EMPLOYMENT LAW ISSUES
FOR CALIFORNIA NONPROFITS AND SMALL BUSINESSES
AFFECTED BY THE ECONOMIC DOWNTURN

Publication Date: August 2009

This information sheet is published as part of Public Counsel’s “Turning the Tide” program, a new initiative designed to meet the changing legal needs of our community in light of the economic downturn. You can access answers to other frequently asked questions (“FAQ”) and updated resources for nonprofits & small businesses at www.publiccounsel.org/practice_areas/community_development.

Many small businesses and nonprofits have felt the squeeze of the recent economic downturn in the form of reduced income and dwindling workflow, and may need to make workforce adjustments to compensate. Because economic recessions are often accompanied by upswings in employment litigation, it is critical to review employment policies and to proceed with extra caution before implementing any workforce changes.

In this information sheet, applicable California employment laws are explored through a series of questions addressing many common concerns of nonprofit organizations and small businesses. The answers offer a starting point for a nonprofit to evaluate alternatives designed to reduce expenses, including reductions in salaries, work hours or benefits, as well as layoffs.

This information sheet is provided for informational purposes only and does not constitute legal advice. While this information can help you understand the options available during a period of financial distress, it is very important that you obtain the advice of a qualified attorney. Qualifying nonprofits may be eligible for free legal consultation or representation to assist with these matters. For an application for legal assistance for existing nonprofits, go to http://www.publiccounsel.org/tools/assets/files/Application-for-Existing-Nonprofits-2010.doc or call Public Counsel at (213) 385-2977 ext 200.
ALTERNATIVES TO LAY-OFFS

The options described below can help you trim workforce costs without conducting layoffs.

1. Voluntary Exit Incentive Programs

Early exit incentives are one way to induce employees to voluntarily terminate their employment relationship with your organization. Some examples of possible incentives are continuation of company-paid medical insurance and salary for a specified period of time, or enhanced severance payments.

- Determine to which employees you are willing to offer this option
- Present the option to the class of eligible employees
- Inform the eligible employees that they have a defined window of time within which they may select the option.

To ensure that the terminations that occur as a result of any such voluntary exit incentive program remain truly voluntary, you should not begin the process of selecting individuals for involuntary layoff before the voluntary exit window closes.

You may want to consider getting a release of claims in exchange for the voluntary incentive. If you obtain such a release, be sure to comply with the requirements of the Older Workers Benefit Protection Act by giving any employee age 40 or older (1) up to 45 days to consider the release before rescinding the offer; (2) 7 days to rescind the release after it is signed; (3) written notice of the job titles and ages of all employees who have been eliminated or who were eligible for voluntary layoff; and (4) written advice to consult an attorney before signing the release.

2. Temporary Shutdowns

Rather than conducting layoffs, consider temporarily shutting down one or more of your worksites.

- If you employ 75 or more full-time or part-time employees, the California Worker Adjustment and Retraining Notification ("WARN") Act requires that you give 60 days’ minimum to all affected employees, as well as to the California Employment Development Department, when planning to shut down a worksite temporarily or permanently. There is also a federal WARN Act applicable to employers of 100 or more full-time employees, when 50 or more employees would be affected by a shutdown.
• Also, if your organization has operations in states outside of California, be aware that many other states (including but not limited to Hawaii, Illinois, New Jersey, New York, and Wisconsin) have passed their own counterparts to the federal WARN Act, or “Mini-WARN Acts” that may impact national employers.

• Salaried employees who qualify as “exempt” under the applicable IWC Wage Orders (see http://www.dir.ca.gov/iwc/wageorderindustries.htm) are entitled to full pay and benefits for each week in which they have performed any work at all, regardless of the number of days or hours worked in the week. Deducting from an exempt employee’s pay for a temporary shutdown of less than a week would violate this rule and may result in the employee losing his or her “exempt” status. However, an employer is not required to pay an exempt employee for a workweek in which he or she does not perform any work. Thus, employers of exempt employees should make an effort to implement temporary shut-downs in week-long increments. Doing so will maximize cost savings and minimize the risk of wage and hour claims.

3. Hours Reduction/Shortened Workweek

If there is insufficient work to be done such that your hourly workers don’t stay busy during their entire shift, or if you need to reduce costs and work could be adjusted to reduced hours, review your shift schedule and make appropriate adjustments, for example, by shortening shifts or reducing staffing on each shift for hourly workers.

