

IRS Issues COBRA Subsidy Guidance

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On March 11, President Biden signed into law the American Rescue Plan Act of 2021 (ARPA), which provides temporary premium assistance for health, dental, and vision coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). On May 18, the IRS issued Notice 2021-31 to guide employers on how to provide premium assistance and how to claim a corresponding tax credit.

ARPA assists qualifying individuals who lose coverage under an employer's group health plan due to an involuntary termination of employment or reduction of hours by allowing them to opt for COBRA coverage at no cost for the period April 1, 2021, through September 30, 2021. The federal government pays the tab by providing employers with an offsetting credit against their federal Medicare taxes for the cost of COBRA coverage. For information about COBRA assistance, see our prior [client alert](#).

Notice 2021-31 includes 86 FAQs covering topics such as who is eligible for COBRA premium assistance, what constitutes a reduction in hours and/or an involuntary termination of employment, what coverage is eligible for COBRA premium assistance, when the COBRA premium assistance period begins and ends, extended election periods, and examples of the practical impacts of the COBRA premium assistance and application of the credit.

Given the wide range of topics covered by Notice 2021-31, this alert only addresses a few key points that may be helpful clarification for employers:

- **Certification of Eligibility.** Employers may require individuals to certify that they are (and remain) eligible for the COBRA premium assistance. Since an individual is ineligible for COBRA premium assistance if he or she is or becomes eligible for health coverage under another health plan, employers (particularly employers that self-insure their health coverage) may wish to require individuals to periodically recertify that they are eligible for COBRA premium assistance.
- **Substantiation/Records.** An employer may rely on an individual's attestation for purposes of substantiating eligibility for the credit. An employer should maintain these in its records.
- **Assistance Eligible Individuals.** An individual can become an assistance-eligible individual more than once (such as due to rehiring and subsequent termination).
- **Reduction in Hours.** A reduction in hours, whether or not voluntary, can cause an individual to be a potential assistance-eligible individual (if the reduction in hours would make the individual eligible for COBRA).
- **Eligibility: Involuntary Termination of Employment.** An involuntary termination of employment for purposes of being eligible for premium assistance means "a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the [employee's] employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services." Q&A 24. A termination due to retirement, resignation, or death would not qualify. A constructive discharge, such as a resignation due to a material change in geographic location of employment, would be considered an involuntary termination of employment for purposes of being eligible for premium assistance.
- **Plans Subject to COBRA Premium Assistance.** Only group health plans (including group health plans that provide vision and dental coverage) that are subject to federal COBRA are required to provide COBRA premium assistance. Flexible spending health account plans, however, are not required to provide COBRA premium assistance. Notice 2021-31 provides guidance as to how COBRA premium assistance applies to health reimbursement arrangements.

- **Retroactive COBRA Coverage.** Previous notices issued by the IRS and the U.S. Department of Labor (DOL) in response to the COVID-19 pandemic extended the period of time that individuals have to elect COBRA until 60 days after the announced end of the COVID-19 emergency or such other date announced by the IRS and the DOL. As a result, individuals who became eligible for COBRA on or after March 1, 2020, have that extended period of time to retroactively elect COBRA coverage if they have not previously made a COBRA election. Question 58 of the FAQs makes clear that an employer may require a former employee to pay for any period of retroactive COBRA coverage prior to April 1, 2021, but cannot condition COBRA coverage during the premium assistance period on the individual's electing such retroactive coverage. In other words, a qualifying individual whose COBRA period extends past April 1, 2021, may elect to continue COBRA coverage for just the period of time that premium assistance is available (but not beyond the time that the individual's 18-month COBRA coverage period would end under normal COBRA rules).
- **Notice Requirements.** Notice of the ARPA extended election period must be furnished by May 31, 2021. An individual who receives such notice must elect COBRA coverage

no later than 60 days after the notice is provided. If an individual initially declined COBRA, they have this 60-day period to decide whether to reacquire COBRA coverage (with premium assistance) and whether they want retroactive coverage. If they decline the retroactive coverage, they cannot later decide they want retroactive coverage.

- **Amount of COBRA Premium Assistance Credit.** The amount of the credit is the amount of premiums that would have been charged to an assistance-eligible individual in the absence of the premium assistance, including the usual 2 percent administrative charge that employers are allowed to charge for COBRA coverage.
- **Claiming the COBRA Premium Assistance Credit.** Notice 2021-31 provides details on when and how to claim the premium assistance credit.

Notice 2021-31 provides further detail on the topics described above. Employers should consult with their COBRA administrator and counsel regarding individual circumstances.

If you have any questions, Lowenstein Sandler's **Employee Benefits & Executive Compensation Practice Group** is available to help guide you through Notice 2021-31.

Contacts

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