

ARPA Premium Subsidy: Long-Awaited Details Finally Arrive

by Christopher S. Lockman on May 24, 2021

The IRS recently issued Notice 2021-31, which provides much sought-after detail regarding the contours and operation of the temporary premium subsidy for COBRA continuation coverage available through the American Rescue Plan Act of 2021 (ARPA).

As enacted on March 11, the basic mechanics of the COBRA premium subsidy under ARPA are as follows: “assistance eligible individuals” may receive a 100% COBRA premium subsidy between April 1, 2021 and September 30, 2021. The entity “to whom premiums are payable” (often, an employer plan sponsor) provides the subsidy by treating assistance eligible individuals as having paid the COBRA premiums due during the applicable period and will be entitled to a refundable tax credit to offset the cost of providing the subsidy. However, ARPA raises several questions beyond the basic mechanics. Who exactly are “assistance eligible individuals”? To what type of benefits does the premium subsidy apply? How does the Outbreak Period Extension Guidance apply to the premium subsidy deadlines? And how is the tax credit claimed? Below is a summary of the answers to these questions provided by the Notice.

Assistance Eligible Individuals

Individuals who lost group health insurance coverage due to a reduction in hours or “involuntary” termination of employment and who enroll in COBRA continuation coverage for some or all of the period between April 1, 2021 and September 30, 2021 are “assistance eligible individuals.” In addition, spouses or dependent children of a covered employee who lost coverage due to a reduction in hours or “involuntary” termination of employment will also be “assistance eligible individuals” provided they enroll in COBRA coverage for some or all of this period.

Involuntary termination:

Because ARPA does not define what constitutes an “involuntary” termination, many benefits professionals looked to IRS guidance (Notice 2009-27) issued with respect to the COBRA premium subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA). Fortunately, this guidance was largely reinforced by Notice 2021-31. Specifically, Notice 2021-31 confirms that an “involuntary” termination occurs when there is an “independent exercise of the unilateral authority of the employer to terminate the employment...” The Notice also confirms that whether a termination is considered “involuntary” is based on the facts and circumstances surrounding the termination. Accordingly, an involuntary termination may occur even if the termination is described as “voluntary” or a “retirement” but (1) the employee is willing and able to continue

performing services, (2) absent voluntary termination the employer would have terminated the employee, and (3) the employee knew that s/he would be terminated if they sought to continue employment. [Q/As-24, 25and 26]

Particularly relevant to organizations that utilize contract employees, as well as colleges and universities that employ term and adjunct professors, the Notice clarifies that an employer's decision not to renew an employment contract constitutes an involuntary termination unless "the parties understood at the time they entered into the expiring contract, and at all times when services were being performed, that the contract was for specified services over a set term and would not be renewed." [Q/A-34]

The Notice also acknowledges terminations that may be linked to the COVID-19 pandemic, providing that an employee who terminates employment because of concerns regarding workplace safety will generally not be treated as "involuntary" unless "the employee can demonstrate that the employer's actions (or inactions) resulted in a material negative change in the employment relationship analogous to a constructive discharge." The Notice clarifies that an employee's departure due to his or her personal circumstances (such as the employee's health or the health of a family member, or a school or daycare closure) will not constitute an "involuntary" termination but cautions that, depending on the facts and circumstances, the departure may constitute a reduction in hours that would render the employee an assistance eligible individual if the employee is capable of returning to work and the absence is intended to be temporary. [Q/A-30 and 31]

Losing eligibility for the subsidy:

ARPA provides that individuals who are eligible for other group health plan coverage or Medicare will not be entitled to the subsidy. The Notice reaffirms this limitation [Q/A-11] but recognizes an exception for individuals who are not yet permitted to enroll in other coverage (for example, during a plan waiting period or if the individual is outside an open enrollment period for a plan sponsored by a spouse's employer). [Q/A-9] The Notice also clarifies that an individual who experiences a reduction in hours or involuntary termination of employment following loss of coverage due to a different COBRA qualifying event (e.g., divorce) will not then become eligible for the COBRA premium subsidy. [Q/A-14]

Because loss of eligibility for the premium subsidy may involve circumstances unknown to an employer, the Notice provides that employers may require individuals to self-certify their eligibility for the subsidy and that employers may rely on the self-certification, absent actual knowledge that the certification is false. [Q/As-5 and 6] However, Notice 2021-31 also provides that, to the extent an employer relies on an individual's self-certification to substantiate eligibility for the premium assistance credit, the employer must retain a record of it. [Q/A-7]