• Remember that under California law, employers may not reduce the pay of an “exempt” salaried employee due to the company’s decision to operate on a shortened workweek in response to poor economic conditions. The public policy of California dictates that because employers are excused from offering overtime pay to salaried employees, by the same token, employers may not reduce these employees’ salaries on account of fewer hours worked. Thus, from a cost savings standpoint, shortening the workweek of salaried employees is not the best option.

4. Reduction or Elimination of Overtime Work

Limiting the amount of overtime work that hourly employees may perform is a good way to manage workforce costs. Consider instituting a policy requiring all overtime requests to be approved by an upper-level manager.
5. **Reduction of Salaries**

So long as your employees are at-will employees, or their employment contracts (including any applicable Collective Bargaining Agreements) do not dictate specific or minimum salaries, salary cuts are available as an option to help manage costs. With respect to exempt employees, be sure that any salary reduction does not bring the employee below the threshold minimum salary for exempt status under the IWC Wage Orders. Also keep in mind that cutting salaries is certain to have a demoralizing effect on your workforce. Communicate to your employees that you recognize that an across-the-board salary reduction is difficult on everyone and that the decision was not made lightly.

6. **Pay Freezes**

Again, so long as your employees do not have employment contracts providing for periodic pay increases, you may choose to forego raises until the economy regains speed.

7. **Status Changes from Full-Time to Part-Time**

If some employees don’t have enough work to justify their full-time status, changing their status to part-time is a good way to manage costs without engaging in layoffs. Again, keep in mind that it is risky to reduce the hours of an exempt employee and proportionately reduce that employee’s salary to reflect the fewer number of hours worked. This may cause the employee to lose his or her “exempt” status. See the explanation above under “Hours Reduction/Shortened Workweek.”

8. **Hiring Freezes**

Evaluate whether a formal hiring freeze is necessary, or whether an informal freeze would be sufficient, such as requiring approval before any vacant position can be posted. A hiring freeze can be implemented both to external applicants and internally, for example, by prohibiting promotions or transfers without prior approval.

9. **Elimination of Temporary and Contract Workers**

You may consider shifting some duties traditionally performed by temporary or contract workers to full-time employees who have additional capacity.
10. Reduction of Benefits:

Consider reducing fringe benefits such as transportation, parking, meals, and other nonessential benefits. Reducing or eliminating discretionary bonuses is also a good option; however, keep in mind that to the extent your employees have been promised a bonus ahead of time – for example on the basis of attendance, staying with your business or organization, productivity, or quality of work, these bonuses may be deemed non-discretionary. If non-discretionary bonuses have already been promised to employees, retroactively eliminating or reducing the bonuses can result in liability.

11. Other Cost Reductions

Reduce or eliminate nonessential travel, cancel conferences, encourage employees to conserve office resources by reusing or reducing their use of office supplies, and reduce other non-personnel costs.

HOW TO HANDLE LAY-OFFS

If you conclude that layoffs are the appropriate option for your small business or nonprofit organization, there are several techniques you can use to minimize the risk of employment litigation. To protect your organization against possible discrimination or retaliation claims, it is best not to use layoffs as an opportunity to eliminate employees wholly on the basis of subjective factors such as work performance. Rather, you should develop a set of uniform criteria that are as objective as possible and conduct layoffs in a manner consistent with your stated criteria. The following suggested steps can assist you throughout the layoff process to select individuals and conduct layoffs in a manner that is sensitive both to addressing business realities, and to protecting your organization’s legal interests.

1. Articulate the legitimate business reasons behind the workforce reductions.

As a first step, it is helpful to articulate the legitimate business reasons that explain why the workforce reduction is necessary. Documenting these legitimate business reasons will facilitate the development of uniform, objective criteria that can guide you in selecting individuals for layoff.
2. Develop uniform, objective criteria that will be used to select individuals for layoff.

- Ensure that the uniform, objective criteria that are chosen are applied consistently across the organization. Each factor used should relate to the legitimate business reasons associated with the workforce reduction.

- Make sure that no impermissible criteria are used in selecting individuals for layoff, such as time taken off for protected reasons (e.g., pregnancy, disability), accommodations granted to individuals with disabilities, participation in a protected activity (e.g., whistle-blowing or reporting harassment), or perceived cost savings of eliminating higher-paid, older employees.

