

IRS Releases Additional COBRA Subsidy Guidance

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The Internal Revenue Service (IRS) has issued Notice 2021-31 (the Notice) which includes significant guidance regarding the American Rescue Plan (ARP) COBRA subsidy. The Notice answers some of the outstanding questions employers have and provides clarification to other important COBRA subsidy issues.

Overview

The Notice includes a summary of the COBRA subsidy requirement, a review of the emergency notice relief issued last year, and a Q&A section with 86 questions and answers. The Q&A section is divided into subsections addressing specific topics, including eligibility for the subsidy, reduction in hours, involuntary termination of employment, coverage that is eligible for the subsidy, details regarding the beginning and end of the subsidy period, how to treat extended election periods, coordination of coverage with emergency extension rules, state continuation issues, and significant clarification and guidance on employer payroll tax credits.

Interesting and Significant Guidance Included in Notice 2021-31

Much of the guidance confirms what was already clear from the statute or had been addressed in the 2009 ARRA COBRA subsidy guidance, but there are several significant clarifications and new information that we will summarize in this review.

Assistance Eligible Individuals (AEIs) and Eligibility for the Subsidy

Generally, individuals are not subsidy-eligible if they are eligible, or become eligible, for other group health plan coverage or Medicare. The Notice addresses several specific eligibility issues.

- Q&A #9 clarifies that an individual is only considered eligible for other group health plan coverage if the individual is able to enroll in the coverage during the April – September 2021 time frame. Examples in the Notice include:
 - If the individual is in a waiting period, the individual is not eligible for other group health plan coverage.
 - If the individual waived at open enrollment and won't have another opportunity to enroll until next open enrollment, the individual is not considered eligible for other group health plan coverage.
 - If the individual could exercise a HIPAA special enrollment right mid-plan year due to the extended time frame currently available during the Outbreak Period, the individual is eligible for other group health plan coverage and would not be subsidy eligible.
- Q&A 10 clarifies that a qualified beneficiary who became eligible for, or even enrolled in, other group health plan coverage prior to April 1, 2021, but who has subsequently lost eligibility for such coverage, is still eligible for the COBRA subsidy as of April 1, 2021.
- Employers will often not know if someone is eligible for other group coverage or Medicare. The Notice states, while not necessary, an employer can require the individual to self-certify their eligibility. The Department of Labor recently issued a form that can be used for this purpose when they released the model COBRA subsidy notices.

Extended Periods of Continuation Coverage and Second Chance Enrollments

The COBRA subsidy, and a second chance to enroll, is available to individuals who had a subsidy-eligible triggering qualifying event, but did not elect COBRA, or who elected COBRA and subsequently dropped it. This second chance to enroll applies to AEIs who are still within their “maximum continuation coverage period.” Generally, the maximum COBRA coverage period is 18 months after a termination of employment or reduction hours. However, coverage periods can be extended due to a variety of situations including, second COBRA events (e.g., divorce, death of an employee, or dependent ineligibility), and extensions due to total disability. In addition, some state continuation that provides more than 18 months of coverage.

Q&A #17 clarifies that individuals who have elected and remained on COBRA continuation coverage for an extended period qualify for the subsidy. Importantly, this means that only individuals who are still covered by the plan due to one of these extensions are subsidy-eligible. Individuals who had a triggering event more than 18 months ago, but who are not currently covered, are not eligible for the subsidy or the second chance enrollment. The second chance enrollment opportunity needs only be made available to individuals that had a triggering event in the 18 months prior to April 1st, 2021, and who are still in their maximum COBRA coverage period.

Q&A #52 clarifies that the second chance election, or extended election period, is not required for AEIs eligible only for state continuation. However, if the state continuation law allows for a second chance election, such individuals taking advantage of it would qualify for the COBRA subsidy.

Involuntary Termination of Employment

The COBRA subsidy is available to anyone who had any qualifying reduction in hours. However, it is only available to individuals who had a termination of employment event if that employment termination was involuntary. The subsidy is not available to individuals who have continuation rights due to other events, such as divorce, death of the employee, or dependent ineligibility. Involuntary termination was addressed in some detail in 2009 by the IRS as part of the ARRA COBRA subsidy, and now Q&As 24 – 34 of the Notice provide additional involuntary termination guidance.

Interestingly, the new guidance uses the exact same definition of involuntary termination as what was used in 2009. In both cases, the IRS has interpreted the term “involuntary” very broadly, stating that: *An involuntary termination of employment means 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... In addition, an employee-initiated termination of employment constitutes an involuntary termination of employment for purposes of COBRA premium assistance if the termination of employment constitutes a termination for good reason due to employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge.*

Both the 2009 and 2021 guidance make it clear that reductions in force, terminations for cause, layoffs, and other related terminations are to be treated as an involuntary termination. Employment terminations do not have to be related to COVID-19 economic issues.

Other questions in the Notice address different situations that may be less clear, including:

- The termination of employment due to someone's inability to work due to an illness or disability will generally be treated as an involuntary termination.
- The end of an employment contract is still generally treated as an involuntary termination as it was in 2009. However, new guidance states that if it was clear to both parties upon entering the contract that it was for a specified term that would not be renewed, then the end of the employment contract would not be considered an involuntary termination.
- There is an interesting new example addressing an employee's resignation due to fear of health and safety at the worksite. The Notice states that this would generally be considered voluntary

termination and thus the individual would not subsidy-eligible. However, the example includes a cryptic qualifier that if the employee could show that the employer took some kind of action that resulted in a “negative change in the employment relationship,” such a resignation may be considered involuntary.

- In an example that illustrates just how broadly the IRS interprets “involuntary,” a 2009 example states that if an employer requires an employee to move to a new geographic area, and the employee decides to resign, that should be treated as an involuntary termination of employment because the employer took the unilateral action to move the employee

The 2009 guidance and the Notice include a number of other examples of what constitutes and involuntary termination. Taken as a whole, the examples confirm that employers should interpret the term “involuntary” very broadly for purposes of determining if someone is eligible for the subsidy.

Coverage Eligible for the Subsidy

The guidance clarifies that the subsidy is available for all types of COBRA coverage except for a health FSA. This includes medical, dental, vision, HRAs, etc. If the employer no longer offers the same plan option that was available at the time the AEI had their initial COBRA event, the employer should offer the coverage most similar to the previous coverage, or optionally can offer cheaper plan options, and still claim a tax credit.

Payroll Tax Credits

A significant portion of the Notice deals with how employers will recover missed COBRA premium payments through a credit taken against payroll tax liability. The basic process will work much the same as employers used to take a credit for expenses related to paid leave as required by the FFCRA. The employer will withhold a portion of payroll tax deposits due equal to the eligible COBRA premiums that were not paid during that period. Then the employer will report those credits taken against their deposits, when they file their quarterly 941. If the anticipated credit for eligible missed COBRA premiums exceeds the federal employment tax deposits available, the employer may file Form 7200 to request an advance payment of the credit.

In news that will disappoint some employers Q&A #64 make clear that employers who chose to subsidize some or all of the COBRA premium (e.g., as part of a severance agreement) can only recover the portion of the premium as a tax credit that otherwise would have been paid by the individual.

Summary

The Notice addresses many of the questions employers have had since the law was passed, but there are still open issues. This summary cannot address all the details covered in the 86 questions and answers released by the IRS, but we have attempted to highlight some of the more interesting or significant guidance. Employers should review the entire notice and consult with qualified advisors regarding specific situations they face. The Notice can be found at <https://www.irs.gov/newsroom/irs-provides-guidance-on-premium-assistance-and-tax-credit-for-continuation-health-coverage>.

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