

### **IRS Publishes Detailed Guidance Relating to ARPA COBRA Premium Assistance**

On May 18, 2021, the Internal Revenue Service ("IRS") published Notice 2021-31 (the "IRS Notice") containing detailed guidance relating to premium assistance for COBRA benefits under the American Rescue Plan Act of 2021 ("ARPA"). The guidance provides much needed clarification on a number of practical questions for employers that arise in implementation of ARPA COBRA subsidies, which may be applicable the period from April 1, 2021 to September 30, 2021. A summary of the ARPA provisions and prior guidance can be found in our prior alerts (available [here](#) and [here](#)).

We summarize in this alert, certain of the clarifications contained in the IRS Notice.

#### **Clarifications Regarding Eligibility for Premium Assistance**

- Assistance eligible individuals may receive COBRA premium assistance under ARPA for electing medical coverage, as well as dental-only coverage and vision-only coverage, during the relevant ARPA assistance period (*i.e.*, April 1, 2021 to September 30, 2021).
- COBRA premium assistance is also available for continuation coverage under a health reimbursement arrangement (HRA).<sup>1</sup>
- COBRA premium assistance applies to assistance eligible individuals enrolled in continuation health coverage under State law requirements that provide for coverage comparable to COBRA continuation coverage, so long as the individual is a federal COBRA qualified beneficiary.<sup>2</sup> However, there is no extended election period for individuals who are eligible only for continuation coverage under State programs.
- COBRA premium assistance also applies to assistance eligible individuals who have elected and remained on COBRA continuation coverage for an extended period (*i.e.*, beyond the original 18-month federal COBRA period) due to a disability determination, second qualifying event, or an extension under State mini-COBRA laws, to the extent those additional periods of coverage fall between April 1, 2021 and September 30, 2021.
- No COBRA qualifying events other than a reduction in hours or involuntary termination of employment qualify for COBRA premium assistance under ARPA. An individual would also not be eligible for premium assistance if a later reduction in hours or involuntary termination followed an earlier qualifying event (such as divorce), because the later event does not cause a loss of coverage for the individual.
- An individual who is eligible for coverage under any group health plan (such as another employer's plan or a spouse's plan) or Medicare during the ARPA premium assistance period is not eligible for the COBRA premium assistance under ARPA.

<sup>1</sup> This includes an individual coverage HRA (*i.e.*, an HRA integrated with individual health insurance coverage), but the COBRA premium assistance only applies to the individual coverage HRA and not the underlying individual health insurance coverage. However, the COBRA premium assistance is not available for a health flexible spending account (FSA) provided through a Section 125 cafeteria plan paid for with salary reduction amounts.

<sup>2</sup> This means that domestic partners (who are not qualified beneficiaries under federal COBRA rules) would not be eligible for the COBRA premium assistance. The IRS Notice also provides guidance on how the premium assistance credit would be allocated where the coverage is provided to both assistance eligible individuals and other non-eligible individuals (*e.g.* under family coverage) (see Q&A 68 of the IRS Notice).

- However, if an individual was eligible for other group health coverage before April 1, 2021, but on and after April 1, 2021 is not permitted to enroll in the plan (e.g., due to a waiting period, or because the individual declined enrollment during a prior open enrollment window and no opportunity to enroll exists during the ARPA premium assistance period), that individual could be eligible for COBRA premium assistance until they are permitted to enroll in that other group health plan.
- If an individual who is receiving premium assistance becomes eligible for or to enroll in any group health plan or Medicare during the ARPA premium assistance period, the premium assistance period ends (whether or not the individual actually enrolls in such other group health coverage or Medicare).
- In addition, eligibility for coverage under an HRA (that is not a health FSA) will end the period of COBRA premium assistance under ARPA in the same manner as eligibility for coverage under any other group health plan.
- An individual is not eligible for the ARPA COBRA premium assistance (and the employer is not eligible for the corresponding tax credit) if an individual loses coverage under a plan that is not subject to federal or state COBRA continuation coverage requirements (for example, certain small employer plans and self-insured church plans) and is offered continuation coverage on a voluntary basis by the employer.
- Employers may require individuals to self-certify or attest regarding their eligibility status with respect to (i) whether they incurred a reduction in hours or involuntary termination and (ii) whether they have other disqualifying group health plan coverage or Medicare. Employers may rely on these attestations for purposes of substantiating eligibility for tax credits relating to providing COBRA premium assistance, unless the employer has actual knowledge that the individual's attestation is incorrect. Employers should retain records of the forms under which individuals self-certify or attest to their status as assistance eligible individuals.

