IRS Addresses Lingering Employer Questions Regarding COBRA Premium Assistance and Corresponding Tax Credits under the American Rescue Plan Act

Insights
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The American Rescue Plan Act (ARPA) provides for 100% premium assistance to certain qualified beneficiaries for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) for periods of coverage beginning on or after April 1, 2021 and ending September 30, 2021. Employers have been grappling with a number of items left unanswered by lawmakers and subsequent DOL guidance, including whether premium subsidies apply to dental and vision plans, whether employers can claim tax credits for COBRA payments included in pre-existing severance agreements, whether premium assistance will continue to apply to a spouse's or dependent's coverage during extended COBRA coverage due to a second qualifying event like the death of the former employee, and what constitutes an involuntary termination of employment that would make someone an assistance eligible individual (AEI). IRS recently released Notice 2021-31 to help answer many of these lingering questions. What do employers need to know about this May 18 Notice?

What Coverage Qualifies for Premium Assistance?

Most observers had inferred from prior guidance that ARPA's COBRA premium subsidy provisions applied to dental and vision plans as well as group medical plans. IRS has confirmed that COBRA premium assistance is available for COBRA continuation coverage of any group health plan (except a health flexible spending account (FSA) under an Internal Revenue Code (IRC) § 125 cafeteria plan) including vision-only and dental-only plans regardless of whether the employer pays for a portion of the premiums for active employees. COBRA premium assistance is not available for continuation coverage offered by employers for non-health benefits that are not subject to federal COBRA continuation coverage requirements, such as group-term life insurance.

The Notice also explains that certain other coverage is eligible for premium assistance. Specifically, retiree coverage, if offered under the same group health plan as the coverage made available to similarly situated active employees, can be eligible even if the amount charged for the retiree coverage may be higher than that charged to active employees. In that case, the retiree coverage may still be eligible for the COBRA premium assistance if the amount charged to a retiree does not exceed the maximum amount allowed under Federal COBRA. Also, coverage under a health reimbursement arrangement (HRA), including an individual coverage HRA (ICHRA) unless the ICHRA is integrated with Medicare, can be eligible.

Can a Furloughed Employee Be an AEI?

The Notice concludes that a furloughed employee can be an AEI. The Notice defines a furlough as a temporary loss of employment or complete reduction in hours with a reasonable expectation of returning to employment or resuming hours – for example, due to an employer's expected business recovery – where an employer and employee intend to maintain the employment relationship. A furlough may be a reduction in hours regardless of whether the employer initiated the furlough, or the individual participated in a furlough process analogous to a window program (discussed below).

When Is a Termination of Employment Involuntary?

The only two COBRA qualifying events that can make someone an AEI are a reduction in hours of employment or an involuntary employment termination (other than for gross misconduct). Unfortunately, nothing in the law or U.S. Department of Labor (DOL) FAQ guidance defined "involuntary." Prior guidance stated only that an involuntary termination did not include a voluntary termination, so questions abounded as to various common workplace scenarios with clashing elements that could be construed as voluntary and involuntary voluntariness.

The Notice provides that, for ARPA COBRA premium assistance purposes, involuntary termination of employment means a severance from employment due to the independent exercise of the unilateral authority of an employer to terminate the employment, other than due to an employee's implicit or explicit request, where the employee was willing and able to continue performing services. Moreover, the Notice states that an employee-initiated termination of employment is involuntary for purposes of COBRA premium assistance if the termination is for good reason due to an employer action that results in a material negative change in the employment relationship for the employee as with a constructive discharge.

The Notice advises employers to consider all facts and circumstances of each case when determining voluntariness. Specifically, if an employer labels a termination as voluntary or as a resignation, but evidence shows that an employee was willing and able to continue performing services, so that, absent the voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary. Additionally, the Notice provides the following instructive examples:

Termination while absent due to disability or illness

An employer terminating an individual's employment while the individual is absent from work due to illness or disability will be deemed involuntary, if that action would otherwise constitute an involuntary termination and if, beforehand, the parties reasonably expected that the employee would return to work after the illness or disability. However, mere absence from work due to illness or disability before an employer terminates an individual's employment is not an involuntary termination of employment. Though the absence from work could be a reduction in hours that results in COBRA continuation coverage if the absence results in a loss of coverage

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Retirement

In general, retirement is a voluntary termination of employment. However, if the facts and circumstances show that, absent retirement, an employer would have terminated an employee, that the employee was willing and able to continue employment, and that the employee had knowledge that they would be terminated absent the retirement, the retirement is involuntary.

