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IRS Provides Much Needed Guidance on COBRA Premium Subsidy

On May 18, 2021, the Internal Revenue Service (IRS) issued much needed guidance on implementing the COBRA subsidy provisions included in the American Rescue Plan Act of 2021 (ARPA), which apply for the period of April 1, 2021, through September 30, 2021. For details on COBRA changes under ARPA (including information regarding a special enrollment period available to assistance eligible individuals, and important COBRA notice requirements), please see our prior alert [here](#).

Key Takeaways

[Notice 2021-31](#) (the Notice) provides some key insight for employers, plan sponsors and administrators, and insurers, including the following points that address common issues that have arisen to date when interpreting ARPA's COBRA subsidy and related tax credit.

Eligibility

Once an individual becomes eligible to enroll in other health coverage (*e.g.*, under a spouse's plan) or Medicare, such individual is no longer eligible for the subsidy. However, the individual must actually be able to enroll in the coverage (regardless of whether the individual does, in fact, enroll). For example, individuals will be eligible for the subsidy while they are in a waiting period for other group health coverage, but once the waiting period ends, their eligibility for the subsidy ends as well. Also, plan sponsors may require individuals to self-certify regarding their eligibility for the COBRA subsidy, and are entitled to rely on such self-certification absent actual knowledge to the contrary.

Involuntary Termination

Whether a termination is involuntary is determined by a facts and circumstances analysis and generally means a "severance from

The Bottom Line

ARPA's COBRA subsidy presents a number of complicated administrative issues that employers, plan sponsors and administrators, and insurers alike should consider. In particular, there are a number of nuances to how the Notice may impact plan sponsors.

Plan sponsors should consult with their ERISA counsel regarding their obligations and options under ARPA, as well as what steps they must take and best practices to secure any available credit. Certain actions may be required imminently, as plan administrators must send out the special extended COBRA election period notices by May 31, 2021.

employment due to the independent exercise of the unilateral authority of the employer to terminate the employment.” The Notice confirms that a resignation for “good reason” by the employee may constitute an involuntary termination, as does a resignation following a material change in geographic location. However, a resignation due to general concerns about workplace safety (such as concerns over COVID-19) is generally not considered an involuntary termination.

Reduction in Hours

An employee who incurs a reduction in hours is potentially eligible for the subsidy. The Notice confirms that a reduction in hours includes both a voluntary and involuntary reduction. A reduction in hours may include a furlough and a work stoppage due to a strike or lockout.

Covered Plans

The COBRA subsidy applies to virtually all plans subject to COBRA, including health, dental and vision plans, as well as health reimbursement arrangements (HRAs), including HRAs integrated with individual health coverage other than Medicare. Qualified small employer HRAs are not group health plans and, therefore, are not subject to COBRA or the subsidy. Retiree health plans raise special considerations under the Notice; any company that sponsors a retiree health plan should discuss the interaction between retiree health coverage and the subsidy with counsel.

State “Mini” COBRA Laws

The COBRA subsidy and credit generally apply to comparable state programs providing continuation coverage. However, the language in the Notice indicates that in order to be eligible to receive the subsidy with respect to any period that is longer than the maximum federal COBRA period, including with respect to any disability extension, the individual must “have elected and remained on COBRA continuation coverage” through April 1, 2021, the start of the subsidized period.

Tax Credits

The IRS addressed a number of important issues relating to the tax credit calculation, although additional questions may remain, including for those employers that otherwise subsidize COBRA premiums (e.g., as part of severance arrangements).

At a basic level, the IRS provided that the amount of the credit is the premium that would have been charged to the assistance eligible individual in the absence of the premium assistance and does not include any amount of subsidy that the employer would have otherwise provided. If an employer provides a subsidy, the amount of the credit is thus generally limited to only the amount the employer typically expects as payment from the individual (e.g., if the COBRA premium is \$1,000 and the employer provides a \$200 subsidy so that the individual pays \$800, the credit available to the employer is only \$800).



However, if a plan that previously charged less than the maximum premium allowed under COBRA increases the premium for similarly situated qualified beneficiaries, then the COBRA subsidy would generally apply to the increased amount.

Payments to Insurers

In the case of a fully insured plan, the employer is required to pay the premium to the insurer for the months of COBRA premium assistance and then may claim the corresponding credit.

Extended Election Periods

While ARPA provides an extended election period for those who are currently not on COBRA to elect free COBRA coverage now, the IRS clarified that this is only required for federal COBRA coverage and not state coverage. However, if a state program provides for a similar extended election period and the individual would otherwise be an assistance eligible individual, the individual will be eligible for an extended election period as well.

Outbreak Period Extensions

The Notice confirms that the tolling periods for COBRA elections during the “outbreak period” (see [here](#) for a discussion) do not apply to the subsidy’s notice or election deadlines. This means an individual eligible for subsidized COBRA coverage will only have 60 days to make their election and not a further extended period as a result of prior “outbreak period” relief.

For More Information

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