

EMPLOYEE BENEFITS LAW

INFORMATION MEMO

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IRS Issues Comprehensive Guidance Regarding ARPA COBRA Subsidy

On May 18, 2021, the Internal Revenue Service (IRS) issued [Notice 2021-31](#) (Notice) which provides additional guidance and clarifications concerning the new COBRA premium assistance (“premium assistance” or “subsidies”) provisions enacted under the American Rescue Plan Act of 2021 (ARPA). [As previously reported](#), under ARPA, employers are required to provide temporary 100% COBRA premium subsidies for certain eligible individuals who elect continuation coverage that is effective during the period of April 1 through September 30, 2021 (for all of the period, or any part of it). Employers will receive a tax credit in the amount of the subsidies provided.

The Notice follows a question and answer format addressing specific issues regarding the implementation of the ARPA COBRA subsidies. Below are some of the highlights from the Notice.

Eligibility for COBRA Premium Assistance (Q&A 1-20)

Under ARPA, premium assistance is limited to covered employees who lost coverage due to an involuntary termination of employment or a reduction in hours, and extends to the employees’ “qualified beneficiaries” – their spouses and dependent children (collectively referred to as “Assistance Eligible Individuals” or “AEIs”). All AEIs must have been covered under the employer’s plan on the day prior to the covered employee’s termination in order to qualify for COBRA premium assistance. Other conditions also apply:

- In order to receive the subsidy, an AEI must not be otherwise eligible to enroll in other group health plan coverage or Medicare during the period of April 1 to September 30, 2021. An individual may lose and regain eligibility for COBRA premium assistance multiple times during the premium assistance period – such as where an AEI becomes eligible for coverage under his spouse’s group health plan, but his spouse later loses coverage during the subsidy period.
- The COBRA premium subsidy is only available where the loss of coverage is due to a reduction in hours or involuntary termination of employment. If coverage is lost for another COBRA qualifying event, the individual would still be able to elect COBRA continuation coverage, but would not be eligible to receive premium assistance.
- If a qualified beneficiary has health coverage through an Affordable Care Act Health Insurance Exchange, the individual may still be eligible to elect COBRA continuation coverage and receive COBRA premium assistance, but may not use COBRA subsidies towards the cost of Exchange coverage.
- Late or unpaid premiums for retroactive COBRA coverage will not impact an individual’s eligibility for COBRA premium assistance.

Employers are required to maintain documentation reflecting an AEI’s eligibility in order to substantiate the employer’s eligibility for the tax credit. To satisfy this requirement, employers may require individuals to provide a self-certification/attestation to substantiate their eligibility. Employers may also rely upon internal employment records (i.e., reduction in hours or involuntary termination of employment) for this purpose.

However, since an employer may not have means to confirm an AEI's continued eligibility for premium assistance (such as, in the event an AEI qualifies for other health care coverage), it may be preferable to utilize a self-certification – noting that AEIs are required to notify the employer if he/she loses eligibility. The [updated COBRA forms](#) issued by the Department of Labor accommodate self-certification of AEI status.

Reduction in Hours (Q&A 21-23)

The Notice offers specific details regarding reductions in hours, noting that individuals will qualify for COBRA premium assistance for an employee's reduction in hours, regardless of whether the reduction in hours is voluntary or involuntary – including furloughs, work stoppages stemming from a lawful strike initiated by employees or their representatives and lockouts initiated by the employers.

Involuntary Termination of Employment (Q&A 24-34)

In the Notice, the IRS defines an involuntary termination of service as “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.” The IRS notes that this determination requires a review of the facts and circumstances surrounding the termination of employment. The IRS identified the following events which may constitute an involuntary termination of service:

- **Failure to Renew an Employment Agreement.** Treated as an involuntary termination if the employee was willing and able to continue employment and execute a new contract with similar terms. However, if the parties' initial understanding was that the contract was for a set term and not intended to be renewed, the failure to renew the contract would not be treated as an involuntary termination.
- **Voluntary Termination for Good Reason.** Treated as an involuntary termination if it occurs as a result of employer action resulting in a material negative change in the employment relationship – analogous to a constructive discharge.
- **Termination While on Leave For Illness or Disability.** Treated as an involuntary termination to the extent the employer has a reasonable expectation that the employee will return to work once the illness/disability has subsided.
- **Retirement.** Not treated as an involuntary termination unless, based upon the facts and circumstances, the employee was willing and able to continue employment, the employer was prepared to terminate the employee, and the employee had knowledge that they would have been terminated but for the retirement.
- **Involuntary Termination For Cause.** Generally speaking, treated as an involuntary termination, except where the termination of employment is due to the gross misconduct of the employee.
- **Voluntary Resignation For Material Change in Geographic Location.** Treated as an involuntary termination.
- **Participation in Voluntary Severance Window Program.** Participation in a voluntary severance window program will be treated as an involuntary termination of employment if, based upon the facts and circumstances, the employee is facing impending termination if the employee does not participate in the program.