### **Reduction in Hours and Involuntary Termination of Employment**

- For purposes of determining who is an assistance eligible individual, a reduction in hours includes an employee's voluntary reduction in hours.
- An involuntary termination of employment means a 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. The determination of whether a termination is involuntary is based on the facts and circumstances.
  - An involuntary termination of employment includes an employer taking action to terminate the employment of an individual who is absent from work due to illness or disability, if there would otherwise be a reasonable expectation that the employee will return to work after the illness or disability has subsided.
  - An involuntary termination includes an involuntary termination for cause. However, if the termination of employment is due to the gross misconduct of the employee, the individual would not be eligible for COBRA continuation coverage (and therefore would not be an assistance eligible individual).
  - An involuntary termination of employment includes a resignation due to a material change in the geographic location of the employee or other material negative change in the employment relationship analogous to a constructive discharge (e.g., what is commonly referred to as "good reason" resignation events).
  - However, an employee's resignation due to general concerns about workplace safety is not treated as an involuntary termination of employment, nor is an employee's resignation because a child is unable to attend school or because another childcare facility is closed due to the COVID-19 national emergency.

- An involuntary termination of employment includes participation by an employee in certain window programs (e.g., voluntary separation programs or voluntary retirement programs) under which employees are offered a severance package to terminate employment within a specified period of time.<sup>3</sup>

### **Clarifications Regarding Beginning of COBRA Premium Assistance Period**

- COBRA premium assistance is available to eligible individuals as of the first applicable period of coverage beginning on or after April 1, 2021 (with periods of coverage defined as a period of a month or less with respect to which premiums are normally charged).
- Individuals eligible for COBRA premium assistance are not required to begin coverage as of the first period of coverage beginning on or after April 1, 2021, but may waive COBRA continuation for any period prior to electing COBRA premium assistance, including periods prior to April 1, 2021.
- If an employer experiences a reduction in its number of employees and is no longer subject to Federal COBRA in 2021, the employer must still provide the extended ARPA election period to those individuals who were eligible for the program at the time of the individual's qualifying event.
- Individuals eligible for COBRA premium assistance for the period between April 1, 2021 and September 30, 2021 may elect COBRA continuation after September 30, 2021 provided the election is made within the applicable 60-day election period (i.e. within 60 days of being provided with the general notice of the qualifying event or the ARPA extended election notice (if the qualifying event occurred prior to April 1, 2021)).

### **End of COBRA Premium Assistance Period**

- If a COBRA premium assistance eligible individual's COBRA eligibility period extends beyond the last period of the subsidy that includes September 30, 2021, COBRA continuation coverage automatically continues, with payment for the first period of coverage due pursuant to the terms of the applicable plan or coverage (taking into account the extensions of certain timeframes pursuant to prior guidance<sup>4</sup> discussed [here](#), the "Emergency Relief Notices").
- The death of an individual who was eligible for COBRA premium assistance does not end the eligibility of such individual's qualified beneficiary spouse and dependent children for premium assistance (if they had otherwise been eligible for such premium assistance).

