



Review of Notice 2021-31

On Tuesday May 19, IRS released Notice 2021-31. This notice provides a series of questions and answers to address many issues that have arisen with respect to COBRA premium assistance available for COBRA continuation coverage under the American Rescue Plan Act (ARP). Generally, the questions and answers apply for purposes of all COBRA continuation coverage requirements under the ARP, that is, both Federal COBRA and comparable State mini-COBRA requirements. If a question or answer or a particular part of an answer is applicable only to Federal COBRA, that discussion refers specifically to Federal COBRA. COBRA premium assistance requirements apply to the employer or plan sponsor, group health plan, or issuer, depending on the facts and circumstances.

The following discussion reviews the important answers to the questions.

A. ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE

1. Assistance Eligible Individuals includes spouse and other dependents: An Assistance Eligible Individual includes qualified beneficiaries who are the spouse or dependent child of the employee who had the reduction in hours or involuntary termination of employment resulting in a loss of coverage, as well as the employee, if that reduction in hours or involuntary termination of employment caused the qualified beneficiary to lose coverage and the other requirements are satisfied.

2. The Requirements to be considered a Qualified Beneficiary: In order to be a qualified beneficiary who is eligible to become an Assistance Eligible Individual, an individual must (1) be covered under the group health plan on the day before the reduction in hours or involuntary termination of the covered employee's employment, and (2) lose eligibility for the coverage due to the reduction in hours or involuntary termination of the covered employee's employment. An individual who loses group health coverage in connection with the termination of a covered employee's employment by reason of the employee's gross misconduct is not a qualified beneficiary and, thus, cannot be an Assistance Eligible Individual.

3. An individual can be an Assistance Eligible Individual many times: An individual who becomes a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment, and who otherwise meets the requirements to be an Assistance Eligible Individual, is treated as an Assistance Eligible Individual regardless of whether the individual was also treated as an Assistance Eligible Individual at an earlier date.



Review of Notice 221-31

4. The First qualifying event must a reduction of hours or involuntary termination to qualify: Qualifying events other than a reduction in hours or an involuntary termination of employment, such as divorce or a covered dependent child ceasing to be a dependent child under the generally applicable terms of the plan (such as loss of dependent status due to aging out of eligibility), are not events qualifying an individual for COBRA premium assistance.

5. When the COBRA premium assistance ends: COBRA premium assistance is available to a potential Assistance Eligible Individual until the individual is permitted to enroll in coverage under any other group health plan (including during a waiting period for any other plan).

6. Enrollment in Coverage before electing COBRA does not end COBRA premium assistance eligibility: Enrollment in other group health plan coverage before electing COBRA continuation coverage does not end the period of eligibility for COBRA continuation coverage. If the individual is no longer covered by (or eligible to enroll in) the other group health plan coverage as of April 1, 2021, that prior coverage by a group health plan does not disqualify the individual from COBRA premium assistance. However, beginning on April 1, 2021, coverage by (or eligibility to enroll in) another group health plan would disqualify the individual from COBRA premium assistance, even though it does not end the period of eligibility for COBRA continuation coverage.

7. The loss of coverage must result from a reduction of hours or involuntary termination to be eligible: If COBRA continuation coverage is based on a qualifying event other than a reduction in hours or involuntary termination of employment, the later reduction in hours or involuntary termination of employment of the employee does not cause a loss of coverage, and the qualified beneficiary therefore does not become a potential Assistance Eligible Individual.

8. A second qualifying event can extend COBRA coverage: If the original qualifying event was a reduction in hours or an involuntary termination of employment, COBRA premium assistance is available to individuals who have elected and remained on COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under State mini-COBRA, to the extent the additional periods of coverage fall between April 1, 2021, and September 30, 2021.



Review of Notice 221-31

B. REDUCTION IN HOURS

1. Reduction of hours can be voluntary or involuntary: An employee's reduction in hours would cause the qualified beneficiary to be a potential Assistance Eligible Individual regardless of whether the reduction in hours is voluntary or involuntary.

2. Reduction of can include work stoppage: A reduction in hours includes a work stoppage, either as the result of a lawful strike initiated by employees or their representatives or a lockout initiated by the employer, as long as at the time the work stoppage or the lawful strike commences the employer and employee intend to maintain the employment relationship.

C. INVOLUNTARY TERMINATION OF EMPLOYMENT

1. The termination must result from actions of the employer: 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. In addition, an employee-initiated termination of employment constitutes an involuntary termination of employment for purposes of COBRA premium assistance if the termination of employment constitutes a termination for good reason due to employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge.

2. The determination of involuntary termination is based on the facts and circumstances: The determination of whether a termination is involuntary is based on the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that the employee was willing and able to continue performing services, so that, absent the voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.