Termination for cause

Termination for cause is typically involuntary and would trigger potential ARPA premium assistance. However, if termination is due to an employee's gross misconduct, it is not a qualifying event, and the employee's (as well as their family members') loss of coverage does not trigger COBRA eligibility. Therefore, the loss of coverage due to a termination of employment for gross misconduct will not result in an individual becoming a potential AEI. Employers should apply this exception carefully since what amounts to gross misconduct varies by jurisdiction and can be a high standard to meet.

Resignation due to material change in geographic location

The Notice states that an employee will be deemed to have involuntarily terminated if they resign because they would otherwise be forced to accept a position in a different geographic location that is a material change from their current location. Unfortunately, the guidance gives no examples or parameters of what will be considered material, so employers should be cautious in such cases.

Window or severance programs

An employee will be deemed to have involuntarily terminated where an employer offers employees with impending employment terminations an arrangement to terminate employment within a specified time period under a window program that offers an early retirement benefit, retirement-type subsidy, social security supplement, or other form of benefit made available for a limited period of time (no greater than one year) to employees who terminate employment during that period or to employees who terminate employment during that period under specified circumstances. Generally, an employee must terminate employment within 12 months of the establishment of the plan (or amendment) providing the benefit. Further, the facts and circumstances must show that the employer established the plan (or amendment) because of the employee's impending termination, and that the program is not part of a repeated pattern of programs over substantially consecutive, limited periods of time.

Concerns over workplace safety due to employee's or a family member's health condition

Typically, an employee's termination due to general concerns about workplace safety will not be considered involuntary. However, a termination would be involuntary if an employee shows that an employer's actions or inactions caused a material negative change in the employment relationship analogous to a constructive discharge. Termination due to the personal circumstances of an

employee unrelated to an action or inaction of an employer, such as a health condition of an employee or a family member, inability to locate daycare, or other similar issues, generally will not rise to the level of being analogous to a constructive discharge absent the employer's failure to either take a required action or provide a reasonable accommodation. Again, the Notice provides no explanation of what will be deemed a material negative change, so employers should weigh these circumstances carefully.

Employee-initiated termination because a child is unable to attend school or because another childcare facility is closed due to the COVID-19 National Emergency

This scenario will be considered an involuntary termination if the individual remains able to return to work, and the facts and circumstances show that the qualifying event is a temporary leave of absence such that the employer and employee intend to maintain the employment relationship. In this case, the qualifying event is a voluntary reduction in hours and the individual would be a potential AEI.

Involuntary material reduction in hours that did not result in a loss of coverage

For purposes of COBRA premium assistance, an employee-initiated termination of employment due to an involuntary material reduction in hours will be treated as a termination for good reason which would be an involuntary termination of employment under ARPA.

Employer fails to renew an employee's contract, including for an employee whose employer is a staffing agency

Generally, an employer's decision not to renew an employee's contract will be considered an involuntary termination of employment if the employee was otherwise willing and able to continue working and was willing either to execute a contract with similar terms or to continue employment without a contract. However, if the parties understood at the time they entered into the expiring contract, and when services were being performed, that the contract was for specified services over a set term and would not be renewed, the completion of the contract without it being renewed is not an involuntary termination of employment. Employers will need to review the specific terms of any employment contracts to be sure to apply the Notice guidance appropriately.

For What Amounts Can an Employer Claim a Tax Credit?

Many employers have been wondering whether and to what extent they would be able to claim ARPA premium assistance tax credits for amounts they may have otherwise promised to pay to certain terminated individuals prior to ARPA. The Notice provides examples to guide employers as to the specific amounts they can claim.

The amount of the available tax credit an employer may claim is the premium that would have been charged to an AEI absent ARPA premium assistance and does not include any amount of subsidy

that the employer would have otherwise provided. Thus, aside from ARPA, if the premium that the employer would have charged to an AEI is less than the maximum COBRA premium (e.g., the employer would have subsidized the coverage by paying all or part of the premium) the credit is equal to the amount that the employer would have charged to the AEI.

The Notice then describes situations where an employer will not be able to claim a full tax credit. For example, where an employer typically requires active employees to pay $200 per month for health coverage and provides that involuntarily terminated employees get severance benefits that include continued health coverage at the active employee cost for three months after termination before the cost increases to $1,000 per month for the duration of COBRA, the tax credit will vary as follows. Assuming an AEI subject to such a severance agreement elects COBRA starting effective April 1, 2021, the employer's credit for April, May, and June 2021, the credit is $200 per month. For July, August, and September 2021, the credit is $1,000 per month.

Can Employers Require Individuals to Self-certify or Attest to ARPA Eligibility and Lack of Other Disqualifying Coverage?