Subsidy Eligible Coverage

Though COBRA generally applies to “group health plans,” many plan sponsors were uncertain as to whether the ARPA premium subsidy would apply to dental and vision plans as well as consumer-driven plans, such as HRAs. The Notice confirms that the ARPA premium subsidy applies to all group health plans (except for Health Flexible Spending Accounts (FSAs) funded by employee contributions), including limited-scope vision and dental plans. [Q/A-35] The Notice further clarifies that the ARPA premium subsidy applies to Health Reimbursement Arrangements (HRAs) and Individual Coverage HRAs (ICHHRAs) but not to Qualified Small Employer HRAs (QSEHRAs) which are exempt from federal COBRA requirements. [Q/As-37, 39, and 40] Assistance eligible individuals enrolled in retiree-only coverage will be eligible for the ARPA premium subsidy only if the retiree coverage is available under the same group health plan that covers active employees. [Q/A-36]

The Notice also provides guidance regarding what should be done if an employer no longer offers the group health plan coverage option in which a potential assistance eligible individual was enrolled while actively employed. The Notice states that the individual must be offered the opportunity to elect a coverage option that would be available to a similarly situated active employee and is most comparable to the option in which individual was formerly enrolled. The full amount of the premium for this similar coverage will be covered 100% by the subsidy regardless of whether the cost is more than for the previous coverage. [Q/A-42]

Application of Outbreak Period Relief Guidance

In response to the COVID-19 National Emergency, the Departments of Labor (DOL) and Treasury issued a joint notice in May 2020 and related emergency relief in February 2021 that extended certain HIPAA, COBRA, and claims procedure deadlines that apply to group health plans (the “Outbreak Period Relief”). The duration of the Outbreak Period Relief is determined on an individual basis and ends on the *earlier of*: (1) one year from the date the individual was first eligible for Outbreak Period Relief, or (2) 60 days after the (not yet) announced end of the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. The Notice provides helpful guidance regarding application of the Outbreak Period Relief guidance to the ARPA premium subsidy.

Confirming information provided by the DOL in Frequently Asked Questions regarding the ARPA premium subsidy, the Notice states that extended deadlines under the Outbreak Period Relief do not apply to the requirement that employers notify potential assistance eligible individuals of the COBRA premium subsidy by May 31, 2021, and do not extend the 60-day deadline for those individuals to elect COBRA continuation coverage after receiving the notice. [Q/As-56 and 57] The Notice also states that

potential assistance eligible individuals that have a right to elect retroactive COBRA continuation coverage under the Outbreak Period Relief will forfeit their right to retroactive coverage if they make a COBRA election during the 60-day ARPA election period that is not retroactive to the date of their qualifying event. [Q/A-59]

Potential assistance eligible individuals who are eligible for the Outbreak Period Relief and make a COBRA election retroactive to a date prior to April 1, 2021 may be required to pay COBRA premiums for the period prior to April 1, 2021 consistent with the Outbreak Period Relief. [Q/A-58] Individuals whose Outbreak Period Relief has expired (the relief is limited to a maximum of one year) and who fail to pay premiums due for months prior to April 1, 2021, may be treated as not electing COBRA continuation coverage until the first period of coverage beginning on or after April 1, 2021. [Q/A-58]

Claiming the Tax Credit

Perhaps the most eagerly anticipated portion of the guidance contained in Notice 2021-31 is the detailed information regarding how the entity “to whom premiums are payable” may claim its tax credit.

The Notice confirms that employers who sponsor either fully-insured or completely or partially self-insured group health plans subject to federal COBRA requirements is the entity claiming the tax credit [Q/As-60, 71 and 72]. Conversely, the insurance carrier is the entity “to whom premiums are payable” for fully-insured plans sponsored by small employers that are not subject to federal COBRA. [Q/A-62]

The Notice also confirms that the premium tax credit is refundable and may be made against the entity’s share of Medicare taxes assessed on a quarterly basis. The Notice specifies that the amount of the credit is equal to the full amount of premiums not paid by assistance eligible individuals, including the 2% maximum COBRA administrative fee. [Q/A-63].

The Notice instructs eligible entities to claim the credit by reporting both the nonrefundable and refundable portions and the number of individuals receiving COBRA premium assistance on the appropriate lines of its federal employment tax return (usually Form 941, Employer’s Quarterly Federal Tax Return). [Q/A-75] In addition, the Notice affirms that an employer may reduce its deposits of federal employment taxes up to the amount of the credit and request an advance of the amount of the anticipated credit that exceeds federal tax deposits available in anticipation of receiving the premium tax credit to which it is entitled. [Q/A-75 and 76] Employers and others claiming the premium tax credit must maintain records to substantiate their eligibility for the credit. [Q/A-84]

Conclusion

Notice 2021-31 provides helpful guidance to employers and others regarding the ARPA premium subsidy and companion tax credit for entities to whom COBRA premiums are typically paid. The above information presents only a non-comprehensive summary of the 86 Q/As contained in the Notice.

If you have questions regarding the ARPA premium subsidy or tax credits, please contact a member of Verrill's Employee Benefits & Executive Compensation Group.



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