IRS Issues ARPA COBRA Premium Assistance Guidance

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On May 18, 2021, the Internal Revenue Service ("IRS") issued Notice 2021-31 (the "Notice"), which answers many questions about the temporary 100% COBRA premium assistance established under the American Rescue Plan Act of 2021 ("ARPA"). Under the ARPA, employers and insurers are required to offer free COBRA coverage between April 1, 2021 and September 30, 2021 to any individual who lost coverage due to an employee's involuntary termination of employment or reduction in work hours and who would be a qualified beneficiary at any time during that period ("Assistance Eligible Individuals" or "AEIs"). Employers and insurers are also eligible to receive a tax credit for the COBRA premiums they would have otherwise received but for the COBRA premium assistance. For purposes of this *Legal Update*, "COBRA" includes both the COBRA requirements imposed by federal law (which generally apply to employers with 20 or more employees) and State programs that provide for coverage continuation comparable to COBRA continuation coverage. The term "qualified beneficiary" includes the employee, the employee's spouse, and the employee's dependent child.

The Notice contains 86 Q&As related to qualification requirements, notice requirements, tax credit information, and more. This *Legal Update* summarizes some of the key guidance the Q&As provide to employers and insurers regarding the ARPA requirements.

Is an individual eligible for COBRA premium assistance if they are covered by or eligible for coverage under another group health plan or Medicare?
No. An otherwise eligible AEI who is either covered by or eligible to enroll in another group health plan or Medicare will not qualify for COBRA premium assistance, even if such coverage or eligibility for coverage does not end the period of eligibility for COBRA continuation coverage. A person's failure to enroll in another available group health plan before April 1, 2021 does not make the person ineligible for COBRA premium assistance, unless the person continues to be or becomes eligible to enroll in the other group health plan on or after April 1, 2021.

These rules do not apply to AEIs with individual coverage from a state or federal Health Insurance Exchange. Such individuals may be eligible to elect COBRA continuation coverage and receive COBRA premium assistance. However, they may lose their premium tax credit for the exchange.

May an employer or insurer require individuals to verify their AEI status?
Yes. The Notice confirms that employers or insurers may request individuals to provide self-certification or attestation of their eligibility for COBRA premium assistance, including information on the AEI's eligibility for other qualifying group health plan coverage or Medicare. An employer or insurer is not required to obtain this verification in order to receive the COBRA premium tax credit, but if an employer or insurer does not receive either a self-certification or attestation regarding an individual's eligibility for COBRA premium assistance, the employer or insurer must have other documentation (such as internal records) to substantiate the individual's eligibility if they wish to claim the tax credit.

Our company offers retiree group health coverage. How does this affect an individual's eligibility for premium assistance?
If the retiree group health coverage is offered under the same group health plan as the employer's group health coverage for regular employees, then the offer of retiree coverage does not alter the individual's eligibility for COBRA premium assistance. If the retiree group health plan is a separate group health plan, the offer of coverage disqualifies the individual from premium assistance. However, under existing COBRA regulations, all health benefits provided by an employer constitute a single health plan unless it is clear from the plan documents that the benefits are provided under separate plans. In many cases, therefore, a retiree will be eligible for COBRA premium assistance even though they are eligible for retiree group health coverage from their former employer.

What types of reductions in hours will qualify someone for COBRA premium assistance?
Under the ARPA, any reduction in hours that results in a loss of group health coverage will qualify an individual as an AEI. The Notice confirms that this includes a voluntary reduction in hours, a reduction in hours due to a furlough, and a reduction in hours due to a lawful strike or employer-initiated lockout.

Does a resignation in lieu of termination qualify as a voluntary termination of employment thereby eliminating qualification for COBRA premium assistance?
No. The Notice clarifies that an involuntary termination of employment is a facts and circumstances analysis of whether the individual experiencing the event would have left employment on their own volition. More likely than not, a resignation in lieu of termination means that it was not the individual's true choice. The severance of employment was, for all intents and purposes, an involuntary termination, qualifying the individual for premium assistance.

Does involuntary termination include termination for cause or due to illness or disability?
Generally, yes. The Notice confirms that an employee who was terminated for cause, or due to illness or disability, is considered to have experienced an involuntary termination of employment. However, an employee who was terminated for gross misconduct is not eligible for the COBRA premium subsidy, because such an employee is not eligible for COBRA continuation coverage.

What other types of termination of employment are considered involuntary?
The Notice includes the following situations as an involuntary termination of employment: a resignation due to a material change in the geographic location of employment; an employee's participation in certain window programs, such as a program in which employees with impending terminations of employment are offered a severance arrangement to terminate within a specified period of time; a resignation due to a material negative change in the employment relationship that would amount to a constructive discharge; and an employer's decision not to renew an employee's contract (including for an employee whose employer is a staffing agency) if the employee was willing and able to continue the relationship.