3. Train the decision-makers.

- Designate specific decision-makers and ensure that they are knowledgeable about the reasons behind the layoffs and the relevant laws, and are able to make decisions in an unbiased manner.

- Give the decision-makers guidance on how to apply the criteria, and what to say (and what not to say) during the layoff process.

- It is highly recommended that the decisions made by the initial group of decision-makers are reviewed by other managers.

4. Consider any required notice period and COBRA requirements.

- The California WARN Act applies to employers with 75 or more part- or full-time employees, and requires 60 days’ minimum notice to all affected employees and to the California Employment Development Department whenever 50 or more employees are expected to be laid off.

- Under the federal WARN Act, in the event of a mass layoff, employers with 100 or more full-time employees must give at least 60 days’ notice to the employee representative (for example, the elected leader of a union), or if there is no representative, to all affected employees.

- Also, if your organization has operations in states outside of California, be aware that many other states (including but not limited to Hawaii, Illinois, New Jersey, New York, and Wisconsin) have passed their own counterparts to the federal WARN Act, or “Mini-WARN Acts” that may impact national employers.
• If your organization has 20 or more employees, you must comply with all requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). For more information, please refer to the section below, “After the Workforce Reduction: Continuing Issues.”

5. **Analyze the workforce as a whole before and after the layoffs.**

• Before making any final decisions, make sure to take a “birds-eye” view of the individuals selected for layoff to ensure that there is no disproportionate impact on any protected group (see “Minimizing the Risk of Employee Claims” below).

• Look carefully at the “relevant decisional unit” – the group of employees affected by the layoff, which may be a subset of the organization’s employees. Make sure that there is not a disproportionate impact on any protected group within the decisional unit.

These steps are particularly important if, for example, the layoffs are confined to one department or to specific job categories. This overview will also give you an idea of what the organization will look like after the workforce reduction, and will help you determine whether the final structure of the workforce is consistent with the legitimate business reasons you documented at the outset.

6. **Conduct a final review of each individual case.**

Identify any suspect cases on the layoff list and ensure that layoff decisions in those cases are supported with ample evidence and by the uniform, objective criteria. For example, keep an eye out for individuals who have taken or are currently on protected leaves of absence, those who have engaged in protected activities, those who have had conflicts with decision-makers, and any individuals in protected categories.

7. **Consider offering a severance package.**

A severance package can help to mitigate the bitter feelings that result from job termination, and reduce the likelihood of an employment lawsuit.

• An “unconditional” severance package is offered regardless of whether any such waiver or release is signed.

• A “conditional” severance package is conditioned upon the individual signing a release of claims in return for a certain amount of pay and/or benefits.
If a conditional severance package is offered, make sure to comply with the requirements of the Older Workers Benefit Protection Act (“OWBPA”) by giving any employee age 40 or older (1) up to 45 days to consider the release before rescinding the offer; (2) 7 days to rescind the release after it is signed; (3) written notice of the job titles and ages of all employees who have been eliminated or who were eligible for voluntary layoff; and (4) written advice to consult an attorney before signing the release.

If you represent a nonprofit organization that is considering an unconditional severance package that is not required under a pre-existing employment contract or collective bargaining agreement, please consult with a nonprofit attorney to determine whether any such payment would be considered an impermissible private benefit.

In addition, when paying any severance, be sure to comply with all tax withholding laws. Please refer to the section below entitled “After the Workforce Reduction: Continuing Issues” for more information.

8. Document the layoff meeting.

Ensure that the selected individuals are treated with respect, honesty, and dignity. Make every effort to have more than one member of management present at the layoff meeting, and document everything that takes place at the meeting. Be discreet about the individuals who were laid off, both out of respect for those employees, and to avoid potential claims of defamation or infliction of emotional distress.


When conducting a layoff, you should take appropriate measures to make sure that your organization’s valuable information – such as donor lists, personal information regarding employees or clients, and other confidential or proprietary information – is protected.

- During exit interviews with the selected individuals, be sure to require the return of your organization’s information and property, including any copies that the employee may have, either in the office or at home.

- Obtain confirmation from the employees that everything has been returned.

