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Employee Benefits & Executive Compensation ADVISORY ■

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IRS Provides 86 Answers to 86 Questions About the COBRA Subsidy

On May 18, 2021 the Internal Revenue Service (IRS) issued Notice 2021-31, providing 86 Q&As on the COBRA premium assistance subsidy under the American Rescue Plan Act of 2021 (ARPA). This guidance comes less than two weeks before the *May 31 deadline* to send the ARPA-required COBRA subsidy extended election notices. Notice 2021-31 is largely consistent with the guidance issued back in 2009 for the COBRA subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA) but with a few differences.

READERS TAKE NOTE: The deadline for issuing ARPA COBRA subsidy notices to assistance eligible individuals (AEIs) is May 31. Steps should be taken to ensure that notices are sent as required.

THE ARPA COBRA SUBSIDY

The ARPA COBRA subsidy applies to certain individuals (referred to as "assistance eligible individuals" or AEIs) whose COBRA qualifying event was an involuntary termination of employment or a reduction in hours of employment. This 100% COBRA subsidy is provided for the period April 1, 2021 to September 30, 2021. To be eligible for the COBRA subsidy, an AEI cannot be eligible for other group health plan coverage or Medicare. AEIs also include qualified beneficiaries who are the spouse or dependent child of the AEI employee who also lost coverage because of the AEI employee's involuntary termination of employment or reduction in hours. Generally, an employer advances the subsidy and then recoups that advance through tax credits against the employer's Medicare tax obligations.

Q&A HIGHLIGHTS

One of the most anticipated aspects of the guidance was how the IRS would define involuntary termination of employment and reduction in hours. The Notice largely mirrors the guidance under ARRA but with some nuances. The Notice provides that, with certain exceptions, an employee who terminates employment because of concerns about workplace safety (presumably including COVID-19) will be treated as having voluntarily terminated from employment and therefore is not an AEI eligible for the subsidy. The same is true for an employee who terminates employment because of a family member's health issues or a school or daycare closure because of COVID-19. If, however, an employee is allowed to voluntarily reduce his or her hours to take care of a family member or for childcare concerns (or for any other reason) and loses coverage because of the reduction in hours, the individual would be an AEI.

The IRS provided one surprise on how the 60-day "second bite" (extended election period) for subsidized COBRA coverage interacts with the COVID-19 Outbreak Period extension for electing unsubsidized COBRA coverage. An AEI electing subsidized COBRA coverage must also elect unsubsidized coverage for prior periods if the AEI desires that unsubsidized coverage. The AEI will lose the right to any unsubsidized coverage if the AEI fails to elect this coverage within the 60-day deadline for electing the subsidy. This is true even though the Outbreak Period for election for that unsubsidized coverage has not otherwise expired.

AEIs are ineligible for the subsidy if they are eligible for other group health plan coverage or Medicare. The IRS provides some helpful guidance on what it means to be "eligible" for other coverage but also provides some "traps" for eligibility due to extended HIPAA special enrollment opportunities under the Outbreak Period.

The IRS notes that employers that already subsidize COBRA coverage will not be eligible for the full Medicare tax credit to the extent of the subsidy. This is the same guidance as provided under ARRA, but the IRS provides some helpful Q&As on possibly ending the employer subsidy to take full advantage of the ARPA COBRA subsidy.

Q&A SUMMARY

The IRS divides its 86 Q&As into the following sections: (1) Eligibility for COBRA Premium Assistance; (2) Reduction in Hours; (3) Involuntary Termination of Employment; (4) Coverage Eligible for COBRA Premium Assistance; (5) Beginning of COBRA Premium Assistance Period; (6) End of COBRA Premium Assistance Period; (7) Extended Election Period; (8) Extensions Under the Emergency Relief Notices; (9) Payments to Insurers Under Federal COBRA; (10) Comparable State Continuation Coverage; (11) Calculation of COBRA Premium Assistance Credit; and (12) Claiming the COBRA Premium Assistance Credit.