An individual cannot be an AEI without having had a qualifying event that is a reduction in hours or involuntary termination of employment. Similarly, an individual cannot be an AEI if they are eligible for other group health coverage or Medicare. The law and DOL template forms contemplate individuals providing information regarding these items, and even include a penalty provision for individuals who do not notify an employer of eligibility for other group health coverage or Medicare. Employers had questioned whether they could require a self-certification or attestation from individuals and whether they could use these items to support claiming the corresponding ARPA premium assistance tax credits.

The Notice states that employers may require individuals to self-certify or attest as to their COBRA premium assistance eligibility based on a reduction in hours or involuntary termination of employment as well as their ineligibility for other group health coverage or Medicare. Employers are not required to obtain a self-certification or attestation, but if they plan to claim the tax credits for amounts they pay for AEI COBRA coverage, they must retain either a self-certification, attestation or other documentation to substantiate that the individual was eligible for the COBRA premium assistance. It remains unclear whether electronic documentation in the form of an email, a voicemail or even a form completed by a call center or HR representative while speaking with an individual by phone will be sufficient.

The Notice allows for an employer to rely on an individual's attestation or self-certification unless the employer knows that the individual's attestation is incorrect. Employers who plan to rely on an individual's attestation must keep a record of the attestation to substantiate eligibility for the premium assistance credit. An employer may rely on other evidence to substantiate eligibility, such as records concerning a reduction in hours or involuntary termination of employment.

Other Disqualifying Group Health Coverage

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An individual cannot be an AEI if they can elect other group health coverage such as under a spouse's employer's group health plan. There can be instances where it is unclear how this limitation applies, so the Notice provides the following examples:

- An individual loses health coverage on October 1, 2020 due to involuntary termination and can elect group health coverage effective November 1, 2020 under a spouse's employer's plan during annual open enrollment. The individual did not enroll at that time and has not been permitted to enroll in coverage under the spouse's group health plan at any time on or after April 1, 2021. In this case, the individual is not considered eligible for coverage under the plan of the spouse's employer until the first available enrollment period, if any, that begins on or after April 1, 2021. So, the individual may elect COBRA continuation coverage under the plan of the individual's former employer during the ARPA extended election period and may receive COBRA premium assistance as an AEI under that plan beginning on or after April 1, 2021.
- The Notice clarifies that the result would be different if the individual has another enrollment period between April 1, 2021 and September 30, 2021 but fails to enroll. In that case premium assistance would end as of what would have been the effective date of coverage under the spouse's employer's plan.

Finally, the Notice stipulates that if the individual in the example remains subject to a special enrollment provision under the spouse's employer's plan, and the extended election periods available under the Emergency Relief Notices issued in 2020 still apply, the individual is considered eligible for coverage under the plan of the spouse's employer. Thus, while the individual could elect COBRA continuation coverage from the former employer's plan, the individual may not receive COBRA premium assistance as an AEI under that.

ARPA Premium Assistance During Extended COBRA Periods

ARPA repeatedly refers to premium assistance being available for the maximum duration of COBRA stemming from a reduction in hours or involuntary termination of employment. Questions had arisen regarding the effect of second qualifying events, disability determinations, and state mini-COBRA provisions that extend a qualified beneficiary's COBRA coverage period.

The Notice declares that if the original qualifying event was a reduction in hours or an involuntary termination of employment, COBRA premium assistance applies to individuals who have elected and remained on COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under State mini-COBRA, to the extent the additional periods of coverage fall between April 1, 2021, and September 30, 2021. Relatedly, the subsequent death of an employee who had a reduction in hours or involuntary termination of employment will not end ARPA COBRA premium assistance of any qualified beneficiary spouse and dependent children. Employers will need to examine records to determine whether any current qualified beneficiaries remain covered due to one of these situations.

Special ARPA Election Period

ARPA allows certain individuals to make a new COBRA election if they would have had COBRA coverage in effect between April 1, 2021 and September 30, 2021 but either failed to elect or had elected but let the coverage lapse. The Notice clarifies some unique fact patterns that involve special ARPA election periods.

