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IRS Releases COBRA Subsidy Guidance

May 28, 2021

The IRS recently issued Notice 2021-31 (the “Notice”) which provides extensive guidance to help employers implement the COBRA premium subsidy that was enacted as part of the American Rescue Plan Act (“ARPA”). The guidance is timely, as employers must take action before May 31, 2021 to ensure compliance with ARPA’s new COBRA notice requirements.

Background

Under ARPA, an individual who is a COBRA qualified beneficiary from April 1, 2021 through September 30, 2021, by reason of involuntary termination or a voluntary or involuntary reduction of hours, and who elects COBRA coverage, may be eligible to receive the COBRA subsidy. Additional information on the COBRA subsidy is available at our prior [Client Alert](#). A payroll tax credit is used to reimburse employers for the cost of the COBRA subsidy.

The New IRS Guidance

Below is some, but certainly not all, of the guidance in the Notice.

Eligibility for Premium Assistance

- Employers may require (and rely on) an individual’s self-certification that the individual is eligible for the COBRA subsidy and not eligible for other group health plan coverage or Medicare. Employers should preserve these certifications and use them to substantiate entitlement to the payroll tax credit.
- Employees who are provided COBRA coverage under a health plan that is not subject to federal COBRA requirements are ineligible for the COBRA subsidy.
- The COBRA subsidy is available for individuals who have remained on COBRA due to a disability extension, second qualifying event, or extension under a state mini-COBRA law.

Reduction in Hours

- Voluntary or involuntary reductions in hours, furloughs, and lawful strikes are qualifying events for the COBRA subsidy.

Involuntary Termination of Employment

- “Involuntary termination” means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate employment. An involuntary termination of employment does not occur if the termination is at the employee’s request where the employee was willing and able to continue performing services.
- The inquiry into whether a termination was involuntary is based on facts and circumstances rather than labels or designation. For example, a resignation could be an involuntary termination if the employee resigns due to a material negative change in the employment relationship such as a material change in the geographic location of employment.
- Failure to renew an employee contract, including a staffing agency contract, is generally an

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involuntary termination. However, if the parties understood at the time they entered into the expiring contract, and at all times services were being performed, that the contract was for services over a set term and would not be renewed, it is not an involuntary termination.

Coverage eligible for the subsidy

- The subsidy is available for group health plans, including vision-only, dental-only, and health reimbursement arrangements (including those integrated with individual health insurance coverage).

Beginning and End of Subsidy Period

- If the plan sponsor is no longer subject to federal COBRA due to a reduction in the number of employees, the plan sponsor must provide the extended election notice to employees whose involuntary termination or reduction of hours occurred while the employer was still subject to COBRA.
- At the end of the subsidy on September 30, 2021 (or earlier, if the participant becomes eligible under another group health plan or Medicare, or if their COBRA continuation period ends), COBRA continuation coverage automatically continues if timely paid according to the terms of the plan or coverage, subject to the [Emergency Relief Notices](#) and subsequent [guidance](#) (the "Relief Notices").
- A COBRA subsidy beneficiary who fails to notify the plan sponsor that he or she is no longer subsidy eligible is subject to a \$250 penalty. For fraudulent failures, the individual is subject to a penalty equal to the greater of \$250 or 110% of the COBRA premium.

Extended Election Period

- The extended COBRA election period does not apply to state mini-COBRA. It only applies to those plans subject to federal COBRA.

Extensions under the Emergency Relief Notices

- The Relief Notices, which extended certain COBRA continuation coverage timeframes, do not apply to the new COBRA election notices required by the ARPA, or the extended election period itself.

Calculation of Payroll Tax Credit

- The payroll tax credit is only for the amount of the COBRA premium the employee would have been required to pay but for the COBRA subsidy.

Claiming the Payroll Tax Credit

- To claim the payroll tax credit, the employer reports the credited amount and number of individuals receiving the COBRA subsidy on the designated line of its federal tax return (typically Form 941).

It is **important** to note that the special COBRA notice required under ARPA is required to be distributed by May 31, 2021. You may find the Model Notice from the DOL [here](#).

Next Steps

- Plan sponsors should ensure the required COBRA notices are timely distributed before the May 31, 2021 deadline.
- Plan sponsors should track the administrative deadlines required by ARPA.
- Employers should ensure they refund and credit any COBRA payments made by eligible beneficiaries for the periods in which they receive the COBRA subsidy.
- Employers should maintain any self-certification or other substantiation records to claim the payroll tax credit.

If you have any questions or need assistance, please contact a member of the Kutak Rock [Employee Benefits Practice Group](#).