1. Eligibility for COBRA Premium Assistance (Q&As 1–20)

AEI definition:

Q&As 1 and 2 provide the definition of an AEI as described above, clarifying that an individual whose termination of employment was for gross misconduct will not be an AEI.

Q&A 3 states that an individual can be an AEI more than once. For example, if an individual (1) loses coverage for a group health plan due to an involuntary termination of employment; (2) gains coverage under the group health plan of a spouse; and (3) loses that spousal coverage because of the spouse's involuntary termination of employment, that individual will be an AEI due to both losses of coverage.

AEI attestations

Q&As 4–7 provide critical guidance on use of AEI attestations to determine eligibility for the COBRA subsidy. Notably, employers can require the AEI attestation to establish an involuntary termination of employment or reduction in hours and that the AEI is not eligible for other disqualifying group health plan coverage. Further, employers may rely on the attestation unless they have actual knowledge that the individual is not eligible for a subsidy. If an employer does not use the attestation, however, it must keep documentation to substantiate that the individual was eligible for the subsidy. If an employer uses an AEI attestation, it must keep that document to substantiate eligibility for the Medicare tax credit.

Practice Pointer: The U.S. Department of Labor (DOL) issued model ARPA notices specifically contemplating the use of an AEI attestation on the form "Request for Treatment as an Assistance Eligible Individual." On that form, the AEI certifies both to an involuntary termination of employment (or reduction in hours) *and* that the AEI was not eligible for other disqualifying coverage. Many employers and COBRA administrators used this form or a variation. For those that did not, there very well may be other employer records that can be used to verify that the AEI experienced an involuntary termination of employment or a reduction in hours. However, an employer cannot generally determine whether an AEI is eligible for other disqualifying coverage without the AEI attestation. Yet the IRS indicates that an employer must still have this documentation. Therefore, collecting and retaining the attestation remains a critical part of the documentation needed to establish that the AEI is eligible for the subsidy so that the employer can claim the Medicare tax credit.

Other disqualifying coverage

Q&As 9–13: In this series of Q&As, the IRS emphasizes that it is simply *eligibility* for other group health plan coverage or Medicare and not enrollment that makes an AEI ineligible for the subsidy. An AEI, however, is not eligible for other coverage if the AEI is in a waiting period for that coverage. Similarly, if an AEI has missed open enrollment for coverage (for example, in a spouse's plan) and cannot enroll mid-year, the individual is not eligible for other group health plan coverage. If, however, open enrollment for that spouse's plan occurs during the subsidy coverage period, with a coverage effective date during the subsidy period, then that other coverage disqualifies the AEI from the COBRA subsidy whether or not the AEI enrolls in that coverage.

Remember, however, that eligibility for "excepted benefits" such as stand-alone dental or vision coverage or a health FSA is not disqualifying coverage.

In an interesting twist, the Outbreak Period extends the period that an individual can enroll in an employer group health plan due to HIPAA special enrollment rights. An individual with HIPAA special enrollment rights must be allowed to enroll in a group health plan even outside an open enrollment period. Under the Outbreak Period guidance, the period to assert HIPAA special enrollment rights is extended until the earlier of 31 days after the end of the Outbreak Period (which is ongoing) or one year and 31 days after the HIPAA special enrollment event. Thus, an AEI with ongoing HIPAA special enrollment rights will be eligible for group health plan coverage and ineligible for the subsidy. **(Q&A 9, Example 3)**