Review of Notice 221-31

3. Involuntary termination occurs when the employer takes action to terminate the employee:

Involuntary termination of employment occurs when the employer takes action to terminate the individual's employment, if before the action there is a reasonable expectation that the employee will return to work after the illness or disability has subsided. However, mere absence from work due to illness or disability before the employer has taken action to end the individual's employment is not an involuntary termination of employment. Whether the absence from work is a reduction in hours potentially resulting in COBRA continuation coverage depends on whether the absence from work results in a loss of coverage.

4. Certain severance window programs can qualify: An involuntary termination of employment includes participation in certain severance window programs.

5. Certain situations can be treated as a constructive discharge: In general, an employee's termination of employment due to general concerns about workplace safety is not treated as an involuntary termination of employment. However, a termination of employment would be 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 departure due to the personal circumstances of the employee unrelated to an action or inaction of the employer, such as a health condition of the employee or a family member, inability to locate daycare, or other similar issues, generally will not rise to the level of being analogous to a constructive discharge absent the employer's failure to either take a required action or provide a reasonable accommodation.

6. Termination of employment following reduction of hours can be treated as involuntary:

For purposes of COBRA premium assistance, an employee-initiated termination of employment in response to an involuntary material reduction in hours is treated as a termination for good reason. Thus, an employee-initiated termination of employment due to an involuntary material reduction in hours would be an involuntary termination of employment for purposes of COBRA premium assistance.



Review of Notice 221-31

7. Failure to renew an employee's contract can be treated as an involuntary termination: An employer's decision not to renew an employee's contract will be considered an involuntary termination of employment if the employee was otherwise willing and able to continue the employment relationship and was willing either to execute a contract with terms similar to those of the expiring contract or to continue employment without a contract. However, if 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, the completion of the contract without it being renewed is not an involuntary termination of employment.

D. COVERAGE ELIGIBLE FOR COBRA PREMIUM ASSISTANCE

1. Coverages eligible for COBRA premium assistance: COBRA premium assistance is available for COBRA continuation coverage of any group health plan, except a health FSA under offered under cafeteria plan. Group health plans include vision-only and dental-only plans, regardless of whether the employer pays for a portion of the premiums for active employees. COBRA premium assistance is not available for continuation coverage offered by employers for non-health benefits that are not subject to Federal COBRA continuation coverage requirements, such as group-term life insurance.

2. Retiree Medical Coverage can be eligible: Retiree coverage is eligible if offered under the same group health plan as the coverage made available to similarly situated active employees, though the amount charged for the retiree coverage may be higher than that charged to active employees. In that case, the retiree coverage may still be eligible for the COBRA premium assistance as long as the amount charged to a retiree does not exceed the maximum amount allowed under Federal COBRA.

E. BEGINNING OF COBRA PREMIUM ASSISTANCE PERIOD

1. When COBRA premium assistance begins: An Assistance Eligible Individual is entitled to receive COBRA premium assistance as of the first applicable period of coverage beginning on or after April 1, 2021. For this purpose, a period of coverage is a monthly or shorter period with respect to which premiums are normally charged by the plan or issuer with respect to such coverage provided to employees and qualified beneficiaries. The start date of the first period of coverage beginning on or after April 1, 2021, depends on the period with respect to which premiums would have been normally charged by the plan if the individual had paid the premium.



Review of Notice 221-31

2. An individual may waive periods of coverage before electing: While a group health plan must make COBRA continuation coverage with COBRA premium assistance available as of the first period of coverage beginning on or after April 1, 2021, in the case of an Assistance Eligible Individual electing COBRA continuation coverage under the ARP extended election period, the Assistance Eligible Individual may waive COBRA continuation coverage for any period before electing to receive COBRA premium assistance, including retroactive periods of coverage beginning prior to April 1, 2021.

F. END OF COBRA PREMIUM ASSISTANCE PERIOD

1. Premiums are due for COBRA continuation coverage after September 30: COBRA continuation coverage automatically continues, and the payment for the first period of coverage after September 30, 2021 will be timely if paid according to the terms of the plan or coverage, subject to applicable COBRA continuation coverage requirements taking into account the Emergency Relief Notices

G. EXTENDED ELECTION PERIOD

1. The Extended Election Period does not apply to state continuation: The ARP extended election period applies only to a group health plan that is subject to Federal COBRA. It does not apply to plans subject to continuation coverage requirements under a State program that provides comparable continuation coverage. However, if a State law or program provides for a similar extended election right and an individual otherwise satisfies the requirements to be an Assistance Eligible Individual, COBRA premium assistance is available for any resulting period of COBRA continuation coverage for periods of coverage from April 1, 2021, through September 30, 2021.