- Monitor what information the employee deletes from computers before leaving the office, and cut off any in-office and remote computer and network access simultaneously with providing the employee notice of his or her selection for layoff.

You should also remember to make plans for advising your employees who are being retained about their status.

- Be aware that retained employees may experience “survivor’s guilt,” and that naturally, after a layoff, employee morale will be low.
- Understand that employees may be concerned about a future layoff, but avoid making any promises that there will be no layoffs in the future.
- Engage your remaining employees in meaningful work, and do your best to help them focus on the future.

MINIMIZING THE RISK OF EMPLOYEE CLAIMS

Even if your organization or small business has not made any changes to its workforce and has not planned to reduce benefits, compensation, or hours in response to the economic recession, it may still be at an increased risk for employment litigation because of the economic climate. Taking the time to review and enforce your employment policies now can help to prevent stressful, expensive litigation in the future. Here is some basic information on wage and hour, discrimination, and whistle-blower laws to keep in mind as you review your employment policies.

1. Wage & Hour Concerns

Avoid common wage and hour pitfalls, such as misclassifying workers as “independent contractors” when they are, in practice, treated as employees, misclassifying workers as “exempt” when they are performing the duties of “non-exempt” workers, failing to keep accurate time records, failing to provide meal or rest periods, failing to pay for travel time, failing to pay for preparation time, improper use of makeup (comp) time, and improper alternative workweek schedules. These seemingly small violations can result in devastating judgments against employers.

2. Employment Discrimination Laws

Employers are prohibited from discriminating against their employees on the basis of race, color, creed, religion, national origin, ancestry, gender, pregnancy, age, disability, medical condition, marital status, sexual orientation, family care or medical leave status, veteran status, or any other basis protected by
federal or state laws. This means that an employer may not treat employees differently based on any of these protected classifications.

- Discrimination protection covers virtually every aspect of the employment relationship, including hiring, firing, layoffs, compensation, assignment, classification, transfer, promotion, job advertisements, recruiting, testing, allowing use of company facilities, training, fringe benefits, retirement plans and disability leave, harassment, and other terms and conditions of employment.

- You are required under these laws to provide reasonable accommodations to individuals who need such accommodations due to their religious beliefs or disabilities. When making any changes to the workforce, be sure to take a second look at the outcomes of the changes to see if there has been a disproportionate impact on any protected group.

- Being aware of your duties and vigilantly maintaining neutrality on the protected bases can help to avoid the burden and expense of employment discrimination litigation.

3. Whistleblower Protections

A whistleblower is an employee who reports or complains of company misconduct, or who participates in the investigation of suspected misconduct. Whistleblowers are protected under several federal statutes, including the Sarbanes-Oxley Act, various employment discrimination statutes that prohibit retaliation against employees who complain of harassment or discrimination, the Family and Medical Leave Act, and various wage and hour laws. States have also instituted their own whistleblower protections in their respective employment statutes. Recently, the IRS has begun requiring each nonprofit to report on its form 990 tax return whether the organization has a written policy to protect whistleblowers.

To protect your organization against possible whistleblower claims:

- Adopt a formal complaint policy, and to make sure that employees understand how to file complaints.

- Investigate each complaint thoroughly and document your findings.

- Promise your employees that they will not be retaliated against for making complaints or claims lodged in good faith.
• Resist the urge to “blame the messenger” – do not accuse any reporting employee of exaggerating or fabricating the situation, or make any suggestions to that effect, before thoroughly investigating the employee’s allegations. (Of course, if your investigation reveals that the employee made a deliberately false complaint, it is perfectly fair to discipline or even terminate the employee for making a fabricated claim.)

• Treat every complaint as an opportunity to make improvements in your organization.

• Once an employee has made a report of possible fraud or other misconduct, exercise extra caution before disciplining that employee for other issues, even if those issues are unrelated to his or her report.

• Ensure that there is sufficient documented evidence of the incident or conduct that warrants the discipline before engaging in such disciplinary action.

AFTER THE WORKFORCE REDUCTION: CONTINUING ISSUES
(SEVERANCE PAY, COBRA, UNEMPLOYMENT INSURANCE)

1. Severance Pay

According to a Revenue Ruling issued in June 2008, the Internal Revenue Service considers severance pay to be “supplemental wages.” (See IRS Rev. Rul. 2008-29.) Therefore, the usual rules for determining income tax withholding with respect to supplemental wages apply to severance pay – i.e., the employer must use one of the following withholding methods, depending partly on whether the employer withholds income tax from the employee’s regular wages.