Practice Pointer: The rules regarding eligibility for other disqualifying coverage are complex as illustrated by the HIPAA special enrollment rights and the Outbreak Period. Other complications abound. For example, if an individual cannot enroll in a spouse's plan on a pre-tax basis mid-year but could enroll on a post-tax basis, that individual is apparently not eligible for a subsidy. Also, because of the COVID-19 pandemic, the IRS provided guidance in Notice 2021-15 that permitted an employer to allow mid-year elections into group health plans that ordinarily would not be allowed under the cafeteria plan rules. AEIs may be unaware of whether a spouse's plan has adopted such a provision and that they are, in fact, eligible for the spouse's group health plan. Further, most AEIs who are 65 or older can enroll in Part A of Medicare *at any time* even outside the special enrollment periods that are applicable to Medicare Part B. So, whether enrolled in Part A or not, it would seem that an individual 65 or older would be ineligible for the subsidy. As mentioned above, an employer can rely on an AEI's attestation that the AEI is not eligible for other coverage. Given all the complexities surrounding what it means to be "eligible" for other coverage, this is all the more reason to use the attestation.

Second qualifying events and disability extensions

In a break from prior ARRA guidance, in **Q&A 17**, the IRS provides that if the original qualifying event was an involuntary termination of employment or a reduction in hours and the individual's 18 months for that coverage ended before April 1, 2021, then the individual may still be eligible for a subsidy if still enrollded due to a disability extension or a second qualifying event extends the period of COBRA coverage into the subsidy period. The second qualifying event would only extend the coverage period of a spouse or dependent. The same rule is true for extensions under a state mini-COBRA that extends beyond 18 months.

Practice Pointer: Generally, employers and COBRA administrators "looked back" to October 2019 (18 months before April 2021) to notify potential AEIs. This guidance will likely require a "look back" much further for those COBRA qualified beneficiaries who have experienced a disability extension or a second qualifying event and elected COBRA. The effect of this expansion of who may be an AEI is likely limited because the individual with a disability extension or a second qualifying event must have "remained on COBRA continuation coverage" to be eligible for this extension and the subsidy.

2. Reduction in Hours (Q&As 21–23)

In these Q&As, the IRS confirms that a reduction in hours can be voluntary if it triggers a loss of coverage. Also, a furlough where there is a complete reduction in hours but the employment relationship continues constitutes a reduction in hours, as does a "lawful strike" as long as the employee and employer intend to continue the employment relationship during the strike. The reduction in hours must, however, have resulted in a loss of coverage for the event to trigger COBRA coverage (and thus ARPA eligibility).

3. Involuntary Termination of Employment (Q&As 24–34)

The IRS maintained the general definition of involuntary termination of employment from ARRA, which is the "severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services."

As under ARRA, the IRS has specifically articulated that a "good reason" resignation would constitute an involuntary termination of employment if it is due to an "employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge." **(Q&A 24)**

In a somewhat ambiguous Q&A **(Q&A 25)**, the IRS states that an involuntary termination of employment occurs when the employer takes action to terminate the individual's employment while an employee is away form work due to illness or disability if "there is a reasonable expectation that the employee will return to work after the illness or disability has subsided."

Practice Pointer: Of course it is often unknown whether an employee will ever return from long-term disability. Our interpretation is that the inquiry should be whether the employee would return *if* he or she recovered from the disability. If so, any termination of employment will be considered involuntary. If, however, an employee informs the employer that the employee will never return or if the employee recovers and takes other employment, then the formal termination of that employee will be considered voluntary rather than involuntary.

The Notice provides that, with certain exceptions, an employee who terminates employment because of concerns about workplace safety (presumably including COVID-19) will be treated as having voluntarily terminated from employment and therefore is not an AEI eligible for the subsidy **(Q&A 30)**. The termination, however, will be considered involuntary if 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."

A termination of employment will also be voluntary for an employee who leaves employment because of a family member's health or a school or daycare closure because of COVIlD-19 **(Q&A 31)**. On the other hand, if an employee is allowed to voluntarily reduce his or her hours to take care of a family member or because of childcare issues and loses coverage because of the reduction in hours, the individual would be an AEI.