The following events will generally not be considered an involuntary termination of service:

- **Termination For Workplace Safety.** Not treated as an involuntary termination where employee voluntarily terminates employment over concerns for their own health condition, or that of their family – unless the employee can show that the employer’s actions (or inactions) resulted in a material negative change in the employment relationship – analogous to a constructive discharge. If the termination is based upon the employee’s personal circumstances unrelated to the employer’s actions/inactions (i.e., employee’s health condition, inability to locate daycare, etc.), generally, it would not constitute a constructive discharge unless the employer fails to take required actions or provide reasonable accommodations.
- **Childcare Considerations.** Not treated as an involuntary termination where employee voluntarily terminates employment because the employee’s children are not able to physically attend school or the employee cannot secure childcare.
- **Death of the Employee.** Not treated as an involuntary termination.

Coverage Eligible for COBRA Premium Assistance (Q&A 35-42)

The Notice provides that COBRA premium assistance is also available for HRAs, dental, and vision plans. Retiree health coverage is also eligible so long as the coverage is offered under the same group health plan as active employees. However, if an AEI enrolls in different coverage with a greater premium, the AEI will not be eligible for COBRA premium assistance unless the AEI’s original coverage option is no longer available. In addition, if the employer no longer offers the AEI’s original health plan, the employer must permit the AEI to enroll in the plan most similar to the prior plan, regardless as to the cost.

Beginning and End of the COBRA Premium Assistance Period (Q&A 43-50)

- The COBRA premium assistance period begins as of the first period of coverage to which premiums are charged beginning on or after April 1, 2021.
- The COBRA premium assistance period ends as of the earliest of: (1) the first date the AEI becomes eligible for other group health plan coverage or Medicare coverage; (2) the date the individual ceases to be eligible for COBRA continuation coverage; or (3) the end of the last period of coverage beginning on or before September 30, 2021.
- While group health plans must provide COBRA subsidies as of the first period of coverage beginning on or after April 1, 2021, if an AEI elects COBRA coverage under the ARPA extended election period, the AEI may choose to waive COBRA coverage for periods prior to the COBRA premium assistance period (i.e., before April 1, 2021), including retroactive periods of coverage beginning prior to April 1, 2021.

Extended Election Period (Q&A 51-55)

Qualified beneficiaries who do not have COBRA elections in place as of April 1, 2021, but otherwise qualify as AEIs had an election been in effect, may elect COBRA coverage under the ARPA extended election period. However, COBRA subsidies are only available for coverage periods beginning on or after April 1, 2021.

Extensions Under the Emergency Relief Notices (Q&A 56-59)

In the Notice, the IRS confirms that the Outbreak Period extensions (see [Notice 2021-01](#)) do not apply to notices or elections under ARPA, but continue to apply to retroactive COBRA elections periods. [See our [prior alert](#) on the outbreak period extensions.] The Notice states that employers may require individuals electing COBRA subsidies to also make an election concerning retroactive COBRA. However, individuals who accept the COBRA subsidy and decline retroactive coverage at time may not later elect retroactive COBRA continuation coverage.

Calculation of COBRA Premium Assistance Credit (Q&A 63-70)

The COBRA premium subsidy is equal to the premium amount that would have been charged to the employee for COBRA continuation coverage but for the COBRA premium assistance. However, if an employer normally charges less than 102% of the COBRA premium, the employer would only be permitted to apply for a tax credit equal to the amount that would have been charged to an AEI in the absence of the COBRA subsidies.

Claiming the COBRA Premium Assistance Credit (Q&A 71-86)

Premium payees (i.e., the “person to whom premiums are payable” such as employers, insurers, multiemployer plans, or government entities) are entitled to tax credits for COBRA subsidies as of the date the AEI submits his or her COBRA election. To receive the tax credit, premium payees must report the total number of AEIs receiving COBRA subsidies, and the total dollar amount, on its quarterly federal tax return, IRS Form 941. In anticipation of receiving the tax credits, premium payees are permitted to either reduce their tax deposits, including tax withholdings, that otherwise would be paid, up to the amount of the anticipated credit; or, instead, request an advance of the anticipated credit that exceeds the federal tax deposits by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19. If the employer does not have any employment tax liability for the quarter in question, they may still claim the tax credit on the Form 941. The premium payee should also report any advance payments received in anticipation of the tax credit on its Form 941, entering zero on all remaining non-applicable lines so that the overpayment amount on the Form 941 is the total amount of the tax credit reduced by any advance payments received.

The Treasury Department and the IRS are aware that additional issues remain and will continue to consider these issues — noting that they may issue additional guidance if warranted. If you have any questions, please contact [Lawrence J. Finnell](#), any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.