2. To whom the extended election period is available to: The extended election period for electing COBRA continuation coverage is available for a potential Assistance Eligible Individual if the qualifying event occurred before April 1, 2021, and if the individual has not yet elected COBRA continuation coverage, including for an individual who has an open COBRA election period as of April 1, 2021. If the individual elects' retroactive COBRA continuation coverage under the original COBRA election period available prior to the ARP extended election period under Federal COBRA, COBRA continuation coverage is retroactive to that individual's loss of coverage. COBRA premium assistance, however, does not apply to periods of coverage prior to the first period of coverage beginning on or after April 1, 2021



Review of Notice 221-31

3. To what coverages does the extended election period apply to: A qualified beneficiary whose qualifying event was a reduction in hours or an involuntary termination of employment is a potential Assistance Eligible Individual and must be offered the ARP extended election period with respect to any health coverage the qualified beneficiary was enrolled in prior to the qualifying event and for which the individual does not have a COBRA election in effect on April 1, 2021, even if the qualified beneficiary previously elected COBRA continuation coverage with respect to other coverage in which the qualified beneficiary was previously enrolled. If the qualified beneficiary elects' additional COBRA continuation coverage pursuant to the ARP extended election period, the qualified beneficiary is an Assistance Eligible Individual with respect to all elected COBRA continuation coverage.

H. EXTENSIONS UNDER THE EMERGENCY RELIEF NOTICES

1. What coverages can a qualified beneficiary elect and pay for during the extended election period: If a qualified beneficiary received a COBRA notice before April 1, 2021, and also receives the notice of the ARP extended election period, then, within 60 days of receiving the notice of the ARP extended election period, the qualified beneficiary may elect COBRA continuation coverage with COBRA premium assistance for periods of coverage beginning on or after April 1, 2021. If a qualified beneficiary elects COBRA continuation coverage with COBRA premium assistance, the individual must also elect or decline COBRA continuation coverage retroactive to the loss of coverage, if eligible, within 60 days of receiving the notice of the ARP extended election period. If the qualified beneficiary elects' retroactive COBRA continuation coverage, the qualified beneficiary may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021

2. Extensions do not apply to COBRA subsidy notices or elections: The extensions of timeframes available under the Emergency Relief Notices do not apply to either the required furnishing of a notice of an ARP extended election period or to the ARP extended election period. The notice of the ARP extended election period under § 9501(a)(5)(C) must be furnished by May 31, 2021 (60 days after April 1, 2021). An individual receiving the notice must elect COBRA continuation coverage no later than 60 days after the notice is provided in order to receive COBRA premium assistance.



Review of Notice 221-31

3. When must COBRA subsidy notices and elections be provided: The extensions of timeframes available under the Emergency Relief Notices do not apply to either the required furnishing of a notice of an ARP extended election period) or to the ARP extended election period. The notice of the ARP extended election period must be furnished by May 31, 2021 (60 days after April 1, 2021). An individual receiving the notice must elect COBRA continuation coverage no later than 60 days after the notice is provided in order to receive COBRA premium assistance.

4. Due dates for payment of COBRA premiums for prior periods: The extensions of timeframes under the Emergency Relief Notices remain available for premium payments for the retroactive periods of coverage for potential Assistance Eligible Individuals and those who have enrolled in COBRA continuation coverage with COBRA premium assistance. If an Assistance Eligible Individual also elects retroactive coverage for a period beginning before April 1, 2021, the employer may require the individual to pay the premiums for that period of COBRA continuation coverage consistent with the timeframes as extended under the Emergency Relief Notices. If, by an applicable deadline, the individual fails to pay any amount towards the total premiums due for periods of retroactive COBRA continuation coverage, the employer may treat the individual as having not elected COBRA coverage until the first period of coverage beginning on or after April 1, 2021. If, by the applicable deadline, the individual pays only a portion of the total premiums due for retroactive coverage, the plan may credit those premiums to the earliest months of the retroactive COBRA continuation coverage and resume providing COBRA continuation coverage as of the first period of coverage beginning on or after April 1, 2021.

5. What happens if prior COBRA continuation coverage is not elected during the extended election period: If a potential Assistance Eligible Individual elects COBRA continuation coverage with COBRA premium assistance but declines to elect COBRA continuation coverage that would begin at the time of a qualifying event that occurred before April 1, 2021, that individual may not, after the 60-day extended election period for electing COBRA continuation coverage under the ARP has ended, later elect COBRA continuation coverage that begins at the time of the qualifying event.