Among the other guidance on involuntary termination of employment:

- Death is not an involuntary termination of employment. **(Q&A 33)**
- Retirement is not an involuntary termination of employment unless:
  - Absent retirement, the employer would have terminated the employee.
  - The employee was willing and able to continue employment.
  - The employee had knowledge that he/she would be terminated absent the retirement. **(Q&A 26)**
- An involuntary termination includes an employee who terminates employment due to a material reduction in the employee's hours (good reason termination) even if the reduction in hours did not cause an initial loss in coverage. **(Q&A 32)**
- An involuntary termination includes a resignation due to a material change in location of employment. **(Q&A 28)**
- Participation in a "window program" will be an involuntary termination of employment. **(Q&A 29)**
- An employer's decision not to renew an employee's contract is an involuntary termination, unless the parties understood at the time they entered into the contract that the contract was for specified services and would not be renewed. **(Q&A 34)**

4. Coverage Eligible for COBRA Premium Assistance (Q&As 35–42)

This series of Q&As confirms that the subsidy is available for all group health plans except health FSAs and includes dental and vision coverage and HRAs (including ICHRAs). QSEHRAs are not included because QSEHRAs are not group health plans. **(Q&As 35, 39, and 40)**

AEIs enrolled in retiree-only coverage will be eligible for the subsidy only if the retiree coverage is available under the same group health plan that covers active employees. **(Q&A 36)**

5. Beginning of COBRA Premium Assistance Period (Q&As 43–46)

Q&A 44 clarifies that even though an AEI might be eligible for the subsidy as of April 1, 2021, that AEI can elect subsidized COBRA coverage at a later date during the subsidy period (this Q&A was designed to facilitate moving off of individual coverage in a Marketplace plan and the way the ACA premium subsidies operate for Marketplace plans).

6. End of COBRA Premium Assistance Period (Q&As 47–50)

Q&A 50 confirms that the death of an AEI does not affect the entitlement of any spouse or dependent children who are also AEI qualified beneficiaries (and in fact may be a second qualifying event extending eligibility for that spouse and dependent children for the COBRA subsidy).

7. Extended Election Period (Q&As 51–55)

Q&A 51 is similar to prior DOL guidance providing that if an AEI had family coverage at the time of the involuntary termination of employment or reduction in hours but elects self-only COBRA, the other family members are eligible for the "second bite" at COBRA for subsidized coverage. Similarly, **Q&A 55** provides that if an AEI at the time of involuntary termination of employment elected only some of the benefit options available but not others, then that AEI has a second bite for those other benefit options for subsidized coverage. For example, if an AEI had vision, dental, and medical coverage at the time of the involuntary termination of employment or reduction in hours but elected only medical coverage for COBRA, that AEI can now also election vision and dental for purposes of the subsidy in addition to medical. These contingencies should be addressed in any ARPA election forms.

Q&A 52 mirrors the DOL model notices and FAQs providing that the second bite at COBRA (extended election period) is not available under state mini-COBRA laws unless the state law provides for a similar extended election period.

8. Extensions Under the Emergency Relief Notices (Q&As 56–59)

In these Q&As, the IRS provided important guidance on the interaction of the 60-day extended election / second bite period under the ARPA COBRA subsidy and elections under the Outbreak Period.

First, **Q&A 57** is similar to prior DOL guidance stating that that the Outbreak Period extensions do not apply to the 60-day period to elect subsidized COBRA coverage under the second bite opportunity.

Q&As 56, 58, and 59 confirm that an AEI can elect just subsidized COBRA coverage or elect subsidized COBRA coverage *and* unsubsidized coverage for prior periods pursuant to the Outbreak Period guidance. However, if within the 60-day ARPA extended election period for subsidized coverage *the AEI elects the subsidy but does not elect retroactive coverage*, the AEI will forfeit the right to retroactive coverage. This is true even if the election would not have otherwise been required under the prior Outbreak Period guidance.