• Method #1: The employer can use the aggregate procedure to determine the proper withholding on the severance payments:

  “Add the supplemental wages to the concurrently paid regular wages, or, if there are no concurrently paid regular wages, to the most recent payment of regular wages this year. Then figure the income tax withholding as if the total was a single payment. Subtract the tax already withheld from the regular wages. Withhold the remaining tax from the supplemental wages. If there are no concurrently paid regular wages but there were other payments of supplemental wages (after the last

Note that employers who did not withhold income tax from the employee’s regular wages in the current or immediately preceding calendar year MUST use this method of withholding.

- **Method #2**: If, and only if, the employer has withheld income tax on the employee’s regular wages in the current or immediately preceding calendar year, the employer may use the optional flat rate withholding method to determine the amount to withhold with respect to severance payments. The flat rate withholding percentage set forth in the IRS’s Publication 15 (2009) is 25%. (IRS Publication No. 15 (2009), p. 15.)

Remember that regardless of the method that you use to withhold income tax on severance payments, they are still subject to social security, Medicare, and FUTA (Federal Unemployment Tax Act) taxes.

2. **How wage continuation and lump sum severance payments affect unemployment insurance benefits**

The position of the California Employment Development Department (“EDD”) is that severance pay is not wages for unemployment insurance purposes and does not affect the claimant’s eligibility for unemployment benefits. (See EDD website, http://www.edd.ca.gov, for detailed information about the EDD’s position.) However, be aware that certain criteria must be met in order for a payment made at termination to be considered “severance pay” by the EDD:

- **The payments must be made in accordance with a company plan or policy.** This plan or policy must provide for payment to employees who are terminated for specific reasons, such as job elimination, reduction in force, closure, etc.

- **The payments must be available to a class or group of employees.** The plan does not need to be available to all employees in order for the payments to qualify as “severance pay,” but they do need to be available to a class or group of employees (e.g., salaried employees, hourly employees, represented employees, management employees, etc.).

- **The purpose of the payment must be to supplement unemployment insurance benefits.** The plan might not specifically state the purpose for the payment. However, if it does state
the purpose, it does not need to specifically state that the purpose is “to supplement unemployment insurance benefits.” The EDD has stated that it will consider that the purpose of a plan is to supplement unemployment insurance benefits if an employer gives one or more reasons such as the following as the purpose for the payment: “to recognize past services,” “to provide additional financial assistance while the employees seek other work,” “to provide a bridge between jobs,” “to help ease the trauma of unemployment,” “conscience money,” etc.

Provided that the factors listed above are met, the method of the payment – i.e., whether the payment is made in a lump sum or periodically – is immaterial to determining whether the payment is “wages” or “severance pay.”

3. New COBRA requirements for terminated employees

The American Recovery and Reinvestment Act of 2009 includes several new requirements that affect the responsibilities of employers under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

- **Basic COBRA Requirements:**

COBRA provides certain individuals with temporary continuation of group health benefits that might otherwise be terminated. COBRA requires group health plans maintained by employers with 20 or more employees to provide elective, self-paid continuation of health coverage to employees and their beneficiaries who experience a “qualifying event” (e.g., a loss of group health coverage resulting from termination of employment, reduced working hours, death, divorce, and other circumstances). Additionally, COBRA also imposes obligations on administrators of group health plans to provide notices to the plan participants and their beneficiaries of their rights under the COBRA and the administrative process for exercising those rights. Employers that have fewer than 20 employees may also be subject to Cal-COBRA requirements under California law.

- **New COBRA Provisions in the American Recovery and Reinvestment Act of 2009:**

**Premium Subsidy:** An employee and members of his or her family are generally entitled to continuation coverage under COBRA if the employee is terminated and would otherwise lose coverage under his or her employer’s group health plan. COBRA coverage is often very expensive, and as a result, many eligible employees do not take advantage of their rights because they cannot afford to pay for continuation coverage for their full period of entitlement.
The American Recovery and Reinvestment Act ("ARRA") helps employees overcome this cost issue by providing a subsidy for COBRA premiums for any “assistance eligible individuals” who are involuntarily terminated between September 1, 2008 and December 31, 2009. “Assistance eligible individuals” are employees or members of their families who are eligible for COBRA continuation coverage due to an involuntary termination occurring during the subsidy period — including individuals who previously waived COBRA coverage or let their coverage lapse.

