

IRS Answers to Your American Rescue Plan Act COBRA Subsidy Questions

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In much-anticipated guidance, the Internal Revenue Service has offered its insight on the implementation of the [COBRA temporary premium subsidy](#) provisions of the American Rescue Plan Act of 2021 (ARPA) in [Notice 2021-31](#).

Spanning more than 40 pages, the IRS-answered frequently asked questions (FAQs) finally resolve many issues relating to temporary premium assistance for COBRA continuation coverage left unanswered in the [Department of Labor's publication](#) of model notices, election forms, and FAQs.

The practical implications of the guidance for employers are many. Significantly, employers must take action prior to May 31, 2021, to ensure compliance with some of the requirements under ARPA and related agency guidance.

Notice 2021-31 Topics

Notice 2021-31 provides comprehensive guidance on the ARPA subsidy and tax credit implementation issues (although it acknowledges there are many issues that still need to be addressed). Some of the key topics addressed include:

- Clarifying that COBRA premium assistance is available for COBRA continuation coverage under vision-only plans, dental-only plans, and health reimbursement arrangements;
- Describing the circumstances in which retiree coverage can be considered COBRA coverage and qualify for the subsidy and when non-COBRA retiree coverage will constitute other coverage for purposes of disqualifying an individual from the subsidy;
- Defining what constitutes an “involuntary termination”;
- Confirming that employers may rely on employee attestations regarding eligibility for premium

assistance and record retention requirements;

- Addressing the impact of employer-provided COBRA premium subsidies on the availability of the tax credit;
- Providing instructions on how the ARPA COBRA premium subsidy notice and election rights are coordinated with the previously issued COVID-19 relief extending deadlines for certain actions; and
- Addressing eligibility for the tax credit for church plans, small employer plans, and professional employer organization or other third-party payer arrangements.

Immediate Next Steps

For employers, there are some immediate takeaways:

1. Review Your Lists of Potential Applicable Eligible Individuals (AEIs) Before May 31, 2021.

As expected, the IRS expansively defines an “involuntary termination.” For purposes of the ARPA COBRA subsidy, involuntary terminations include employee-initiated terminations due to good reason as a result of employer action (or inaction) resulting in a material adverse change in the employment relationship.

The guidance provides helpful COVID-19-specific examples. Employees participating in severance window programs meeting specified regulatory requirements could qualify. Voluntary employee terminations due to an involuntary material reduction in hours also could qualify. Further, voluntary terminations due to daycare challenges or concerns over workplace safety may constitute an involuntary termination, but only in the narrow circumstances in which the employer's actions or inactions materially affected the employment relationship in an adverse way, analogous to a constructive discharge.

Employer action to terminate the employment relationship due to a disability also will constitute an involuntary termination, but only if there is a reasonable expectation before the termination the employee will return to work after the end of the illness or disability. This requires a specific analysis of the surrounding facts and circumstances. The guidance notes that a disabled employee alternatively may be eligible for the subsidy based on a reduction in hours if the reduction in hours causes a loss of coverage.

A number of the circumstances that meet the involuntary termination definition in the guidance may not be coded in payroll or HRIS systems as involuntary terminations. As employers have an affirmative obligation to reach out to employees who could be AEIs, employers will need to look behind the codes to understand the circumstances of the terminations.

Further, to identify all potential AEIs, employers may need to sweep involuntary terminations or reductions in hours occurring *prior to* the October 1, 2019, date referenced in the Department of Labor's FAQs. The IRS makes clear that COBRA-qualified beneficiaries who qualified for extensions of COBRA coverage due to disability (up to 29 months), a second qualifying event (up to 36 months),

or an extension under state mini-COBRA potentially can qualify for the subsidy if their coverage could have covered some part of the ARPA COBRA subsidy period (April 1, 2021–September 30, 2021).

An involuntary termination is not the only event that can make an employee potentially eligible for the subsidy. Employees who lose coverage due to a reduction in hours (regardless of the reason for the reduction) can be eligible for premium assistance as well. This can include employees who have been furloughed, experienced a voluntary or involuntary reduction of hours, or took a temporary leave of absence to facilitate home schooling during the pandemic or care for a child.

2. Re-Evaluate Employee Exit Strategies, Severance Plans to Assess Eligibility for the Tax Credit

The IRS explains that, if an employer subsidizes COBRA premiums for similarly situated covered employees and qualified beneficiaries who are not AEIs, the employer may not be able to claim the full ARPA tax credit. In this case, the amount of the credit the employer can receive is the premium *that would have been charged to the AEI in the absence of the premium assistance* and does not include any amount of subsidy the employer would otherwise have provided. For example, if a severance plan covering all regular full-time employees provides that the employer will pay 100 percent of the COBRA premium for three months following separation, this employer could not take a tax credit for the subsidy provided during this three-month period.

Notice 2021-31 does not elaborate on this issue beyond providing specific examples involving a company severance plan. Thus, ambiguity remains as to whether this guidance would prohibit an employer from claiming a tax credit where an employer has agreed to provide a COBRA subsidy in a negotiated separation or settlement agreement and not pursuant to an existing severance plan or policy. Further IRS guidance on this point may be forthcoming. In light of this guidance, employers should re-evaluate their COBRA premium subsidy strategies.

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