Once retroactive coverage is elected, however, payment for that retroactive coverage will be subject to the Outbreak Period guidance. Premium payments for retroactive coverage will not be due until the Outbreak Period ends (or one year after payment would ordinarily have been due if earlier). If the AEI then fails to pay those premiums, the employer can retroactively cancel COBRA coverage for periods for which the premiums are not paid (but, of course, not the subsidized period). Also under the Outbreak Period guidance, coverage can be suspended for the retroactive period until COBRA premiums are actually made.

Practice Pointer: This one aspect of the Notice caught most by surprise and appears contrary to the prior Outbreak Period guidance. Indeed, it seems contrary to a sentence in the DOL model notices which states: "The election period for COBRA continuation coverage with premium assistance does not cut off an individual's preexisting right to elect COBRA continuation coverage, including under the extended timeframes provided by the Joint Notice and EBSA Disaster Relief Notice 2021-01." It is likely this has not been communicated since most extended election notices were formalized or actually mailed before the IRS provided this guidance. On the other hand, if this guidance is ignored and COBRA elections are allowed pursuant to prior understandings of the Outbreak Period guidance, then there could be issues with stop-loss carriers for self-funded plans or carriers for fully insured plans.

9. Comparable State Continuation Coverage (Q&As 61–62)

Under state mini-COBRAs, even if an employer pays the subsidized premium directly to the insurer, the employer still cannot take the Medicare tax credit. This is one of the limited instances where the carrier takes the tax credit. **(Q&A 62)**

10. Calculation of the COBRA Premium Assistance (Medicare Tax) Credit (Q&As 63–70)

Q&As 64–67 provide guidance on how the ARPA COBRA subsidy interacts with employers that are already providing a COBRA subsidy, and **Q&A 64** provides four different examples of this interaction. Consistent with ARRA guidance, if an employer provides a "true" subsidy (in other words, not the ARPA subsidy), then the amount of the Medicare tax credit is only the amount the AEI would be charged without the ARPA subsidy. For example, if an employer otherwise charges COBRA beneficiaries 50% of the $600 maximum COBRA premium, the AEI would only be charged $300 and the employer could only take a $300 tax credit. Continuing with this example, if the employer subsidy ends and a COBRA beneficiary is otherwise required to pay $600, then an employer's Medicare tax credit for an AEI would be $600. In **Q&A 66**, the IRS provides an example where the maximum COBRA premium is $1,000, but COBRA beneficiaries are only charged $400. The employer increases the COBRA premium obligation to $1,000 but provides AEIs with a $600 taxable severance payment. The $600 is not treated as an employer-provided COBRA subsidy, and the employer can take the full $1,000 Medicare tax credit.

> **Practice Pointer:** Employers will want to carefully examine any existing "true" employer-provided COBRA subsidy to see whether that subsidy can be ended to take full advantage of the ARPA COBRA subsidy. It appears that employers can offer taxable incentives for an AEI to forgo any subsidy provided in a severance agreement or severance plan in order to take advantage of the ARPA COBRA subsidy.

The Notice also makes clear that (other than a newborn or adopted children) AEIs only include individuals who were covered by a plan at the time of the involuntary termination of employment or reduction in hours. For example, if an AEI had self-only coverage at the time of the involuntary termination of employment or reduction in hours but subsequently added a spouse or dependent children during a plan's open enrollment, neither that spouse nor dependent child would be AEIs **(Q&A 68, Example 3)**. While no additional family members can be added at open enrollment for purposes of the subsidy, new benefits can be elected and they will count for the subsidy. As another example, if an AEI had only vision coverage immediately before an involuntary termination of employment or reduction in hours, that AEI could only elect vision coverage for COBRA. But if there is an intervening open enrollment when the AEI elects group medical and dental as well, then that group medical and dental coverage (in addition to vision) will be eligible for the subsidy. **(Q&A 69)**