The subsidy covers 65% of the COBRA premium costs, and the assistance eligible individual is required to cover the remaining 35%. For employers, this means that only 35% of the costs of COBRA coverage can be passed through for assistance eligible individuals during the subsidy period.

For employers that are not subject to COBRA (i.e., generally those with fewer than 20 employees), the COBRA premium subsidy may still be available where a state law equivalent of COBRA is applicable (e.g., the “Cal-COBRA” program applicable to smaller employers in California).

**Election Rights:** For those assistance eligible individuals who were terminated in 2008, the original period in which to elect COBRA coverage has already expired. Recognizing this, the ARRA created an extended election process so that all assistance eligible individuals who were not already receiving COBRA benefits on February 17, 2009 have a second opportunity to elect to receive them. The extended election period generally began on February 17, 2009 and ends on the 60th day following the date on which the employer provides the assistance eligible individual with notice of the extended election right. For electing assistance eligible individuals, the premium subsidy is available as of the first day of coverage on or after February 17, 2009. For example for health plans whose coverage runs on a monthly basis, the premium subsidy would commence on March 1, 2009; there are separate timing rules for health plans whose coverage does not run on a monthly basis.

**Notice Requirements:** Under the ARRA, employers were required to supply notice of the extended election and subsidy rights to all COBRA qualified beneficiaries (whether or not they are assistance eligible individuals) no later than April 18, 2009. This notice may be a stand-alone notice that the employer distributes on its own or incorporated into existing COBRA notices and election forms and redistributed. The Department of Labor has provided model notices that employers may use (see [http://www.dol.gov/ebsa/cobramodelnotice.html](http://www.dol.gov/ebsa/cobramodelnotice.html)), and employers are also free to prepare their own form of notice.

An employer’s failure to timely provide the notice required by the Act is treated in the same manner as a failure to provide any other required COBRA notice. This could lead to substantial excise taxes and other penalties as well as the employer’s liability for the costs of any medical care that a prospective qualified beneficiary might have received if the COBRA election had been timely offered and related attorney’s fees and costs. There is not a prescribed corrective action for failing to
provide timely COBRA notices or make COBRA coverage available, although immediately extending coverage to the eligible individuals can significantly mitigate the employer’s potential liabilities. Because of the risks involved, an employer facing COBRA compliance issues should seriously consider consulting with its legal counsel immediately to develop appropriate corrective action.

**Reimbursement:** The COBRA premium subsidy is reimbursed by the U.S. Treasury through credits toward future payroll tax obligations. The entity entitled to reimbursement for COBRA premiums depends on the kind of plan. For **insured health plans**, the credit may be claimed by the insurance company or the employer, depending on the administrative procedures agreed by the parties. For **self-funded health plans other than multiemployer plans**, the 65% of the COBRA premium that is not paid by the assistance eligible individual is reimbursed to the employer maintaining the group health plan through a credit against the employer’s employment tax obligations. (See IRS Publication 15 (2009) [[Circular E] Employer’s Tax Guide for Use in 2009] at p. 8, available at [http://www.irs.gov/pub/irs-pdf/p15.pdf](http://www.irs.gov/pub/irs-pdf/p15.pdf).) The IRS treats the credit as a deposit made on the first day of the return period (quarter or year). For **multiemployer plans**, the plan itself, and not the employer, has the reimbursement rights.

Be aware that any entity claiming the credit for COBRA assistance payments must retain the following information to support its claim for reimbursement:

- Information on the receipt, including dates and amounts, of the assistance eligible individuals’ 35% share of the premium.
- In the case of an **insurance plan**, a copy of the invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier required under COBRA.
- In the case of a **self-insured plan**, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals.
- Attestation of involuntary termination, including the date of the involuntary termination for each covered employee whose involuntary termination is the basis for eligibility of the subsidy.
- Proof of each assistance eligible individual’s eligibility for COBRA coverage and the election of COBRA coverage.
- A record of the Social Security Numbers for all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or two or more individuals.

(See IRS Publication 15 (2009), p. 8.)