- If an employee had a reduction in hours or an involuntary termination of employment before April 1, 2021 and elected self-only COBRA continuation coverage, the spouse or dependent child who is a qualified beneficiary due to the reduction in hours or involuntary termination of employment can elect COBRA continuation coverage and receive COBRA premium assistance. So, a spouse or dependent child in this situation has a second election opportunity, even though the former employee originally elected self-only COBRA continuation coverage.
- The Notice provides that an extended election period is not available to an individual if the continuation coverage is provided only under state law and not federal COBRA. The ARPA extended election period applies only to a group health plan that is subject to federal COBRA. However, if a state law or program provides for a similar extended election right and an individual otherwise satisfies the requirements to be an AEI, COBRA premium assistance is available for any otherwise qualifying period of COBRA continuation coverage.
- An AEI who has an open COBRA election period due to a reduction in hours or involuntary employment termination before April 1, 2021 may elect coverage under the special extended election period and receive COBRA continuation coverage with COBRA premium assistance that starts with a period of coverage beginning on or after April 1, 2021. However, if the individual elects retroactive COBRA continuation coverage under the original COBRA election period available prior to any ARPA extended election period under federal COBRA, COBRA continuation coverage is retroactive to that individual's loss of coverage. COBRA premium assistance, however, does not apply to periods of coverage prior to the first period of coverage beginning on or after April 1, 2021.
- An individual who has an HRA and makes only a prospective election under the ARPA extended election rules cannot be reimbursed under the HRA for expenses incurred between the qualifying event and the first period of coverage beginning on or after April 1, 2021.
- An individual who was offered comprehensive health coverage and dental-only or vision-only coverage and who elected COBRA continuation coverage only with respect to the dental-only or vision-only coverage now can elect any health coverage the qualified beneficiary was enrolled in prior to the qualifying event and for which the individual does not have a COBRA election in effect on April 1, 2021. If a qualified beneficiary elects additional COBRA continuation coverage pursuant to the ARPA extended election period, the qualified beneficiary is an AEI with respect to all elected COBRA continuation coverage.

Coordinating Emergency Relief Election Period and ARPA Special Election Period

If a qualified beneficiary received a regular COBRA notice before April 1, 2021 and receives the notice of the ARPA extended election period, then, within 60 days of receiving the notice of the ARPA extended election period, the qualified beneficiary may elect COBRA continuation coverage with COBRA premium assistance for periods of coverage beginning on or after April 1, 2021. If a qualified beneficiary elects COBRA continuation coverage with COBRA premium assistance, the individual must also elect or decline COBRA continuation coverage retroactive to the original loss of coverage, if eligible, within 60 days of receiving the notice of the ARPA extended election period. If the qualified beneficiary elects retroactive COBRA continuation coverage, the qualified beneficiary may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021. The Notice specifies that if a potential AEI elects COBRA continuation coverage with COBRA premium assistance but declines to elect COBRA continuation coverage that would begin at the time of a qualifying event that occurred before April 1, 2021, that individual may not, after the 60-day ARPA extended election period, later elect COBRA continuation coverage that begins retroactively to the time of the original qualifying event.

Premium Assistance Tax Credits

ARPA provides that employers can claim a fully refundable tax credit against quarterly Medicare taxes for COBRA premiums they pay on behalf of AEI who qualify for premium assistance. The Notice provides practical guidance on the process and requirements that apply to claiming the available tax credits.

An employer will claim the credit by reporting the credit (both the nonrefundable and refundable portions) and the number of individuals receiving COBRA premium assistance on the designated lines of its federal employment tax return, usually Form 941, Employer's Quarterly Federal Tax Return. In anticipation of receiving the credit to which it is entitled, the employer may:

- reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit; and
- request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

Employers will report the credit for April through June 2021 on the Form 941 for the second quarter of 2021. If a coverage period straddles a quarter and results from an AEI election received in the latter quarter, the employer should report the total credit on the Form 941 for the latter quarter, including the credit for the periods of coverage during the prior quarter.

An employer may reduce its deposits of federal employment taxes and, if applicable, file Form 7200 to request an advance of the anticipated premium assistance credit that exceeds the federal employment tax deposits available for reduction as of the date the employer is entitled to the credit. The Form 7200 may be filed after the end of the payroll period in which the employer became

entitled to the credit. Deposits may not be reduced, and advances may not be requested, for a credit for a period of coverage that has not begun. Form 7200 must be filed before the earlier of (1) the day the employment tax return for the quarter in which the employer is entitled to the credit is filed, or (2) the last day of the month following that quarter. The employer entitled to the credit should also report any advance payments received in anticipation of the credit for the quarter on the employment tax return.

ARPA requires AEIs receiving COBRA premium assistance to notify an employer if they become ineligible due to other group health coverage or Medicare. The Notice states that where an AEI fails to so notify an employer, the employer remains entitled to the credit received for that period of ineligibility, unless the employer knew of the individual's eligibility for the other coverage. If the employer learns that the individual is eligible for other coverage, it is not entitled to the credit from that point forward.

An employer must maintain records that substantiate its eligibility for the credit. An employer will be liable for employment taxes that are due because of any improper claim of premium assistance credits in accordance with their liability under the Code and applicable regulations for the employment taxes reported on the federal employment tax return.

Conclusion

We will continue to monitor this issue and provide relevant updates as needed. You should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions about any aspect of this new law and its impact on your workplace, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Benefits Practice Group.

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