11. Claiming the COBRA Premium Assistance (Medicare Tax) Credit (Q&As 71–86)

In **Q&A 75**, the IRS provides the methods of taking the Medicare tax credit either on the quarterly Form 941 employment tax return or an advance of the credit using Form 7200. IRS Notice 2021-24 provides more detail. If an individual is treated as an AEI eligible for the subsidy but that individual fails to inform the plan of other disqualifying coverage, then the employer will not have to refund any Medicare tax credit it has taken for that individual. **(Q&A 78)**

In **Q&A 79**, the IRS repeats the ARPA statutory rule that the Medicare tax credit is generally included in the gross income of the employer. Placing timing issues aside, this inclusion of income should not have any adverse tax effects on an employer because it should be able to deduct the payments that the credit is intended to reimburse (for example, the premium payments to the insurer in the case of a fully insured plan or the actual payment of benefits to the AEI in the case of a self-funded plan).

For a plan covered by federal COBRA (other than a collectively bargained multiemployer plan), the employer is the entity that takes the Medicare tax credit. **Q&A 81** clarifies that this is the general rule even if an employer uses a "third-party payer" such as a reporting agent, payroll service provider, professional employer organization, certified

professional employer organization, or § 3504 agent to report and pay its federal employment taxes. **Q&A 82** contains an exception to this rule if the third-party payer meets the following three conditions: (1) it maintains the group health plan; (2) it is considered the sponsor of the group health plan and is subject to the applicable DOL COBRA guidance, including providing the COBRA election notices to qualified beneficiaries; and (3) it would have received the COBRA premium payments directly from AEIs if not for the COBRA subsidy. In that limited instance, the third-party payer will be entitled to the Medicare tax credit.

Practice Pointer: The rules regarding third-party payers can be complex. **Q&A 81** contains even more guidance on the methods that third-party payers should use to claim the credit on behalf of their clients. The exception in **Q&A 82** is narrow, but we believe that some multiple employer welfare arrangements, including association health plans, may be able to use the **Q&A 82** exception in certain instances.

PRIMARY EMPLOYER TAKEAWAYS

- The deadline for issuing ARPA COBRA subsidy notices to AEIs is May 31. Steps should be taken to ensure that Notices are sent as required.
- Ensure that a process is in place to collect (and retain) AEI election (and certification) forms to support claimed Medicare tax credits.
- Use the Q&As to help you identify when there has been an involuntary termination of employment or a reduction in hours (whether voluntary or involuntary).
- It is important to analyze whether a dependent or spouse is eligible for the subsidy on a case-by-case basis.
- A spouse or dependent who was covered under a plan at the time of an involuntary termination of employment or reduction in hours is going to be an AEI even if the employee elected self-only COBRA coverage.
  - On the other hand, a spouse or dependent who was not covered at the time of the involuntary termination of employment or reduction in hours but is added during open enrollment will not be an AEI eligible for the subsidy.
- A spouse or dependent whose initial qualifying event was a death, divorce, or dependent aging out will not be an AEI.
  - On the other hand, if the initial qualifying event was an involuntary termination of employment or reduction in hours and the second qualifying event was a death, divorce, or dependent aging out, then the spouse or dependent may be an AEI.
- Review any employer severance plan or severance agreements where a "true" employer subsidy is being offered to AEIs and see if that severance plan or severance agreement can be modified to take full advantage of the ARPA COBRA subsidy. Modifications could include taxable payments to AEIs to incentivize them into waiving any previous contractual promise for the employer subsidy.
- Understand how the Outbreak Period interacts with the 60-day extended election period (second bite) and make sure that AEIs know that if they make a subsidy election without making a retroactive election under the Outbreak Period for unsubsidized COBRA coverage, they will lose the right to unsubsidized coverage.
- Review the process for claiming the Medicare tax credit on Form 941 or 7200 and make sure document retention systems are in place to justify the credit in the case of audit. Use of an AEI attestation form is a best practice. It will be difficult if not impossible to prove that an AEI was not eligible for other disqualifying coverage without it.

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