### **Extended Election Period**

- Qualified beneficiaries who received COBRA notices prior to April 1, 2021 and are eligible for the ARPA extended election period may elect COBRA continuation with COBRA premium assistance for periods beginning on or after April 1, 2021. For individuals who elect COBRA premium assistance under ARPA, to the extent still otherwise available, they may also elect or decline COBRA continuation coverage for any periods beginning prior to April 1, 2021 for which they would be eligible within 60 days from receipt of the ARPA extended election period notice.<sup>5</sup>
- For individuals who elect COBRA premium assistance under ARPA, the extended timeframes under the Emergency Relief Notices do not apply to notices that are required to be provided under ARPA (with initial

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<sup>3</sup> The IRS Notice defines a window program by reference to Treasury Regulation 31.3121(v)(2)-1(b)(4)(v), which generally defines a "window benefit" as an early retirement benefit, retirement-type subsidy, social security supplement, or other form of benefit made available by an employer for a limited period of time (no greater than one year) to employees who terminate employment during that period or to employees who terminate employment during that period under specified circumstances; provided that the employer offering the window benefit does not have a pattern of repeatedly providing for similar benefits in similar situations for substantially consecutive, limited periods of time.

<sup>4</sup> Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (Joint Notice) (85 FR 26351, published May 4, 2020) and EBSA Disaster Relief Notice 2021-01 (February 26, 2021).

<sup>5</sup> This guidance appears to limit the longer election period for certain retroactive elections otherwise provided under the Emergency Relief Notices.

notices required by May 31, 2021) or to the ARPA extended period to elect COBRA continuation (60 days after the additional election notice is provided).

- An individual who is eligible for COBRA premium assistance and elects COBRA continuation and COBRA premium assistance but does not elect such coverage retroactively to a date of the initial qualifying event may not elect coverage extending retroactively to such earlier date after the special ARPA-related 60-day election period has ended.<sup>5</sup>

### **Calculation of, and Eligibility for, the Amount of Premium Assistance Credit and its Inclusion in Income**

- The premium assistance credit may be claimed by:
  - The multiemployer plan, if the plan is a group health plan
  - The common law employer if the plan is a group health plan which is not a multiemployer plan and is subject to Federal COBRA or if it is wholly or partially self-funded<sup>6</sup>
  - The insurer providing coverage if the group health plan is not covered above.<sup>7</sup>
- If an employer subsidizes the cost of COBRA premiums for individuals who are similarly situated to those who are eligible for COBRA premium assistance,<sup>8</sup> the amount of the COBRA premium assistance tax credit that the employer can claim is limited to the premium that the employer would have been charged to an assistance eligible individual absent the premium assistance (*i.e.*, the employer cannot claim a tax credit on any amount of subsidy that the employer would have otherwise provided in the normal course to the assistance eligible individual).
- Individuals who have severance arrangements with employers that provide for employer-paid COBRA premiums are not eligible for COBRA premium assistance during the period in which they are not required to pay premiums pursuant to the severance arrangement (because their premium is zero), therefore no COBRA premium assistance tax credit is available to the employer for that period.
- If a plan that previously charged less than the maximum allowable COBRA continuation premium increases the premium for similarly situated covered employees (whether or not such employees are assistance eligible individuals) and beneficiaries, COBRA premium assistance can apply to the increased amount. The result is the same even if after such increase in COBRA premiums, the employer pays a separate taxable payment to the assistance eligible individuals.
- The premium assistance credit is included in gross income of the employer or insurer receiving the credit (as applicable) in the year which includes the last day of a quarter with respect to which the credit is allowed.
- The IRS Notice also contains a set of detailed FAQs relating to how employers may claim the premium assistance tax credit.

Note that the summary contained in this alert is not intended to be a complete discussion or list of all of the Q&A guidance in the IRS Notice.

The IRS Notice provides a number of welcome clarifications on how the COBRA premium assistance should operate in practice. However, the Q&As in the IRS Notice do not address every situation that may arise, and certain interpretive issues remain.

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<sup>6</sup> This assumes the employer pays the COBRA continuation premiums to the insurer and properly claims the credit.

<sup>7</sup> This would include fully insured plans subject only to State continuation coverage mandates, not Federal.

<sup>8</sup> It appears that whether or not individuals are similarly situated for purposes of receiving an employer COBRA subsidy in the normal course is a fact specific inquiry.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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