An employee experienced an involuntary termination or reduction in hours prior to April 1, 2021. The individual has not yet elected COBRA coverage, but the deadline to elect COBRA coverage continues to be extended because of the IRS' emergency relief relating to COVID-19 (the "Emergency Relief Notices"). How do we handle their election for ARPA COBRA premium assistance and general COBRA coverage?

According to the IRS Notice, if and when a person elects ARPA COBRA premium assistance, the person must also choose whether he or she wants to elect COBRA coverage retroactive to the original qualification date. If the individual elects ARPA COBRA premium assistance coverage and declines retroactive coverage, their coverage begins as of April 1st. If the individual elects retroactive coverage, they may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021. However, premium payments may be still be extended if the extensions of timeframes applicable under the Emergency Relief Notices are still in effect.

The Notice also states that in an AEI elects COBRA coverage with COBRA premium assistance, but declines to elect retroactive COBRA coverage at that time, he or she may not later elect retroactive COBRA coverage. This is true even if the Emergency Relief Notices would have otherwise extended the individual's deadline to elect retroactive COBRA coverage beyond the election period for the COBRA premium assistance.

A former employee elected retroactive COBRA continuation coverage under IRS COVID-19 guidance, but still owes premiums for that coverage. Is the former employee still eligible for COBRA premium assistance?

Yes. If an individual elected retroactive COBRA coverage under IRS emergency relief related to COVID-19, the fact that the individual makes or owes premiums for the retroactive coverage does not make him or her ineligible for COBRA premium assistance. The individual might lose retroactive COBRA coverage for failure to pay premiums, but late or unpaid premiums for retroactive COBRA coverage will not affect an individual's eligibility for COBRA premium assistance.

How do I, as an employer, calculate the COBRA premium assistance for purposes of tax credits?

Employers may file for tax credits on Form 941 for the amount of the premium that would have been charged to an AEI in the absence of the premium assistance. For example, if an AEI would have ordinarily been required to pay $1,000 for COBRA continuation, that is the amount included in the tax credit filing. On the other hand, if the employer would have internally subsidized the COBRA continuation, covering 50% of the $1,000, then the employer would record $500 on Form 941 for that particular individual.

During the COBRA premium assistance period (April 1, 2021 – September 30, 2021), an employer that previously charged less than the maximum COBRA premium allowed may increase the COBRA premiums up to the maximum COBRA premium allowed during the premium assistance period. The premium assistance tax credit will apply to the increased premium amount.

Who qualifies for the premium assistance tax credit and how do I get it if my business is qualified?

The entity that would ordinarily receive the COBRA premium (the "premium payee") will file for the tax credit. The premium payee is:

1. the multiemployer plan;
2. the common law employer maintaining the plan that is (a) subject to Federal COBRA, or (b) under which some or all of the coverage is not provided by insurance (that is, a plan that is self-funded in whole or in part); or
3. the insurer providing the coverage.

The premium payee can include a governmental entity, including any State or political subdivision, any Indian tribal government, any agency or instrumentality of any of the foregoing, and any government instrumentality of the United States that is described in 501(c)(3).

A premium payee is entitled to the tax credit as soon as it receives the AEI's election of COBRA continuation coverage. For example, if an AEI elects COBRA premium assistance coverage as of June 1, 2021 for coverage dating back to April 1, 2021, the employer is entitled to credit for the premiums due back to April 1, 2021.

Qualified premium payees must report the credit on Form 941, Employer's Quarterly Federal Tax Return. A premium payee can claim the credit on Form 941 even if the payee does not have any employment tax liability. The relevant information required to claim the credit includes the number of individuals receiving COBRA premium assistance, the amount of premiums (both refundable and non-refundable) paid by the employer, and the necessary dates. Qualified employers can reduce the deposits of federal employment taxes or request an advance of the amount of the anticipated credit that exceeds the federal employment tax depositions available for reduction by filing Form 7200 in anticipation of receiving the tax credit.

May a premium payee keep the premium tax credit even if the individual who received the COBRA premium assistance failed to notify me that they were no longer eligible for the premium assistance?
Yes. Under the ARPA, AEIs who receive COBRA premium assistance are required to provide notice if they lose eligibility for the premium assistance due to becoming eligible for coverage under another group health plan or Medicare. However, unless the premium payee knew of the AEIs eligibility for such other coverage, the premium payee is still entitled to the tax credit for the COBRA premium assistance amounts.

Is the COBRA premium tax credit considered taxable income?
Yes. Under the ARPA, the gross income of any premium payee who received a COBRA premium tax credit is increased by the amount of the credit.

What must I keep records of to substantiate my calculations for the tax credit?
A premium payee claiming the tax credit must keep records that substantiate eligibility for the credit, including documentation demonstrating that individuals were eligible for the COBRA premium assistance. Failure to adequately substantiate the claim, upon IRS review, may be required to pay employment taxes that are due as a result of any improper claim for coverage.

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