July the date of the letter had to be adjusted manually to properly reflect the date the letter was mailed. This was not always done.

The auditors recognized that this problem did not impact the calculation of the number of days for processing the appeal. The day counts have never been calculated based on the dates that appear on the letters. There is a Correspondence Sent Tracking Grid in TAIS that is used for the letter tracking. The date entered into that field is the date the letter is signed and mailed. EBSA's policy has always been that the final determination /review completed date in TAIS is the date the letter was mailed. The OIG's final audit report should make that finding clear.

Recommendation # 5: Revise the current version of the final determination letter by moving up the notification of its decision to the beginning of the appellant's letter to make it easier for the appellants to locate. The auditors found that EBSA's appeal decision was obscure and difficult to locate in the determination letters as the decision was contained in the fifth paragraph, twelfth sentence.

We do not believe that recipients of our letters have had any difficulty in locating the determination as the letters included the required statement of eligibility in bold type. However, we have now revised the letters to reflect the opinion of the auditors by amending the subject line to indicate the determination made. We note that there has not been a single complaint from any participant indicating difficulty finding our determination in the letter; just from participants who are unhappy with the determination.

In short, we are pleased that you found only minor issues during your audit. Although no program can be perfectly implemented, we are very proud of our response to EBSA's new Recovery Act responsibilities. Implementation of these provisions has presented some unique challenges for us, but we never lost sight of the fact that our work is very important for ordinary people facing difficult financial circumstances. We are disappointed that this audit report fails to acknowledge that significant achievement and instead focuses on relatively minor criticisms.

Again, we appreciate the opportunity to provide our comments to the draft report and hope they will be helpful to you in developing a final document.

Respectfully,



Phyllis C. Borzi
Assistant Secretary