Review of Notice 221-31

I. COMPARABLE STATE CONTINUATION COVERAGE

1. Period of coverage for state continuation coverage: A different period of continuation coverage under a State continuation coverage program does not by itself mean a State program fails to provide comparable coverage to Federal COBRA continuation coverage under the ARP. For example, the fact that a State continuation coverage program provides only six months of continuation coverage (instead of 18 months) would not by itself result in the State program failing to provide comparable coverage. Similarly, State programs providing for different qualifying events, different qualified beneficiaries, or different maximum premiums generally do not fail to provide comparable coverage solely for those reasons.

2. The insurer pays the premium and receives the credit for coverage: In the case of an insured plan subject solely to State law with respect to the requirement to provide continuation coverage, the premium payee is the insurer providing the coverage under the group health plan. The Treasury Department and the IRS are aware that this requirement may create administrative issues for certain Small Business Health Options Program (SHOP) exchanges that aggregate premiums paid by participating employers or where State rules require full payment of premiums by the employer; the Treasury Department and the IRS are continuing to consider this issue.

J. CALCULATION OF COBRA PREMIUM ASSISTANCE CREDIT

1. Credit does not apply to part of the COBRA premium paid by the employer: If the employer does not subsidize COBRA premium costs for similarly situated qualified beneficiaries who are not Assistance Eligible Individuals, the credit for a quarter is the amount equal to the premiums not paid by Assistance Eligible Individuals for COBRA continuation coverage due to the application of the ARP for the quarter. In this case, the amount of the premiums not paid by the Assistance Eligible Individuals is the premium amount charged for COBRA continuation coverage to other similarly situated covered employees and qualified beneficiaries (for example, coverage for a single individual, individual plus one, or family who are not Assistance Eligible Individuals). The premium amount also includes any administrative costs otherwise allowed (that is, generally 102 percent of the applicable premium).



Review of Notice 221-31

The amount of the credit is the premium that would have been charged to an Assistance Eligible Individual in the absence of the premium assistance and does not include any amount of subsidy that the employer would have otherwise provided. Thus, absent the premium assistance, if the premium that the employer would have charged to an Assistance Eligible Individual is less than the maximum COBRA premium—for example, if the employer would have subsidized the coverage by paying all or part of the premium—the credit is equal to the amount that the employer actually would have charged to the Assistance Eligible Individual.

K. CLAIMING THE COBRA PREMIUM ASSISTANCE CREDIT

1. Premium Payee is defined as: The premium payee is:

(a) The multiemployer plan, in the case of a group health plan that is a multiemployer plan.

(b) The common law employer maintaining the plan, in the case of a group health plan, other than a multiemployer 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).

(c) The insurer providing the coverage, in the case of any other group health plan not described in (a) or (b) (generally, fully insured coverage subject to State continuation coverage requirements).

2. Premium Payees can include a governmental entity: A premium payee may include the government of any State or political subdivision thereof, any Indian tribal government), any agency or instrumentality of any of the foregoing, and any agency or instrumentality of the Government of the United States and exempt from taxation.

3. When the Premium Payee is entitled to the credit: As of the date on which the premium payee receives the potential Assistance Eligible Individual's election of COBRA continuation coverage, the premium payee is entitled to the credit for premiums not paid by an Assistance Eligible Individual for any periods of coverage that began before that date. The premium payee is entitled to the credit for the premiums not paid by an Assistance Eligible Individual for each subsequent period of coverage as of the beginning of each period of coverage that the individual does not pay the premiums in accordance with the individual's election, without regard to when the premium payee could have required the payment of any premium.



Review of Notice 221-31

4. How is the premium credit claimed: A premium payee claims the credit by reporting the credit (both the nonrefundable and refundable portions of the credit, as applicable) and the number of individuals receiving COBRA premium assistance on the designated lines of its federal employment tax return(s), usually Form 941, Employer's Quarterly Federal Tax Return.

5. Premium Payee can request advance payment of the credit: In anticipation of receiving the credit to which it is entitled, the premium payee may (a) reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit, and (b) request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

A premium payee may reduce its deposits of federal employment taxes in anticipation of the credit to which the premium payee has become entitled with regard to a period of coverage as of the date the premium payee is entitled to the credit. If the anticipated credit exceeds the federal employment tax deposits available for reduction, the premium payee may file Form 7200 to request an advance payment of the credit. The Form 7200 may be filed after the end of the payroll period in which the premium payee became entitled to the credit.

Deposits may not be reduced, and advances may not be requested, for a credit for a period of coverage that has not begun. Form 7200 must be filed before the earlier of (a) the day the employment tax return for the quarter in which the premium payee is entitled to the credit is filed, or (b) the last day of the month following that quarter. The premium payee entitled to the credit should also report any advance payments received in anticipation of the credit for the quarter on the employment tax return.

6. The premium credit is taxable: The gross income of any premium payee allowed a credit is increased by the amount of the credit for the taxable year which includes the last day of any quarter with respect to which the credit is allowed.